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the FIR on the website except where a decision not to upload is taken by Deputy Superintendent of Police by a speaking order - a person can file an appeal before Superintendent of Police which shall be decided within three working days by a Committee of three higher Officer.

Title: Rama Nand Rathore Vs. State of H.P. & Ors. Page-1171

Code of Criminal Procedure, 1973- Section 428- An FIR was registered against the petitioner for commission of offences punishable under Sections 420 and 120-B of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- allegations against the accused are regarding the embezzlement of Rs.1 lac- hence, in these circumstances, custodial interrogation of the accuses is necessary- bail rejected.

Title: Kunal Jaggi S/o Sh Ajay Jaggi Vs. State of Himachal Pradesh

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Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 354A, 306, 506 read with Section 34 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused during the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- allegations against the applicant are heinous and grave in nature- applicant had abetted the deceased to commit suicide – investigation is at initial stage, and allowing application will affect the investigation adversely- bail application dismissed.

Title: Ram Lal son of Sh Buaditta Vs. State of Himachal Pradesh

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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 363 and 366 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused during the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- In the present case, investigation was complete- challan has been filed- therefore, it would not be proper to keep applicant in custody- bail granted.

Title: Gulchen Singh son of Suram Singh 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 147, 148, 149, 323, 353, 332, 506, 427 and 307 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- object of bail is to secure the presence of the accused during the trial- in the present case, investigation is complete and challan has already been filed in the Court- other accused have already been released on bail- mere pendency of criminal cases against the petitioner is not

sufficient to decline the bail to the petitioner-considering that petitioner had joined the investigation, petitioner is ordered to be released on bail.

Title: Dinesh Kumar S/o Sh. Ratti Ram Sharma Vs. State of H.P.

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Code of Criminal Procedure, 1973- Section 482- Complaint was filed against the petitioners for the commission of offences punishable under Sections 451, 323, 506 and 141 read with Section 149 of IPC- Magistrate found sufficient grounds to summon the petitioners for the commission of offences punishable under Sections 451, 323, 506 and 141 read with Section 149 of IPC- it was contended that the order passed by the magistrate was bad as no reasons were given for summoning the accused- held, that there is no legal requirement to pass a detailed and speaking order while issuing the process- however, when the Investigating Agency had submitted a closure report, it was appropriate though not imperative for the Magistrate to record reasons but the order is not vitiated merely because of absence of reasons- petition dismissed.

Title: Kali Dass & ors. Vs. Shobha Ram & anr. Page-1225

Constitution of India, 1950- Article 14- Petitioner pleaded that he was asked to perform duty of Assistant Collector (Printing) w.e.f. 5.10.1992 till 21.2.1994 and no benefit of pay as granted to him- petitioner made representation but no decision was conveyed to him- he applied under RTI and was informed that his case was rejected on the ground that no ex-post-facto sanction could be granted in case of promotion- however, such ex-post-facto was granted to one 'S'- petitioner claimed the benefit of higher scale- respondent stated that 'S' had performed the duties of Assistant Collector till his retirement and no order was passed directing the petitioner to hold the charge of Assistant Controller- it was proved on record that the petitioner had performed the duties of Assistant Collector in addition to his work- held, that the petitioner is entitled to the salary of Assistant Controller on the principle of equal pay for equal work.

Title: Moti Ram Kainthla son of late Shri Rulda Ram Vs. State of H.P. and others

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Constitution of India, 1950- Article 226- Daughter of the petitioner was missing - petitioner lodged a missing report in Police Station, Bangana- petitioner suspected that respondent No. 7 had unlawfully detained his daughter with the help of respondents No. 8 to 15- direction was issued to the police to produce the daughter of the petitioner but the police failed to do so- police directed to hand over the complete record to CBI who will complete the investigation within the period of 15 days and will produce the daughter of the petitioner before the Court on 8.1.2015.

Title: Sanjeev Kumar Vs. State of H.P. & Ors. Page-1190

Constitution of India, 1950- Article 226- Husband of the petitioner was employed as Mali in a Private College- College informed the petitioner that she is entitled to leave encashment amount of Rs. 19,811/- and sum of Rs. 6,12,909/- towards gratuity- however, no amount was paid – State contended that husband of the petitioner was not Government servant- his case was not covered under the CCS (Pension) Rules, 1972- State only released financial assistance towards the part of salary component- held, that respondent No. 2 is establishment as per Section 1(3)(b) of the Payment of Gratuity Act, 1972- Government should make efforts to see that teachers and non-teaching staff of Government Aided Colleges/Schools are treated at par with teachers and non-teaching staff of Government Colleges/Schools- College directed to release the gratuity and state directed to pay amount towards the leave encashment.

Title: Jamila Khan Vs. State of H.P. & others Page-1083

Constitution of India, 1950- Article 226- Income Tax Department had issued show cause notice to the petitioners- petitioners filed reply to the notice - an order was passed by the Department transferring the case to DCIT, Central Circle, Chandigarh- record showed that order was passed on the facts, which were not disclosed in the show cause notice- department was in possession of facts mentioned in the order of transfer- held, that petitioners were entitled to know the facts which were to be used against them- non disclosure of the facts amounts to violation of principle of natural justice.

Title: Anand Chauhan Vs. The Commissioner of Income Tax, Himachal Pradesh Page-1119

Constitution of India, 1950- Article 226- License qua unit No. 23 was issued by respondent in favour of petitioner – Petitioner deposited an amount of Rs. 7,50,879/- for renewal of the license on the expiry of original license-however, license was not renewed- a conscious decision was taken by the respondent to merge this unit with other units- unit No. 23 lost his identity- petitioner was advised to obtain license for Unit No. 25- petitioner insisted upon renewal of license for unit No. 23- held, that mere deposit of license fees, does not confer any right upon the petitioner to obtain the renewal of license of unit No. 23 when it had ceased to exist- Financial Commissioner had power to merge liquor units - petition dismissed.

Title: Hem Raj Vs. State of H.P. & Ors. Page-1141

Constitution of India, 1950- Article 226- Petitioner claimed that he was appointed as temporary employee- he is entitled for the pay and allowances at par with the temporary employees and his entire services should be counted for the purpose of pension, gratuity and other service benefits- petitioner was regularized on 14.2.1992 and he filed writ petition on 2.4.2913, after the gap of 21 years- no explanation was given for the delay- hence, petition is liable to be dismissed on this short ground alone.

Title: Krishan Chand son of late Sh. Ram Rakhu Vs. HPSEB Limited and another Page-1237

Constitution of India, 1950- Article 226- Petitioner was appointed as Anganwari Worker- her services were terminated on 14.12.2001- she filed a Writ Petition which was allowed and the order of the termination was quashed – written notices were to be served upon the petitioner in terms of the guidelines- respondent had not served notice, therefore, termination order was rightly quashed - however, the petitioner had not pleaded that she was not gainfully engaged when she was kept out of services, therefore, she is not entitled to back wages- order modified and it is directed that petitioner is not entitled to back-wages but is only entitled for other consequential benefits.

Title: Child Development Project Officer & others Vs. Tripta Devi Page-1093

Constitution of India, 1950- Article 226- Petitioner was appointed as Gram Panchayat Vikas Adhikari – his name was sponsored by the Department for undergoing five years degree course in B.Sc Agriculture - he was allowed study leave and he completed B.Sc Agriculture by scoring 70.1% marks- petitioner claimed that he is qualified to be appointed as Agricultural Development Officer by way of promotion under 5% quota- it was proved on record that no post was lying vacant- held that, petitioner cannot claim promotion.

Title: Than Singh son of Sh. Sobha Ram Vs. State of H.P. and others Page-1335

Constitution of India, 1950- Article 226- Petitioner was appointed as temporary employee in the year 1981- his service was regularized w.e.f. 9.9.1997 – he was retired from service in July 2003, the period from 1981 to 9.9.1997 was not counted for pay fixation, increments and pensionary benefits- it was proved on record that petitioner was appointed as T-mate on work charge basis- petitioner challenged the status of T-mate after the gap of 15 years- held that service rendered by government employee as daily wages cannot be counted for pensionary benefits- further, no representation was filed for redressal of the grievances by the petitioner- no explanation was given for the delay- in these circumstances, petitioner was not entitled for any relief- petition dismissed.
Title: Hans Raj son of Sh. Gokal Ram Vs. HPSEB and another Page-1222

Constitution of India, 1950- Article 226- Petitioner was appointed as TGT (Mathematics) for a period of two years- period of probation was extendable by another year at the discretion of the competent authority- period of probation was extended up to 2.4.2007 and thereafter it was extended for one year up to 31.3.2008- a show cause notice was served upon the petitioner- petitioner filed a reply to the notice but her services were terminated vide order dated 4.7.2008- it was contended that petitioner was allowed to continue after probation and, therefore, she is deemed to be confirmed – petitioner further contended that her probation period could be extended by only one year and further extension of probation after one year was not permissible- held, that the services of a person can be confirmed by an order in writing- mere continuation beyond the probation period will not amount to deemed confirmation- petition dismissed.
Title: Suman Sharma Vs. Union of India and others Page-1318

Constitution of India, 1950- Article 226- Petitioner was enrolled in the Central Reserve Police Force as Constable- petitioner suffered from eye problem- he was found blind in left eye and partially blind in the right eye- he was found to be permanently incapacitated for further service and was invalidated from service - held that, petitioner had acquired disability during his service and he could not have been invalidated from the service on account of disability in view of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.
Title: Union of India through its Secretary (Home) to the Govt. of India and others Vs. Bali Ram Page-1205

Constitution of India, 1950- Article 226- Petitioner was transferred on the basis of U.O. Note received from the office of Chief Minister- respondents claimed that they had received numerous complaints against the petitioner from public representatives of nearest Panchayat, which compelled the authorities to effect the transfer- petitioner has remained in and around his home district- held, that transfer is an incident of service and can be effected on the basis of administrative exigency and taking into consideration the public interest- government servant has no vested right to remain posted at one place or the other and courts should not interfere with the orders of transfer- however, if the exercise of power is based on extraneous considerations or for achieving an alien purpose or an oblique motive, it would amount to colourable exercise of power- transfer has been made on the basis of UO Note, no proposal for transfer had originated from the administrative department- hence, order is not sustainable.
Title: Raj Kumar Vs. State of H.P. & ors. Page-1306

Constitution of India, 1950- Article 226- Petitioners claimed that they were appointed as temporary employees w.e.f. 1.11.1986 and 13.12.1985 respectively- petitioners were conferred the work charge status w.e.f. 3.1.1998- they claimed that services rendered by them till conferment of work charge

assessee- the assessee had not deducted the income tax at the sources at the time of disbursement- penal action was taken by ITO- assessee filed an appeal and the decision of ITO was reversed- an appeal was preferred before Income Tax Appellate Tribunal Chandigarh, which was also dismissed- Government had issued a notification under Section 194(A) covering any undertaking or body including a Society registered under the Societies Registration Act wholly financed by the Government- held, that once the notification had been issued, it is not necessary for the assessee to seek exemption from the Authorities under the Act or the Central Government or the central Government- therefore, the Appellate Authority had rightly allowed the Appeal and had set aside the order passed by ITO. (Para- 3 to 9)

Title: Commissioner of Income tax (TDS), Chandigarh Vs. State Bank of Patiala Sectt. Shimla Page-1292

Income Tax Act, 1961- Section 260-A- Assessee is entitled to depreciation on goodwill or other intangible assets.

Title: Commissioner of Income Tax Vs. RFCL Limited. Page-1283

Indian Evidence Act, 1872- Section 65- An application was filed to permit the plaintiff to prove office note dated 31.3.2009 by leading secondary evidence- defendant denied the execution of the note and stated that no such office note is available in the record- the persons stated to have executed the note were not employees of the defendant and they had no power to make any financial commitment on behalf of defendant- held, that the denial of the defendant is not regarding the execution of the document but regarding the competency of the officer to execute any such note- question of leading the secondary evidence will only arise during the stage of the evidence and not prior to the same- application dismissed.

Title: Ashok Chauhan Vs. M/s S.S.J.V Projects Pvt. Ltd., (a Body Cooperate) and others Page-1192

Indian Penal Code, 1860- Section 302- Accused gave beating with the help of wooden piece and inflicted injuries upon 'K'- children raised hue and cries on which PW-1 and PW-2 arrived at the spot – 'K' was beaten by the accused in their presence - PW-13, vice-president of Panchayat was called- 'K' was lying unconscious on the floor – she was taken to hospital where an application was moved for ascertaining whether she was fit to make the statement or not- Medical Officer certified that she was not fit to make statement and referred her to PGI, Chandigarh- 'K' succumbed to injury at PGI, Chandigarh- PW-1 did not state in the Court that he had seen the accused giving beating to the deceased- accused was not arrested immediately- PW-13 also admitted that he never summoned the accused in the Panchayat as no complaint was received against him- PW-1 and PW-2 entered had entered the room simultaneously – therefore, PW-2 could not be called to be an eye-witness to the beating- children who had witnessed to the incident were not examined- there were 40-50 house in the village- no person was examined to corroborate the testimony of eye-witness- there are major contradictions in the testimonies of eye-witness- hence, in these circumstances, prosecution case is not proved beyond reasonable doubt.

Title: Vinod Kumar Khadia Vs. State of H.P. Page-1077

Indian Penal Code, 1860- Section 306 read with Section 34- Deceased was married to 'A'- 'A' remained in the matrimonial home for 1-2 months- she was dropped at her parent's home- thereafter efforts were made to call her but she did not come- accused raised demand of Rs. 5 lacs- PW-1 had not stated before investigating officer that demand of Rs. 5 lacs was made- PW-2 deposed that demand of Rs. 3.5 lacs was raised- deceased had committed suicide after 3

years of raising demand - held, that there was no proximity in the demand and the suicide- therefore, it cannot be said that demand was an instigatory factor for the deceased to commit suicide.

Title: State of H.P. Vs. Jai Ram and others Page-1252

Indian Penal Code, 1860- Section 376- Prosecutrix returned with her friends- she forgot her bag and returned to retrieve it-Accused met her with his friends on the way and told her that he had not seen any bag- Accused took prosecutrix on his scooter - he stopped the scooter on the way and raped the prosecutrix in the jungle- prosecutrix narrated the incident to her aunt and her parents- held that none of the friends of the prosecutrix was examined to corroborate her version- prosecution had also not examined the persons with whom accused was present- thus, genesis of the occurrence had become doubtful and leads to an inference that prosecutrix had met the accused alone for a specific purpose- testimony of the aunt was not satisfactory, which creates doubt that she had ever met prosecutrix or the prosecutrix had narrated any incident to her- prosecutrix admitted that she had fallen down the scooter which shows that prosecutrix had inculpated the accused when an inquiry was made from her by her parents-no injuries were found on the private parts of the prosecutrix which shows that she was a consenting party.

Title: Kehar Singh Vs. State of H.P. Page-1232

Indian Penal Code, 1860- Section 376(2)(f) – Accused took the prosecutrix to the back side of the temple and sexually assaulted her- PW-2 heard the cries of the prosecutrix and went to the spot- accused ran away on seeing PW-2- prosecutrix was minor- medical evidence proved that blood detected on vaginal swab was on account of micro haemorrhage, which could be caused by the sexual attempt- held, that mere absence of injury cannot be a ground to disbelieve the testimony of the prosecutrix- testimony of the prosecutrix was corroborated by PW-1, Pardhan who deposed that in the meeting of the Panchayat, accused had admitted his mistake- in these circumstances, conviction of the accused was justified.

Title: Susheel Kumar Vs. State of Himachal Pradesh Page-1268

Indian Penal Code, 1860- Sections 382, 341, 506 and 323 read with Section 34 IPC- Accused had committed theft of Rs. 6,700/- after having made preparation for causing hurt- testimony of eye-witness was contradictory in examination-in-chief and cross-examination- recovery witness also denied the recovery- FIR was not lodged immediately on the date of incident- held, that in these circumstances, prosecution version was not proved and the acquittal of the accused was justified.

Title: State of Himachal Pradesh Vs. Ajay Shakti and another

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Indian Succession Act, 1925- Section 63- Will was witnessed by one marginal witness- the other person had put his signature above the words "***Shinakhat Karta***, (identifier)- held, that even if it is believed that Lambardar was only an Identifier, one of the marginal witness had stepped into witness box and had deposed about the execution and attestation of the Will- execution and attestation of the Will was duly proved.

Title: Dashoda alias Yashoda Devi & another Vs. Ramesh and others

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'L'

Land Acquisition Act, 1894- Section 18 - Appellants claimed that an award announced by District Judge should have been taken into consideration while assessing the compensation payable to them- held, that award pronounced by the District Judge could have been taken into consideration only when the lands

of the owner- held, that when a person had hired the vehicle for transporting his goods and was returning in the same vehicle, then he cannot be held to be an unauthorized passenger. (Para- 16 to 20)

Title: Oriental Insurance Company Ltd. Vs. Rikta alias Kritka & others

Page-1163

Motor Vehicle Act, 1988- Section 149- Tribunal held that driver/insured was not having a driving licence- record showed that insured/driver possessed a learner's licence- RW-1 deposed that he was travelling in the scooter as an instructor and was sitting behind the insured in the scooter- held, that driver was having a valid driving licence and was competent to drive the vehicle - he was accompanied by an instructor, and it cannot be said that driver was not competent to drive the vehicle.

Title: Anuj Sirkek vs. Neelma Devi & Ors. Page-1145

Motor Vehicle Act, 1988—Section 166- Claimant sustained injury in the collision between the bus and Swaraj Mazada- his claim petition was dismissed on the ground that bus was not involved in the accident but the accident was caused by the Driver of Swaraj Mazada- it was established that the driver of Swaraj Majda had died in the accident- a closure report was filed before the Court- held, that it was the duty of the Presiding Officer of the Claim Tribunal to provide an opportunity to claimant to array the owner and insurer of the vehicle as respondent in the claim petition- hence, matter remanded with the direction to afford an opportunity to the claimant to array the owner and insurer in the claim petition. (Para- 7 to 10)

Title: Kaula Ram Vs. Kusum Sood & others Page-1158

Motor Vehicle Act, 1988—Section 171- Tribunal had granted interest on compensation at the rate of 9% per annum- held, that the rate of interest has to be granted at the rate of 7.5% per annum- accordingly, rate of interest reduced to 7.5% per annum.

Title: Oriental Insurance Company Vs. Tanu Chauhan & others

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N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3.5 kg of charas in the vehicle- independent witness had not supported the prosecution version- there are material contradictions in the improvement, embellishment and falsehood in the testimonies of the police officials- there is contradiction regarding the handing over of the case property to MHC- held, that in these circumstances, prosecution version cannot be relied upon- accused acquitted.

Title: Manoj Kumar Vs. State of Himachal Pradesh Page-1276

'N'

N.D.P.S. Act, 1985- Section 20- Petitioner was found in possession of 150 grams of charas- independent witness did not support the prosecution version- there was contradiction between site plan and the seizure memo regarding the place of recovery- original seal was not produced before the Court for comparison- there was difference in weight of sample mentioned in the seizure memo and the sample received in the laboratory- there was contradiction regarding the re-seal impression, therefore, in these circumstances, acquittal of the accused was justified.

Title: State of Himachal Pradesh Vs. Mustkeen son of Mr.Karimulla

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'S'

Specific Relief Act, 1963- Section 34- 'T' had gifted the land in favour of 'J'- subsequently, she filed a suit for recovery of gift- 'J' agreed to pay maintenance @ Rs. 50/- per month to 'T' and arrears of maintenance @ Rs. 200/- per month before 11.5.1965- 'T' could recover the possession on breach of undertaking given by 'J'- 'J' exchanged the land with 'B' and 'D'- 'B' transferred the portion of the suit land in favour of defendants No. 14 and 15- 'J' transferred the portion of the land in favour of defendants No. 8 to 13- 'T' filed an Execution Petition without impleading the transferee - warrant of possession was issued on 6.7.1971 – plaintiffs, successors of the transferee sought declaration that they are owners in possession of the suit land- held, that copy of the report filed by Field Kanungo and copy of Raznamcha does not show as to who was evicted from the suit land- these documents further do not show that 'T' was put in possession of the suit land- exchange made by predecessor-in-interest of the plaintiffs was valid and they could not be deprived of the land given to them.

Title: Kunj Lal & ors. Vs. Kekh Ram & ors. Page-1094

Specific Relief Act, 1963- Section 38- Plaintiff claimed that suit land had fallen to the share of the plaintiff in the family partition and was bifurcated into two parts after the construction of Oddi-Bithal horticultural link road- settlement official carved out a new khasra number out of two khasra numbers and made the land compact, which was not permissible - plaintiff relied upon mutation in support of this submission- plaintiff had not examined the revenue official who had prepared field map of old khasra of mutation- held, that mutation entries do not confer any title- plaintiff had also not produced the report of the demarcation- hence, an adverse inference has to be drawn against him.

Title: Man Mohan Singh (deceased) through his LRs Smt. Asha Devi and others Vs. Gopi Chand (deceased) through his LRs Sh. Daneshwar Singh and other Page-1159

'W'

Wakf Act, 1995- Section 7- Defendant was removed by Himachal Pradesh Wakf Board from the post of Imam of the mosque - he was caught red handed taking bribe from the Muslim community for sending them to Haz- he was in possession of the residential accommodation free of cost- he was using two storeyed building attached to the mosque as guest house- he was asked to vacate the premises but he refused to do so- held, that defendant had not assailed his termination order as Imam of the mosque- status of the defendant after termination was of a mere tress passer- he had no vested right to reside in the accommodation after his removal as Imam- therefore, defendant was liable to vacate the premises and to pay use and occupation charges.

Title: Maulana Mumtaz Ahmed Quasmi Vs. Himachal Pradesh Wakf Board Page-1074

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Techno Shares and Stock Ltd. vs. Commissioner of Income Tax, [2010] 327 ITR 323 (SC)

The State Vs. Captain Jagjit Singh AIR 1962 SC 253

The Commissioner of Police, Hubli and another v. R.S. More AIR 2003 SC 983

The Management of S.I.E.T. Women's College, Madras vrs. Mahamed Ibrahim and ors. (1992) 1 LLJ 91

The Union of India v. Mahadeolal Prabhu Dayal, AIR 1965 SC 1755

Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760

Tulshidas Kanolkar v. State of Goa, (2003) 8 SCC 590

'U'

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

Union of India and others vs. Modiluft Ltd. (2003) 6 SCC 65

U.P.Jal Nigam Vs. Narinder Kumar Agarwal 1996 (8) SCC 43

U.P. Pollution Control Board vs. Mohan Meakins Ltd. (2000) 3 SCC 745

U.P. Rajya Sahakari Bhoomi Vikas Bank Ltd., U.P. vs. Its Workmen AIR 1990 SC 495

'V'

Varinder Kumar vs. Janak Raj, 1987 (3) Rent Law Reporter 193

Venkateshwara Rao V vrs. SMVM Polytechnic, Tanuku & others, 1998-I LLJ 181

Vijay Kumar and others vs. State of Punjab and others, AIR 1994 SC 265

Vinod Kumar Arora vs. Surjit Kaur, (1987) 3 SCC 711

Voltas Limited versus Rolta India Limited (2014) 4 SCC 516

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

Maulana Mumtaz Ahmed Quasmi .....Appellant.
Versus
Himachal Pradesh Wakf Board .....Respondent.

RFA No. 484 of 2011-C.
Reserved on: August 25, 2014.
Decided on: September 10, 2014.

Code of Civil Procedure, 1908- Section 11- Plaintiff filed a civil suit for permanent prohibitory injunction and recovery of use and occupation charges- an application under Order 7 Rule 11 of CPC was moved by the defendant- application was allowed by the Tribunal constituted under the Wakf Act- an appeal was preferred by plaintiff which was allowed and it was held that recovery of possession use and occupation charges is a dispute relating to the Wakf and Tribunal had jurisdiction- held, that in view of adjudication of the application filed by the defendant – question whether the Wakf Tribunal had jurisdiction or not cannot be raised subsequently in the suit. (Para-7 and 8)

Title: Maulana Mumtaz Ahmed Quasmi Vs. Himachal Pradesh Wakf Board

Wakf Act, 1995- Section 7- Defendant was removed by Himachal Pradesh Wakf Board from the post of Imam of the mosque - he was caught red handed taking bribe from the Muslim community for sending them to Haz- he was in possession of the residential accommodation free of cost- he was using two storeyed building attached to the mosque as guest house- he was asked to vacate the premises but he refused to do so- held, that defendant had not assailed his termination order as Imam of the mosque- status of the defendant after termination was of a mere tress passer- he had no vested right to reside in the accommodation after his removal as Imam- therefore, defendant was liable to vacate the premises and to pay use and occupation charges. (Para-14)

Title: Maulana Mumtaz Ahmed Quasmi Vs. Himachal Pradesh Wakf Board

For the appellant: Mr. Dushyant Dadwal, Advocate.

For the respondent: Mr. B.S.Attri, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular first appeal is instituted against the judgment dated 27.8.2011 of the learned District Judge (Wakf Tribunal), Shimla, H.P., rendered in Civil Suit No. 7-S/1 of 2008.

2. Key facts, necessary for the adjudication of this first appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff for the convenience sake) has filed suit for possession, permanent injunction and recovery of use and occupation charges against the appellant-defendant (hereinafter referred to as the defendant for the convenience sake). The defendant had been working as Honorary Imam of mosque at Boileauganj, as per letter dated 31.7.2003, issued by the Chief Executive Officer, of the then Punjab Wakf Board. In the year 2005, the H.P. Wakf Board had been constituted. All rights, title and interests of wakf property situated in H.P. stood vested in the plaintiff. On 29.1.2006, vide resolution No. 4/2006, the H.P. Wakf Board had removed the defendant from the post of Honorary Imam. On representation, the defendant was reinstated. However, in December, 2006, T.V. Channel IBN-7, in

its coverage, had caught the defendant red handed taking bribe from the members of the muslim community for sending them to Haz. The defendant was the Chairman of the Haz Committee. The plaintiff on 14.2.2007 had removed the defendant from the service of Honorary Imam. The defendant was in possession of residential accommodation free of cost. There was two storeyed building attached to the mosque, which was used as guest house by the defendant. The defendant had also started running a school of Muhammadan studies in the mosque without the permission from the plaintiff. He was asked to vacate the premises. He has refused to do so. The mosque and the accommodation attached thereto was situated in prime locality of Boileauganj and in any case could fetch rent of Rs. 600/- per day.

3. The defendant resisted the suit. According to him, the Muslim Wakf committee had appointed him as Imam of the mosque. The accommodation under the occupation of the defendant stood permanently allotted to him. He has denied having been removed as Imam by the H.P. Wakf Board. The defendant has also denied the charges of bribe. He has not been provided reasonable opportunity before removing him on 14.2.2007. He has started school of Muhammadan studies in the mosque under Shariat. He was not liable to pay use and occupation charges at the rate of Rs. 600/- per day.

4. The suit of the plaintiff was decreed. The learned District Judge, Shimla (Wakf Tribunal) held the plaintiff entitled to the possession of residential accommodation of Imam under the occupation of defendant in mosque at Boileauganj. The plaintiff was also held entitled to possession of guest house of the mosque alongwith goods lying therein. A permanent injunction was issued against the defendant restraining him from running school of Muhammadan studies in the mosque at Boileauganj and the accommodation attached thereto. The plaintiff was also held entitled to use and occupation charges at the rate of Rs. 600/- per day from the date of institution with interest at the rate of 9% per annum till payment and vacation. Hence, the present regular first appeal.

5. Mr. Dushyant Dadwal, Advocate, appearing for the defendant has vehemently argued that the Wakf Tribunal has no jurisdiction to adjudicate upon the matter. He has also argued that the learned District Judge (Wakf Tribunal), Shimla has not correctly appreciated the evidence led by the parties. On the other hand, Mr. B.S.Attri, Advocate, has supported the judgment dated 27.8.2011, rendered by the District Judge Shimla (Wakf Tribunal).

6. I have heard the learned Advocates for both the sides at length.

7. The defendant, during the course of the pendency of the suit, has moved an application on 20.8.2007 under Order VII Rule 11 read with Section 151 CPC. According to him, the Act was not applicable to the suit land of the plaintiff. The application was resisted by the plaintiff. The learned Tribunal vide order dated 15.1.2008, allowed the application preferred by the defendant. The suit of the plaintiff was ordered to be returned for institution before the Court of competent jurisdiction. The plaintiff filed an appeal against the order dated 15.1.2008 by way of FAO No. 156 of 2008, in this Court. FAO No. 156 of 2008 was allowed by this Court, vide judgment dated 22.5.2008. The operative portion of the judgment reads as under:

> " The petition is to prevent the misuse and also recovery of the wakf property. Admittedly property in question is a wakf property and, therefore, the administration of the same has to be a dispute under the Act. The Board is enjoined with a duty to protect and preserve the wakf property and also take action against the erring officials. The Tribunal having all powers of Civil Court can determine all rival contentions. Any interpretation to the contrary would render the provisions of the Act, empowering the Board to protect and preserve the property to be superfluous and redundant. The Act specifically oust the jurisdiction of

> the Civil Court in respect of any dispute, question or other matter relating to wakf or wakf property. Thus, no other interpretation can be given to the expression 'any dispute' under 'the Act'. The dispute for protection and preservation of the property is certainly a dispute falling under the Act.
>
> In my view, the order passed by the Tribunal is unsustainable in law. The recovery of possession and use and occupation charges is definitely a dispute relating to the wakf under the Act. Simply because an Imam inducted into the wakf property, ceases to be one, it cannot be said that it is a dispute pertaining to the said property would be a dispute against a third person having nothing to do with the wakf. (Subhan Shah through Lrs. Ramjan Khan and others v. M.P. Wakf Board and others (AIR 1997 Madhya Pradesh 8)."

8. Thus, it is evident that this Court has categorically held that the District Judge (Wakf Tribunal) had the jurisdiction to go into the matter. The judgment dated 22.5.2008 has attained finality. Thus, the question whether the learned District Judge (Wakf Tribunal) had the jurisdiction in the matter or not is no more *res integra* in view of the judgment dated 22.5.2008.

9. According to PW-1, Kutab Deen, the defendant was appointed as Honorary Imam by the Punjab Wakf Board vide letter dated 31.7.2003. The services of the defendant stood terminated by the plaintiff on 29.1.2006. He was requested to vacate the accommodation vide letter dated 14.2.2007. The accommodation could yield income of Rs. 600/- per day. The defendant was caught red handed accepting the bribe. The Board has appointed Mohd. Mussa Nadvi, as Imam of the mosque. The newly appointed Imam could not be given the accommodation since the defendant has not vacated the same.

10. PW-2, Murad Khan deposed that the defendant was in occupation of the residential accommodation. He was caught red handed while accepting the bribe from Haz pilgrims.

11. The defendant has appeared as DW-1. According to him, the accommodation in question was allotted to him permanently by the Wakf Committee. He was not removed from the services of Imam. He was running a School of Muhammadan studies under the Shariat.

12. DW-2, Sayeed Hasan Falahi was an employee of the Punjab Wakf Board. He tendered in evidence document Ext. DW-2/A. The Punjab Wakf Board had approved the appointment of the defendant as Honorary Imam on 31.7.2003.

13. DW-3, Shafiq Ahmad was also an official of Punjab Wakf Board. He had prepared the document Ext. DW-2/A. DW-4, Krishan Chand deposed that the mosque at Boileauganj had been provided power connection and billing was being done in the name of the defendant. According to DW-5, Mohammad Ali, he had been visiting the mosque but was not charged any amount by the defendant.

14. What emerges from the facts enumerated hereinabove, is that the defendant was terminated as honorary Imam on 29.1.2006, vide resolution No. 4 / 2006. He was directed to vacate the accommodation on 14.2.2007. The defendant has attained the age of 62 years. It is the duty cast upon the Board to protect its property. The defendant, till date, has not assailed his termination as Imam of the mosque. The status of the defendant after order dated 14.2.2007, was of a mere trespasser. He was in un-authorised occupation of the mosque. He has no vested right to reside in the accommodation after his removal as Imam. He had also been using the portion of the premises of the mosque as school of Mohammadan studies without the permission of the plaintiff. He had also been using the portion of the mosque as guest house and charging money

from the occupants. The accommodation where the defendant was running guest house is two storeyed. It cannot be believed that the defendant was not charging any amount from the occupants of the guest house. The property is situated in Boileauganj area. It is a commercial area. The Court below has rightly come to the conclusion that the plaintiff was entitled for use and occupation charges at the rate of Rs. 600/- per day. The learned District Judge (Wakf Tribunal) has correctly appreciated the evidence. The defendant was removed as Imam of the mosque.

15. The Court below has correctly appreciated the oral as well as documentary evidence on record. Accordingly, there is no merit in the appeal, the same is dismissed. No costs.

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

Vinod Kumar Khadia .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 66 of 2011.
Reserved on: October 08, 2014.
Decided on: October 13, 2014.

Indian Penal Code, 1860- Section 302- Accused gave beating with the help of wooden piece and inflicted injuries upon 'K'- children raised hue and cries on which PW-1 and PW-2 arrived at the spot – 'K' was beaten by the accused in their presence - PW-13, vice-president of Panchayat was called- 'K' was lying unconscious on the floor – she was taken to hospital where an application was moved for ascertaining whether she was fit to make the statement or not- Medical Officer certified that she was not fit to make statement and referred her to PGI, Chandigarh- 'K' succumbed to injury at PGI, Chandigarh- PW-1 did not state in the Court that he had seen the accused giving beating to the deceased- accused was not arrested immediately- PW-13 also admitted that he never summoned the accused in the Panchayat as no complaint was received against him- PW-1 and PW-2 entered had entered the room simultaneously – therefore, PW-2 could not be called to be an eye-witness to the beating- children who had witnessed to the incident were not examined- there were 40-50 house in the village- no person was examined to corroborate the testimony of eye-witness- there are major contradictions in the testimonies of eye-witness- hence, in these circumstances, prosecution case is not proved beyond reasonable doubt.

(Para-19 to 25)

For the appellant: Nemo.
For the respondent: Mr. M.A. Khan, Addl. AG with Mr. J. K.Verma, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 16.2.2011 and consequent order dated 17.2.2011, rendered by the learned Addl. Sessions Judge, Solan, H.P. in Sessions Trial No. 5-S/7 of 2010, whereby the appellant-accused (hereinafter referred to as the accused) who was charged with and tried for offence under Section 302 IPC, was convicted and sentenced to undergo rigorous imprisonment for life and to pay fine of Rs. 20,000/- and in default of payment of fine, the accused was ordered to suffer further imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 23.11.2009, at about 10:30 PM, accused gave beatings with the help of a wooden piece, Ext. P-1 and inflicted injuries with knife Ext. P-2, to Smt. Kiran Bala. The children raised hue and cry. The noises were heard by PW-1, Sushil Kumar. The elder son of the accused called PW-2, Naresh Kumar. PW-2, Naresh Kumar reached the spot and Kiran Bala was given beatings by the accused in their presence with the help of Ext. P-1. Thereafter, PW-13 Prabhu Dayal, Vice President of Panchayat, was called on telephone. The deceased was lying unconscious on the floor. The statement of PW-1 Sushil Kumar was recorded under Section 154 Cr.P.C. vide memo Ext. PW-1/A. FIR Ext. PW-10/B was registered on the basis of the statement Ext. PW-1/A. PW-6 ASI Yadav Singh moved an application Ext. PW-6/B to the doctor who opined vide his opinion Ext. PW-6/D that the victim was not fit to make the statement. The deceased died at PGI, Chandigarh on 27.11.2009. The blood stained wooden block, knife, pieces of bangles and blood lying on the floor was taken into possession. The site was photographed. The sketch of wooden block and knife were drawn. These were sealed in a cloth parcel with seal 'T'. Ext. P-1 wooden block and knife Ext. P-2, were sent to FSL, Junga through PW-9 alongwith pant of the accused and report of FSL is Ext. PW-14/J. The police prepared the spot map. The post mortem of dead body was conducted by PW-15, Dr. S.P. Mandal on 30.11.2009. The police completed the investigation and the challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 15 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C to which he pleaded not guilty. According to him, he was falsely implicated in the case and claimed to be innocent. He also deposed that his wife fell from the lintel and he was not present at his house at the time of the incident. The learned Trial Court convicted and sentenced the accused, as stated hereinabove. Hence, the present appeal.

4. The Advocate on behalf of the accused was not present on two dates and Mr. M.A. Khan, learned Addl. Advocate General appeared for the State. Mr. M.A.Khan, learned Addl. Advocate General, has supported the judgment of the learned Addl. Sessions Judge, Solan, H.P. dated 16.2.2011.

5. We have gone through the impugned judgment dated 16.2.2011 and records of the case carefully.

6. PW-1 Sushil Kumar, deposed that the houses of Naresh Kumar Attri and Leela Dutt are adjoining to his house. He knew accused Vinod Kumar. He remained the tenant of Leela Dutt for about one or two months. The accused was residing in a rented accommodation alongwith his wife and three minor children. On 23.11.2009 at about 10:30 PM, he heard noise from the house of Leela Dutt. The elder son of accused was knocking at the door of his neighbor Naresh Kumar Attri and was shouting that his mother had been killed by his father. Thereafter, he alongwith Naresh Kumar Attri went to the room of the accused where deceased Kiran Bala wife of the accused was lying on the floor in a pool of blood. She was unconscious and the accused was standing there. They enquired from the accused as to why he killed his wife. The accused told them that he had received telephonic calls from his native place that his entire family shall be eliminated. He further disclosed that he thought before his family is killed by someone else he killed his wife and thereafter he was to kill his children and himself lateron. Rest of the family members were saved due to the shouting of elder son of the accused. The accused disclosed that he killed his wife with the help of wooden piece and knife. The wooden piece and knife were lying on the spot. They telephonically called Prabhu Dayal, Up-Pradhan of Gram Panchayat, who informed the police for further proceedings. The police came to the spot. His statement under section 154 Cr.P.C. was recorded. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that when he reached in the room of the accused, the

accused was beating the deceased with the wooden piece. He admitted that the deceased was saved by them from the clutches of the accused. In his cross-examination by the learned Advocate for the accused, he deposed that his house was at a distance of approximately 10 feet from the house of Leela Dutt. He was watching T.V. in the ground floor. He was residing with his mother and wife in his house and they were present in the house on that night. There were other houses situated at a distance of approximately 25 feet from his house and the house of Naresh Kumar Attri. He has never seen the accused quarreling with his wife. The elder son of the accused was about 3-4 years old. His statement was recorded by the police in the hospital.

7. PW-2 Naresh Kumar Attri deposed that on 23.11.2009 at about 10:45 PM, he was present in his house. The elder son of accused Vinod Kumar knocked his door. He opened it and the boy asked him to save his mother. He told him that the accused was beating his wife. He visited the room of the accused who was tenant of Leela Dutt. After hearing the noise, PW-1 Sushil Kumar, also came and they both visited the room of the accused. When they went inside the room of the accused, he was beating his wife with the help of wooden piece and was also having knife in his hand. The deceased was lying unconscious on the floor. The accused had thrown her by pulling her from legs on the floor. Thereafter they saw the face of the wife of the accused which was badly injured. The accused on their inquiry told them that he will finish his wife. He called up-Pradhan Prabhu Dayal from his telephone. He came to the spot and called the police. The police reached the spot and inspected the spot. He identified wooden piece Ext. P-1 and knife Ext. P-2. In his cross-examination, he admitted that there are 40-50 houses in their village and the population is approximately 100-150. He also admitted that the child of accused was 3-4 feet in height and might be 9-10 years old. He was residing with his wife and son in his house. His son is 24 years old. 25-30 people had assembled on the spot. He told the police that the boy of the accused had come to him. He had stated to the police that the boy of accused had come to him and he knocked his door and thereafter he told him to save his mother from his father. Confronted with statement of this witness mark PW-2/A, wherein it is not so recorded.

8. PW-3 Leela Dutt, has deposed that the accused was his tenant since October, 2009.

9. PW-4 Gopal Singh, Patwari has prepared the *spot map* Ext. PW-4/A, *tatima* Ext. PW-4/B and issued copy of *jamabandi* Ext. PW-4/C.

10. PW-5 Madan Lal, deposed that he was working as Manager in All India Sewa Samiti Chandigarh. They were informed by Satish Kumar from PGI Chandigarh and thereupon they visited PGI, Chandigarh. The dead body of deceased Kiran Bala was unclaimed, so the body was cremated by the Samiti.

11. PW-6 ASI Yadav Singh, deposed that on 23.11.2009, at 10:55 PM, Sh. Prabhu Dayal, Vice President telephonically informed at Police Post that a tenant of Leela Dutt had beaten his wife. He made the report in the Daily Diary Register at Sr. No. 10, which is Ext. PW-6/A. He alongwith other police officials rushed to the spot. The deceased was badly injured and was unconscious at that time. Accused Vinod Kumar was also present there. He immediately informed SHO PS Kasauli and immediately shifted the deceased to PHC Dharampur. He moved application Ext. PW-6/B to the doctor. The doctor opined vide Ext. PW-6/C that the victim was not fit to give statement. He procured MLC mark 'A'. He recorded statement of Sushil Kumar Ext. PW-1/A. The deceased died at PGI, Chandigarh. He admitted in his cross-examination that the accused was not formally arrested since the deceased was very serious and they were concerned about the condition of the deceased at that relevant time. The '*rukka*' was sent to SHO at about 2:30 PM.

12. PW-7 Dr. Naresh Attri, deposed that he examined the accused. His blood stained pant was sealed by him with the seal impression 'X'. He issued MLC Ext. PW-7/B.

13. Statements of PW-8 MC Hardev Singh, PW-9 Const. Shyam Lal and PW-10 HC Chet Ram are formal in nature.

14. PW-11 HC Rakesh Kumar, deposed that on 24.11.2009, SHO Ramesh Thakur, deposited with him a parcel duly sealed with seal 'T' stated to be containing a wooden piece, knife and blood lifted from the spot. He entered these items at Sr. No. 237 of the *Malkhana r*egister. On 25.11.2009, SHO again deposited with him parcel duly sealed with seal 'X' stated to be containing pant of the accused Vinod Kumar. He entered the same at Sr. No. 238 of the *Malkhana* register. These parcels were sent to FSL Junga for examination.

15. PW-12 Dr. Parvinder Singh, deposed that he examined Kiran who was brought to him by police vide request Ext. PW-6/B. He issued MLC Ext. PW-12/A. He noticed following injuries on the person of deceased:

> "1. There was an open wound about 5 cm x 1 cm on chin straight clean and clear margins from left side towards centre, fresh blood was oozing from the wound.
>
> 2. There was lacerated, open wound 1 cm - 3 cm on forehead, above the left eye brow with 1 cm in breadth. Fresh blood was present. I have drawn the shape of injury in the MLC.
>
> 3. There was swelling over left eyelid. It was of bluish discleration.
>
> 4. Bleeding was present from mouth and teeth. Patient was unconscious, pulse rate 100 p.m. respiratory rate 22 per minute and pupils were slowly reacting."

The probable duration of all the injuries was less than 12 hours at the time of examination. The injury No. 1 was caused with the sharp weapon whereas injuries No. 2, 3 & 4 were caused with a blunt weapon. He issued final opinion in this regard on MLC Ext. PW-12/A vide Ext. PW-12/B. According to him, injury No. 1 in MLC Ext. PW-12/A could be caused by knife Ext. P-2 shown to him in the Court. The injuries No. 2, 3 & 4 shown in Ext. PW-12/A could be caused with the wooden block Ext P-1. He admitted that in PW-12/A, there were some cuttings in the column of date and arrival of patient in the hospital.

16. PW-13 Prabhu Dayal, deposed that on 23.11.2009, he was at his residence at about 10:45 PM. PW-1 Sushil Kumar telephonically informed him that a quarrel had taken place between the husband and wife who were tenants of Leela Dutt. Thereupon, he telephonically informed at Police Chowki Garkhal. He visited the house of Leela Dutt. Accused Vinod Kumar was found present in his room. His wife was lying on the floor. She was unconscious and had sustained injuries on her head which were bleeding. In the meantime, accused Vinod Kumar fled away from the spot. After some time, the police also reached at the spot. The room was locked on 24.11.2009. In his presence, the police seized the wooden block, knife, piece of bangles and blood from the room of the accused. In his cross-examination, he deposed that after receipt of the telephonic call, he went to the spot. He noticed Sushil Kumar and Naresh Kumar already present on the spot. The children of the accused were weeping in the room. His house is at the distance of approximately 50 meters. The house of Sushil Kumar and Naresh Kumar are adjoining to the room of the accused. However, there were so many houses in the village at some distance of the house of Leela Dutt. He had never summoned accused in Panchayat, since no written complaint was received against him. The accused ran away from the spot after sometime when he reached at the spot. They did not apprehend the

accused since they were more worried about the condition of the wife of the accused.

17. PW-14 Inspector Ramesh Thakur, deposed that on 24.11.2009, ASI Yadav Singh, Incharge PP Garkhal sent the statement of Sushil Kumar Ext. PW-1/A alongwith *'rukka'* Ext. PW-6/D, through HC Raghubir Singh. Thereafter, he recorded FIR Ext. PW-10/B. He visited the spot in the presence of Vice President Prabhu Dayal. He clicked the photographs. He took into possession wooden block and knife. The accused was arrested. He was got medically examined. He got prepared the spot map Ext. PW-4/A, *tatima* Ext. PW-4/B and *jamabandi* Ext. PW-4/C. In his cross-examination, he admitted that it is not mentioned in the FIR whether it was recorded at 1:45 AM or PM. He met the children on the spot. He inquired from the children but they could not understand since they were small and had some language problem. According to him, the son of the accused was approximately 5-6 years old. They were not cited as witnesses since they could not understand his queries. The accused was arrested on 24.11.2009 at 4:00 PM.

18. PW-15 Dr. S.P. Mandal, has conducted the post mortem examination on the body of the deceased. According to him, the deceased died due to shock and head injury. The injuries were ante mortem caused with blunt weapon. The probable duration between injury and death was around 4 days and between death and post mortem was 76 hours. The copy of the post mortem repot is Ext. PW-15/B. He admitted in his cross-examination that there was no fracture in the scalp.

19. The statement of PW-1 Sushil Kumar was recorded under Section 154 Cr.P.C. vide memo Ext. PW-1/A. It is specifically stated in Ext. PW-1/A that on 23.11.2009 at 10:45 PM he was in his room. He heard cries from the house of Leela Dutt. He alongwith his neighbor Naresh Kumar Attri went to the spot. The tenant of Leela Dutt, Vinod Kumar was beating his wife with wooden block. He and Naresh Kumar saved the deceased from the clutches of Vinod Kumar with great difficulty. According to him, it appeared that the accused has given knife blow on the body of the deceased. Vinod Kumar ran away from the spot proclaiming that he would kill his wife. If they had not reached the spot, the accused would have killed his wife. He informed the Up-Pradhan Prabhu Dayal about the incident. However, when Sushil Kumar appeared before the Court as PW-1, he deposed that he was watching T.V at 10:30 PM on 23.11.2009. He heard noises from the house of Leela Dutt. The children were crying. The elder son of accused was knocking at the door of his neighbor Naresh Kumar Attri and was shouting that his mother had been killed by his father. Thereafter, he and Naresh Kumar Attri went to the room of the accused where deceased was lying on the floor in a pool of blood. She was unconscious. They inquired from the accused why he killed his wife. The accused told them that he received telephonic calls from his native place that his entire family shall be eliminated. He further disclosed that before his family is killed by someone else he killed his wife and thereafter he was to kill his children and himself lateron. In his cross-examination, he admitted that he has never seen the accused quarreling with his wife. His house was at a distance of 10 feet from the house of Leela Dutt. There were many houses in the locality. PW-2 Naresh Kumar Attri, has given a different version. According to him, when they went inside the room of the accused, he was beating his wife Kiran Bala with the help of wooden block and was also carrying one sharp edged weapon in his hand. The deceased was lying unconscious on the floor. The accused, on their enquiry, told them that he would finish his wife. He called Prabhu Dayal from his telephone, who came to the spot.

20. PW-1 Sushil Kumar, though in his statement under Section 154 Cr.P.C. has stated that when he and Naresh Kumar PW-2 went to the room, the accused was beating his wife. They saved her from the clutches of the accused. However, when PW-1 Sushil Kumar appeared in the Court, as noticed by us

hereinabove, he deposed that when he and Naresh Kumar went to the room of the accused, the deceased was lying on the floor. He has not deposed that he had seen the accused giving beatings to the deceased. PW-2 Naresh Kumar Attri, has deposed that they had seen accused giving beatings to his wife with the help of wooden block and was carrying sharp edged weapon in his hand. PW-6 ASI Yadav Singh, reached the spot after receiving information at 10:55 PM on 23.11.2009. He has not arrested the accused on 23.11.2009. The accused was arrested on 24.11.2009 at 4:00 PM. The explanation given for not arresting the accused on 23.11.2009 is that they were more worried about the condition of the deceased. PW-13 Prabhu Dayal, has admitted in his cross-examination that he has never summoned the accused in the Panchayat since no written complaint was ever recorded against him. The deceased, as per the opinion of PW-15 Dr. S.P.Mandal, died due to shock and head injuries.

21. PW-1 Sushil Kumar has not seen the accused beating his wife though he had gone to the room where the accused was residing with PW-2 Naresh Kumar Attri. PW-2 Naresh Kumar Attri in view of the statement of PW-1 Sushil Kumar cannot be termed as eye-witness to the incident, more particularly, when both PW-1 and PW-2 have entered the room simultaneously. According to PW-2 Naresh Kumar Attri, the elder son of the accused knocked his door. Thereafter he visited the room of the accused with PW-1 Sushil Kumar. He was confronted with Ext. PW-2/A wherein it is not so recorded. The prosecution has not examined the elder son of the accused. According to PW-1 Sushil Kumar, the age of the elder son of the accused could be 3-4 years. According to PW-2 Naresh Kumar Attri, the age of the boy could be between 9-10 years. According to PW-14 Inspector Ramesh Thakur, the age of the elder son of the accused was about 5-6 years. The child has not been examined. The explanation given by PW-14 Inspector Ramesh Thakur, as to why he has not cited the child as witness is that the child could not understand the queries and there was some language problem. The child was material witness, since according to the case of the prosecution; he went to the house of PW-2 Naresh Kumar Attri. The prosecution has not attributed a specific motive why the accused would have killed his wife. The only evidence to this effect is statement of PW-1 Sushil Kumar that the accused has told them that he has received telephonic calls from his native place that his entire family would be eliminated and he further disclosed that before his family is killed by someone else, he killed his wife and thereafter he was to kill his children and himself lateron. This version of PW-1 Sushil Kumar, cannot be believed. The person would not kill his wife and thereafter children and try to commit suicide only because somebody had advanced threats to his family. He would try to protect his family instead of killing his family members.

22. PW-1 Sushil Kumar and PW-2 Naresh Kumar Attri were residing with their family members. The family members ought to have accompanied them when they visited the house of the accused, more particularly, when according to them the accused was giving beatings to the deceased. The family members would have definitely visited the house of the deceased. There are about 40-50 houses in the village. The house of the accused was situated in the middle of the village. The population was approximately 100-150. If the children were crying in the house and one boy had gone to the house of PW-2 Naresh Kumar Attri, it would have drawn the attention of the other villagers. None other than PW-1 Sushil Kumar and PW-2 Naresh Kumar Attri has visited the spot, though PW-13 Prabhu Dayal also reached after some time. According to PW-1 Sushil Kumar, he heard the noise emanating from the house of Leela Dutt at 10:30 PM on 23.11.2009, however, in his statement recorded under Section 154 Cr.P.C, it is stated that it was at 10:45 PM that he heard the noise coming from the house of Leela Dutt. According to Naresh Kumar Attri PW-2, he was present in the house at 10:45 PM when the elder son of the accused Vinod Kumar knocked the door.

23. The defence of the accused before the trial Court was that he was not present in his house on the date of the incident i.e. on 23.11.2009. PW-6 ASI Yadav Singh, has deposed that the accused was arrested on 24.11.2009. PW-14 Inspector Ramesh Thakur, has also admitted that the accused was arrested on 24.11.2009. The accused could have been arrested on 23.11.2009 itself. The explanation given by PW-6 ASI Yadav Singh and PW-14 Inspector Ramesh Thakur, is that the accused was not arrested for the simple reason that they were looking after the deceased. The deceased had already been taken to the hospital and if the accused was present on the spot, he ought to have been arrested on 23.11.2009 itself. The fact that he has not been arrested on 23.11.2009 but on 24.11.2009, probablizes the defence of the accused that he was not present on the spot at the relevant time.

24. There are major contradictions in the statements PW-1 Sushil Kumar, PW-2 Naresh Kumar vis-à-vis the manner they have entered the house and seen the incident on 23.11.2009. The prosecution has not attributed any specific motive towards the accused. The eldest son of the accused was a material witness, who has not been examined. The explanation given by PW-14 Inspector Ramesh Thakur, for not examining him is not believable. Thus, the prosecution has failed to prove its case against the accused beyond reasonable doubt.

25. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 16.2.2011 and consequent order dated 17.2.2011, rendered by the learned Addl. Sessions Judge, Solan, in Sessions trial No. 5-S/7 of 2010, is set aside. The accused is acquitted of the charge framed under Section 302 IPC, 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.

26. 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.

****

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

Jamila Khan .....Petitioner.

Versus

State of H.P. & others. .....Respondents.

CWP No. 6807 of 2014.
Decided on: 20.11.2014.

Constitution of India, 1950- Article 226- Husband of the petitioner was employed as Mali in a Private College- College informed the petitioner that she is entitled to leave encashment amount of Rs. 19,811/- and sum of Rs. 6,12,909/- towards gratuity- however, no amount was paid – State contended that husband of the petitioner was not Government servant- his case was not covered under the CCS (Pension) Rules, 1972- State only released financial assistance towards the part of salary component- held, that respondent No. 2 is establishment as per Section 1(3)(b) of the Payment of Gratuity Act, 1972- Government should make efforts to see that teachers and non-teaching staff of Government Aided Colleges/Schools are treated at par with teachers and non-teaching staff of Government Colleges/Schools- College directed to release the gratuity and state directed to pay amount towards the leave encashment. (Para-3 to 18)

Cases referred:
State of Punjab versus Labour Court, Jullundur and ors., (1980) 1 SCC 4
Principal, S.D.Kanya Vidhyala, Jammu versus Authority under the Payment of Gratuity Act and another, 1983 Lab.I.C. 1263,
The Management of S.I.E.T. Women's College, Madras vrs. Mahamed Ibrahim and ors. (1992) 1 LLJ 91
Principal, Bharatiya Mahavidyalaya, Badnera Road and another vrs. Shri Ramkrishna, 1994 Lab. I.C. 404
Ram Gopal Vyas versus Shri Mahesh Sikshan Sansthan and others, 1996(73) FLR 1162
Venkateshwara Rao V vrs. SMVM Polytechnic, Tanuku & others, 1998-I LLJ 181
Laxmi D. vrs. A.P. Agricultural University and another, 2002-I- LLJ 69
Habibia Girls Primary School, (rep. by its Manager), Ambur Vrs. Noorinisha (Ms.) and others, 2004-II- LLJ 398
Agarwal Shiksha Samiti and Another vrs. Moti Chand Jain and Others 2009-II-LLJ 616 (Raj),

For the petitioner: Ms. Anita Parmar, Advocate.
For the respondents: Mr. M.A.Khan, Addl. AG with Mr. P.M.Negi, Dy. AG and Mr. J.S.Guleria, Asstt. AG for respondent No. 1.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J. (oral)

The reply filed by respondent No. 1 is taken on record.

2. The petitioner's husband was employed as Mali in respondent No. 2- Private College on 15.7.1976. He was placed in regular pay scale on 11.5.1990. He died on 3.1.2011. Respondent No. 2 informed the petitioner that she is entitled to leave encashment amount of Rs. 19,811/- and a sum of Rs. 6,12,909/- towards gratuity. The fact of the matter is that the petitioner has neither been paid leave encashment nor gratuity. The respondent No. 2 College was established in the year 1976. It is affiliated to H.P. University. It is receiving 95% grant-in-aid from the respondent-State.

3. The Legislative Assembly of Himachal Pradesh has enacted the Act to provide for the security of services to the employees of the aided Colleges in the State of Himachal Pradesh known as The Himachal Pradesh Aided Colleges (Security of Services of Employees) Act, 1994 (in short "the Act"). Section 2(a) of the Act defines the "aided College" or "College" to mean College affiliated to and admitted to the privileges of a University and receiving financial assistance not less than fifty per centum of the salary component for both teaching and non-teaching staff from the State Government. Section 3 of the Act lays down the minimum qualifications for recruitment of various classes of the employees of a College. The method of recruitment is provided under Section 4 of the Act. Section 6 provides that the scales of pay and other allowances and privileges of the employees of a College shall be such as may, from time to time, as specified by the State Government. Section 13 lays down the procedure for payment of salaries. Section 21 empowers the State Government to frame rules by way of notification. The State Government has also notified on 16.3.2008, The Himachal Pradesh Non-Government College Grant-in-aid Rules, 2008. The object of the grant, as per Rule 3, is to financially assist non-Government Colleges teaching in Arts, Commerce and Science subjects at under Graduate levels, till they become self-reliant. According to Rule 4, grant-in-aid is admissible for meeting, a part of the salary expenses, in respect of approved staff (teaching & non-teaching). However, grant-in-aid to a College should not exceed 50% of the revenue gap (total expenditure on salary of approved teaching and non-teaching staff minus the total income from all

sources). The actual amount of grant-in-aid is dependent upon the availability of resources and budgetary allocation with the Government for this purpose. Rule 5 lays down the eligibility criteria. Rule 7 provides for equitable distribution in case of insufficiency of funds. Rule 13 lays down that where the Government is of the opinion that it is necessary or expedient to do so, it may relax any of the provisions of these rules. By way of amendment notified on 6.10.2009, after first proviso, the following proviso was inserted in Rule 4:

> "Provided further that colleges which were getting Grant-in-aid under the Himachal Pradesh Non-Government Affiliated Colleges Grant-in-aid Rules, 1994 shall be provided Grant-in-aid only for those teaching and non-teaching staff for whom Grant-in-aid was being provided prior to notification of Himachal Pradesh Grant-in-aid to non-Government Colleges Rules, 2008 and the amount of annual Grant-in-aid to these colleges shall be restricted up to the amount of annual Grant-in-aid provided against each of these teaching and non-teaching staff in these colleges prior to 31.3.2008. On accrual of any incremental and other benefits after 31.3.2008, no additional Grant-in-aid shall be provided to these colleges. Further, the Grant-in-aid shall be reduced as and when the staff gets retired.
>
> Provided further that the Grant-in-aid shall be provided w.e.f. 1.4.2008".

4. The respondent No. 2 though is duly served, however, there is no representation on its behalf. The stand of the respondent-State as per the reply is that the petitioner's husband was not a government servant. His case was not covered under the CCS (Pension) Rules, 1972. The employees of 95% aided institutions would not fall within the category of the Government. It is also averred in the reply that the role of the State is confined to release financial assistance in the form of GIA only towards part of salary component as provided in the GIA Rules. It is also averred that the gratuity and leave encashment applicable to the petitioner and other employees of non-Government affiliated colleges whether aided or non-aided is to be released as per the Ist Ordinance of 1973 Appendix-"A" Chapter XXXVIII para 38.5B(d).

5. Appendix "A" of Ist Ordinance, 1973 talks of teachers and not the non-teaching staff. The petitioner's husband has served respondent No. 2-College for almost 35 years as Mali. The petitioner has been informed of the entitlement towards leave encashment and gratuity. However, the fact of the matter is that till date, neither gratuity nor leave encashment has been released in favour of the husband of the petitioner. The Himachal Pradesh Aided Colleges (Security of Services of Employees) Act, 1994, only lays down as per Section 6 that the scales of pay and other allowances and privileges of the employees of a College shall be such as may from time to time, be specified by the State Government. It is not clear from the language employed in Section 6 of the Act that whether the gratuity was intended to be included herein or not.

6. Respondent No. 2-College is an establishment as per Section 1(3)(b) of the Payment of Gratuity Act, 1972. The petitioner's husband would fall within the ambit of Section 2(e) of the Act. The non-teaching employees of the establishment are entitled to gratuity as per Section 4 of the Act. The Gratuity is to be determined as per Section 7 of the Act.

7. Their lordships of the Hon'ble Supreme Court in the case of ***State of Punjab versus Labour Court, Jullundur and ors.,*** reported in ***(1980) 1 SCC 4,*** have held that there is no warrant for limiting the expression "law..... in relation to shops and establishments" to a law which relates to both shops and establishments. The expression is comprehensive in its scope and can mean a law in relation to shops as well as, separately, a law in relation to establishments or a law in relation to shops and commercial establishments and

a law in relation to non-commercial establishments. Their lordships have held as under:

> "3. In this appeal, the learned Additional Solicitor- General contends on behalf of the appellant that the Payment of Gratuity Act, 1972 cannot be invoked by the respondents because the Project does not fall within the scope of Section 1(3) of that Act. Section 1(3) provides that the Act will apply to :
>
> "(a) every factory, mine, oilfield, plantation, port and railway company;
>
> (b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;
>
> (c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf."
>
> According to the parties, it is clause (b) alone which needs to be considered for deciding whether the Act applies to the Project. The Labour Court has held that the Project is an establishment within the meaning of the Payment of Wages Act, section 2(ii) (g) of which defines an "industrial establishment" to mean an "establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on." It is urged for the appellant that the Payment of Wages Act is not an enactment contemplated by section 1(3)(b) of the Payment of Gratuity Act. The Payment of Wages Act, it is pointed out, is a central enactment and section 1(3)(b), it is said, refers to a law enacted by the State Legislature. We are unable to accept the contention. Section 1(3) (b) speaks of "any law for the time being in force in relation to shops and establishments in a State." There can be no dispute that the Payment of Wages Act is in force in the State of Punjab. Then, it is submitted, the Payment of Wages Act is not a law in relation to "shops and establishments". As to that, the Payment of Wages Act is a statute which, while it may not relate to shops, relates to a class of establishments, that is to say, industrial establishments. But, it is contended, the law referred to under section 1(3) (b) must be a law which relates to both shops and establishments, such as the Punjab Shops & Commercial Establishments Act, 1958. It is difficult to accept that contention because there is no warrant for so limiting the meaning of the expression "law" in section 1(3) (b). The expression is comprehensive in its scope, and can mean a law in relation to shops as well as, separately, a law in relation to establishments, or a law in relation to shops and commercial establishments and a law in relation to noncommercial establishments. Had section 1(3)(b) intended to refer to a single enactment, surely the appellant would have been able to point to such a statute, that is to say, a statute relating to shops and establishments, both commercial and non-commercial. The Punjab Shops & Commercial Establishments Act does not relate to all kinds of establishments. Besides shops, it relates to commercial establishments alone. Had the intention of Parliament been, when enacting section 1(3)(b), to refer to a law relating to commercial establishments, it would not have left the expression "establishments" unqualified. We have carefully examined the various provisions of the Payment of Gratuity Act, and we are unable to discern any reason for

giving the limited meaning to section 1(3) (b) urged before us on behalf of the appellant. Section 1(3) (b) applies to every establishment within the meaning of any law for the time being in force in relation to establishments in a State. Such an establishment would include an industrial establishment within the meaning of section 2(ii) (g) of the Payment of Wages Act. Accordingly, we are of opinion that the Payment of Gratuity Act applies to an establishment in which any work relating to construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on. The Hydel Upper Bari Doab Construction Project is such an establishment, and the Payment of Gratuity Act applies to it."

8. The Jammu and Kashimir High Court in the case of ***Principal, S.D.Kanya Vidhyala, Jammu versus Authority under the Payment of Gratuity Act and another,*** reported in ***1983 Lab.I.C. 1263,*** held that the employees of private educational institution are entitled to the receipt of gratuity under the Payment of Gratuity Act, 1972 when the conditions for the applicability as enumerated in the Gratuity Act are satisfied. It has been held as under:

"[11] In view of this settled position of law, it is obvious that the definition of the 'private educational institution' as contained in Private Educational Institutions (Regulations and Control) Act, 1967, cannot be imported into SRO-740 or to the J & K Shops and Establishments Act. That being the position, it is obvious that by virtue of SRO-740 of 1978 all Private Educational Institutions in the State have been declared as establishments under J & K Shops and Establishments Act, 1966 and in view of the provisions of S. 1 (3) (b) of the Gratuity Act, 1972, the employees of 'Private Educational Institutions' are entitled to the receipt of gratuity under the said Act, when the conditions for the applicability as enumerated in the Act are satisfied."

9. In the case of ***The Management of S.I.E.T. Women's College, Madras vrs. Mahamed Ibrahim and ors.*** reported in ***(1992) 1 LLJ 91,*** the Division Bench of the Madras High Court has held that the Women's College was also an 'establishment' as defined in Section 2 (C) of the Tamil Nadu Payment of subsistence Allowance Act and educational institution was an Industry within the meaning of Industrial Disputes Act. Thus, the College was an establishment falling within the purview of Section 1(3)(b) of the Payment of Gratuity Act, 1972. It has been held as under:

"5. The Employees 'Provident Funds and Miscellaneous Provisions Act, 1958 is applicable to the petitioner as all educational institutions have been notified as 'establishments' within the meaning of the said Act by the Central Government under Section 1(3)(b) of that Act, (Vide Notification S.O. 986 dated February 19, 1982). Hence, the petitioner is an 'establishment' within the meaning of a law for the time being in force in relation to establishments in the State. One of the contentions urged by learned counsel for the petitioner is that the law referred to in Section 1(3)(b) of the Act should be a law already in force in the concerned State and not any law which comes into force subsequently. We do not agree with this contention. The question has to be decided only when it arises before the Court. If at the time when the question arises before the Court for consideration, there is a law in force in relation to shops or establishments in a State, then the Act will apply to all shops and establishments within the meaning of such law. There is no necessity for the relevant law to have been in forced already when the Act was passed in 1972. However, that argument will not apply to the Employee' Provident Funds and Miscellaneous Provision Act, 1952, as that came

into force long prior to the passing of the Payment of Gratuity Act. Even assuming that the contention of learned counsel is acceptable, it cannot escape the applicability of the Act as the petitioner is an establishment within the meaning of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

6. The petitioner is also an 'establishment' as defined by Section 2(c) of other Tamil Nadu Payment of Subsistence Allowance Act (43 of 1981). That Section reads as follows :- "establishment" means any place where any industry, trade, business, undertaking, manufacture, occupation or service is carried on, and with respect to which the executive power of the State extends, but does not include ---

(i) any office or department of the Central or the State Government; or

(ii) a railway administration; or

(iii) any mine or oil field; or

(iv) any major port; or

(v) any public sector undertaking of the Central Government.

Explanation :- For the purpose of this clause "any public sector undertaking of the Central Government" means an establishment owned, controlled or managed by -

(1) the Central Government or a department of the Central Government.

(2) a Government company as defined in Section 617 of the Companies Act, 1956 (Central Act I of 1956) and owned or controlled by the Central Government;

(3) A Corporation established by or under a Central Act, which is owned, controlled or managed by the Central Government."

"Industry" is defined in Section 2(e) of that Act as "an industry as defined in Section 2(j) of the Industrial Disputes Act, 1947 (Central Act XIV of 1947)". An educational institution is an 'industry' within the meaning of the Industrial Dispute Act, as elucidated by the Supreme Court in Bangalore Water Supply & Sewerage Board Etc. v. A. Rajappa and Other Etc. (1978-I-LLJ-349). Section 2(j) of the Industrial Disputes Act defines an 'industry' as "any business, trade undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen." The amendment of the definition sought to be introduced by the Industrial Disputes (Amendment) Act, 1982 (46 of 1982) excluding educational institutions from the purview thereof, has not yet come into force.

7. A Division Bench of the Allahabad High Court has in U. P. Co-operative Union and others v. Prabhu Dayal Srivastava and others 1988 (57) F.L.R. 70 held that the world "establishment" as used under Section 1(3)(b) and Section 1(3)(c) of the Act connotes an organised body of men and women employed where the relationship of employer and employee comes into existence. The Division Bench has taken the view that the Act being a progressive, Social and beneficial legislation, the construction that promotes the purpose of legislation should be preferred to a literal construction. Relying upon the meaning of the word 'establishment' as found in the dictionaries. The Bench held that the Act would apply to an apex-co-operative society registered under the U.P. Co-operative Societies Act, 1965.

8. The result of the above discussion leads to the conclusion that the petitioner is an 'establishment 'falling within the purview of Section

1(3)(b) of the Act and the contention to the contrary urged by learned counsel for the petitioner should be rejected."

10. In the case of ***Principal, Bharatiya Mahavidyalaya, Badnera Road and another vrs. Shri Ramkrishna,*** reported in ***1994 Lab. I.C. 404,*** the learned Single Judge of the Bombay High Court has held that the educational institution is covered under the Payment of Gratuity Act, 1972. It has been held as under:

"[7] In order to appreciate the controversy, it will be better to go to the various provisions of law. Section 1 of Payment of Gratuity Act, 1972 runs as under:

"1. (1) This Act may be called the Payment of Gratuity Act, 1972.

(2) It extends to the whole of India:

Provided that in so far as it relates to planations or ports, it shall not extend to the State of Jammu and Kashmir.

(3) It shall apply to---

(a) .....

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employee, or were employed, on any day of the preceding twelve months;

(c) .....

(3-A) .....

(4) ....."

The word establishment is not defined in the Payment of Gratuity Act. In short, the Payment of Gratuity Act would apply to all the establishments which are 'establishments' as per any law in the State concerning the shops and establishments. There is no dispute and indeed there cannot be any that the Bombay Shops and Establishments Act, 1948 would be one of such laws which is in force in the State of Maharashtra and which pertains to the subject of shops and establishments. In order that an establishment is covered under section 1(3)(b) of the Gratuity Act, that establishment will have to be "within the meaning of" the Bombay Shops and Establishments Act or any other law which covers the subject of shops and establishments.

[8] Section 5 of the Gratuity Act provides that the appropriate Government may by notification and subject to such conditions as may be specified in the notification exempt any establishment from the operation of the Gratuity Act. It will be better to quote section 5(1) of the Payment of Gratuity Act, 1972 which is as under:---

"Section 5(1). The Appropriate Government may, by notification, and subject to such conditions as may be specified in the notification, exempt any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act if, in the opinion of the appropriate Government, the employees in such establishment, factory, mine oilfield, plantation, port, railway company or shop are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act."

There is no dispute about the fact that the appropriate Government in the present case would be the State Government, i.e. the Government of Maharashtra. The State of Maharashtra, therefore, is empowered to

specifically exempt any establishment provided it does so according to the modality provided by section 5(1) of the Gratuity Act. It is also an admitted position that the State of Maharashtra has not exempted any education institutions, muchless any institution or establishment like that of the petitioners from the operation of the Gratuity Act."

11. The learned Single Judge in the case of ***Ram Gopal Vyas versus Shri Mahesh Sikshan Sansthan and others,*** reported in ***1996(73) FLR 1162,*** have held that the provisions of Payment of Gratuity Act, 1972 would be applicable to the aided schools. It has been held as under:

"[4] I have carefully considered the arguments advanced by both the learned counsel and also perused the orders passed by the Controlling Authority as well as by the appellate authority. Mr. Vyas learned counsel for the petitioner was very much right in submitting that the Controlling Authority in its judgment running into 24 typed pages has considered all the aspects of the case and rightly come to the conclusion that the State Government has exempted the respondent No. 1 Institution and, therefore, the Controlling Authority was very much right in treating that the respondent No. 1 was an establishment. Thus, therefore, provisions of Payment of Gratuity Act, 1972 would be applicable in this case and the original petitioner was entitled for the gratuity from the respondent No. 1 It must be stated that while allowing the appeal the appellate authority has passed a cryptic order, except reproducing the provisions he has not given any other finding except stating that:

"An educational institution may be an industry under the Industrial Disputes Act, 1947 in view of the law laid down by the Supreme Court of India in the Case of Bangalore Water Supply and Sewage Board v. Rajagpa or it may be an establishment but unless it is a Commercial establishment under the Rajasthan Shops & Commercial Establishments, Act 1958,it will not come within the ambit of the Payment of Gratuity Act, 1972."

[5] The View taken by the appellate authority is wholly unsustainable. In my opinion the appellate authority was wrong in coming to the conclusion that the respondent No. 1 Institution may be an establishment, but unless it is held to be commercial establishment under the Raj. Shops and Commercial Establishments Act, 1958 it will not come within the ambit of Pay-ment of Gratuity Act. 1972."

12. The Division Bench of Andhra Pradesh High Court in the case of ***Venkateshwara Rao V vrs. SMVM Polytechnic, Tanuku & others,*** reported in ***1998-I LLJ 181,*** held that the polytechnic was an institution in which the activity of imparting knowledge or training was systematically carried on and was an "establishment" for the purpose of the Gratuity. It has been held as under:

"[7] Now, apart from the petitioner/polytechnic being an establishment by virtue of Section 1(3)(a) of the Gratuity Act being a factory etc., and an establishment etc., under several laws supra, there is also a positive material to bring it within the meaning of 'establishment' under Section 1(3)(b) of the Act.

Section 1(3) of Employees Provident Funds and Misc. Provisions Act., 1952 reads:

"1. 3: Subject to the provisions contained in Section 16, it applies--

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, and

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf.

It is almost in pan materia with Section 1(3) of the Gratuity Act. The Central Government has issued a notification No. SO.986 dt.19-2-1982 under Section 1 (3)(b) of the Act supra as follows:-

"In exercise of the powers conferred by Clause (b) of Sub-section (3) of Section 1 of the Employees' Provident Funds and Misc. Provisions Act, 1952, the Central Government hereby specifies the following classes of establishments in each of which twenty or more persons are employed, as establishments to which the said Act shall apply, namely--

(i) any University

(ii)any College, whether or not affiliated to a University

(iii) Any school, whether or not recognised or aided by the Central or a State Government

(iv) any scientific institution

(v) any institution in which research in respect of any matter is carried on

(vi) Any other institution in which the activity of imparting knowledge or training is systematically carried on."

The petitioner/polytechnic cannot but to accept that it is an institution in which the activity of imparting knowledge or training is systematically carried on to come within Clause (vi) of the notification. In other words, it comes within the applicability provision of Section 1(3)(a) of the Employees Provident Fund and Misc. Provisions Act to make the Act, 1952 applicable upon itself. Therefore, such an act in the State of A.P., making the petitioner/polytechnic an 'establishment' under the said provision inforce should necessarily come within the meaning of "establishment" for the purpose of Section 1(3)(b) of the Gratuity Act to operate such a law to the Polytechnic. Thus, both legally and logically the petitioner polytechnic is governed by the provisions of the Payment of Gratuity Act entitling the fifth respondent/appellant to get the Gratuity as claimed and as correctly conceded by the fourth respondent. The approach of the matter beyond such a legal reinforcement approved by the Supreme Court also and rightly followed by the Division Bench of the High Court of Madras by the learned single Judge cannot persuade us to hold to the contrary and sustain the impugned order in the appeal and we propose to set aside the same."

13. In the instant case also, more than 10 employees are engaged by respondent No. 2 College for imparting knowledge.

14. In the case of ***Laxmi D. vrs. A.P. Agricultural University and another,*** reported in ***2002-I- LLJ 69,*** the Division Bench of the A.P. High Court held that 'establishment' in Section 1(3)(b) of the Act was comprehensive to include 'establishment' within the meaning of any law, not only law relating to shops and establishments, for the time being in force in a State. It has been held as under:

"[5] The learned single Judge while answering the first question relied upon the decision of a learned single Judge of this Court in Chairman, G.B.S.M.V.M.P. Technic, Tanuku v. Government of Andhra Pradesh and Ors., 1989(2) LLJ 95. It now appears that the subject-matter, as raised before us, earlier came up for consideration before a Division Bench of this Court in V. Venkateswara Rao v. S.M.V.M. Polytechnic, , wherein the Division Bench following the decision of the Apex Court in State of Punjab v. Labour Court, , reversed the view that the University is not an

educational institution. The Apex Court in State of Punjab v. Labour Court (supra) while rejecting the contention that Section 1 (3) (b) must be a law, which relates to both shops and establishments stated:

".....Section 1(3) (b) speaks of 'any law for the time being in force in relation to shops and establishments in a State". It is difficult to accept such a contention because there is no warrant for so limiting the meaning of the expression 'law' in Section 1 (3) (b). The expression is comprehensive in its scope, and can mean a law in relation to shops and commercial establishments and a law in relation to shops as well as separately, a law in relation to establishments or a law in relation to non-commercial establishments... Had Section 1(3) (b) intended to refer to a single enactment, surely the appellant would have been able to point to such a statute, that is to say, a statute relating to shops and establishments both commercial and noncommercial.....Had the intention of Parliament been, when enacting Section 1(3)(b), to refer to a law relating to commercial establishments, it would not have left the expression "establishment" unqualified. We have carefully examined the various provisions of the Payment of Gratuity Act, and we are unable to discern any reason for giving the limited meaning to Section 1(3) (b) urged before us on behalf of the appellant. Section 1(3)(b) applies to every establishment within the meaning of any law for the time being in force in relation to establishments in a State.....

[6] Although the aforesaid decision was rendered in the light of Section 2(g) of the Payment of Wages Act, defining 'industrial establishment' in a State being the law in force, we are of the opinion, that the above decision would cover the instant case also. The Act refers to an establishment. It, therefore, embraces in its fold all types of establishments, including industrial establishments. Furthermore, as noticed hereinbefore, the Act applies to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments. The Central Government also issued notification dated 19-2-1982 extending its applicability to a University, College - whether affiliated or not to a University held that the Act is applicable. The Apex Court in A. Sundarambal v Government of Goa, Daman and Diu, held that though school is an industry, the teachers employed therein are not workmen."

15. In the case of ***Habibia Girls Primary School, (rep. by its Manager), Ambur Vrs. Noorinisha (Ms.) and others,*** reported in ***2004-II- LLJ 398,*** the learned Single Judge has held that the 'school' whether aided or otherwise, would come under the ambit of 'establishment' under the Payment of Gratuity Act, 1972. It has been held as follows:

"[4] It is, of course, true that the original authority had decided the matter ex parte, as the petitioner had not appeared. Even before the appellate authority, no concrete materials had been adduced, in support of such an assertion and the appellate authority came to the conclusion that the school was being run from the year 1972. This being a factual conclusion, there is no scope for interfering with the conclusion arrived at by the appellate authority.

[15] Following the aforesaid decisions, I have no hesitation in observing that the provisions contained in Section 1(3) of the Payment of Gratuity Act are also applicable to unaided educational institutions. Once such a conclusion is arrived at, there is hardly any scope for interfering with the order passed by the appellate authority."

16. The Division Bench of the Rajasthan High Court in the case of ***Shri Agarwal Shiksha Samiti and Another vrs. Moti Chand Jain and***

Others reported in ***2009-II-LLJ 616 (Raj)***, has held that non-governmental educational institutions were bound to pay gratuity to its employees. It has been held as under:

> "[2] All these appeals arise from a common order of learned Single judge whereby, the appellant Samiti was directed to make payment of gratuity to the respondents along with interest. The order does not call for interference in view of the ratio indicated in Children Garden Play School Education Society v. Raj Nan Government Educational Institutions Tribunal and Ors.,2008 3 WLC(Raj) 147 wherein, the Division Bench of this Court held that non-government educational institutions are bouna to pay gratuity to the employees worked with them since gratuity is a benefit arising from past service and meant for relief and assistance after retirement or cessation of employment."

17. The employees of respondent No. 2-College are also doing yeomen's service in educational field. The conditions for the service of teaching and non-teaching staff must be humane and the endeavour should be made by the State Government that the teachers and non-teaching staff of Government Aided Colleges/Schools are treated at par with teachers and non-teaching staff of Government Colleges/Schools. The teachers in private Aided Colleges are appointed as per the Ordinance framed by the University and they are also supposed to fulfill the minimum educational qualification criteria, as laid down under the UGC norms. The petitioner's husband was also entitled to leave encashment. The expression salary in the grant-in-aid clause would also cover leave encashment.

18. Accordingly, the Writ Petition is allowed. Respondent No. 2-College is directed to release the gratuity to the petitioner, strictly as per the provisions of the Payment of Gratuity Act, 1972 within ten weeks from today. The respondent No. 1 is also directed to pay a sum of Rs. 19,811/- to the petitioner towards leave encashment, if necessary by relaxing the Rules under Rule 13 of the Himachal Pradesh Non-Government College Grant-in-aid Rules, 2008 within six weeks. It is made clear that the amount paid towards the leave encashment can be adjusted by the respondent No. 1-State while releasing grant-in-aid to respondent No. 2-College. The respondent-State is also directed to consider making comprehensive rules/ guidelines for the retiral benefits of the Government aided Colleges/Institutions.

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

Child Development Project Officer & others ...Appellants.

Versus

Smt. Tripta Devi ...Respondent.

LPA No. 11 of 2007
Decided on: 10.12.2014

Constitution of India, 1950- Article 226- Petitioner was appointed as Anganwari Worker- her services were terminated on 14.12.2001- she filed a Writ Petition which was allowed and the order of the termination was quashed – written notices were to be served upon the petitioner in terms of the guidelines- respondent had not served notice, therefore, termination order was rightly quashed - however, the petitioner had not pleaded that she was not gainfully engaged when she was kept out of services, therefore, she is not entitled to back wages- order modified and it is directed that petitioner is not entitled to back-wages but is only entitled for other consequential benefits. (Para-2 to 7)

For the appellants: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. M.A. Khan, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General.

For the respondents: Ms. Monika Shukla, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This Letters Patent Appeal is directed against the judgment and order, dated 18th April, 2007, passed by the Writ Court in CWP No. 255 of 2002, titled as Tripta Devi versus Child Development Project Officer & another, whereby the writ petition filed by the writ petitioner-respondent herein came to be allowed (hereinafter referred to as "the impugned judgment").

2. The writ petitioner-respondent herein was engaged as Anganwari Worker. Her services were terminated vide order, dated 14th December, 2001, was subject matter of the writ petition filed by the writ petitioner-respondent herein, was allowed and the order of termination was quashed.

3. In terms of the guidelines (Annexure R-4), three written notices were to be issued, which were not served upon the writ petitioner-respondent herein and the Writ Court, after noticing the said fact, quashed the termination order.

4. Mr. J.K. Verma, learned Deputy Advocate General, frankly conceded that three written notices were not issued, but the notice issued contains the details.

5. Having said so, we are of the considered view that the Writ court has passed a well reasoned judgment, needs no interference.

6. The writ petitioner-respondent herein was not in position and has not performed her duties. It is not, however, pleaded that she was not gainfully engaged during the said period.

7. In the given circumstances, we deem it proper to modify the impugned judgment by providing that the writ petitioner-respondent herein is not entitled to back-wages/honorarium from the date of termination till today, but is to be counted for all service benefits.

8. Accordingly, the impugned judgment is modified and the appeal is disposed of alongwith all pending applications.

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

Kunj Lal & ors. .....Appellants.

Versus

Kekh Ram & ors. .....Respondents.

RSA No. 399 of 2001.
Reserved on: 03.12.2014.
Decided on: 11.12.2014.

Specific Relief Act, 1963- Section 34- 'T' had gifted the land in favour of 'J'- subsequently, she filed a suit for recovery of gift- 'J' agreed to pay maintenance @ Rs. 50/- per month to 'T' and arrears of maintenance @ Rs. 200/- per month before 11.5.1965- 'T' could recover the possession on breach of undertaking given by 'J'- 'J' exchanged the land with 'B' and 'D'- 'B' transferred the portion of the suit land in favour of defendants No. 14 and 15- 'J' transferred the portion of

the land in favour of defendants No. 8 to 13- 'T' filed an Execution Petition without impleading the transferee - warrant of possession was issued on 6.7.1971 – plaintiffs, successors of the transferee sought declaration that they are owners in possession of the suit land- held, that copy of the report filed by Field Kanungo and copy of Raznamcha does not show as to who was evicted from the suit land- these documents further do not show that 'T' was put in possession of the suit land- exchange made by predecessor-in-interest of the plaintiffs was valid and they could not be deprived of the land given to them.

(Para- 25)

For the appellant(s): Mr. Sanjeev Kuthiala, Advocate.

For the respondents: Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Ajeet Singh Jaswal, Advocate, for respondents No. 1 & 2.

Mr. Sunil Mohan Goel, Advocate, for respondents No. 13 to 16, 18 & 19.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Kullu, H.P. dated 9.8.2001, passed in Civil Appeal No. 80 of 2000.

2. Key facts, necessary for the adjudication of this regular second appeal are that the appellants-plaintiffs (hereinafter referred to as the plaintiffs, for the convenience sake), have instituted a suit for declaration with consequential relief of injunction and in the alternative suit for possession against the respondents-defendants (hereinafter referred to as the defendants) or their predecessor in interest. According to the plaintiffs, their predecessor-in-interest, namely Sh. Bhagat Ram was owner-in-possession of land comprised in Kh. Nos. 701 and 702 as per jamabandi for the year 1960-61 and 1/3rd share of land comprised in Khata Khatauni No. 207/310, Kh. No. 39, specifically described in jamabandi for the year 1966-67 and predecessor-in-interest of the defendants No. 3(a) to 3(f) of Jeet Ram, as per the array of parties given in original suit. Since the deceased defendant Jeet Ram was owner-in-possession of Kh. No. 260 and 695 and of ½ share of land comprised in Kh. No. 661, as per jamabandi for the year 1960-61, Sh. Bhagat Ram predecessor-in-interest of the plaintiffs exchanged 4/5th share of his land comprised in Kh. No. 701 and land comprised in Kh. No. 702 with the ½ share of land comprised in Kh. No. 661 and Kh. No. 695 belonging to Jeet Ram vide mutations No. 539 dated 29.9.1965 and mutation No. 548 dated 12.8.1966. Sh. Jeet Ram has also exchanged his land comprised in Kh. No. 260 with the 11/14 share of land comprised in Kh. No. 18 belonging to defendant No. 13 Dola Ram vide mutation No. 837 dated 26.9.1965 and Dola Ram in turn exchanged the land comprised in Kh. No. 260 with 1/3rd share of land comprised in Kh. No. 39 belonging to Bhagat Ram vide mutation No. 538 dated 26.9.1965. Defendant No. 13 Dola Ram subsequently transferred Kh. No. 39 in favour of defendant No. 14 Ram Dayal and defendant No. 15, Thakar Dass. Jeet Ram further transferred Kh. Nos. 701 and 702 in favour of defendants No. 8 to 13, namely, Nawang Chhering, Dorje Angroop, Tashi Angroop, Tashi Tandup, Padma Dorje and Dole Ram. Bhagat Ram raised an orchard on the suit land. They came to know for the first time in the year 1997 that Thakri Devi widow of Parmanand was owner-in-possession of ½ share of Kh. Nos. 260, 695 and 661 along with some other Khasra numbers and that she had gifted this land in favour of Sh. Jeet Ram. However, she subsequently filed a suit bearing No. 250 of 1964 against defendant Jeet Ram. The matter was compromised on 11.5.1965. The compromise decree was drawn. According to the compromise-decree, Jeet Ram would pay a monthly maintenance amount of Rs. 50/- to her along with the arrears of Rs.

200/- and in case of default Thakri Devi was empowered to get the possession of the gifted land back by way of execution. Thereafter, Thakri Devi hatched a conspiracy with Jeet Ram by concealing the material facts that the suit land had already been transferred by way of exchange in favour of Bhagat Ram. Smt. Thakri Devi filed an execution petition in the Court without impleading the predecessor-in-interest of the plaintiffs as a party. The warrant of possession was issued vide order dated 6.7.1971. Rapat No. 183 dated 7.12.1971 was prepared by Halqua Patwari. Mutation No. 782 was attested. After the death of Smt. Thakri Devi, defendants No. 1 & 2 Sh. Khimatu and Shamsher Singh procured mutation No. 977 in respect of the suit land in their favour. The plaintiffs, have thus claimed decree of declaration, to the effect that they were owners-in-possession of the suit land and defendants No. 1 & 2 be restrained from interfering in their possession over the suit land comprised in Kh. Nos. 701 and 702 and 1/3 share in Kh. No. 39.

3. The suit was contested by defendants No. 1 & 2, namely Sh. Khimatu and Shamsher Singh, defendants No. 8 to 13 and defendants No. 14 & 15. A joint written statement was filed by defendants No. 1 & 2. It is admitted that defendant No. 3, namely, Jeet Ram had exchanged the suit land with the land of Bhagat Ram, predecessor-in-interest of the plaintiffs. It is asserted that defendant No. 3 had no right to exchange the khasra numbers in dispute with Bhagat Ram and defendant No. 13 Dola Ram in view of the compromise dated 11.5.1965 in suit bearing No. 250/1964. Smt. Thakri Devi has executed the *'Will'* dated 4.10.1978 in favour of defendant No. 1 Khimatu and Fateh Chand, the father of defendant No. 2. According to them, the possession of the suit land was delivered to Thakri Devi in execution petition by way of warrant of possession.

4. Jeet Ram, in his written statement, has admitted that he had exchanged the suit land with Bhagat Ram and defendant No. 13 Dola Ram. However, he has pleaded that he was owner of Kh. No. 260 only to the extent of ½ share and he has given only this share in exchange to Dola Ram who in lieu thereof had given to him 11/14 share of Kh. No. 18. He has admitted about the compromise decree. He has denied that he had hatched conspiracy with Smt. Thakri Devi.

5. Defendants No. 8 to 13 have filed the joint written statement. They have denied for want of knowledge the facts relating to the exchange of land and passing of compromise decree and thereafter execution petition. According to them, defendant No. 8 Nawang Cherring and Nawang Thele, predecessor-in-interest of defendants No. 9 to 12 had purchased 4/5 share of Kh. No. 701 and land measuring 1-3-0 bighas comprised in Kh. No. 702 from Hira Lal son of Sh. Lal Chand. They have purchased the land bonafide.

6. The replication was filed by the plaintiffs. The learned Sub Judge Ist Class, Manali, framed the issues and additional issue was framed on 19.5.2000. The learned Sub Judge Ist Class, Manali, decreed the suit on 29.5.2000 by declaring the plaintiffs to be owners-in-possession of suit land and defendants No. 1 & 2 were perpetually restrained from interfering in any manner over the suit land. The LRs of defendant No. 1 and defendant No. 2 Shamsher Singh filed an appeal before the learned District Judge, Kullu. The learned District Judge, Kullu, allowed the appeal and set aside the impugned judgment and decree vide judgment dated 9.8.2001. Hence, this regular second appeal.

7. This regular second appeal was admitted on the following substantial questions of law on 28.8.2001:

> "1. Whether oral and documentary evidence on record especially the statements of PW-1 Kunj Lal plaintiff, PW-2 Cherring Dorje, Exhibits, P-9 to P-15 mutations, Exhibits P-16 jamabandi for the year 1960-61, Ext. D-1 compromise decree, Ext. D-2 compliance report, Ex. D-7 and Ex. D-

8 mutations, Ex. D-15 Rapat Rojnamcha, Ex. PA-1 mutation, DW-2 statement of Bhoop Ram, Chowkidar have not been considered in their proper perspective by the learned first appellate court?

2. Whether the principles of Section 41 and Section 52 of the Transfer of Property Act can be applied to a bonafide transaction, which was made during the period when there was no pendency of any suit and after due and diligent investigation regarding the title of the person making the transfer?

3. Whether Section 119 of the Transfer of Property Act would be applicable where one of the party to the transaction is subsequently deprived of property transferred and there is non receipt of properties stipulated to be received and the said property is entitled to the option for return of the property from the other party, legal representative or the transferee is also entitled to damages for the deprivation of that property?

4. Whether in a gift where the dispositive words are clear and an absolute estate is given and mutation entered thereto regarding acceptance and delivery of possession, and where allegedly the purpose of the gift is allegedly for maintenance of the donor, it does not follow that a complete estate is given and there is a rider in said transfer of gift?"

8. Mr. Sanjeev Kuthiala, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that the first Appellate Court has not correctly appreciated the documentary evidence placed on record. He has supported the judgment and decree passed by the trial Court. On the other hand, Mr. Bhupinder Gupta, Sr. Advocate, has supported the judgment and decree passed by the learned District Judge, Kullu dated 9.8.2001.

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

10. The dispute, in a nut shell, is that the predecessor-in-interest of the plaintiffs Sh. Bhagat Ram, exchanged 4/5 share of his land comprised in Kh. No. 701 and 702 with ½ share of land comprised in Kh. Nos. 661 and 695 belonging to Jeet Ram. The mutations No. 539 and 548 dated 29.9.1965 and 12.8.1966, respectively, were also attested. Sh. Jeet Ram has also exchanged his land comprised in Kh. No. 260 with the 11/14 share of land comprised in Kh. No. 18 belonging to defendant No. 13 Dola Ram vide mutation No. 837 dated 26.9.1965 and Dola Ram in turn exchanged the land comprised in Kh. No. 260 with 1/3rd share of land comprised in Kh. No. 39 belonging to Bhagat Ram vide mutation No. 538 dated 26.9.1965. Defendant No. 8 Nawang Chhering and Nawang Thele, predecessor-in-interest of defendants No. 9 to 12 had purchased 4/5 share of Kh. No. 701 and land measuring 1-3-0 bighas comprised in Kh. No. 702 from Hira Lal son of Sh. Lal Chand. Smt. Thakri Devi has gifted Kh. Nos. 260, 695 and 661 to Sh. Jeet Ram. She filed Civil Suit bearing No. 250/64 against Jeet Ram. It was compromised on 11.5.1965. Thereafter, she filed execution petition and mutation was attested on 7.12.1971.

11. PW-1 Kunj Lal deposed that Sh. Jeet Ram was owner of Kh. Nos. 260, 695 and 661. His father owned Kh. Nos. 701 and 702. Kh. No. 260 was also owned by Sh. Jeet Ram. He has exchanged this Kh. No. with Sh. Dole Ram. Sh. Dole Ram has exchanged this Kh. No. with Kh. No. 39. Jeet Ram was given Kh. No. 695 for exchange of Kh. No. 702 and Kh. No. 661was exchanged with Kh. No. 701. Sh. Jeet Ram was owner of Kh. Nos. 260, 695 and 661. With the exchange thereafter, they have become owners of the land. An orchard was raised on Kh. No. 695. The defendants have started interfering in their possession since 1997. They came to know about the gift executed by Thakri Devi in favour of Jeet Ram. They have never left the possession. A false report

was prepared by the revenue department. The mutation was wrongly attested in favour of Thakri Devi. In his cross-examination, he deposed that his father died in the year 1982. The exchange was made in the year 1965. Jeet Ram was owner of ½ share of Kh. No. 661 and absolute owner of Kh. Nos. 695 & 260.

12. PW-2 Cherring Dorje deposed that he knew the parties. He had seen the disputed land. Bhagat Ram has raised an orchard 30-35 years back. In his cross-examination, he could not narrate the khasra number. He was not aware that defendants No. 8 to 13 have purchased land from Hira Lal.

13. DW-1 Shamsher Singh deposed that the disputed land was owned by Thakri Devi. The land was gifted to Jeetu. Thakri Devi has instituted suit in the year 1964. The suit was compromised. Sh. Jeetu has to pay a sum of Rs. 200/- per month to Thakri Devi and in case of breach, Thakri Devi has right to get the possession of the land back. Thakri Devi was in possession of the suit land. She has executed the '*Will'* in the year 1978 in favour of Sh. Fateh Chand and Khimatu, vide mark A. It was scribed by Chuhru Ram. Sh. Mukand Lal and Dholu Ram were the marginal witnesses. Sh. Chuhru Ram has read the contents of the '*Will'* in front of the marginal witnesses. She has put her signatures in front of the witnesses. Thereafter, the marginal witnesses have put their signatures. The possession was taken over through Kanungo and Patwari. The legal heirs of Jeet Ram were in possession of the suit land. In his cross-examination, he deposed that Bhagat Ram knew that Thakri Devi was in possession of the suit property at the time of exchange.

14. DW-2 Bhoop Ram deposed that he was Chowkidar. He has seen the suit land. The land was in possession of Thakri Devi. After her death the land came to the possession of Fateh Chand and Khimatu. Thereafter, it came to the possession of Shamsher Singh. The Patwari and Kanungo had come on the spot to give possession to Thakri Devi.

15. PW-3 Sh. Chuhru Ram deposed that he was working as Petition Writer since 1968. Ext. DW-3/A was scribed by him at the instance of Thakri Devi. It was scribed on 4.10.1978. Smt. Thakri Devi has put her signatures in the presence of marginal witnesses Mukand Lal Upadhyay, Advocate and Dola Ram. Thereafter, the marginal witnesses have also signed the '*Will'*. The contents of '*Will'* were read over to Thakri Devi. She after admitting the contents to be true put her thumb impression on the same. She was in her senses. She knew her profit and loss.

16. DW-4 Mukand Lal deposed that '*Will'* Ext. DW-3/A was scribed by Chuhru Ram at the instance of Thakri Devi. The contents of the '*Will'* were read over to Thakri Devi. She after admitting the contents of the '*Will'* to be true, put her thumb impression in his presence and Dola Ram. Thereafter, he and Dola Ram signed the '*Will'*. She was in her senses.

17. DW-5 Dola Ram deposed that he has taken Kh. No. 39 in the year 1968 from Bhagat Ram by way of exchange and in lieu thereof Kh. No. 54 was taken from Rattan Dass in the year 1970. He has raised parapets on the same. He has spent Rs. 5,00,000/-. He has admitted in his cross-examination that he exchanged Kh. No. 260 and Bhagat Ram has given him Kh. No. 39 in lieu thereof in the year 1965.

18. DW-6 Tashi Angroop deposed that Kh. Nos. 701 & 702 were purchased by their predecessor-in-interest from Sh. Hira Lal. They have improved the property. He was not aware that on Kh. Nos. 260, 695 and 661, defendants No. 1 & 2 have raised an orchard.

19. DW-7 Phunchok deposed that he knew Dola Ram. He was in possession of Kh. No. 54 since 1970. He has raised an apple orchard over the same.

20. DW-8 Thakur Dass deposed that their father has given Kh. No. 54 to Dola Ram in exchange and in lieu thereof Kh. Nos. 17, 18, 19 and 39 were given to his father.

21. DW-9 Heera Singh deposed that Jeet Ram was his father. His father had exchanged the land with Bhagat Ram. His father has given ½ share of Kh. Nos. 260, 661 and 695 to Bhagat Ram and Bhagat Ram had given in exchange Kh. Nos. 701 & 702. Thakri Devi has executed gift in favour of his father. Thakri Devi has also filed a Civil Suit. Bhagat Ram, father of the plaintiffs' was not aware of this Civil Suit. The possession was also handed over at the time of the exchange. Thakri Devi has filed execution petition. The possession was given to Thakri Devi. He admitted in his cross-examination that after exchange, the plaintiffs were in possession of Kh. Nos. 260, 695 and 661. He also admitted that Jeet Ram was owner of Kh. No. 260.

22. Smt. Thakri Devi has made a gift in favour of Jeet Ram. She filed suit for revocation of the gift. Decree-sheet is Ext. D-1 dated 11.5.1965. According to the decree-sheet, Jeet Ram has undertaken to regularly pay maintenance amount of Rs. 50/- per month to Smt. Thakri Devi and also to pay arrears of maintenance @ Rs. 200/- before 11.5.1965. Thakri Devi could take back the possession in breach of the undertaking given by Sh. Jeet Ram. Sh. Bhagat Ram has exchanged 4/5th share of his land comprised in Kh. No. 701 and whole share in Kh. No. 702 with Jeet Ram who in lieu thereof gave ½ share of land comprised in Kh. No. 661 and land compromised in Kh. No. 695 to Sh. Bhagat Ram. The mutation No. 539 was attested on 26.9.1965 and mutation No. 548 on 12.8.1966. Sh. Jeet Ram has further exchanged his land comprised in Kh. No. 260 with the 11/14 share of land comprised in Kh. No. 18 belonging to defendant No. 13 Dola Ram vide mutation No. 837 dated 26.9.1965 and Dola Ram in turn exchanged above mentioned Kh. No. 260 with 1/3rd share of land comprised in Kh. No. 39 belonging to Bhagat Ram vide mutation No. 538 dated 26.9.1965. According to these mutations, Sh. Bhagat Ram was put in possession of the suit land. Civil Suit No. 250 of 1964 was compromised on 11.5.1965. Smt. Thakri Devi, as per Ext. D-3 copy of order dated 16.3.1970 has admitted that Jeet Ram has made payment to her in accordance with the terms of decree upto 11.11.1966. Thus, it can safely be presumed that the decree remained in abeyance till 11.11.1966. The mutations were attested on 29.9.1965, 12.8.1966 and 26.9.1965 before 11.11.1966.

23. It is not disputed that Bhagat Ram has given Kh. Nos. 701, 702 and 39 to Sh. Jeet Ram. There is no contemporaneous material placed on record by the contesting defendants that Bhagat Ram knew about the Civil Suit instituted by Thakri Devi for revocation of the gift and compromise decree dated 11.5.1965. Neither from Ext. D-2, copy of report made by field Kanungo nor from D-15, copy of Rojnamcha, it is clear who was evicted from the suit land in pursuance of the warrant of possession. No tangible material has been placed on record that Thakri Devi was infact physically put into possession of the suit property. PW-1 Kunj Lal has categorically deposed that they were in possession of Kh. No. 260, 695 and 661 and have raised orchard on Kh. No. 695. PW-2 Cheering Dorje has also deposed that Bhagat Ram has raided an orchard on one portion of the land. Sh. Bhagat Ram was owner-in-possession of the suit land. Thereafter, the plaintiffs came in possession of the suit land. DW-1 Shamsher Singh has admitted in his cross-examination that he did not know whether anybody has dispossessed Bhagat Ram from the land which he got in exchange. DW-2 Bhoop Ram has categorically admitted in his examination-in-chief that Jeet Ram was never in possession of the suit land. DW-9 Heera Singh has also admitted in his cross-examination that after the exchange, possession of the suit land was delivered and the plaintiffs came in possession of the same. Even according to Ext. P-1 to P-8 jamabandis, plaintiffs were shown in possession of the suit land. Thus, the learned first appellate Court has come to a wrong

conclusion that at the time of exchange of the suit land the title of Bhagat Ram was under clog.

24. Smt. Thakri Devi has made gift in favour of Jeet Ram. The compromise decree was passed on 11.5.1965. Thereafter, the land was exchanged and mutations were attested. Thakri Devi, as noticed hereinabove, has admitted that Jeet Ram has paid her maintenance up to 11.11.1966. Sh. Jeet Ram has not adhered to the terms and conditions of the decree only after 11.11.1966. It is also not proved that Thakri Devi was ever put in physical possession of the suit property rather it has come on record that plaintiffs were in possession of the suit land. They could alone be evicted from the suit land. It cannot be said that plaintiffs were bound by the compromise decree dated 11.5.1965. Bhagat Ram, predecessor-in-interest of the plaintiffs has exchanged his own land with the land of Sh. Jeet Ram. Plaintiffs cannot be deprived of the land which their father has exchanged with Sh. Jeet Ram. The exchange has been admitted by the defendants. The learned first appellate Court has not even considered the alternative prayer of the plaintiffs for recovery of the land given in exchange by their father to defendant No. 3 Sh. Jeet Ram only on the ground that there was complexity of the matter. There was hardly any complexity of the matter and plaintiffs could not be forced to initiate fresh proceedings. The first appellate Court has not correctly appreciated the oral as well as documentary evidence placed on record, more particularly, the revenue entries and mutations. The exchange of land made by the predecessor-in-interest of the plaintiffs with defendant No. 3 Jeet Ram was bonafide. They could not be deprived of their land given in exchange to Sh. Jeet Ram as per the settled law. The substantial questions of law are answered accordingly.

25. Consequently, the regular second appeal is allowed. The judgment and decree passed by the learned first Appellate Court dated 9.8.2001 is set aside. Judgment and decree of the learned Sub Judge Ist Class, Manali, dated 29.5.2000, is affirmed. In view of the above, pending application(s), if any, including CMP No. 11889 of 2014 shall stand disposed of.

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

Manohar Lal. ...Petitioner.

Versus

Joginder Singh and another. ...Respondents.

Civil Revision No.2/2014
Reserved on : 26.11.2014
Decided on: 15.12.2014

H.P. Urban Rent Control Act, 1987- Sections 2(e) and 12- tenant claimed that he had taken permission of the landlord to carry out commercial activities which was granted at the enhanced rent- parties had not taken the permission of the Rent Controller in writing for converting residential building into non-residential building- held that, landlord and tenant cannot convert a residential building into non-residential building by their mutual consent and landlord would be entitled to seek ejectment of the tenant. (Para- 24 to 31)

Code of Civil Procedure, 1908- Order 41 Rule 27- There must be satisfactory reasons for non-production of the evidence in trial court- any party guilty of remissness in not producing evidence in trial court cannot be allowed to produce it in appellate court. (Para-33)

Cases referred:

Kamal Arora vs. Amar Singh and others, 1986 (Supp) SCC 481

Vinod Kumar Arora vs. Surjit Kaur, (1987) 3 SCC 711
Tara Chand Chandani vs. Shri Shashi Bhushan Gupta, 1980 (2) Rent L.R. 212
Shri Hari Mittal vs. Shri B.M. Sikka, 1986 (1) Punjab Law Reporter 1
Varinder Kumar vs. Janak Raj, 1987 (3) Rent Law Reporter 193
Surjit Singh Arora vs. Harbans Singh 1989 (1) Rent Control Reporter
Krishan Lal Nanda vs. Madan Lal, 1992 (2) Rent Control Reporter 104
Union of India vs. Ibrahim Uddin and another, (2012) 8 SCC 148

For the Petitioner: Mr. B.C. Negi, Advocate.
For the Respondents: Mr. Satyen Vaidya, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This revision petition is directed against the order dated 20.7.2013 rendered in CMP No. 193-S/6 of 2013 and order dated 20.7.2013 rendered in Rent Appeal no. 19-S/14 of 2012 rendered by the Appellate Authority.

2. "Key facts" necessary for the adjudication of this petition are that respondents-landlords (hereinafter referred to as the "landlords" for convenience sake) filed eviction petition against the petitioner-tenant (hereinafter referred to as the "tenant" for convenience sake) under section 14 of the H.P. Urban Rent Control Act, 1987. According to the landlords, tenant has ceased to occupy the premises continuously for a period of 12 months immediately prior to filing of eviction petition. The premises were lying locked continuously. Tenant has acquired sufficient accommodation for his requirement at B-19, Sector-1, near State Bank of India, New Shimla, which was within the urban area. The residential premises were two rooms, one kitchen and one bath room. The rent was fixed @ Rs. 300/- per month.

3. The petition was contested by the tenant. It was denied that tenant has ceased to occupy premises immediately prior to filing of eviction petition. He was inducted as tenant in premises in the year 1962. He was inducted by previous landlords, i.e. Jagat Ram and Suresh Chand. He was unmarried when he was inducted as tenant. He got married in the year 1967. He requested the landlord for one additional room, which was used as godown by landlords. In the year 1994, tenant requested the landlords to grant permission to start commercial activities from premises and the same was agreed at the enhanced rent and upon payment of lump sum amount of ` 10,000/-. He has purchased B type plot in New Shimla in the year 1990. He has shifted to new premises in the year 2001. The premises were used by the tenant for business purpose. Tenant was suffering from skin problem. He was also suffering from heart ailment.

4. Landlords filed rejoinder. Learned Rent Controller framed the issues on 3.9.2009. He allowed the petition on 1.3.2012. Tenant preferred an appeal against the order dated 1.3.2012 before the Appellate Authority. Tenant also moved an application under order 41 rule 27 of the Code of Civil Procedure. The Appeal was dismissed on 20.7.2013 and the application under order 41 rule 27 of the Code of Civil Procedure vide CMP No. 193-S/6 of 2013 was also dismissed on 20.7.2013. Hence, the present petition.

5. Mr. B.C. Negi has vehemently argued that since the character of the building has been converted into non-residential building, landlords could not seek ejectment of the tenant on the ground of bona fide requirement. He

has also contended that his client has always remained in the occupation of the premises.

6. Mr. Satyen Vaidya has supported the orders passed by the Appellate Authority.

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

8. PW-1 Joginder Singh has testified that he has purchased building in the year 2007. It is three storeyed building. He has proved rough sketch plan Ex.PW-1/A. Neither tenant nor his family members were residing in the premises. The premises remained closed for more than 12 months. Tenant has acquired accommodation in New Shimla.

9. PW-2 Inder Mohan has deposed that no one was residing in the premises. The premises were closed for the last 5-6 years. He has not seen either Manohar Lal or his family members residing in the premises for the last 4-5 years.

10. PW-3 Nek Ram has proved Ex.PW-3/A. According to Ex.PW-3/A, from February, 2008 to June, 2009, total 192 units were consumed. No units have been consumed in the months of February, 2008, March, 2008, May, 2008, June, 2008, July, 2008, September, 2008, October, 2008, January, 2009, February, 2009 and only 4 and 10 units have been consumed during March, 2009 and April, 2009, respectively.

11. PW-4 Raj Pal has deposed that Manohar has been recorded as tenant in the disputed premises. The premises were found locked.

12. RW-1 Kamla Devi has proved that Ex.RW-1/A. She has admitted that there were no details of incoming calls.

13. RW-2 Aman Chadda has deposed that the tenant was agent of Bajaj Alliance. He has proved Ex.PW-2/A.

14. RW-3 Lekh Raj has proved Ex.RW-3/A.

15. Tenant Manohar Lal has appeared as RW-4. According to him, the disputed premises comprised of two rooms, one kitchen and one bath room. It was taken on rent in the year 1962 from Jagat Ram Sood and Suresh Chand. He requested the landlords to give him one more room. Landlords agreed for the same. He retired from the Government service in the year 1994. He requested the landlords to convert residential premises into office-cum-residence. He started business of small saving agency, UTI agency and IDBI agency. The rent was enhanced to Rs. 1,200/-. In addition, he has also paid Rs. 10,000/- to the landlords. He has got a telephone installed in the premises. He has constructed the residential house in New Shimla. He has serious skin disease. He was doing business from the disputed premises between 10.30 A.M. to 3.30 P.M.

16. RW-5 Vinay Kumar has deposed that the tenant was his patient. He was suffering from skin disease.

17. RW-6 Sandeep Kumar has deposed that the tenancy was created in the year 1962. Tenant was residing in premises comprised of two rooms, kitchen and bathroom. Tenant used to pay Rs. 300/- in the year 1962 initially. The rent was enhanced to Rs. 1200/- annually and a sum of Rs. 10,000/- additional was also paid when the request of tenant was accepted for converting premises for commercial purpose.

18. RW-7 Subhash Chand has deposed that tenant has retired from T&CP Department in the year 1995. Manohar Lal started business in the year 1995. He used the premises for office-cum-residence.

19. Mr. B.C. Negi has drawn the attention of the Court to section 2 (e) of the H.P. Urban Control Act, 1987. It reads as under:

2. (e) "non-residential building" means a building being used-

(i) mainly for the purpose of business or trade; or

(ii) partly for the purpose of business or trade and partly for the purpose of residence, subject to the condition that the person who carried on business or trade in the building resides therein :

Provided that if a building is let out for residential and non-residential purposes, separately to more than one person, the portion thereof let out for the purpose of residence shall not be treated as non-residential building.

20. Section 12 of the H.P. Urban Control Act reads as under:

"12. Conversion of a residential building into a non-residential building

No person shall convert a residential building into a non-residential building except with the permission in writing of the Controller.

13. Landlords` duty to keep the building or rented land in good repairs

(1) Every landlord shall be bound to keep the building or rented land in good and tenantable repairs.

(2) if the landlord neglects or fails to make, within a reasonable time after receiving a notice in writing, any repairs which he is bound to make under sub-section (1), the tenant may make the same himself and deduct the expenses of such repairs from the rent or otherwise recover them from the landlord :

Provided that the amount so deducted or recoverable in any year shall not exceed one-twelfth of the rent payable by the tenant for the year."

21. Tenant cannot take assistance from section 2 (e) (ii). It is evident from the plain language of section 2 (e) (ii) that non- residential building would mean "building used partly for the purpose of business or trade and partly for the purpose of residence, subject to the condition that the person who carried on business or trade in the building resides therein". Tenant has purchased the plot in the year 1994. He has raised the construction. He has shifted in the year 2001 to the new premises. The parties have not taken permission of the Rent Controller in writing for converting a residential building into non-residential building. Tenant while appearing as RW-4 has deposed that he had requested the landlords to give him one additional room. According to RW-4 he has sought permission of the landlords in the year 1994 to covert the residential premises into office-cum-residence. He has enhanced rent from Rs. 300/- to Rs. 1200/-. The language employed in section 12 is imperative and mandatory. It is reiterated that the parties were required to get the permission in writing from the Rent Controller before converting the residential premises to non-residential premises under section 12 of the H.P. Urban Rent Control Act, 1987.

22. PW-1 Joginder Singh has testified that neither the tenant nor his family members were residing in the premises and they have shifted to new accommodation in New Shimla. Similarly, PW-2 Inder Mohan has deposed that he has seen the premises closed for the last 5-6 years. He has not seen Manohar Lal or his family members residing in the premises for the last 4-5 years. It is also established from the statements of PW-3 Nek Ram and PW-4 Raj Pal that the premises were not being used by the tenant.

23. The copy of sale deed is mark P-1. It is evident from clause-B of mark P-1 that in demised premises Manohar Lal was residing. It is not mentioned in mark P-1 that Manohar Lal was carrying on his business as well. Tenant has not produced vendor. Landlords have conclusively proved that the tenant has ceased to occupy the premises and he has acquired alternative accommodation sufficient for his requirements in New Shimla.

24. Since the premises have never been converted from residential to non-residential, landlords have absolute right to evict the tenant from the premises. There is no merit in the contention of Mr. B.C.Negi, Advocate that for violating Section 12, there is only provision of penalty under Section 30 and the eviction proceedings could not be initiated. Section 30 does not debar the landlord to file independent petition seeking eviction of the tenant under Section 14 of the H.P. Urban Rent Control Act, 1987 from the residential premises. Section 12 & 30 operate independently. A person violating Section 12 can be punished with fine, which may extend to Rs. 1000/-. The underlying purpose of enacting Sections 12 and 30 is to highlight the scarcity of residential premises and not converting the same to non-residential premises. In this case, no permission has been taken under Section 12 of the H.P. Urban Rent Control Act, 1987. The suit premises have never lost the character of residential premises.

25. Their Lordships of the Hon'ble Supreme Court in ***Kamal Arora*** vs. ***Amar Singh and others***, 1986 (Supp) SCC 481 have held that the landlord and the tenant by their mutual consent cannot convert a residential building into a non-residential building because that would be violative of the provisions of section 11. Their Lordships have held as under:

> **"3. Undoubtedly, the landlord let out the premises knowingly that it is being taken for running a school and admittedly the building is used for running a school. Therefore, prima facie the leased premises would fall within the definition of a non-residential building. The High Court after examining the provision of the Capital of Punjab (Development and Regulation) Act, 1951 read with Section 11 of the Rent Act held that statute prohibits conversion of residential building into non-residential by act inter vivos. It was said that the landlord and the tenant by their mutual consent cannot convert a residential building into a non-residential building because that would be violative of the provision of Section 11. And it is admitted that building is situated in a sector falling within the residential zone. In this fact situation, coupled with the fact that the landlord has retired from service and genuinely needs the premises for his residence as found by all courts, we are not inclined to interfere with the judgment and order of the High Court. Mr. Goel, however, wanted us to examine the question : whether where the parties have by mutual consent changed the user, the landlord cannot be permitted to back out from his consent? He wanted to invoke the situation where parties are pari delicto court should not render assistance to any one of them. In our opinion this is not a case to examine this contention. Let it be decided in an appropriate case."**

26. ***Kamal Arora*** vs. ***Amar Singh and others***, 1986 (Supp) SCC 481 has been relied upon by their Lordships of the Hon'ble Supreme Court in ***Vinod Kumar Arora*** vs. ***Surjit Kaur***, (1987) 3 SCC 711. Their Lordships have held as under:

> **"11 However, when the appellant entered the witness box, he gave up the case set out in the written statement and propounded a different case that the hall had been taken on lease only for non-residential purposes. The perceptible manner in which the appellant had shifted his defence has escaped the notice and consideration of**

the Statutory Authorities. Both the Authorities have failed to bear in mind that the pleadings of the parties form the foundation of their case and it is not open to them to give up the case set out in the pleadings and propound a new and different case. Another failing noticed in the judgments of the Rent Controller and the Appellate Authority is that they have been oblivious to the fact that the respondent had leased out the hall to the appellant only for a period of 11 months. Such being the case, even if the respondent had come to know soon after the lease was created that the appellant was using the hall to run a clinic, she may have thought it prudent to let the appellant have his way so that she can recover possession of the hall after 11 months without hitch whereas if she began quarrelling with the appellant for his running a clinic, she would have to be locked up in litigation with him for a considerable length of time and can obtain possession of the hall only after succeeding in the litigation. Yet another factor which vitiates the findings of the Rent Controller and the Appellate Authority is that both of them have overlooked Sec. 11 of the Act, and the sustainability of any lease transaction entered in contravention of Sec. 11. The legislature, with a view to ensure adequate housing accommodation for the people, has interdicted by means of Section 11 the conversion of residential buildings into non-residential ones without the written consent of the Rent Controller. Admittedly, in this case the parties had not obtained the consent in writing of the Rent Controller for converting the hall in a residential building into a clinic. Such being the case, the appellant cannot get over the embargo placed by section 11 by pleading that the respondent was well aware of his running a clinic in the hall and that she had not raised objection at any time to the running of the clinic. Learned counsel for the appellant referred us to the decision in Dr. Gopal Dass Verma v. Dr. S. K. Bharadwaj (1962) 2 SCR 678 : (AIR 1963 SC 337) and argued that the ratio laid down therein would be fully attracted to the facts of this case. It is true that in the said decision, it was held that when a leased premises was used by the lessee incidentally for professional purposes and that too with the consent of the landlord, then the case would go out of the purview of Section 13(3)(e) of the Delhi and Ajmer Rent Control Act, 1954 and consequently the landlord would not be entitled to see eviction of the tenant on the ground he required the premises for his own residential requirements. We find the facts in that case to be markedly different and it was the speciality of the facts which was largely instrumental in, persuading this Court to render its decision in the aforesaid manner. Moreover, the Court had not considered the question whether the conversion. of a residential premises into a non-residential one without the permission of the Rent Controller was permissible under the Delhi and Ajmer Rent Control Act and if it was not permitted, how far the contravention would affect the rights of the parties. In our opinion, the more relevant decision to be noticed would be Kamal Arora v. Amar Singh, 1986 (Suppl) SCC 481 where this Court declined to interfere with an order of eviction passed in favour of the landlord as the Court was of the view that even if the landlord and the tenant had converted a residential building into a nonresidential one by mutual consent, it would still be violative of Section 11 of the East Punjab Rent Restriction Act and, therefore, the landlord cannot be barred from seeking recovery of possession of the leased building for his residential needs. We are therefore of the view that the findings of the Rent Controller and the Appellate Authority about the appellant having taken the hall on lease only for running a clinic and that he had not changed the user

of the premises have been rendered without reference to the pleadings and without examining the legality of the appellant's contentions in the light of Section 11 of the Act. We do not therefore think the High Court has committed any error in law in ignoring the findings rendered by the Statutory Authorities about the purpose for which the hall had been taken on lease.

27. Learned Single Judge of Punjab and Haryana High Court in ***Tara Chand Chandani*** vs. ***Shri Shashi Bhushan Gupta,*** 1980 (2) Rent L.R. 212 has held that when the premises were let out to a Chartered Accountant for residential purposes and the Chartered Accountant was running office in the building, the premises would remain residential building. Learned Single Judge has held as under:

"[8] There is another aspect of the matter as well. Section 11 of the Act, as reproduced earlier, says that no person shall convert a residential building into a non-residential building except with the permission in writing of the Controller In the present case admittedly the rented premises are a part or a portion of a residential building known as `Lakshmi Vishnu Bhawan. The portion other than the rented one is being used by the landlord for his own residence. Under these circumstances, could the landlord convert a part of the residential building into a non-residential one without the permission in writing of the Rent Controller? Since there is a bar provided under the Act itself and under Section 19 of the Act penalty for the breach of the same has been provided it is quite clear that a residential building as such could not be converted into a non-residential building by letting it out to a Chartered Accountant for running his office therein. Anything done in contravention of the provisions of the Act cannot bind the landlord or the tenant. In this view of the matter also it cannot be held that the premises have become non-residential building because it is being used solely for the purpose of running the office by the tenant as Chartered Accountant. This also indicates that the Legislature used the expression 'profession as distinguished from the expression 'business' or 'trade' under the Act."

28. The Full Bench of Punjab and Haryana Court in ***Shri Hari Mittal*** vs. ***Shri B.M. Sikka***, 1986 (1) Punjab Law Reporter 1 has held that section 11 of East Punjab Urban Rent Restriction Act, 1949 was intended to subserve a public policy of seeing that the residential accommodation does not fall short of community's requirement. The Full Bench has further held that the residential building let out for non-residential purpose by the landlord without obtaining the written permission of the Rent Controller would continue to be residential building and the landlord would be entitled to seek ejectment of the tenant on the ground of his bona fide personal requirement. The Full bench has held as under:

"18. In our opinion, the kind of purpose that clause (k) of S. 14(1) of the Delhi Rent Act served, the same purpose appears to have been intended by the Punjab appears to have been intended by the Punjab Legislature in the present case to be served by the provision of S. 11 of the Act, so far as the use of the residential building for non-residential purpose is concerned. This injunction was intended to subserve a public policy of seeing that the residential accommodation does not fall short of the community's requirement, as the shortage of residential accommodation would tend to result in unhygienic conditions of the residential areas by accommodating more members than it could legitimately be intended or the extra population resorting to unhygienic use of the open spaces and pavements and creating social tension and health hazards to the

community. In view of the above, the provisions of section 11 of the Act are mandatory in character.

30. The reference made by the learned single judge is answered in the affirmative and it is held that a residential building let out for non-residential purpose by the landlord without obtaining the written permission of the Rent Controller in terms of S. 11 of the Act would continue to be a residential building and the landlord would be entitled to seek ejectment of the tenant on the ground of his bona fide personal requirement."

29. Learned Single Judge of Punjab Haryana High Court in ***Varinder Kumar*** vs. ***Janak Raj***, 1987 (3) Rent Law Reporter 193 has held that residential building let out for non-residential purposes without the permission of Rent Controller under section 11 of the Rent Act, the premises would continue to be residential and character of the building would not be changed. Learned Single Judge has held as under:

"[3] The only contention raised by the learned counsel for the petitioner before me is that the premises in dispute is a house bearing Municipal No. 366 situated at Buria Gate, Jagadhri. It consists of one room and a courtyard. In spite of the fact that it is proved on the record that it was let out to the respondent for a non-residential purpose, the premises continues to be a residential house and the petitioner has a right to seek eviction of the respondent on the ground that he requires the premises bonafide his own use and occupation. He placed reliance on Hari Mittal v. B.M. Sikka, 1986 90 PunLR 1, to urge that without the permission of the Rent Controller a residential building cannot be converted into non-residential one."

30. Learned Single Judge of Punjab and Haryana High Court in ***Surjit Singh Arora*** vs. ***Harbans Singh*** 1989 (1) Rent Control Reporter while replying upon ***Shri Hari Mittal*** vs. ***Shri B.M. Sikka***, 1986 (1) Punjab Law Reporter 1 has held that the landlord cannot convert a residential building into non-residential without permission of Rent Controller as required under section 11. Learned Single Judge has held as under:

"[6] Section 11 of the Act is intended to prevent residential accommodation being converted into a non-residential one without the permission of the Rent Controller. The landlord cannot convert a residential building into a non-residential one without permission of the Rent Controller and Section 11 of the Act is mandatory. This Court in the Full Bench judgment reported as Shri Hari Mittal v. Shri B. M. Sikka, 1986 90 PunLR 1 held as under:

In our opinion, the kind of purpose that Clause (k) of S. 14 (1) of the Delhi Rent Act served, the same purpose appears to have been intended by the Punjab Legislature in the present case to be served by the provision of Section 11 of the Act, so far as the use of the residential building for non-residential purpose is concerned. This injunction was intended to subserve a public policy of seeing that the residential accommodation does not fall short of the community's requirement, as the shortage of residential accommodation would tend to result in unhygienic condition of the residential areas by accommodating more members than it could legitimately be intended or the extra population resorting to unhygienic use of the open spaces and pavements and creating social tension and health hazards to the community in view of the above, the provisions of Section 11 of the Act are mandatory in character.

It was then argued that if Section 11 of the Act was intended to subserve a public policy of the kind, then it would prohibit even a landlord for converting a self occupied residential building, but this Court in two Division Bench decisions referred to by the Division Bench in Bansal's case that is, Chattar Sain's case and Faqir Chand's case has taken the view that Section 11 is not attracted to a residential building which is in the self-occupation of the landlord, hence the landlord could convert it into a self occupied non-residential building without the permission of the Controller in terms of Section 11 of the Act.

The learned Counsel drew my attention to a case reported as Dr. Jagit Mehta v. Dev Brat Sharma, 1987 HRR 680, to substantiate the plea that the demised premises being a non-residential building cannot be got vacated by the Respondent by invoking the provisions of Section 13-A of the Act. This judgment is not applicable to the facts of the present case. The premises in dispute in that case were located in Jullundur and the provisions of the Regulation Act were not applicable to the town of Jullundur Moreover, the learned Judge, on the evidence produced on the record came to the conclusion that the location and nature of the building was such that it could only be used as shop and for no other purpose."

31. Learned Single Judge of Punjab and Haryana High Court in ***Krishan Lal Nanda*** vs. ***Madan Lal***, 1992 (2) Rent Control Reporter 104 has held that though the tenant has converted the residential building into non-residential with consent of landlord, it being violative of section 11, would not deprive the landlord seeking ejectment of tenant on ground of his bona fide need. Learned Single Judge has held as under:

"[7] Tara Chand RW-3 and Jagan Nath RW-4 have admitted in their cross-examination that the main building of which the demised premises was a part, was being used by the landlord as his residence; that the houses in neighbourhood of the said property were also being used for residential purposes; that Vakilpura mohalla was a residential locality and portions of various houses in that mohalla are being used as shops. Both the lower authorities on the basis of appreciation of evidence on record have concurrently found that tenant failed to prove that the premises in question was constructed as an independent shop. It was in fact a portion of the main residential building. In Dr. Subhash Chander's case (supra), it has been held that mere fact that a room of the main building was being used by the tenant as a shop, did not convert the building into a non-residential building and that merely because it was given for business purpose was not sufficient to hold that it had become commercial premises. More over, in Vinod Kumar Arora v. Smt. Surjit Kaur , A. I. R. 1987 S. C. 2179. it has been held that even if the tenant had converted the residential building into a non-residential one, by mutual consent, it being violative of Section 11 of the Act, the landlord could not be deprived of seeking the ejectment of the tenant on the ground of his bonafide residential need.

32. Tenant had also moved an application under section 41 rule 27 of the Code of civil Procedure whereby he intended to place on record copy of order dated 2.8.2012 and letter dated 31.3.2013. Learned first appellate court has rightly rejected the application under section 41 rule 27 of the Code of Civil Procedure. Tenant has placed on record unattested Photostat copy of the document. It has also come on record that the landlords have purchased built up area and the same did not fall within the definition of section 118 of the H.P. Tenancy and Land Reforms Act, 1972. Eviction petition was instituted by the

landlords in the year 2009 and the application was thus filed belatedly to delay the proceedings. Moreover, the parties cannot be permitted to fill in lacuna in their case by filing an application under order 41 rule 27 of the Code of Civil Procedure. The principles for allowing the additional evidence must be fulfilled while allowing the application under order 41 rule 27 of the Code of Civil Procedure.

33. Their Lordships of the Hon'ble Supreme Court in ***Union of India*** vs. ***Ibrahim Uddin and another***, (2012) 8 SCC 148 have held that party guilty of remissness in not producing evidence in trial court cannot be allowed to produce it in appellate court. There must be satisfactory reasons for non-production of the evidence in trial court for seeking production thereof in appellate court. Their Lordships have held as under:

> **"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553).**
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> **37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).**
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> **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)].**
>
> **39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of**

remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

42. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough comp1iance with the requirement as to recording of reasons.

44. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice - delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the

order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi, AIR 2008 SC 2026; The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285; and Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors., (2010) 13 SCC 336).

45. In The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc., AIR 1976 SC 2403, while dealing with the issue, a three judge Bench of this Court held as under:

> **"We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence."**
>
> **(Emphasis added)**

A similar view has been reiterated by this Court in Basayya I. Mathad v. Rudrayya S. Mathad and Ors., AIR 2008 SC 1108.

46. A Constitution Bench of this Court in K. Venkataramiah (Supra), while dealing with the same issue held:

> **"It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence..... The omission to record reason must, therefore, be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory."**
>
> **(Emphasis added)**

In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.

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.

48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below

and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

Stage of Consideration:

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)."

34. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed. The tenant shall handover the premises in question to the landlords within a period of three months from today, failing which it shall be open to the landlords to initiate appropriate proceedings for the eviction of the tenant. Pending application(s), if any, also stands disposed of. No costs.

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

RFA No.130 of 2006 a/w RSA Nos. 131, 132, 133, 134, 135, 136 and 137 of 2006.
Reserved on : 10.12.2014
Decided on : 16.12.2014

RFA No. 130 of 2006
Prakash Kaur & Others ....Appellants.
Versus
L.A.C & others ....Respondents.

RFA No. 131 of 2006
Ram Dass & another ....Appellants
Versus
L.A.C & Others ....Respondents.

RFA No. 132 of 2006
Hari Ram & Others ....Appellants
Versus
L.A.C & Others ....Respondents.

RFA No. 133 of 2006
Mehar Chand & Others ....Appellants

Versus

L.A.C & Others ....Respondents.

RFA No. 134 of 2006

Hari Ram & Others ....Appellants

Versus

L.A.C & Others ....Respondents.

RFA No. 135 of 2006

Jeewan Singh ....Appellant

Versus

L.A.C & Others ....Respondents.

RFA No. 136 of 2006

Savitri Devi & Others ....Appellants

Versus

L.A.C & Others ....Respondents.

RFA No. 137 of 2006

Ram Pal & others ....Appellants

Versus

L.A.C & Others ....Respondents.

Land Acquisition Act, 1894- Section 18 - Appellants claimed that an award announced by District Judge should have been taken into consideration while assessing the compensation payable to them- held, that award pronounced by the District Judge could have been taken into consideration only when the lands are proximate to each other – oral testimonies of the claimants in absence of Khaka Dasti prepared by revenue officials cannot lead to an inference that the lands were proximate to each other-District Judge was justified in rejecting the previous award. (Para-3)

Case referred:

Krapa Rangiah versus Special Deputy Collector, Land Acquisition 1982 (2) SCC 374

For the Appellant(s): Mr. H.K Bhardwaj & Mr. Dheeraj K Vashisht, Advocate.

For the respondents: Mr. Vivek Singh Attri, Deputy Advocate General for respondent-State.

Mr. Rahul Mahajan, Advocate for Respondent-General Manager, Northern Railways in all appeals except RFA No. 137 of 2006.

Mr. Jagan Nath, Advocate vice Mr. Anand Sharma, Advocate for respondent-General Manager, Northern Railways in RFA No. 137 of 2006.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

All these appeals are directed against the impugned award rendered by the learned District Juna, Una in Land Reference Petition Nos. 1,2,3,4,5,6,7 and 8 of 2002, wherein the award of the learned District Judge, Una is subjected to a frontal attack by the learned counsel for the appellants herein, on the score of his having assessed deficient, unjust and unreasonable compensation in favour of the appellants herein qua their lands subjected to acquisition for respondent No.3-General Manager Northern Railways.

2. The learned counsel appearing for the appellants herein has concerted to espouse before this Court that the learned District Judge in rendering findings, on the issues, qua which the parties were at contest, has

committed an impropriety inasmuch as he has omitted to take into consideration the factum of applicability of award rendered in a Reference Petition comprised in Ex. P-4 to the instant appeal even though, the lands of the land owners therein, as were subjected to acquisition, while being located in Village Ajnauli, as are the lands of the appellants herein located, as such, the determination of compensation by the learned District Judge in his award comprised in Ex. P-4 ought to have been the determinant parameters for the learned District Judge, Una in his impugned award to on its strength assessing compensation qua the lands of the appellants herein. He hence, concerts that the learned District Judge, Una while assessing compensation qua the lands of the appellants herein has discarded the probative worth of Ex. P-4 and proceeded to assess a deficient, unreasonable and unjust compensation qua the lands of the appellants herein. The above contention as addressed before this Court by the learned counsel appearing for the appellants herein would garner immense weight and strength in the face of cogent evidence having come to be adduced before the learned District Judge, Una qua the fact of the advantages inherent in the lands of the land owners subjected to acquisition and qua which a determination was rendered by the learned District Judge, Una in Ex. P-4 and which advantages are extracted hereinafter being also inherent in the lands of the appellants herein while both being proximately located to each other.

> *" 27. From the perusal of the evidence as has been re-produced hereinabove the following factors emerges as proved:-*
>
> *(i) That the aforesaid land of the petitioners which has been acquired happened to be situated on the boundary of Municipal Committee Una by the side of District Hospital, Una and a shopping complex named as Bhikha Market..*
>
> *(ii) The acquired land abutted the main road leading from Una to Hamirpur.*
>
> *(iii) The acquired land happened to be situated in the vicinity of village Ajnauli.*
>
> *(iv) The petitioners were growing crop in the acquire land and one of the petitioner siri Ram had built a shop on the land bearing Khasra No. 1184.*

3. The apt and apposite evidence of probative worth to constitute or to lay foundation for an inference that the advantages borne by the lands of the land owners qua whose lands an award is comprised in Ex. P-4 are also borne by the lands of the appellants herein was comprised in potent and cogent evidence portraying the factum of proximity of lands of the lands owners qua whom an award was rendered in Ex. P-4 with the lands of the appellants herein. Even though the oral testimonies of the petitioners in support thereof exist or occur on record, however, the self serving depositions of the petitioners are deficient as well as inapt for rendering a conclusion that hence cogent and potent evidence has come on record qua accomplishment and fulfillment of the relevant admissible parameter of the lands comprised in Ex. P-4 being situated in close proximity to the lands of the appellants so as to prod this Court to adjudge, on the strength of compensation determined in Ex. P-4, compensation qua the lands of the appellants herein at par thereon. Rather the deposition of PW-1 unfolds the factum of lands being away from the main highway. Besides the deposition of PW-2 while unfolding the factum of the vastness of expanse of village Ajnauli where the lands of the appellants is located, in as much as its extending up to 7 Kms., does also give leeway to an inference that given the expanseness or the width of the tract of the village wherein the lands of the land holders qua whom an award was rendered as comprised in Ex. P-4 are located and wherein too the lands of the appellants herein are located, that, hence the lands of the land holders comprised in the verdict existing in Ex. P-4 and lands

of the appellants herein are improximately located. Consequently, as such, the determination of compensation by the learned District Judge in his award comprised in Ex. P-4 qua the lands located in Village Ajnauli as the lands of the appellants are located cannot for lack of cogent evidence portraying proximity interse lands of the petitioners in the award comprised in Ex. P-4 with the lands of the appellants herein form anvil for determining on score thereof compensation in favour of the lands of the appellants herein, too located in Village Ajnauli especially with theirs being improximately located to each other. Even otherwise the best evidence, for marshalling an inference that the determination of compensation by the learned District Judge in his award comprised in Ex. P-4 ought to be the anvil or anchor for determining on score thereof compensation for the lands of the appellants herein, was constituted by adduction of 'Khaka Dasti' at the instance of the Revenue Officials of the Mohal Concerned portraying the factum of proximity in location of the lands inter se the petitioners in award comprised in Ex. P-4 and the lands of the appellants herein. Omission of its adduction into evidence fosters rather a concomitant deduction that the lands of the land holders comprised in award existing in Ex. P-4 cannot be reinforcingly concluded to be forming or constituting a viable, just and apposite parameter for on its score determining compensation qua the lands of the appellants herein though located also in village Ajnauli. Consequently, the reasoning and the concomitant conclusions arrived at by the learned District Judge that the award of the learned District Judge Una comprised in Ex. P-4 is unreliable or does not constitute a relevant parameter for on its score adjudging or determining compensation for the lands of the appellants herein is un-interfereable.

4. The learned counsel appearing for the appellants herein vociferously canvasses before this Court that the learned District Judge in his impugned award has untenably discarded the probative worth of Ex. PW-4/A, sale deed entered into a willing seller and willing buyer, hence bereft of an element of its constituting a rigged transaction, as such, when it was reliable and relevant piece of evidence, it rather ought to have been borne in mind by the learned District Judge for on its score determining compensation for the lands of the appellants herein as were subjected to acquisition dehors the fact that the sale deed adduced into evidence by the petitioners comprised in Ex. PW-4/A is qua a small tract of land and then may be the market value as unfolded in it may not in its entirety constitute the market value for the vast expanse or tract of lands of the appellants herein as subjected to acquisition unless obviously some legal permissible deductions from it were meted out. Nonetheless, the further fact that even when the apposite evidence for unraveling the factum of the land comprised in Ex. PW-4/A being located in close proximity to the lands of the appellants herein, is amiss, the apt conclusion which is to be formed is that the market value unfolded in the sale instance comprised in Ex. PW-4/A, cannot hence constitute a reckonable parameter for on its strength determining compensation for the lands of the appellants herein. Moreso, when the said factum of proximity inter se the land comprised in Ex. PW-4/A and the lands of the appellants herein as subjected to acquisition remained un-pronounced even in the testimonies of the vendor and vendee therein. Concomitantly then it has been tenably concluded by the learned District Judge Una in his impugned award that the market value of the sale instance comprised in Ex. PW-4/A was both unreliable as well as un- reckonable for on its strength determining compensation for the lands of the appellants as were subjected to acquisition.

5. Be that as it may, when this Court while allowing an application preferred by the counsel for the appellants in RFA No. 131 of 2006 under Order 41 Rule 27 had then permitted him to adduce into evidence a judgment rendered by the learned Additional District Judge, Fast Track Court, Una who then come to tender the same into evidence and exhibited the same as Ex. AX. It hence becomes imperative for this Court to adjudicate and determine whether the compensation awarded by the learned Additional District Judge, Fast Track

Court, Una in his judgment comprised in Ex. AX qua the lands of the lands owners therein constitutes, though rendered subsequently, to the rendition of the impugned award a relevant just and acceptable parameter for prodding this Court to on its strength determine compensation qua the lands of the appellants herein. A perusal of award comprised in Ex. AX unfolds the fact that the lands of the land owners therein as the lands of the appellants herein are located in Village Ajnauli. However, the mere factum of location of the lands of the land owners therein and of the appellants herein, in a common village Ajnauli, would not per se constitute Ex. AX, to be an apt parameter for on its strength determining compensation for the lands of the appellants herein, unless of course, evidence of potent worth and of immense probative value unveiling the factum of interse proximity of lands comprised in Ex. AX and the lands of the appellants herein came to be unfolded as well as unearthed. The said evidence is manifestly brought to the fore by the factum of revelation in Annexure AX of the lands comprised in Khasra No. 1074/2, 583/2, 707/2, 741/3, 705/2, 706/2, 1075/2, 661/2, 698/2, respectively, having come to be therein subjected to acquisition. Now given also the imminent fact of the lands of the appellants herein bearing Khasra No. 583/1, 698/1 705/1, 706/1, 707/1, 741/1, 741/2, 1075/1 and 661/1, hence, only having a dissimilarity of min number vis-à-vis the lands detailed in Ex. AX, as such, obviously when the core khasra Numbers borne by each aforesaid are congruous or analogous to each other does then boost an inference that given the commonality of the core Khasra Nos. of the lands of the land holders in Ex. AX and of the lands of certain land holders/appellants herein that hence, the lands of the land holders in Ex. AX and the lands of the appellants herein are proximately located. Consequently, when there is an accomplishment and satiation of the relevant parameter of proximity inter-se the land of the land holders in Ex. AX with the lands of the appellants herein, as such, given the substantiation of proximate location of lands interse the land holders in Ex. AX with the lands of the appellants herein, the determination of compensation as rendered in favour of the land holders in Ex. AX also ought to prod this Court to qua the lands of the appellants herein award rates of compensation at par with the rates assessed qua the land of the land holders in Ex. AX. Even though, the lands of the land holders in Ex. AX were subjected to acquisition, subsequent to acquisition of the lands of the appellants herein and an award by the learned District Judge was also rendered subsequent to the rendition of the impugned award, yet especially in the face of rendition of an authoritative pronouncement of the Hon'ble Apex Court comprised in a judgment reported in 1982 (2) SCC 374 titled as ***Krapa Rangiah*** versus ***Special Deputy Collector, Land Acquisition***, the relevant portion whereof is extracted hereinafter, wherein it has been held that where higher rates of compensation are awarded by the Courts of law in subsequent claims, for adjoining lands then the higher rates of compensation as adjudged or assessed qua such lands adjoining the lands previously acquired be also adjudged as compensation for such previously acquired lands.

> *".....The area being comparable, the situation also being the same and all the plots having been acquired under the selfsame notification for Housing Scheme it seems to us proper that the same rate of compensation should be awarded to the claimant herein as was awarded by the High Court in Appeal No. 50 of 1970. We accordingly enhance the compensation granted to the claimants by Rs. 2 per Sq. Yd. with consequential increase in solatium and interest....." (p.p 375-376)*

6. Consequently, it is held that even though the land holders herein/appellants were unable to establish before the learned District Judge Una, who was seized of the Reference Petition, the factum of their lands being carrying a potentiality equivalent or at par with the lands of the land holders qua whom a verdict as comprised in Annexure AX was rendered while theirs being located in proximity to the lands of the land holders therein, yet, when in

Ex. AX the land owners therein have been able to adduce cogent evidence qua the fact of their lands carrying/bearing immense potentiality in as much as theirs being located on Una Hamirpur road as well as being 500 meters away from Municipal Limits of Una. As such, when for the reasons aforesaid, it has been held that the lands of the appellants herein are located in close proximity to the lands of the land holders in Ex. AX, it would be inexpedient, unjust and unfair to deprive to the appellants herein compensation at par with the one afforded to the land holders in Ex. AX merely for the reason that the appellants herein had failed or omitted to then before the learned District Judge adduce cogent evidence portraying the factum of the location of the lands in proximity to Una Hamirpur road as also being located 500 meters away from Municipal limits of Una town which evidence now as has surged forth by way of adduction into evidence Ex. AX ought to be revered to facilitate assessment of fair, just and reasonable compensation, even though Ex. AX is subsequently pronounced. Consequently, Rate of compensation awarded qua the lands of the land holders in Ex. AX is assessed to be the rate of compensation for the lands of the appellants herein alongwith all statutory benefits.

7. For reiteration, the appeals are allowed and all the appellants herein are held entitled to the enhanced compensation at the rate of Rs. 1,58,400/- per kanal of land. The appellants are awarded interest @ 12% per annum on the enhanced amount of compensation under Section 23(1-A) from the date of publication of notification under Section 4 up to the date of pronouncement of award by LAC i.e. w.e.f 26.3.1998 to 18.9.2000. Further, the appellants are entitled to solatium at the rate of 30% on the enhanced amount of compensation on account of compulsory acquisition of lands on the enhanced amount of compensation. Apart from above, the appellants are entitled to interest at the rate of 9% per annum for one year from the date of pronouncement of award by LAC i.e. 18.9.2000 and thereafter at the rate of 15 % per annum till the amount of compensation is deposited in the Court.

The judgment disposes of all the appeals.

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

Sant Ram .....Appellant.
Versus
Land Acquisition Collector & anr. .....Respondents.

RFA No. 06 of 2005.
Reserved on: 09.12.2014.
Decided on: 16.12.2014.

Land Acquisition Act, 1894- Section 18- The land of the petitioner was acquired for the construction of the road- Petitioner claimed that his Gharat was damaged in the year 1985 along with water channel and remaining wall was damaged in the year 1993- he claimed that he was earning Rs. 5,000/- and had incurred total loss of Rs. 1 lac due to damage to Gharat- held, that there was no satisfactory evidence to show that Gharat and its three walls were damaged in the year 1985- Land Acquisition Collector had awarded amount of Rs. 2,157/- amount was enhanced to Rs. 25,000/- for the damage to one wall. (Para-11)

For the appellant(s): Mr. G.D.Verma, Sr. Advocate, with Mr. B.C.Verma, Advocate.
For the respondents: Mr. J.S.Guleria, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular first appeal is directed against the award passed by the learned District Judge, Shimla, dated 18.08.2004, in Land Ref. No. 3-S/4 of 2000.

2. Key facts, necessary for the adjudication of this regular first appeal are that the Government of Himachal Pradesh had issued notification under Section 4 of the Land Acquisition Act on 11.3.1998. It was published in the H.P. Rajpatra on 28.3.1998. It was also published in two newspapers i.e. Jansatta and Dainik Tribune on 7.5.1998. The notification was issued under Section 6 & 7 on 7.4.1999. These were published in H.P. Rajpatra on 22.4.1999 and two newspapers i.e. Punjab Kesari and The Tribune on 12.5.1999 and 13.5.1999, respectively. It was also brought to the notice of the general public through the Tehsildar, Kotkhai on 5.5.1999. Notice under Section 9 of the Act was issued to the interest holder(s) on 10.5.1999. They were directed to appear before the Land Acquisition Collector on 27.5.1999. The Land Acquisition Officer made the award on 5.6.1999.

3. The present appeal has been filed for enhancement of the amount.

4. Mr. G.D.Verma, Sr. Advocate, appearing for the appellant has vehemently argued that the learned District Judge has not assessed the market price of the land and *'Gharat'* in accordance with law. On the other hand, Mr. J.S.Guleria, learned Asstt. Advocate General, vehemently argued that the road was constructed in the year 1993 and only one wall of the *'Gharat'* was damaged.

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

6. The notification, as noticed hereinabove, was issued under Section 4 of the Act on 11.3.1998. It was published in H.P. Rajpatra on 28.3.1998. All the codal formalities were completed and award was made by the Land Acquisition Collector on 7.6.1999. According to the appellant, the market value of the agriculture land was not less than one lac rupees per bigha at the time of issuance of the notification dated 11.3.1998. PW-1 Sh. Anant Ram Negi has deposed that the market value of the land was Rs. 25,000/- per bishwa. However, the appellant has not produced any record to prove that any sale transaction has actually taken place at *Chak Jungle Kambli,* where the land was acquired. The respondents have place on record sale transaction Ext. R-1 whereby 1-15 bighas of land situated in Village Shawala has been sold for a consideration of Rs. 23,000/-. The learned District Judge, on the basis of the land acquired at Village Shawala has assessed the market rate at Rs. 22,280.40 per bigha.

7. Mr. G.D.Verma, learned Sr. Advocate, has vehemently argued that the three walls of the *'Gharat'* of the appellant were damaged in the year 1985 alongwith the water channel and remaining wall was damaged in the year 1993. According to him, the appellant was earning Rs. 5,000/- and has incurred a loss of Rs. 1,00,000/-.

8. PW-1 Anant Ram, has deposed that the *'Gharat'* (Water Mill) was functional for the last 40 years. However, when the road was constructed in the year 1984 from Prem Nagar to Chander Nagar and Chander Nagar to Halaila, the three walls of the *'Gharat'* (Water Mill) and water channel were damaged. The *'Gharat'* became non-functional in the year 1985. According to him, the value of the *'Gharat'* was more than Rs. 1,00,000/-. The income from the *'Gharat'* has come to an end. He has admitted in his cross-examination that

he could not produce any cogent evidence about the income from the '*Gharat'*. He has also not led any evidence to prove the value of the land.

9. PW-2 Ramesh Chand has supported PW-1. He has deposed that the '*Gharat'* was in existence. He used to visit the same. However, the '*Gharat'* was damaged when the road was constructed in the year 1985 alongwith the water channel.

10. PW-3 Prem Parkash, Patwari has proved Ext. P-3. However, in his cross-examination, he has admitted that he has never remained Patwari of this Patwar Circle and he has never seen the '*Gharat'* of the appellant.

11. The road was constructed on 17.7.1993 on this particular portion of the land. The appellant has not led any cogent evidence except the self serving statement of PW-1 Anant Ram that the '*Gharat'* was in existence and three walls were damaged in the year 1985 at the time of construction of the road. Infact, the '*Gharat'* was already damaged and one wall was damaged during the construction of the road in the year 1993. The Land Acquisition Collector awarded a sum of Rs. 2157/- and the same has been upheld by the learned District Judge vide award dated 18.8.2004. In case the '*Gharat'* of the appellant was damaged in the year 1985, he should have definitely taken action against the respondents. Though the appellant has failed to plead any tangible evidence, as noticed hereinabove, that the '*Gharat'* was damaged in the year 1985, but the fact of the matter is that one wall was damaged in the year 1993. The award made by the learned District Judge whereby he has enhanced the amount for acquisition of the land to Rs. 22,280.40 per bigha is upheld. The appeal is partly allowed. The appellant is held entitled to a sum of Rs. 25,000/- for the damage caused to one wall of '*Gharat' (Water Mill)* situated on Kh. No. 10 in the year 1993, with all statutory benefits under the Land Acquisition Act, to be paid within ten weeks from today.

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

CWP No. 5173 of 2014 alongwith CWP Nos. 5452, 5453, 5454, 5455, 5456 and 5457 of 2014.
Judgement reserved on: 26.11.2014.
Date of decision: December 18th, 2014.

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1. **CWP No. 5173 of 2014.**
Anand Chauhan ..... Petitioner.
Vs.
The Commissioner of Income Tax,
Himachal Pradesh ..... Respondent.

2. **CWP No. 5452 of 2014.**
Aprajita Kumari ..... Petitioner.
Vs.
The Commissioner of Income Tax,
Himachal Pradesh ..... Respondent.

3. **CWP No. 5453 of 2014.**
M/s Virbhadra Singh ..... Petitioner.
Vs.
The Commissioner of Income Tax,
Himachal Pradesh ..... Respondent.

4. **CWP No. 5454 of 2014.**
Chunni Lal Chauhan ..... Petitioner.
Vs.

The Commissioner of Income Tax,
Himachal Pradesh & anr. ..... Respondents.

5. **CWP No. 5455 of 2014.**
Pratibha Singh w/o Sh.Virbhadra Singh ..... Petitioner.
Vs.
The Commissioner of Income Tax,
Himachal Pradesh ..... Respondent.

6. **CWP No. 5456 of 2014.**
Vikramaditya Singh ..... Petitioner.
Vs.
The Commissioner of Income Tax,
Himachal Pradesh ..... Respondent.

7. **CWP No. 5457 of 2014.**
Virbhadra Singh ..... Petitioner.
Vs.
The Commissioner of Income Tax,
Himachal Pradesh ..... Respondent.

Constitution of India, 1950- Article 226- Income Tax Department had issued show cause notice to the petitioners- petitioners filed reply to the notice - an order was passed by the Department transferring the case to DCIT, Central Circle, Chandigarh- record showed that order was passed on the facts, which were not disclosed in the show cause notice- department was in possession of facts mentioned in the order of transfer- held, that petitioners were entitled to know the facts which were to be used against them- non disclosure of the facts amounts to violation of principle of natural justice. (Para-15 to 43)

Cases referred:

S. L. Kapoor vs. Jagmohan, AIR 1981 SC 136

Collector of Central Excise vs. H.M.M. Limited 1995 Supp (3) Supreme Court cases 322

Raj Bahadur Narain Singh Sugar M. Ltd. vs. Union of India and others (1997) 6 SCC 81

Kaur & Singh vs. Collector of Central Excise, New Delhi 1997 (94) E.L.T. 289 (S.C.)

M. A. Jackson v. Collector of Customs, reported in (1998) 1 SCC 198

K. Vijayalakshmi v. Union of India, (1998) 4SCC 37: (AIR 1998 SC 2961)

Tarlochan Dev Sharma vs. State of Punjab and others (2001) 6 SCC 260

Commissioner of Central Excise Bangalore vs. Brindavan Beverages (P) Ltd. & ors. (2007) 5 SCC 388

M/s Ajantha Industries and others v. Central Board of Direct Taxes, New Delhi and others AIR 1976 SC 437

Budhia Swain and others versus Gopinath Deb and others (1999) 4 SCC 396

Grindlays Bank Ltd. versus Income-tax Officer, Calcutta and others AIR 1980 SC 656

Kapoor Chand Shrimal versus Commissioner of Income Tax, Andhra Pradesh, Hyderabad (1981) 4 SCC 317

Commissioner of Income Tax versus Bharat Kumar Modi 2000 (246 ITR) 693

For the petitioner(s) : Mr. N.K.Sood, Senior Advocate with M/s Yashwardhan Chauhan, C.S.Verma, Neeraj Sharma, Hemant Sharma & Pranay Pratap Singh, Advocates, (in all the petitions)

For the respondent(s) : Mr. Vinay Kuthiala, Senior Advocate with Ms. Vandana Kuthiala, Advocate, (in all the petitions).

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Since common question of law and fact arise for consideration, therefore, all these cases are taken up together for disposal.

2. All the petitioners are income tax assessees and are aggrieved by the action of the respondents whereby their cases have been transferred to DCIT, Central Circle, Chandigarh.

3. Undisputed facts are that the petitioners prior to transfer of their cases were issued show-cause notices which were duly replied to by the petitioners and thereafter the respondents have passed the order transferring the cases to DCIT, Central Circle, Chandigarh (for short the 'impugned order').

4. The petitioners have contended that before their cases could have been ordered to be transferred, they were entitled to fair and proper hearing and principles of natural justice were required to be complied with and the adjudicating authority was under an obligation to furnish the relevant material, which formed the basis of issuance of show-cause notices. This material, according to them, was never disclosed either in the show-cause notices or at the time of hearing and the same was disclosed only in the impugned order. Had the same been disclosed, the petitioners could have offered an appropriate explanation. The non-disclosure of the same has caused serious prejudice to them. The impugned order has been questioned on various other grounds as taken in the writ petitions.

5. The respondents filed their reply (s), wherein it was alleged that writ petitions are not maintainable since no legal right of the petitioners has been infringed and the respondents have acted only in exercise of their statutory duties in order to protect the interest of the department and for carrying out proper investigation of the case as well as assessment and collection of taxes. The order dated 14.7.2014 has been passed in order to ensure coordinated investigation and assessment of a number of assessees including 11 other persons who had been assessed at Delhi, whose financial dealings are interlinked with the petitioners. The cases of 11 other persons who have been assessed at Delhi and have financial dealings with the petitioners are also in the process of transfer from Delhi to Chandigarh for coordinated investigation and assessment. There is yet another preliminary objection with regard to a public interest litigation pending at Delhi High Court.

6. In so far as the merits of the cases are concerned, it is contended that there is no fundamental right of an assessee to be assessed in a particular area or locality and that section 127 of Income Tax Act, 1961 (for short, the Act) is a machinery provision and it should be construed to effectuate a charging section so as to allow the authorities concerned to do so in the manner therefore the statute was enacted. It is further averred that the petitioners cannot take any exception to the case being transferred from one jurisdiction to other for coordinated investigation. It is then contended that relevant material was provided in the show cause notice and it was not necessary to provide materials gathered during the course of investigation and enquiries as it is not relevant at the stage of transfer of jurisdiction contemplated under section 127 of the Act.

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

7. Shri Naresh Sood, learned Senior Advocate assisted by S/Sh.Yashwardhan Chauhan, C.S.Verma, Neeraj Sharma, Hemant Sharma and Pranay Pratap Singh, Advocates, for the petitioners has vehemently argued that assuming that the show-cause notices are valid, even then the petitioners were not provided the necessary material during the course of investigation and inquiry and the respondents while passing the impugned order have relied upon extraneous material simply in order to justify the transfer of cases. This contention is without prejudice to the other contentions that the show-cause notices itself are not valid since the only reason given for transfer of the cases was that the same is being proposed for the effective and coordinated investigation of the assessment case which is vague and too general and the assessees could not have been expected to make an effective and purposeful representation against the proposed transfer while replying to the show-cause notices.

8. On the other hand, Shri Vinay Kuthiala, learned Senior Advocate assisted by Ms. Vandana Kuthiala, Advocate, for the respondents has vehemently argued that respondents have acted within the four corners of law and no exception of the same can be taken by the relevant.

9. We proceed to examine the first contention raised by the petitioners to the effect that even if the show cause notices are held to be valid even then the petitioners were not provided necessary material during the course of investigation and inquiry and the respondents have relied upon extraneous material in order to justify the transfer of the cases.

10. The relevant portion of the show cause notices in case of each of the petitioners reads thus:-

In CWP No. 5173 of 2014:

"On the basis of enquires carried out, and also material gathered during the course of assessment proceedings, in the cases of Sh. Virbhadra Singh (HUF), R/o. Holy Lodge, Jhaku, Shimla (AACHV0223N), Sh. Virbhadra Singh, R/O. Holy Lodge, Jhaku, Shimla (ALRPS6513N), Smt. Pratibha Singh w/o Sh. Virbhadra Singh and R/O Holy Lodge, Jhaku, Shimla (AESPK2933C), Sh. Vikramaditya Singh (CAXPS8819J), Ms. Aprajita Kumari D/o. Sh. Virbhadra Singh (AOUPK6157L), Sh. Anand Chauhan, R/o. Kailash Niwas, Inder Nagar, Dhali, Shimla (ADFPC3964R) and Sh. Chunni Lal Chauhan, Prop. Universal Apple Associates, Parwanoo (AAHPC7645L), reveal the following:-

> **The assessee has made huge cash deposits of more than Rs.6 crores in his bank accounts which have been used for purchase of insurance polices in the name of the Sh. Virbhadra Singh and his family members. The evidence on record suggests that money have been sourced in his bank accounts from undisclosed sources."**

In CWP No. 5452 of 2014:

"On the basis of enquires carried out, and also material gathered during the course of assessment proceedings, in the cases of Sh. Virbhadra Singh (HUF), R/o. Holy Lodge, Jhaku, Shimla (AACHV0223N), Sh. Virbhadra Singh, R/o. Holy Lodge, Jhaku, Shimla (ALRPS6513N), Smt. Pratibha Singh w/o Sh. Virbhadra Singh and R/O Holy Lodge, Jhaku, Shimla (AESPK2933C), Sh. Vikramaditya Singh (CAXPS8819J), Ms. Aprajita Kumari D/O. Sh. Virbhadra Singh (AOUPK6157L), Sh. Anand Chauhan, R/o. Kailash Niwas, Inder Nagar, Dhali, Shimla (ADFPC3964R) and Sh. Chunni Lal

Chauhan, Prop. Universal Apple Associates, Parwanoo (AAHPC7645L), reveal the following:-

The assessee has invested Rs.34 lacs in the purchase of shares of M/s . Tarini Infrastructures Ltd. but no such investment appears to be declared by the assessee in her return of income. Investment in purchase of LIC Policies to the tune of Rs.10 Lakh for the F.Y. 2009-10 were found to be made from the alleged agricultural income, shown in the revised income tax returns of Sh. Virbhadra Singh, HUF which was routed through the bank account of Sh. Anand Chauhan. However, the investment made is not found to be reflected in the assessee's return of income."

<u>In CWP No. 5453 of 2014:</u>

"On the basis of enquires carried out, and also material gathered during the course of assessment proceedings, in the cases of Sh. Virbhadra Singh (HUF), R/o. Holy Lodge, Jhaku, Shimla (AACHV0223N), Sh. Virbhadra Singh, R/o. Holy Lodge, Jhaku, Shimla (ALRPS6513N), Smt. Pratibha Singh w/o Sh. Virbhadra Singh and R/O Holy Lodge, Jhaku, Shimla (AESPK2933C), Sh. Vikramaditya Singh (CAXPS8819J), Ms. Aprajita Kumari D/o. Sh. Virbhadra Singh (AOUPK6157L), Sh. Anand Chauhan, R/o. Kailash Niwas, Inder Nagar, Dhali, Shimla (ADFPC3964R), Sh. Chunni Lal Chauhan, Prop. Universal Apple Associates, Parwanoo (AAHPC7645L), reveal the following:-

1. Agricultural income of Sh. Virbhadra Singh (HUF), R/o. Holy Lodge, Jhaku, Shimla (AACHV0223N) was shown as follows in the original returns filed at the below given details:

A.Y.	Returned income/agricultural income		Date of filing
	Income	Agri.	
2009-10	Rs.16,38,438/-	Rs.7,35,000/-	24.07.2009
2010-11	Rs.44,67,584/-	Rs.15,00,000/-	29.07.2010
2011-12	Rs.15,13,712/-	Rs.25,00,000/-	11.07.2011

The agricultural income has dramatically increased as follows in the revised returns filed at the following details:

A.Y.	Income as per revised return		Date of filing
	Income	Agri.	
2009-10	Rs.16,38,938/-	Rs.2,21,35,000/-	02.03.2012
2010-11	Rs.44,67,584/-	Rs.2,80,92,500/-	02.03.2012
2011-12	Rs.15,13,710/-	Rs.1,55,00,000/-	02.03.2012

The revised agricultural income is an apparent attempt to justify the investments made in the purchase of insurance policies in the name of Sh. Virbhadra Singh and his family. The insurance policies were noticed by the department while investigating large cash deposits in the bank accounts of Sh. Anand Chauhan. The investments in the insurance policies in the name of family members of Sh. Virbhadra Singh were made from the accounts of Sh. Anand Chauhan and the purported source of cash deposits in the bank account of Sh. Anand Chauhan is highly suspect."

In CWP No. 5454 of 2014:

"On the basis of enquires carried out, and also material gathered during the course of assessment proceedings, in the cases of Sh. Virbhadra Singh (HUF), R/o. Holy Lodge, Jhaku, Shimla (AACHV0223N), Sh. Virbhadra Singh, R/o. Holy Lodge, Jhaku, Shimla (ALRPS6513N), Smt. Pratibha Singh w/o Sh. Virbhadra Singh and R/o Holy Lodge, Jhaku, Shimla (AESPK2933C), Sh. Vikramaditya Singh (CAXPS8819J), Ms. Aprajita Kumari D/o. Sh. Virbhadra Singh (AOUPK6157L), Sh. Anand Chauhan, R/o. Kailash Niwas, Inder Nagar, Dhali, Shimla (ADFPC3964R) and Sh. Chunni Lal Chauhan, Prop. Universal Apple Associates, Parwanoo (AAHPC7645L), reveal the following:-

The assessee has allegedly purchased apples of Sh. Virbhadra Singh, HUF from Sh. Anand Chauhan (agent of Sh. Virbhadra Singh, HUF) in cash. No further evidence of sale of apples by him or arranging cash sale receipts to Sh. Anand Chauhan from other agents of apple buyers has been furnished."

In CWP No. 5455 of 2014:

"On the basis of enquires carried out, and also material gathered during the course of assessment proceedings, in the cases of Sh. Virbhadra Singh (HUF), R/o. Holy Lodge, Jhaku, Shimla (AACHV0223N), Sh. Virbhadra Singh, R/o. Holy Lodge, Jhaku, Shimla (ALRPS6513N), Smt. Pratibha Singh w/o Sh. Virbhadra Singh and R/o Holy Lodge, Jhaku, Shimla (AESPK2933C), Sh. Vikramaditya Singh (CAXPS8819J), Ms. Aprajita Kumari D/o. Sh. Virbhadra Singh (AOUPK6157L), Sh. Anand Chauhan, R/o. Kailash Niwas, Inder Nagar, Dhali, Shimla (ADFPC3964R) and Sh. Chunni Lal Chauhan, Prop. Universal Apple Associates, Parwanoo (AAHPC7645L), reveal the following:-

The assessee has received unsecured loans of Rs.1.50 crores from Sh. Vakamulla Chandershekhar in FY 2011-12. Further on the basis of news item appearing in various national dailies shows that the assessee has invested Rs.34 lacs in the purchase of shares of M/s Tarini Infrastructures Ltd. but no such investment appears to be declared by the assessee in her return of income. Investment in purchase of LIC Polices to the tune of Rs.2.60 Crore for the F.Y. 2008-09, 2009-10 & 2010-11 were found to be made from the alleged agricultural income, shown in the revised income tax returns of Sh. Virbhadra Singh, HUF which was routed through the bank account of Sh. Anand Chauhan. However, the investment made is not found to be reflected in the assessee's return of income."

In CWP No. 5456 of 2014:

"On the basis of enquires carried out, and also material gathered during the course of assessment proceedings, in the cases of Sh. Virbhadra Singh (HUF), R/o. Holy Lodge, Jhaku, Shimla (AACHV0223N), Sh. Virbhadra Singh, R/o. Holy Lodge, Jhaku, Shimla (ALRPS6513N), Smt. Pratibha Singh w/o Sh. Virbhadra Singh and R/o Holy Lodge, Jhaku, Shimla (AESPK2933C), Sh. Vikramaditya Singh (CAXPS8819J), Ms. Aprajita Kumari D/o. Sh. Virbhadra Singh (AOUPK6157L), Sh. Anand Chauhan, R/o. Kailash Niwas, Inder Nagar, Dhali, Shimla (ADFPC3964R) and Sh. Chunni Lal Chauhan, Prop. Universal Apple Associates, Parwanoo (AAHPC7645L), reveal the following:-

> **The assessee has received unsecured loans of Rs.2 crores from Sh. Vakamulla Chandershekhar in FY 2011-12. Further on the basis of news item appearing in various national dailies shows that the assessee has invested Rs.30 lacs in the purchase of shares of M/s. Tarini Infrastructures Ltd. but no such investment appears to be declared by the assessee in his return of income. Investment in purchase of LIC Policies to the tune of Rs.1.64 Crore in the F.Y. 2009-10 & 2010-11 were found to be made from the alleged agricultural income, shown in the revised income tax returns of Sh. Virbhadra Singh, HUF which was routed through the bank account of Sh. Anand Chauhan. However, the investment made is not found to be reflected in the assessee's return of income."**

In CWP No. 5457 of 2014:

"On the basis of enquires carried out, and also material gathered during the course of assessment proceedings, in the cases of Sh. Virbhadra Singh (HUF), R/o. Holy Lodge, Jhaku, Shimla (AACHV0223N), Sh. Virbhadra Singh, R/o. Holy Lodge, Jhaku, Shimla (ALRPS6513N), Smt. Pratibha Singh w/o Sh. Virbhadra Singh and R/o Holy Lodge, Jhaku, Shimla (AESPK2933C),Sh. Vikramaditya Singh (CAXPS8819J), Ms. Aprajita Kumari D/o. Sh. Virbhadra Singh (AOUPK6157L), Sh. Anand Chauhan, R/o. Kailash Niwas, Inder Nagar, Dhali, Shimla (ADFPC3964R) and Sh. Chunni Lal Chauhan, Prop. Universal Apple Associates, Parwanoo (AAHPC7645L), reveal the following:-

> **"The assessee has received unsecured loans of Rs.2.4cr from Sh. Vakamulla Chandershekhar in FY 2011-12. However there is no such information available in the return filed by the assessee for the relevant Assessment year. Further, investments in purchase of LIC Policies to the tune of Rs.2.25 Crore during the F.Y. 2008-09 & 2009-10 in the assessee's name were found to be made from the alleged agricultural income, shown in the revised income tax returns of Sh. Virbhadra Singh, HUF which was routed through the bank account of Sh. Anand Chauhan. However, the investment made is not found to be reflected in the assessee's return of income."**

11. It was not in dispute that a detailed reply to the said notices was filed by each of the petitioners and they were also afforded an opportunity of hearing. But, the grievance made by the petitioners is that the reasons now spelt out in the impugned order are not the same to which they had been put to

notice. Para-1 of the impugned order in all the cases sets out in verbatim the contents of the show-cause notices (supra), but thereafter the contents of Para-2 (Para-3 in CWP No.5453 of 2014, CWP No.5455 of 2014 and CWP No.5456 of 2014) in the impugned orders read as under:-

> **"2. The information and facts also show that above named persons mentioned in para-1 above have close relations/ nexus and business dealings amongst themselves and other persons namely Sh. Vakamulla Chandershekhar and M/s Tarini Infrastructure Limited. The details of the transactions entered with the above entities are as under:-**
>
> **i. Interest free unsecured loan of Rs.5.9 crores was advanced by Sh. Vakamulla Chandershekhar to Sh. Virbhadra Singh (Rs.2.4 Crore), Smt. Pratibha Singh (Rs.1.5 Crore) and Sh. Vikramaditya Singh Rs.2 Crore). But no information is available in the income tax returns of these persons. The source of loans given by Sh. Vakamulla Chandershekhar to Sh. Virbhadra Singh and family members is highly suspect. Information available so far shows that Sh. Vakamulla Chandershekhar has failed to show any disclosed source of income that could have been used by him to advance the above mentioned loans.**
>
> **ii. Investment of Rs.34 lacs, Rs.30 lacs and Rs.34 lacs were made in the shares of M/s. Tarini Infrastructure Limited (Director Sh. Vakamulla Chandershekhar) by Smt. Pratibha Singh, Sh. Vikarmaditya Singh and Ms. Aprajita Kumari respectively. The family of Sh. Virbhadra Singh have earned profit on the sale of the shares of M/s. Tarini Infrastructure Limited, which is yet to be offered for tax. Sources of acquisition of these shares are not found in the respective returns, nor the profit earned on sale of these shares are being shown in the return of income."**

12. The petitioners have contended that the aforesaid allegations for the very first time have appeared only in the impugned orders and these allegations had never been brought to the notice of the petitioners either in the show-cause notices or at the time of hearing so as to afford them a proper and effective opportunity to reply to these allegations.

13. Here it may be noticed that on 30.6.2014 i.e. after about five days of issuance of show cause notice, the respondent addressed a letter to the Chief Commissioner of Income Tax, H.P. Region Shimla, on the subject of centralization of cases, which reads:-

> **"To**
>
> **The Chief Commissioner of Income Tax,**
> **H.P. Region, Shimla.**
>
> **Sir,**
>
> **Sub:- Centralization of cases- regarding-**
>
> **Kindly refer to your letter No. CCIT/SML/Tech/2014-15/Sr.PS 02 dated 12.6.2014 enclosing therein letter of member investigation CBDT, regarding centralization of cases related to Sh. Virbhadra Singh and connected cases, in view of the above a meeting was held with the DGIT (Inv.) Chandigarh, DIT (Inv.) at Chandigarh alongwith your goodself in which it was decided that the cases related to Sh. Virbhadra Singh are to be centralized with**

DCIT/ACIT (Central) Circle Chandigarh under the charge of CIT (Central) Gurgaon. The details of the cases which are to be centralized are as under:

Sr.No.	Name & Address	Presently Assessed with the AO	CCIT Charge	CIT Charge
1.	Sh.Virbhadra Singh (HUF), R/o.Holy Lodge, Jhaku, Shimla (AACHV0223N)	DCIT, Shimla Circle	Shimla	Shimla
2.	Sh. Virbhadra Singh, R/o.Holy Lodge, Jhaku, Shimla (ALRPS6513N)	DCIT, Shimla Circle	Shimla	Shimla
3.	Smt. Pratibha Singh w/o. Sh. Virbhadra Singh and R/o. Holy Lodge, Jhaku, Shimla (AESPK2933C)	DCIT, Shimla Circle	Shimla	Shimla
4.	Sh. Vikramaditya Singh s/o Sh. Virbhadra Singh, r/o Holy Lodge, Jhaku, Shimla (CAXPS8819J)	ITO, Ward-1, Shimla	Shimla	Shimla
5.	Ms. Aprajita Kumari D/o. Sh. Virbhadra Singh (AOUPK6157L,)	ITO, Ward-1 Shimla	Shimla	Shimla
6.	Sh. Anand Chauhan, R/o. Kailash Niwas, Inder Nagar, Dhali, Shimla (ADFPC3964R)	ITO, Ward-1, Shimla.	Shimla	Shimla
7.	Sh. Chunni Lal Chauhan, Prop. Universal Apple Associates, Parwanoo (AAHPC7645L)	DCIT,Parwanoo Circle	Shimla	Shimla.

Hence show cause notices u/s 127 of the I.T. Act, 1961 have been issued to the above persons on 25.6.2014 for furnishing their

objections if any. For this purpose the cases are fixed for 4.7.2014. A letter dated 30.6.2014 has also been issued to the CIT (Central) Gurgaon to accord his concurrence and also to specify the names and designation of the officer of Central circle at Chandigarh with whom the above cases are to be centralized.

During the above meeting held with the DGIT (Inv.) it was informed by him that investigation wing Chandigarh has also conducted investigation in the various cases related to Sh. Virbhadra Singh including Sh. Vakamulla Chander Shekher. The result/outcome of investigations carried out by the Investigation Wing will help the undersigned to strengthen the order to be passed u/s 127 of the I.T. Act, 1961. Hence, you are requested to please take up the mater with the DGIT (Inv.) Chandigarh to share result/ outcome of the investigation with this office so that the same may be utilized in passing the order u/s 127 of the I.T. Act, 1961.

You are also requested to take up the matter with the DGIT (Inv.) Chandigarh in respect of the centralization of other cases related to Sh. Virbhadra Singh and which are not assessed under the jurisdiction of the undersigned."

It would be noticed from the underlined portion of the letter that the respondent was well aware of the investigation being carried out in various cases relating to the petitioners, particularly, petitioner in CWP No.5453 of 2014 and 5457 of 2014 and one Vakamulla Chander Shekhar, but despite this the respondents did not make a mention of the same in the show-cause notices issued to the petitioners.

14. Though, prima facie, it appeared that the reasons in the impugned order were totally different from what was spelt out in the show-cause notices. But, then to test the veracity of the contentions of petitioners that the reasons now assigned in the show-cause notices have never been confronted to the petitioners, this Court vide order dated 18.11.2014 summoned the original records of the cases. After going through the same meticulously, we find that there is no material available on record which may show even remotely that the reasons now spelt out in the impugned order were ever brought to the notice of the petitioners so as to afford them an adequate and effective opportunity to respond to the same.

15. It is trite that every person before an authority exercising the adjudicatory power has right to know the case he is required to meet. The fundamental principle remains that nothing should be used against the person, which has not been brought to his notice. If the relevant material is not disclosed to a party, there is prima facie unfairness irrespective of whether the material in question arose before, during or after the hearing.

16. For reasons best known to the respondent, it has treated all the petitioners/assessees as one person/assessee. We observe so because all the petitioners were admittedly issued individual show-cause notices where separate and distinct allegations against each one of them had been set out. But, now when the impugned order is seen, it is absolutely clear that after setting out the allegations as mentioned in Para-1 of the show-cause notice, an omnibus reason common to all the petitioners has been recorded for the transfer of the cases, which indisputably did not find mention in the show-cause notices.

17. The show-cause notices issued to the petitioners in CWP No.5173 of 2014, CWP No.5452 of 2014 and CWP No.5453 of 2014 did not even make a reference of Shri Vakamulla Chandershekhar. Similarly, the petitioners in CWP No.5455 of 2014 and CWP No. 5456 of 2014 were though put to notice that they had received unsecured loans of Rs. 1.50 crores and Rs. 2 crores respectively from said Shri Vakamulla Chandershekhar which were invested in M/s Tarini

Infrastructure Ltd., but then nowhere it was brought to the notice that such information was not available in the income tax returns of these persons (Vakamulla Chandershekhar etc.). Similarly, there was no allegation in the show-cause notices issued to the petitioners in CWP Nos.5452, 5455, 5456 and 5257 of 2014 that by investing in M/s Tarini Infrastructure Ltd., these persons had earned profit on the sale of shares of M/s Tarini Infrastructure Ltd., which was yet to be offered for tax.

18. The aforesaid reasons and allegations contained in the show-cause notices vis-à-vis the impugned order are only illustrative and not exhaustive and have been taken note of in order to satisfy ourselves that the reasons now reflected in the impugned order have never been made known to the petitioners individually in the show-cause notices issued to them. Therefore, it is apparent that the impugned order is founded on grounds at variance from the one in the show-cause notices and consequently the same being based on extraneous consideration is bad in law.

19. In this background, the question which would require our consideration, therefore, is as to whether at the time of issuance of show-cause notices and passing of impugned order, the requirements of natural justice have been complied with because non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It is here then that the action of the respondent is required to be tested on the touchstone of justice, equity, fair play and in case its decision is not based on justice, equity and fair play and has been taken after taking into consideration other material, then even though on the face of it, the decision may look to the legitimate, but as a matter of fact the reasons are not based on values but on extraneous consideration that decision cannot be allowed to stand.

20. In this connection, the decision in **S. L. Kapoor vs. Jagmohan, AIR 1981 SC 136** is relevant for our purpose. In paragraph 16 of the judgment, their Lordships have held as follows:-

> ***".....In our view, the requirements of natural justice are met only if opportunity to represent is given in view of proposed action. The demands of natural justice are not met even if the very person proceeded against has furnished the information on which the action is based if it is furnished in a casual way or for some other purpose. We do not suggest the opportunity need be a 'double opportunity' that is one opportunity on the factual allegations and another on the proposed penalty. Both may be rolled into one. But the person proceeded against must know that he is being required to meet the allegations which might lead to a certain action being taken against him. If that is made known the requirements are met. ..."*** *(Emphasis added)*
>
> ***.....In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs. We do not agree with the contrary view taken by***

the Delhi High Court in the judgment under appeal."
(Emphasis supplied)

21. In Wade & Forsyth -- 'Administrative law', the learned Authors have said thus :-

> ***"A proper hearing must always include a 'fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view'. Lord Denning has added :***
>
> ***'If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.' ...."*** *(Emphasis supplied)*

22. In De Smith, Woolf and Jowell's --Judicial Review of Administrative Action, under the caption 'Duty of adequate disclosure', it is said thus :-

> ***"If prejudicial allegations are to be made against a person, he must normally, as we have seen, be given particulars of them before the hearing so that he can prepare his answers. In order to protect his interests he must also be enabled to controvert, correct or comment on other evidence or information that may be relevant to the decision; indeed, at least in some circumstances [here will be a duty on the decision maker to disclose information favourable to the applicant, as well as information prejudicial to his case. If material is available before the hearing, the right course will usually be to give him advance notification; .....***
>
> ***If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie unfairness, irrespective of whether the material in question arose before, during or after the hearing. ,, ..."***

23. In our considered opinion, once show cause notice has been sought to be issued, then it was incumbent upon the respondent to have set out in detail and with precision the various acts of commission and omission to the notice of the petitioner so as to afford him an effective opportunity to meet the case of the department. In taking this view, we are fortified by the following observations of Hon'ble Supreme Court in **Collector of Central Excise vs**. **H.M.M. Limited 1995 Supp (3) Supreme Court cases 322:-**

> ***"..... If the department proposes to invoke the proviso to Section 11-A(1), the show-cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the assessee falling within the four corners of the said proviso....."***

24. The party to whom the show cause notice has been issued must be made aware of the exact allegations, he is required to meet. This was so held by Hon'ble Supreme Court in **Raj Bahadur Narain Singh Sugar M. Ltd.** vs. **Union of India and others (1997) 6 SCC 81** wherein after placing reliance

upon **Collector of Central Excise** vs. **H.M.M** case (supra), it was held as follows:-

> ***"9.....The party to whom a show-cause notice under Rule 10 is issued must be made aware that the allegation against him is of collusion or wilful misstatement or suppression of fact. This is a requirement of natural justice. It is also the law, laid down by this court in CCE v. H.M.M. Ltd. It has been said there with reference to Section 11-A of the central Excises and Salt Act, 1944, which replaced Rule 10, that if the authorities propose to invoke the proviso to Section 11-A(1, the show-cause notice must put the assessee to notice which of the various commissions and omissions stated in the proviso is committed to extend the period from six months to five years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the authorities. The defaults enumerated in the proviso were more than one and if the authorities placed reliance on the proviso, it had to be specifically stated in the show-cause notice which was the allegation against the assessee falling within the four comers of the said proviso."***

25. The requirement of making a person aware of the exact allegations he is required to meet is a requirement of natural justice as held by the Hon'ble Supreme Court in **Kaur & Singh** vs. **Collector of Central Excise, New Delhi 1997 (94) E.L.T. 289 (S.C.)** where the Hon'ble Supreme Court after placing reliance upon **Collector of Central Excise** vs. **H.M.M** and **Raj Bahadur Narain Singh Sugar M. Ltd.** vs. **Union of India and others** cases held that:-

> ***"3. This court has held that the party to whom a show cause notice of this kind is issued must be made aware of the allegation against it. This is a requirement of natural justice. Unless the assessee is put to such notice, he has no opportunity to meet the case against him. This is all the more so when a larger period of limitation can be invoked on a variety of grounds. Which ground is alleged against the assessee must be made known to him, and there is no scope for assuming that the ground is implicit in the issuance of the show cause notice. [See: Collector of Central Excise vs. H.M.M. Limited, 1995 (76) E.L.T. 497 and Raj Bahadur Narain Singh Sugar M. Ltd. vs. Union of India and others, 1996 (88) E.L.T.24]."***

26. In the decision **M. A. Jackson v. Collector of Customs, reported in (1998) 1 SCC 198** which relates to a case under the Customs Act, the Department proceeded under Section 28(1) of the Customs Act alleging short levy of duty. The Department computed the duty on the basis of certain documents, for which no notice was given to the appellant. The question was whether the Department was justified in relying on the documents, copies of which were not furnished to the appellant. It was held thus:-

> ***"In our view, once it is admitted that the price mentioned in the magazine was not mentioned in the show-cause notice issued to the petitioner, any reliance on the said price mentioned in the magazine by the Customs authorities must be held to be illegal. Further, it is clear that though this point was taken in the grounds of the appeal before the appellate authorities a copy of the magazine was never made available to the petitioner, ..."*** *(Emphasis added)*

For the above reason, the Orders of the Authorities were set aside by the Honourable Supreme Court.

27. Similarly in **K. Vijayalakshmi v. Union of India, (1998) 4SCC 37: (AIR 1998 SC 2961)**, it was held thus:-

> ***"We are of the view that without going into the factual aspect of the case, the order of the Tribunal as well as the order of the General Manager confirmed by the appellate authority are liable to be set aside on the sole ground that the document based on which the conclusion came to be reached having not been supplied to the appellant, the decision cannot be sustained. The respondent ought to have given to the appellant a copy of the opinion of the Forensic Department based on which the impugned order came to be passed."*** *(Emphasis supplied)*

28. In **Tarlochan Dev Sharma** vs. **State of Punjab and others (2001) 6 SCC 260,** the impugned order was founded on grounds at variance from the one in show cause notice, consequently the same was held to be bad in law. The Hon'ble Supreme Court observed as under:-

> ***".....There is nothing in the show cause notice or the ultimate order to hold how the act of appellant had 'obstructed the working of Municipal Council' or was 'against the interest of council.' We are, therefore, clearly of the opinion that not only the principles of natural justice were violated by the factum of the impugned order having been founded on grounds at variance from the one in the show cause notice, of which appellant was not even made aware of let alone provided an opportunity to offer his explanation, the allegations made against the appellant did not even prima facie make out a case of abuse of powers of President....."***

29. It cannot be disputed that the show cause notice is the foundation on which the department has to build up its case, therefore, if the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/ or unintelligible or do not disclose the real material upon which a proposed action is contemplated to be drawn, then it is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice. **(Ref: Commissioner of Central Excise Bangalore** vs. **Brindavan Beverages (P) Ltd. & ors. (2007) 5 SCC 388.**

30. In view of the aforesaid exposition of law it can therefore safely be concluded that the fundamental principle of law is that adjudication has to be within the four corners of the allegations set out in the show cause notice. Any finding given beyond the terms of show cause notice will be hit by violation of principles of natural justice.

31. It is in terms of Section 127 of the Act that the respondent has ordered the transfer of the cases of the petitioners. This provision was subject-matter of consideration before the Hon'ble Supreme Court in **M/s Ajantha Industries and others** v. **Central Board of Direct Taxes, New Delhi and others AIR 1976 SC 437** and relevant observations are as follows:-

> ***"5.....The successor section under the Income-tax Act, 1961 is Section 127 and the same may be set out:***
>
> ***"Transfer of cases from one Income-tax Officer to another:-***
>
> > ***(1) The Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one Income-tax Officer subordinate to him to another also subordinate to him, and the Board may similarly transfer any case from one Income-tax Officer to another.***

Provided that nothing in this sub-section shall be deemed to require any such opportunity to be given where the transfer is from one Income-tax Officer to another whose offices are situated in the same city, locality or place.

(2) The transfer of a case under sub-s. (1) may be made at any stage of the proceedings, and shall not render necessary the re-issue of any notice already issued by the Income-tax Officer from whom the case is transferred.

Explanation:- In this section and in Sections 121 and 125, the word 'case' in relation to any person whose name is specified in any order or direction issued thereunder, means all proceedings under this Act in respect of any year which may be pending on the date of such order or direction or which may have been completed on or before such date, and includes also all proceedings under this Act which may be commences after the date of such order or direction in respect of any year."

The section was amended by Section 27 of Finance (No. 2) Act, 1967, and Section 127 since then stands as under:-

(1) "The Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from any Income-tax Officer or Officers subordinate to him to any other Income-tax Officer or Income-tax Officers also subordinate to him and the Board may similarly transfer any case from any Income-tax Officer or Income-tax Officers to any other Income-tax Officer or Income-tax Officers.

Provided that nothing in this sub-section shall be deemed to require any such opportunity to be given where the transfer is from any Income-tax Officer or Income-tax Officer or Income-tax Officers to any other Income-tax Officer and the offices of all such Income-tax Officers are situated in the same city, locality or place:

Provided further that where any case has been transferred from any Income-tax Officer or Income-tax Officers to two or more Income-tax Officers, the Income-tax Officers to whom the case is so transferred shall have concurrent jurisdiction over the case and shall perform such functions in relation to the said case as the Board or the Commissioner (or any Inspecting Assistant Commissioner authorised by the Commissioner in this behalf) may, by general or special order in writing, specify for the distribution and allocation of the work to be performed.

(2) The transfer of a case under sub-section (1) may be made at any stage of the proceedings, and shall not render necessary the re-issue of any notice already issued by the Income-tax Officer or Income-tax Officers from whom the case is transferred.

Explanation:- In this section and in Sections 121, 123, 124 and 125, the word 'case' in relation to any person whose name is specified in any order or direction issued thereunder, means all proceedings under this Act in respect

of any year which may be pending on the date of such order or direction or which may have been completed on or before such date, and includes also all proceedings under this Act which may be commenced after the date of such order or direction in respect of any year."

10. The reason for recording of reasons in the order and making these reasons known to the assessee is to enable an opportunity to the assessee to approach the High Court under its writ jurisdiction under Article 226 of the Constitution or even this Court under Article 136 of the Constitution in an appropriate case for challenging the order, inter alia, either on the ground that it is mala fide or arbitrary or that it is based on irrelevant and extraneous considerations. Whether such a writ or special leave application ultimately fails is not relevant for a decision of the question.

11. We are clearly of opinion that the requirement of recording reasons under Section 127 (1), is a mandatory direction under the law and non-communication thereof is not saved by showing that the reasons exist in the file although not communicated to the assessee.

15. When law requires reasons to be recorded in a particular order affecting prejudicially the interests of any person, who can challenge the order in court, it ceases to be a mere administrative order and the vice of violation of the principles of natural justice on account of omission to communicate the reasons is not expiated."

32. A perusal of the aforesaid observations makes it clear that the requirement for recording of reasons in the order and making these reasons known to the assessee is to enable an opportunity to the assessee to approach the High Court under its writ jurisdiction under article 226 of the Constitution so as to enable him to challenge the order, inter alia, either on the ground that it is mala fide or arbitrary or that it is based on irrelevant and extraneous considerations as would be clear from the perusal of para-10 thereof.

33. Furnishing of specific and intelligible reasons for the proposed transfer of the case is only a concomitant of the concept of reasonable opportunity enshrined in section 127 (1) and (2). Unless the assessee knows the precise reasons for the transfer, he would be handicapped in putting forth his objections effectively and in case the transfer of case is based on extraneous considerations then issuance of show cause notice becomes meaningless and is reduced to an idle formality.

34. The law is, therefore, fairly well settled that if prejudicial allegations are to be made against a person, he must be given particulars of that before hearing, so that he can prepare his defence. The fair procedure and principle of natural justice are inbuilt into the rules. It is also well settled that show cause proceeding is meant to give a person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice. Therefore, at that stage the person proceeded against must be told the charges against him so that he can give an effective and proper reply to the same. Reply to show cause notice is not an empty formality because after all justice must not only be done but it must manifestly appear to be done which principle is equally applicable to quasi-judicial proceedings.

35. It is also equally settled that statutory authority must exercise its jurisdiction within the four corners of the law. Therefore, in case the respondent wanted to rely upon any material which subsequently came to its notice, then fairness demanded that petitioner ought to have been put to notice before acting

upon the same especially when it not only forms the foundation but even the basis of the transfer of cases. The giving of notice containing reasons for the proposed action is after all a basic postulate for compliance of the principles of natural justice. It is axiomatic that unless a party is informed of the reasons for the proposed action, it would be impossible for the noticee to put-forth its point of view with regard to reasons for the proposed action of show-cause notice. It must be adequate so as to enable a party to effectively object/respond to the same.

36. In view of aforesaid discussion, we have no hesitation in holding that the show cause notices issued to the petitioners were only an empty formality as the basis and foundation of the transfer of the cases is not the one for which the petitioners infact had been asked to show-cause. The impugned order has been passed after taking into consideration the extraneous material which had never been brought to the notice of the petitioners prior to passing of the impugned order. Therefore, the action of the respondents is violative of principles of natural justice and fair play and therefore not sustainable in the eyes of law.

In view of the aforesaid findings, the other contentions as raised by the respective parties need not to be gone into.

37. However, it only needs to be clarified that there is a difference between lack of jurisdiction and irregular exercise of authority/jurisdiction. Proceedings will be a nullity when the authority assuming it has no power to have seisin over the case. An irregularity in procedure need not result in annulment unless the statute specifically stipulates to the contrary.

38. In **Budhia Swain and others versus Gopinath Deb and others (1999) 4 SCC 396**, the Hon'ble Supreme Court highlighted that distinction exists and was well recognized between lack of jurisdiction and mere error of jurisdiction in the following terms:-

> **"9. A distinction has to be drawn between lack of jurisdiction and a mere error in exercise of jurisdiction. The former strikes at the very root of the exercise and want of jurisdiction may vitiate the proceedings rendering them and the orders passed therein a nullity. A mere error in exercise of jurisdiction does not vitiate the legality and validity of the proceedings and the order passed thereon unless set aside in the manner known to law by laying a challenge subject to the law of limitation. In Hira Lal Patni v. Kali Nath AIR 1962 SC 199 it was held:**
>
> > **"The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it."**

39. In **Grindlays Bank Ltd. versus Income-tax Officer, Calcutta and others AIR 1980 SC 656**, the Hon'ble Supreme Court quashed the assessment order but then issued directions to make fresh assessment in the circumstances of the case. It was held as under:-

> **"7. The next point is whether the High Court possessed any power to make the order directing a fresh assessment. The principle relief sought in the writ petition was the quashing of the notice under**

Section 142(1) of the Income-tax Act and inasmuch as the assessment order dated March 31, 1977 was made during the pendency of the proceedings consequent upon a purported non-compliance with that notice, it became necessary to obtain the quashing of the assessment order also. The character of an assessment proceeding, of which the impugned notice and the assessment order formed part, being quasi-judicial the "certiorari" jurisdiction of the High Court under Article 226 was attracted. Ordinarily, where the High Court exercises such jurisdiction it merely quashes the offending order and the consequential legal effect is that but for the offending order the remaining part of the proceeding stands automatically revived before the inferior court or tribunal with the need for fresh consideration and disposal by a fresh order. Ordinarily, the High Court does not substitute its own order for the order quashed by it. It is, of course, a different case where the adjudication by the High Court establishes a complete want of jurisdiction in the inferior court or tribunal to entertain or to take the proceeding at all. In that event on the quashing of the proceeding by the High Court there is no revival at all. But although in the former kind of case the High Court, after quashing the offender order, does not substitute its own order it has power nonetheless to pass such further orders as the justice of the case requires. When passing such orders the High Court draws on its inherent power to make all such orders as are necessary for doing complete justice between the parties. The interest of justice require that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court, by the mere circumstance that it has initiated a proceeding in the court, must be neutralized. The simple fact of the institution of litigation by itself should not be permitted to confer an advantage on the party responsible for it. The present case goes further...."

40. Similarly, in **Kapoor Chand Shrimal versus Commissioner of Income Tax, Andhra Pradesh, Hyderabad (1981) 4 SCC 317**, it was held that the duty of the appellate authority does not end with making a declaration that the assessments are illegal. It has also to issue further directions which include remanding the matter afresh unless forbidden from doing so by the statute. It was held as under:-

"17....It is, however, difficult to agree with the submission made on behalf of the assessee that the duty of the Tribunal ends with making a declaration that the assessments are illegal and it has no duty to issue any further direction. It is well known that an appellate authority has the jurisdiction as well as the duty to correct all errors in the proceedings under appeal and to issue, if necessary, appropriate directions to the authority against whose decision the appeal is preferred to dispose of the whole or any part of the matter afresh unless forbidden from doing so by the statute....."

41. A Division Bench of Bombay High Court in **Commissioner of Income Tax versus Bharat Kumar Modi 2000 (246 ITR) 693,** after taking note of the aforesaid well settled principles of law held that an order is not a nullity or in exercise of void *ab-initio* jurisdiction, when the Assessing Officer does not confront the assessee with the material in his possession. The said error is in irregularity which could be corrected by remitting the matter. Therefore, power of annulment and power to set aside and remit the case, have to be exercised keeping in mind the distinction between lack of jurisdiction and irregularity in exercise of authority/jurisdiction, while the former cannot be rectified, the latter can always be rectified.

42. In the present case, it cannot be disputed that respondent had the jurisdiction to decide the case, but omitted to confront the assessees with the material in his possession and proceeded to pass impugned order which was founded on grounds at variance from the one in the show-cause notices which however, does not affect the *ab-initio,* jurisdiction enjoyed by the respondent in respect of the proceedings.

43. Therefore, bearing in mind the aforesaid exposition of law, the impugned order passed by the respondent though is not sustainable, however, it will be open for the respondent to commence the proceedings afresh which needless to say shall be strictly in accordance with the law. It also needs to be clarified that since we have not made any observation on the relative merits of the case(s), therefore, in the event of fresh show-cause notice(s) being issued, it shall be open to the petitioner(s) to raise all questions of fact and law including those raised before this Court.

44. In view of the aforesaid discussion, the impugned order(s) dated 14.07.2014 is quashed and set aside and the petitions are disposed of as aforesaid, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of. The Registry is directed to place a copy of this judgment on the files of connected matters.

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

Badri Nath ..... Appellant
Vs.
H.P. State Forest Corporation Ltd. ..... Respondent

RFA No. 153 of 2012.
Date of decision: 18.12.2014.

Limitation Act, 1965- Article 112 - Plaintiff filed a civil suit for the recovery on the ground of loss suffered by him due to breach of contract- suit was instituted on 10.12.2004, whereas, agreement was entered between the parties on 28.6.1997- plaintiff claimed that his case was covered under Article 112 of Limitation Act- hence, suit is within limitation- held that, Article 112 covers the suit filed by State Government or the Central Government- any authority/corporation which falls within definition of state under Article 12 will not become entitled to be treated as Central Government or State Government within the meaning of Article 12- suit was to be filed within the period of three years and the suit having not been filed within period of three years is barred by limitation. (Para- 3 to 12)

Case referred:
Nav Rattanmal and others vs. State of Rajasthan AIR 1961 SC 1704

For the appellants : Mr. Sunil Mohan Goel, Advocate.
For the respondent: Mr. Bhupinder Pathania, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

This appeal is directed against the judgement and decree passed by the learned District Judge, Kangra at Dharamshala whereby the suit filed by the plaintiff- respondent has been decreed, while the counter-claim filed by the appellant- defendant has been dismissed.

2 The facts in brief may be noticed. The respondent herein filed a suit for recovery of Rs.6,17,599/- on account of loss suffered by the plaintiff due to breach of contract. The suit admittedly was instituted on 10.12.2004 and the agreement in question had been entered into on 28.6.1997 and the cause of action, if any, accrued to the plaintiff on 8.12.1997. A specific issue regarding limitation was framed to the following effect:-

"Whether suit is within time? OPP"

The learned trial court answered the issue in the following manner:-

> *"21. Submission of ld. Advocate appearing on behalf of plaintiff that suit is within time is also accepted for the reasons hereinafter mentioned. It is proved on record that written agreement Ex. PW 1/D was executed interse parties on dated 28.6.1997. It is also proved on record that HPFC is owned by Himachal Pradesh State Government. Court is of the view that any suit filed by State Forest Corporation owned by H.P. State Government is covered under Art.112 of the limitation Act. As per Art. 112 of the Limitation Act any suit (except a suit before the Supreme Court in the exercise of its original jurisdiction) by or on behalf of the Central government or any State Government including the Government of the State of Jammu & Kashmir, can be filed within thirty years when the period of limitation would begin to run. Present suit was filed on dated 10.12.2004. Hence it is held that present suit is governed under Art. 112 of the limitation Act 1963 because HPFC is owned by H.P. Government and any suit filed by Corporation owned by Government is governed by Art. 112 of Limitation Act 1963. Hence it is held that present suit is within time. Issue No. 10 is decided in favour of plaintiff."*

The suit was decreed. However, the counter claim preferred by the defendant-appellant was ordered to be dismissed.

Hence, this appeal.

3 The question which arises for consideration is as to whether the suit and the counter claim can be held to be within time.

Article 112 of Limitation Act, 1963 which has been relied upon by the learned trial court to decree the suit of the plaintiff- respondent reads as follows:

	Description of appeal	***Period of limitation.***	***Time from which period begins to run.***
112	Any suit (except a suit before the Supreme Court in the exercise of its original jurisdiction) by or on behalf of the Central Government, or any State Government including the Government of the State of Jammu and Kashmir.	Thirty years	When the period of limitation would begin to run under this Act against a like suit by a private person.

4 Therefore, the moot question required to be answered is as to whether recourse to Article 112 of the Limitation Act can be taken by the plaintiff- corporation to claim that the suit is within limitation. It cannot be

disputed that a particular period of limitation for filing a suit by a Central government or State government or as the case may be has been provided for under Article 112. The State Government has been provided for in the statute of Limitation for a purpose and object. Prior to Article 112 of 1963 Act, the paramateria provision was Article 149. While noticing the purpose and object of Article 149 of the Limitation Act, the Hon'ble Supreme Court in **Nav Rattanmal and others** vs. **State of Rajasthan AIR 1961 SC 1704** held as follows:-

> *"10. First and foremost there is this feature that the Limitation Act, though a statute of repose and intended for quieting titles, and in that sense looks at the problem from the point of view of the defendant with a view to provide for him a security against stale claims, addresses itself at the same time also to the position of the plaintiff. Thus, for instance where the plaintiff is under a legal disability to institute a suit by reason of his being a minor or being insane or an idiot, it makes provisions for the extension of the period taking into account that disability. Similarly, public interest in a claim being protected is taken into account by S. 10 of the Act by providing that there shall be no period of limitation in the case of express trusts. It is not necessary to go into the details of these provisions but it is sufficient to state that the approach here is from the point of view of protecting the enforceability of claims which, if the ordinary rules applied, would become barred by limitation. It is in great part on this principle that it is said that subject to statutory provision, while the maxim vigilantibus et non dormientibus jura Subveniunt is a rule for the subject, the maxim nullum tempus occurit regi is in general applicable to the Crown. The reason assigned was, the quote Coke, that the State ought not to suffer for the negligence of its officers or for their fraudulent collusion with the adverse party. It is with this background that the question of the special provision contained in Art. 149 of the Act has to be viewed. First we have the fact that in the case of the Government if a claim becomes barred by limitation, the loss falls on the public, i.e., on the community in general and to the benefit of the private individual who derives advantage by the lapse of time. This itself would appear to indicate a sufficient ground for differentiating between the claims of an individual and the claims of the community at large. Next, it may be mentioned that in the case of governmental machinery, it is a known fact that it does not move as quickly as in the case of individuals. Apart from the delay occurring in the proper officers ascertaining that a cause of action has accrued- Government being an impersonal body, before a claim is launched there has to be inter-departmental correspondence, consultations, sanctions obtained according to the rules. These necessarily take time and it is because of these features which are sometimes characterised as re-tape that there is delay in the functioning of Government officers....."*

5 The words "Central Government" or "State Government" have not been defined in Limitation Act, 1963. The "Government" has been defined in section 3(23) of the General Clauses Act, 1897 in the following words:-

> *"23. "Government" or "the Government" shall include both the Central Government and any State Government."*

6 The word "State" has been defined under Article 12 of the Constitution of India to mean:-

> "**12. *Definition.*-** In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

An analysis of the aforesaid definition of word "State" would show that the same is an inclusive definition which includes the Government, Parliament of India and the Government and Legislature of each States and all local or other authorities within the territory of India or under the control of the Government of India. The definition of word "State" as contained in Part-II of Constitution of India is for the purpose of Part-III and Part-IV of the Constitution of India. Article 12 itself indicates that the words "the State" is a word of wider definition and it encompasses in it other authorities, which may be controlled by Government of India.

7 No doubt, the plaintiff- corporation may be an authority within the meaning of Article 12 of the Constitution of India, but the question is as to whether the words "Central Government" and "State Government" used in Article 112 of the Limitation Act, 1963 should be read as the word "State".

8 When the Limitation Act, 1963 was enacted, the Parliament was well aware of the concept of Central Government, State Government and concept of "State". The Limitation Act, 1963 itself indicates that the word "Local Authority" is not included within the meaning of Central Government or State Government, which is apparent from the fact that a separate limitation period has been provided for Local Authority in the limitation Act under Article 111, which reads as follows:-

	Description of appeal	***Period of limitation***	***Time from which period begins to run.***
111.	By or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession.	Thirty years	The date of the dispossession or discontinuance.

9. Therefore, had the Legislature intended to include local authority within the meaning of State Government or Central Government under Article 112 of the Limitation Act, there was no occasion to provide for a separate limitation period for local authority. It is thus clear that the local authority and other authorities which may fall within the definition of "State" under Article 12 of the Constitution of India were never intended to be included in the words "Central Government" or "State Government". Thus any authority/ corporation, which may be State within the meaning of Article 12 does not *ipso facto* become entitled to be treated as Central Government or State Government within the meaning of Article 112 of the Limitation Act. Accordingly, the plaintiff-appellant is not entitled to the extended period of limitation as provided for under Article 112 of the Limitation Act.

10 Indisputably the agreement in this case was entered into between the parties on 28.6.1997. The appellant- defendant had completed the rope way work and floating the timber in ravi river. On 18.12.1997, there was obstruction in the river and consequently a large quantity of timber was washed away. The total timber received by the corporation at road side depot was 1433.662 M^3 and there was short fall of 187.572 M^3 of timber. Therefore, the entitlement of the plaintiff- respondent to recover the amount towards balance timber arose on 18.12.1997 itself and the suit for recovery of money in terms of Article 113 of the Act is within three years.

11 The plaintiff has examined PW 1 B.S. Datwalia, who had been serving the department and had retired in 1989 as Divisional Manager, Forest Corporation. In the years 1994 to 1998, he had been posted as Divisional Manager, H.P. Forest Corporation, Dharamshala and he proved on record the bid given by the defendant and thereafter the agreement Ex. PW 1/D entered into between plaintiff and the defendant. The details of timber handed over to the defendant Ex. PW 1/E was also duly proved on record. The witness thereafter has only stated that some of the timber has been washed away and report to this effect had been lodged at P.P. Holi. PW 2 on the other hand has only stated about filing of the present suit under his signature.

12 The plaintiff has led no evidence whatsoever to show and prove that the suit has been filed within three years of the alleged cause of action. A perusal of the statement shows that cause of action as per plaintiff arose on 8.12.1997 when some of the timber was washed away, recovery whereof in fact had been sought by the plaintiff. In case the limitation is computed from such period, then same admittedly expired on 7.12.2000, while the present suit came to be instituted only on 10.12.2004 and the same is apparently barred by limitation. Once the suit by the plaintiff- respondent is held to be not maintainable, then the counter claim preferred by the defendant for withholding his amount for the very transaction and based on same cause of action has also been filed beyond the prescribed period of three years of cause of action and is thus required to be dismissed on the ground of limitation.

13 Having held so, the other questions need not be gone into since neither the suit nor the counter-claim is maintainable having been filed beyond the period of limitation.

14 Accordingly, the appeal is partly allowed. Resultantly, the suit filed by the plaintiff- respondent and the counter claim preferred by defendant-appellant are both dismissed as being time barred, so also the pending application(s) if any.

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

Hem Raj .....Petitioner.

Vs.

State of H.P. & Ors. .....Respondents.

CWP No.7353 of 2014.
Reserved on: 11.12. 2014.
Decided on:18.12.2014.

Constitution of India, 1950- Article 226- License qua unit No. 23 was issued by respondent in favour of petitioner – Petitioner deposited an amount of Rs. 7,50,879/- for renewal of the license on the expiry of original license-however, license was not renewed- a conscious decision was taken by the respondent to merge this unit with other units- unit No. 23 lost his identity- petitioner was advised to obtain license for Unit No. 25- petitioner insisted upon renewal of license for unit No. 23- held, that mere deposit of license fees, does not confer any right upon the petitioner to obtain the renewal of license of unit No. 23 when it had ceased to exist- Financial Commissioner had power to merge liquor units - petition dismissed. (Para-3 to 7)

Case referred:
M/s Rishi Pal and Co. Vs. State of H.P. and others, 1998(5) SCC 333

For the Petitioner: Mr. Jagat Paul, Advocate.
For the respondents: Mr. Ramesh Thakur, Asstt. Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through the instant writ petition, the petitioner herein seeks quashing of notice comprised in Annexure P-7 as well as the impugned orders comprised in Annexures P-9 and P-10, besides a direction is sought for from this Court against the respondents inasmuch, as, the latter being directed to order for the petitioner being holder of Unit No. 23.

2. As divulged by Annexure P-1 a license qua Unit No. 23 was issued by the respondents in favour of the petitioner. Under Unit No. 23, L-2 Shalaghat, L-14 Shalaghat, L-14 Palania, L-14 Madhuva fall. The petitioner under Annexure P-4 deposited a sum of Rs.7,50,879/- for obtaining renewal of license qua Shallaghat Unit No.23 as initially issued in his favour as divulged by Annexure P-1. He continues to aver that even a no objection certificate as divulged by Annexure P-6 was issued in his favour by the competent authority. However, under Annexure P-7 the respondents were constrained to communicate/convey to the petitioner for the reasons comprised in it that they were precluded or deterred to renew the license as comprised in Annexure P-1, initially issued in favour of the petitioner qua Unit No.23.

3. The entire factual matrix apposite for rendition of an adjudication on the writ petition is embedded and encapsulated in impugned Annexures P-9 and P-10. An incisive reading with discernment of the aforesaid Annexures articulates that in both the impugned Annexures aforesaid the authority concerned as was seized of a lis inter-se similar/analogous contestants as are the contestants herein, had on an in-depth scrutiny of the facts, material as well as the apposite law applicable thereon concluded that the ventilation of the grievance therein by the petitioner herein had no force. True it is that under Annexure P-1 license qua Unit No. 23 inasmuch as qua Shalaghat was issued in favour of the petitioner herein for the year 2013-14. The petitioner under Annexure P-4 deposited before the authority concerned the necessary fee for renewal of license qua Unit No.23 in his favour, however, under notice comprised in Annexure P-7 a communication was conveyed to the petitioner that owing to non-renewal of Unit No.20 Kunihar, Unit No.25 Darlamor, Unit No. 27 Bhararighat and Unit No.44 Dumehar of Arki Tehsil, a conscious decision was taken by the respondents in the interest of buoying revenue that the units aforesaid be clubbed with Units No.22 Arki, Unit No. 23 Shalaghat and Unit No. 24 Darlaghat. Since the liquor license issued in favour of the petitioner under Annexure P-1 was qua Unit No. 23 inasmuch, as, qua Shalaghat hence when the unit aforesaid on reconstitution/regrouping respectively of Units No. 20, 25, 27, 44 with it a newly constituted Unit No. 45 of which hitherto Unit No. 23 qua which a liquor license was initially issued in favour of the petitioner herein is a part, came into existence, as such the respondents were constrained not to renew the liquor license in favour of the petitioner qua Unit No. 23, it having lost its identity or it having become extinct on its amalgamation with units aforesaid whereby a rechristened unit No. 45 was constituted. Even the respondents had advised the petitioner to file an application before 12.00 noon on 26.03.2014 before the authority concerned, for obtaining license on completion of codal formalities for the newly constituted Unit No. 45. Nonetheless, the petitioner herein has chosen to anchor his claim for renewal of license qua Unit No. 23 which now has paled into extinction on regrouping/reconstitution of Units. His espousal before this Court for renewal of license qua Unit No. 23 is anchored upon the factum of Annexure P-4 with a disclosure in it of his having deposited the necessary fees before the authority concerned, hence, it is urged by the counsel for the petitioner that the receipt of the necessary license fees by the

authority concerned as portrayed by annexure P-4 invests an inherent, indefeasible right in him ensuing from the applicability of the principle of promissory estoppel or in other words acceptance of license fees by the authority concerned from the petitioner disclosed by Annexure P-4 estops/interdicts the respondents against non renewal of license of Unit No. 23 in his favour qua which a license initially was issued in his favour comprised in Annexure P-1. He also proceeds to submit that the regrouping and reconstitution as well as realignment of Units No. 20, 25, 27, 44 with Unit No. 22, 23 and 24 and theirs hence being ascribed a new Unit No. 45 is an act of the respondents ridden with arbitrariness merely to oust the petitioner herein to obtain renewal of hitherto Unit No. 23 even when he had deposited the necessary fees for its renewal before the authority concerned.

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 non-renewal 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.

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 buoy 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.

7. Preeminently the ascription of Unit No. 45 to Unit No. 23, on its regrouping with units at Kunihar, Darlamore, Bhararighat and Dumehar too, cannot be said to have been arbitrarily done inasmuch as Unit No. 23 qua which initially a liquor license was issued in favour of the petitioner under Annexure P-1, having been arbitrarily singled out for amalgamation with other units, on regrouping whereof, a newly constituted unit No. 45 came into existence, especially in the face of revelation by the impugned annexures that not only newly constituted unit No. 45 came into existence on regrouping rather with their being a revelation on an incisive discernment of the record of Darlaghat & Arki units, too having been subjected to regrouping or realigning hence theirs having also then acquired a fresh identity rather dispel the contention of the learned counsel for the petitioner that his unit No. 23 was arbitrary handpicked or singled out by the respondents to an act of regrouping alongwith other units.

8. The upshot of above discussion is that the authorities below while rendering the impugned Annexures had incisively applied their mind to the entire material on record. It appears that they neither excluded germane material from consideration nor took inapposite material into consideration. Consequently, the findings as recorded by both the Authorities below in their impugned Annexures are well merited, they do not suffer from any perversity or absurdity of mis-appreciation or non-appreciation of material placed on record. Accordingly, we find no merit in the petition, which is accordingly dismissed, so also the pending application, if any. No costs.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C. J.

Anuj Sirkek ...Appellant.
Vs.
Neelma Devi and Ors. ...Respondents.

FAO No.57 of 2014
Decided on: December 19, 2014.

Motor Vehicle Act, 1988- Section 149- Tribunal held that driver/insured was not having a driving licence- record showed that insured/driver possessed a learner's licence- RW-1 deposed that he was travelling in the scooter as an instructor and was sitting behind the insured in the scooter- held, that driver was having a valid driving licence and was competent to drive the vehicle - he was accompanied by an instructor, and it cannot be said that driver was not competent to drive the vehicle. (Para-11 to 18)

Cases referred:
National Insurance Co. Ltd. vs. Swaran Singh and others, AIR 2004 SC 1531

For the appellant : Mr.R.K. Bawa, Senior Advocate, with Mr.Jeevesh Sharma, Advocate.
For the respondents: Mr.Ramesh Sharma, Advocate, for respondents No.1 to 7.
Mr.B.M. Chuahan, Advocate, for respondent No.8.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral):

Challenge in this appeal is to the award, dated 21st October, 2013, passed by Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr,

District Shimla, H.P. (for short, the Tribunal), in MAC Petition No.0100061 of 2011, titled Neelma Devi and others vs. Anuj Sirkek and another, whereby compensation to the tune of Rs.8,25,600/-, with costs quantified at Rs.3,000/- and interest at the rate of 6% per annum from the date of filing of the petition till its realization, was awarded in favour of the claimants No.1 to 6, (respondents No.1 to 6 herein), and the insured/driver/appellant came to be saddled with the liability, (for short, the impugned award).

2. The claimants and the insurer have not questioned the impugned award. Therefore, the only question needs to be determined in this appeal is – Whether the Tribunal was right in discharging the insurer and saddling the appellant/owner/driver with the liability?

3. In order to determine the controversy in hand, it is necessary to have a glance of the facts of the case, the womb of which has given birth to the present appeal.

4. Claimants, seven in number, invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, (for short, the Act), for grant of compensation to the tune of Rs.20.00 lacs, as per the break-ups given in the Claim Petition, on the ground that on 7th May, 2011, at about 9.30 a.m., the driver, namely, Anuj Sirkek (appellant herein), had driven the offending vehicle i.e. Pick Up, bearing registration number HP-63B-0553, rashly and negligently and hit the deceased Budhi Singh at Nogli, District Rampur, H.P., who sustained injuries resulting, lateron, into his death.

5. The Claim Petition was resisted by the insured/driver and the insurer on various grounds, by filing replies.

6. On the pleadings of the parties, the following issues came to be framed:

1. Whether late Sh.Budhi Singh had died on account of injuries sustained by him due to the rash and negligent driving of vehicle No.HP-63B-0553, being driven by respondent No.1, as alleged? OPP
2. If issue No.1 is proved, to what amount of compensation the petitioners are entitled to and from whom? OPP
3. Whether at the relevant time, respondent No.1 was not possessed of a valid and effective driving licence? OPR-2
4. Whether at the relevant time, the offending vehicle was being plied without fitness certificate? OPR-2
5. Relief.

7. Claimants, in order to prove their claim, have examined one Sagar Dass as PW-2 and one of the claimants i.e. Smt.Neelma Devi also stepped into the witness box as PW-1. The driver has examined one Dinesh Chauhan as RW-1, while the insurer examined Sangat Ram Negi as RW-2.

8. The Tribunal, after scanning the pleadings and the evidence led by the parties, decided issue No.1 in favour of the claimants, against the driver/owner/insured. Theses findings of the Tribunal are not in dispute, therefore, the same are upheld.

9. Onus to prove issue No.4 was upon the insurer, in which it has failed to discharge. Moreover, the findings on this issue are also not in dispute and, therefore, the same are liable to be upheld and are upheld accordingly.

10. Now, coming to issues No.2 and 3, the Tribunal, after making assessment, held the claimants entitled to compensation to the tune of Rs.8,25,600/-, with costs and interest, as detailed above. Neither the claimants

nor the insurer has questioned the adequacy of compensation. Thus, it is held that the amount of compensation awarded by the Tribunal is just and appropriate.

11. During the course of hearing, the learned counsel for the appellant/owner/driver strenuously argued that the Tribunal has fallen in error in saddling the appellant with the liability. The learned counsel laid emphasis on the statement of RW-1 Dinesh Chauhan, who has stated that, at the relevant point of time, he was sitting beside the appellant and was having a valid and effective driving licence.

12. I have gone through the entire record of the case. The Tribunal has saddled the appellant/insured with the liability on the ground that the appellant/driver/insured was not having a valid driving licence for the reason that he, at the relevant point of time, was having a learner's licence and was not accompanied by any instructor having valid and effective driving licence to drive the offending vehicle in terms of the insurance policy. Copy of the learner's licence has been proved on record as Ext.RW-1/B. It is not the case, either of the claimants or of the insurer, that the appellant/driver/insured was not having a learner's licence.

13. Dinesh Chauhan RW-1 has deposed before the Tribunal that on the fateful day, he was accompanying the appellant/driver/owner as instructor and was sitting beside him in the offending vehicle.

14. The insurer has not led any evidence to disprove the said fact and has not been able to shatter the evidence of RW-1 Dinesh Chauhan during the cross examination.

15. Having glance of the above discussion, the question which emerges is – Whether a driver, having a learner's licence and accompanied by a person having valid and effective driving licence to drive the vehicle in question, can be said to be competent to drive the vehicle and whether it can be termed as breach of the insurance policy, read with the mandate of the Act.

16. To answer the above contentious issue, a reference may be made to the decision of the Apex Court in **National Insurance Co. Ltd. vs. Swaran Singh and others, AIR 2004 SC 1531.** It is apt to reproduce paragraphs No.88, 89 & 105 (i), (iii), (iv), (vi) and (viii), hereunder:

> "88. Motor Vehicles Act, 1988 provides for grant of learner's licence. [See Section 4(3), Section 7(2), Section 10(3) and Section 14]. A learner's licence is, thus, also a licence within the meaning of the provisions of the said Act. It cannot, therefore, be said that a vehicle when being driven by a learner subject to the conditions mentioned in the licence, he would not be a person who is not duly licensed resulting in conferring a right on the insurer to avoid the claim of the third party. It cannot be said that a person holding a learner's licence is not entitled to drive the vehicle. Even if there exists a condition in the contract of insurance that the vehicle cannot be driven by a person holding a learner's licence, the same would run counter to the provision of Section 149(2) of the said Act.
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> 89. The provisions contained in the said Act provide also for grant of driving licence which is otherwise a learner's licence. Sections 3(2) and 6 of the Act provide for the restriction in the matter of grant of driving licence, Section 7 deals with such restrictions on granting of learner's licence. Sections 8 and 9 provide for the manner and conditions for grant of driving licence. Section 15 provides for renewal of driving licence. Learner's licences are granted under the rules farmed by the Central Government or the

State Governments in exercise of their rule making power. Conditions are attached to the learner's licences granted in terms of the statute. A person holding learner's licence would, thus, also come within the purview of "duly licensed" as such a licence is also granted in terms of the provisions of the Act and the rules farmed thereunder. It is now a well-settled principle of law that rules validly framed become part of the statute. Such rules are, therefore, required to be read as a part of main enactment. It is also well-settled principle of law that for the interpretation of statute an attempt must be made to give effect to all provisions under the rule. No provision should be considered as surplusage.

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105. The summary of our findings to the various issues as raised in these petitions are as follows :

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

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(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 toward insured, the insurer has to prove that the insurer was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the conditions 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 wherefor would be on them.

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(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 defence available to the insured under section 149(2) of the Act.

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(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

17. Coming to the facts of the instant case, admittedly, the driver of the offending vehicle was having a learner's licence at the relevant point of time. A driver who is having a learner's licence can be said to be competent to drive a vehicle, provided such a person is accompanied by an instructor holding a valid and effective driving licence to drive the vehicle in question.

18. In the present case, the driver/insured, in order to satisfy the mandate of the Act, has examined Dinesh Chauhan as RW-1, who has stated that he was sitting with the driver of the offending vehicle, i.e. the appellant, at the relevant point of time. Therefore, by no stretch of imagination, it can be said that the appellant/insured/driver was not competent to drive the vehicle in question.

19. It was for the insurer to plead and prove that the insured has committed any willful breach, has failed to do so.

20. Viewed thus, the Tribunal has fallen in error in coming to the conclusion that the insured has committed the breach.

21. In view of the above discussion, the appeal is allowed, the impugned award is modified by providing that the owner/driver has not committed any willful breach and the insurer has to satisfy the impugned award. Accordingly, the insurer is directed to deposit the entire award amount within a period of 8 weeks from today in the Registry of this Court and on deposit, the Registry is directed to release the same in favour of the claimants strictly in terms of the impugned award. Thereafter, the amount deposited by the appellant/driver, if any, be released in his favour through payee's account cheque.

22. The appeal stands disposed of accordingly, alongwith pending CMPs, if any.

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

Himachal Pradesh State Electricity Board. .....Petitioner

Versus

Sh. Madan Lal Gulati ... ...Respondent

Arb. Case No. 50 of 2007
Reserved on 17th November, 2014
Decided on: 19th December, 2014

Arbitration and Conciliation Act, 1996- Section 34- Construction of underground work comprising of Head Race Tunnel and Desilting Chambers was awarded to the respondent-Contractor by the Executive Engineer- date of completion was fixed as 31.8.1991- Contractor failed to complete the work well within the time- Contract was rescinded on 23.03.1992 with the condition to get it completed by the Electricity Board at the cost of the Contractor- Work was completed in June, 1996 – A notice was served on 16.10.1998 for the appointment of the Arbitrator for adjudication of the dispute- the Arbitrator was appointed on 9.9.1999- Arbitrator announced the award on 7.9.2007- held, that delay in execution of the work granted a right to the Board to rescind the contract- Board was competent to get the work executed at the cost of the contractor - rescission of the contract and execution of the remaining work by Board at the risk and cost of the contractor did not fall within the definition of

the dispute and could not have been referred to Arbitrator- cost of the remaining work should have been adjusted against the security deposit bill.

(Para-14 to 18)

Arbitration and Conciliation Act, 1996- Section 34- Contract was rescinded by the Electricity Board on failure of the contractor to complete the contract within time on 23.3.1992- contractor claimed that he was not responsible for non-completion of the work within time and the non-completion was due to the acts of the board- held, that the dispute could have been raised within 30 days before the Arbitrator- contractor had not sought the appointment of the Arbitrator and had filed a counter-claim on 28.6.2008 when the appointment of the Arbitrator was sought by Electricity Board- the counter-claim preferred by contractor was barred by limitation (Para-19 to 23)

Cases referred:

Voltas Limited versus Rolta India Limited (2014) 4 SCC 516

State of Goa versus Praveen Enterprises (2012) 12 SCC 581

For the petitioner: Mr. J.S. Bhogal, Senior Advocate with Mr. Suneet Goel, Advocate.

For the respondent: Mr. Y.P.S. Dhaulta, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

Petitioner is a Board constituted under the Electricity (Supply) Act 1948. The petitioner-Board had taken in hand the construction work of Thirot Hydel Project. The construction of underground work comprising of Head Race Tunnel and Desilting Chambers was awarded to the respondent-Contractor for a sum of Rs.1.15 crores by the Executive Engineer, Thirot, Division No. 1 vide letter dated 21.11.1989. An agreement was entered upon between the petitioner and the respondent-Contractor. The agreed date for completion of the work was 31.08.1991. The respondent-Contractor, however, as agreed upon. The contract, therefore, was rescinded on 23.03.1992 with the stipulation to get the same completed by the petitioner-Board at the risk and cost of the respondent. The work could only be completed in the month of June, 1996.

2. The respondent-Contractor served the petitioner-Board with a legal notice dated 16.10.1998 calling upon thereby to appoint an Arbitrator for adjudication of the dispute having arisen in relation to the agreement. The Arbitrator came to be appointed on 09.09.1999.

3. The petitioner-Board preferred the claims against the respondent-Contractor well within the period of limitation in the month of June, 1999 i.e. well within three years of the date of completion of work i.e. June, 1996. The respondent, however, filed reply to the claims of the petitioner-Board and also the counter-claims on 26.08.2002 allegedly beyond the period of limitation. The Arbitrator announced the award on 07.09.2007 and thereby while awarding a sum of Rs.12,00,000/- along with interest @ 15% in favour of the petitioner-Board at the same time awarded a sum of Rs.21,63,850/- along with interest @ 15% in favour of the respondent-Contractor.

4. The petitioner-Board aggrieved by the award has questioned the legality and validity thereof on the grounds inter-alia that the same being non-speaking award having no reasons, as required under Section 31 of the Arbitration and Conciliation Act, 1996 recorded by the Arbitrator is against the public policy of India. Also that, the counter-claims being time barred have been erroneously entertained and the aspect of limitation has not been considered. The amount under the counter-claims has been awarded without there being

any evidence available on record and rather the Arbitrator travelled beyond the terms of the agreement, while making the award in favour of the respondent-Contractor. On the other hand, claim to the tune of Rs.39,12,870/- of the petitioner-Board has not been considered in the light of the evidence available on record and only a paltry amount i.e. Rs.12,00,000/- has been awarded out of the same.

5. The respondent-Contractor in preliminary submissions has urged that no ground in terms of Section 34(2) of the Act is made out for setting aside the impugned award and also that the objection not filed by the authorized person, the same is not maintainable. The petition is also claimed to be time barred. On merits, while supporting the award, it has been submitted that he preferred the counter-claims well within the period of limitation. It is specifically pointed out that the petitioner-Board raised objections qua the counter-claims time barred only after 17 hearings having taken place in the matter before the learned Arbitrator. It is also denied that he failed to complete the work within the stipulated period. It is rather the petitioner-Board stated to have erroneously rescinded the contract.

6. In rejoinder, the petitioner-Board has denied the contents of the preliminary submissions being wrong. On merits, while reiterating the contents of the petition denied the contentions to the contrary in the reply being wrong.

7. On the pleadings of the parties, following issues were framed on 28.07.2008:

i) Whether the award dated 7.9.2007 is against the Public Policy of India ? If so, its effect? OPO

ii) Relief.

8. The parties though initially opted for producing evidence by way of affidavits, however, on 29.09.2008 intended to argue the matter on the basis of record of the Arbitrator, as find recorded in the order passed on that day.

9. It is seen that a Co-ordinate Bench of this Court dismissed the petition and also the counter-claims vide judgment dated 6th May, 2009. The matter on being taken to a Division Bench by way of Arbitration Appeal No. 7/09 was remanded to learned Single Judge for fresh disposal after taking on record reply to the petition on behalf of respondent-Contractor, as it was not filed earlier, though rejoinder thereto was on record. Now, reply stands taken on record as discussed supra.

10. Mr. J.S. Bhogal, learned Senior Advocate has mainly emphasized on the point of limitation and has canvassed that counter-claims, the respondent-Contractor preferred being hopelessly time barred have erroneously been entertained and the amount so claimed by the respondent-Contractor by way of counter-claim awarded wrongly. On merits also, it has been urged that award without there being any reason, is non-speaking hence perverse and not legally sustainable. According to Mr. Bhogal, claims to the tune of Rs.39,12,870/- having been preferred by the petitioner-Board well within the period of limitation should have been awarded as a whole. The Arbitrator without recording any cogent and plausible reason has erroneously reduced the same and awarded only a sum of Rs.12,00,000/- against the claim of the petitioner-Board.

11. On the other hand, Mr. Y.P.S. Dhaulta, learned counsel representing the respondent-Contractor has urged that the impugned award to the extent of allowing counter-claims is absolutely legal and valid, hence calls for no interference by this Court under Section 34 of the Act. The claims preferred by the petitioner-Board allegedly being time barred should have not been entertained nor any amount awarded. The award to the extent of allowing

the claims preferred by the petitioner-Board partly has been sought to be quashed.

12. It is seen from the record that the Arbitrator on the basis of the claims and counter-claims preferred by the parties on both sides before him has framed the following issues:

1. Issue No.1-Whether the claim filed by the claimant is within time limit.
2. Issue No.2-Whether the counter claim filed by the Respondent is within time limit.
3. Issue No.3-Whether there has been a breach of contract by the Respondent.
4. Issue No.4-Whether the Claim of the Claimant is justified.
5. Issue No.5-Whether the counter claim of the Respondent is justified.

13. Issue Nos. 1 and 3 have been answered in favour of the petitioner-Board. Issue No. 4 has also been answered in favour of the Board, however, partly as only Rs.12,00,000/- has been awarded against the claim of the Board to the tune of Rs.39,12,870/-. Issue No. 2 has been answered in favour of the respondent-Contractor. Issue No. 5 has also been answered in favour of the respondent-Contractor, however, partly because against the claim of Rs.1,99,41,497/-, he claimed by way of counter-claims, only a sum of Rs.21,63,850/- has been awarded to him.

14. Now the question arise that the claim/counter-claim constitutes disputes within the meaning of Clause 25 of the contract agreement, which reads as follows:

"Clause 25-SETTLEMENT OF DISPUTES BY ARBITRATION"

> "Except where otherwise provided in the contract, all questions and disputes relating to the meaning and interpretation of the terms of contract, specifications, design, drawings and instructions herein before mentioned and as the quality of workmanship or material used in the work or as to any other question, claim, right matter, or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion of abandonment thereof of the contract, shall be referred to a Sole Arbitrator who will be appointed by HPSEB.
>
> It will be no objection to any such appointment that the Arbitrator, so appointed, is Govt./Board servant, that he had to deal with matters to which the contract relates to and that in the course of his duties as Govt./Board servant, he had expressed views on all or any of the matters in dispute or difference. In case the Arbitrator to whom dispute/difference so referred is unable to function as such for any reason whatsoever or his Award being set aside by the Court for any other reasons, another Arbitrator shall be appointed in the same manner as indicated above. Such person shall be appointed to proceed with the references from the stage at which it had been left by his predecessor or to conduct the proceedings afresh as he may deem fir or as the case may be.

It is also a terms of the contract that the party invoking Arbitration shall specify the dispute(s) to be referred to the arbitration under this Clause together with the amount(s) claimed in respect to each dispute. If work under the contract has not been completed when a dispute on any matter whatsoever is referred to arbitration, the contractor shall not be entitled to suspend such work to which the dispute relates and payment to the contractor shall be continued to be made in terms of the contract.

It is also a terms of the contract that if the contractor(s) does not prefer any claim, in writing within 90 (ninety) days of the date on which the dispute first arises or date of limitation of the preparation of the bill, thereof, whichever is earlier, the claim(s) of the contractor will be deemed to have been waived and absolutely barred and the HPSEB shall be discharged and released of all the liabilities under the contract in respect of such claim(s). Likewise all dispute(s) referred to above shall be preferred as provided above within 90 (90) days of the final bill otherwise all claim(s) shall stand extinguished. Provided, in the event of rejection of contractor's claim(s), the contractor within 80 days after receiving limitation in writing of such decision shall give notice in writing to the Chief Engineer, requesting him that the matter be referred to the arbitration.

In all cases referred for arbitration, the Arbitrator/Umpire shall assign reasons under all circumstances on which his decision is based. The Arbitrator/Umpire from time to time, with the consent of the parties enlarge time for making/publishing the Award. The decision of the Arbitration/Umpire as the case may be, shall be conclusive, final and binding on the parties.

Subject to the provisions of the contract on the contrary as aforesaid, the provisions of the Indian Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force, shall apply to all arbitration proceedings under this Clause. All disputes regarding the contract shall be subject to the jurisdiction of Shimla Courts alone irrespective of place, execution and performance of contract and delivery & payment whatsoever etc. etc."

15. The present is a case where on account of non completion of work within the stipulated period, the petitioner-Board has rescinded the contract on 23.03.1992 and resorted to the course of action provided under Clause 3 of the contract agreement and arranged to execute the remaining work at the risk and cost of the respondent-Contractor. Clause 3 of the agreement, reads as follows:

"Clause 3-DETERMINATION OF CONTRACT"

Chief Engineer, may without prejudice to Board's right in respect of any delay or inferior workmanship or otherwise or to any claim for damage in respect of any right or remedies under this contract or otherwise and irrespective of the fact whether the date of completion has or has not elapsed by notice in writing, absolutely determine the contract in any of the following cases:

1(i). If the contractor, having been given by the Engineer-in-Charge a notice in writing to rectify, reconstruct or replace any defective work or that the work/or part of work is being performed in an inefficient manner or otherwise improper or unworkman like manner, fails to

comply with the requirement of such notice within a period of seven days thereafter or if the contractor shall delay or suspend the execution of the work or part of the work so that either in the judgment of the Chief Engineer(which shall be final and binding) the contractor will be unable to secure completion of the work by the date for completion or the contract has already failed to complete the work by that date.

2(ii). If the contractor being company shall pass a resolution or the court shall make an order that the company shall be wound up or if a receiver or a manner on behalf of creditor shall be appointed or if circumstances shall arise which entitle the court or creditor to appoint a receiver or a manager or which entitle the court to make a winding up order.

3(iii). If the contractor commits breach of any of the terms and conditions of this contract.

4(iv). If the contractor commits any acts mentioned if Clause-21 hereof.

When the contractor has made himself liable for action under any of the cases aforesaid, the Chief Engineer, on behalf of the Board shall have powers:

a) To determine or rescind the contract as aforesaid (of which termination or rescission notice in writing to the contractor under the hand of the Chief Engineer, shall be conclusive evidence). Upon such determination or rescission, the security deposit of the contractor shall be liable to be forfeited and shall be absolutely at the disposal of HPSEB.

b) To execute the work departmentally and debit the cost (cost as certified by the Engineer-in-Charge shall be final and conclusive against the contractor) of such execution to the contractor and credit him with the value of the work done in all respects in the same manner and at the same rates as if it had been carried out by the contractor under the terms of his contract. The certificate of the Engineer-in-charge as to the value of the work done shall be final and conclusive against the contractor, provided always that action under the sub-clause shall only be taken after giving notice in writing to the contractor, provided also that if the expense incurred by the department are less than the amount payable to the contractor at contracted rates, the difference should not be paid to the contractor and if the expenses incurred by the department are more than the amount payable to the contractor at contracted rates, the difference shall be paid by the contractor.

c) After giving notice to the contractor to measure up the work executed by him and to take such part thereof as shall be unexecuted out of his hands and to give it to another contractor to complete in which case any expenses which may be incurred in excess of the sum which would have been paid to original contractor, if the whole work had been executed by him(of the amount of which excess the certificate in writing of the Engineer-in-charge shall be final and conclusive) shall be borne and

paid by the original contractor and may be deducted from any money due to him by the Board under this contract or any other amount whatsoever or from his security deposit or the proceeds of Sales thereof or sufficient part thereof as the case may be.

d) To take any part of the work out of contractor's hands which in the opinion of Engineer-in-charge is not being carried out by the contractor with required diligence and efficiency and to execute it departmentally or through other agency at the risk and cost of the contractor.

In the event of any one or more of the above courses being adopted by the Engineer-in-charge, the contractor shall have no claim to compensation for any less sustained by him by reason of his having purchased or procured any materials or entered upon into any engagements or made any advances on account or with a view to the execution of the work or the performance of contract. And in case, action is taken under any of the provisions aforesaid, the contractor shall not been entitled to recover or be paid any sum for any work thereto or actually performed under this contract unless and until the Engineer-in-charge has certified in writing the performance of such work and the value payable in respect thereof and he shall be only be entitled to be paid the value so certified."

16. It is seen that the delay in execution of the work or completion of the work within the stipulated period extends a right in favour of the Board to rescind the contract under intimation in writing to the Contractor. The Board was also competent to execute the remaining work at the cost of the contractor by crediting him with the value of the work so executed in such a manner and at the rate, as if such work has been executed by the Contractor himself under the terms of the contract. Such course of action can only be resorted to after giving notice in writing to the Contractor.

17. Clause 3 of the agreement is self-speaking and provides for the determination of the contract on account of breach of any terms and conditions including qua completion of the work within the stipulated period. This Clause further provides for procedure to be followed to execute the remaining work at the cost of the Contractor to his notice and knowledge and the costs of the work so executed as it is the liability of the Contractor to bear the costs of the work so executed as per the bill(s) to be prepared by the Engineer Incharge.

18. Therefore, rescission of the contract and execution of the remaining work by the petitioner-Board at the risk and costs of the Contractor being not a dispute within the meaning of Clause 25, the petitioner-Board should have neither sought the appointment of an Arbitrator nor Arbitrator so appointed had any jurisdiction to entertain or adjudicate the same. As a matter of fact, Clause 3 of the contract agreement is non arbitral. The amount of Rs.39,12,870/- has been determined by the Board under Clause 3 of the contract, as discussed supra. There was no need for the Board to have invoked arbitration Clause i.e. Clause No. 25 of the contract agreement. The Arbitrator had also no jurisdiction to arbitrate and adjudicate the same. The claim petition itself was misconceived and the costs of the remaining work, the Board executed should have been adjusted against the security deposits made by the Contractor or against his outstanding bill(s), if any, or by resorting to any other and further remedy available to it to recover the same. As a matter of fact, the petitioner-Board has already resorted to such remedy by filing Civil Suit No. 77 of 2009 in this Court, after the judgment dated 6th May, 2009 in this petition initially, as stated by Mr. Suneet Goel, Advocate, learned counsel for the petitioner-Board. Any how, in my considered view, the Arbitrator has exceeded the jurisdiction

and erred in entertaining as well as adjudicating the claims preferred by the petitioner-Board.

19. If coming to the counter-claims, the respondent-Contractor preferred though, the same could have been entertained and adjudicated by the Arbitrator under Clause 25 of the contract agreement, however, if preferred within 90 days from the date of dispute having arisen. Admittedly, the contract was rescinded on 23.03.1992 by the petitioner-Board on the ground of non-completion of work within the stipulated period. The respondent-Contractor, however, claims that he is not responsible for non-completion of the work within the stipulated period and rather it is the petitioner-Board responsible for the same and to the contrary the contract has been rescinded in an arbitrary manner. The Contractor should have raised all such questions in accordance with the agreed terms and conditions i.e. by issuance of notice for appointment of Arbitrator and preferring his claims well within the period of limitation. He, however, never served the Board with any notice for appointment of Arbitrator nor ever preferred his claims, if any. It is rather the petitioner-Board sought the appointment of Arbitrator in June, 1999 after the completion of the left out work in the month of June, 1996. The determination of the contract agreement on account of breach of contract and the payment of the cost of the left out work is a matter not covered under Clause 25 of the contract agreement. It is rather entitlement of the petitioner-Board to recover the costs of such work, of course, subject to compliance of the procedure prescribed under Clause 3 supra. The limitation for filing a suit for recovery of money is three years. The petitioner-Board, therefore, could have recovered the amount, if any, left out after adjustment of the security deposits or against the pending bill(s), if any, of the Contractor by way of resorting to the remedy available to it in accordance with law. The respondent-Contractor did not approach the competent authority for appointment of the Arbitrator nor ever lodged his claims within 90 days as prescribed under Clause 25 of the contract agreement. He, rather preferred counter-claims on 28.06.2002 viz. even much after the appointment of Arbitrator and his having entered upon the reference, because first hearing before the Arbitrator did take place on 22.10.2001.

20. Surprisingly enough, the respondent-Contractor even not sought the condonation of delay as occurred in filing the counter-claims within the meaning of Section 5 of the Limitation Act. It is significant to note that in terms of Clause 25 of the contract agreement, any disputes having arisen in relation to the terms of contract, specifications, design, drawings and instructions of the work to be executed under the agreement, the aggrieved party has to seek the appointment of an Arbitrator to refer such dispute(s) for adjudication within a period of 90 days from the day such dispute(s) having arisen.

21. In the case in hand, the contract was rescinded on 23.03.1992. Therefore, had there been any dispute or claims of the respondent-Contractor against the petitioner-Board, he should have approached the competent authority for appointment of the Arbitrator within the period of 90 days from the date thereof and also preferred his claims. He has neither sought the appointment of Arbitrator nor preferred his claims till 28.06.2002. The counter-claims, he preferred, therefore, are definitely beyond the period of limitation. The apex Court in ***Voltas Limited*** versus ***Rolta India Limited (2014) 4 SCC 516*** has supplied emphasis on the law laid down in ***State of Goa*** versus ***Praveen Enterprises (2012) 12 SCC 581***, which reads as follows:

> 23. Thereafter, addressing the issue pertaining to counterclaims, the Court observed as follows: (Praveen Enterprises case, SCC pp. 590-91, para 20)
>
> > "20. As far as counterclaims are concerned, there is no room for ambiguity in regard to the relevant date for determining the limitation. Section 3(2)(b) of the Limitation Act, 1963 provides

> that in regard to a counterclaim in suits, the date on which the counterclaim is made in court shall be deemed to be the date of institution of the counterclaim. As the Limitation Act, 1963 is made application to arbitrations, in the case of a counterclaim by a respondent in an arbitral proceeding, the date on which the counterclaim is made before the arbitrator will be the date of 'institution' insofar as counterclaim is concerned. There is, therefore, no need to provide a date of 'commencement' as in the case of claims of a claimant. Section 21 of the Act is therefore not relevant for counterclaims. There is however on exception. Where the respondent against whom a claim is made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant but subsequently raises that claim as a counterclaim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under Section 11 of the Act, the limitation for such counterclaim should be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counterclaim."
> (Emphasis supplied)

22. Applying the principle settled in **Parveen Enterprises's** case supra and applying the same to the given facts and circumstances in the case before it the apex Court has observed that in a case of counter-claims by a respondent in arbitral proceedings, the date on which the counter-claim is made before the Arbitrator will be the date of institution of the counter-claims and the respondent can wriggle out from the rigor of the limitation, only if he had also made a claim against the claimant and sought arbitration by serving a notice to the claimant. In the case before the apex Court, the appellant (respondent in the Court below) had also raised the counterclaims and sought arbitration by expressing its intention on number of occasions. It is in that backdrop the counterclaims in that case were held to be within the period of limitation. In the case in hand, however, as noticed supra, the respondent-Contractor never preferred the claims nor made any request for appointment of Arbitrator and rather preferred the counterclaims much after the arbitration proceedings commenced on the request made by the petitioner-Board. The counterclaims, therefore, without there being any reasons for condonation of delay should have not been entertained, what to speak of adjudication thereof. The Arbitrator while deciding issue No. 2 has held as follows:

> "**Issue No. 2**: Counterclaim of the Respondent is admissible in view of the permission granted by the Arbitrator Er. S.R. Khitta. In case the claimant had any objection to grant of permission by the Arbitrator to the Respondent, it should have been filed before the Arbitrator at that time itself. This was not done. This issue has not been contested even during the proceedings. This counter claim has been objected to only in the written arguments. ***As such I allow the counter claim of the Respondent***."

23. As a matter of fact, the Arbitrator had no authority or jurisdiction to condone the limitation at his own and without any case thereto made out.

24. In view of what has been said hereinabove, the Arbitrator has erred himself and also mis-conducted while adjudicating the dispute *inter-se* the parties being barred not only under the terms of the contract but also the law of limitation. The award, as such, is set aside. The petition stands accordingly disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Sh. Kaula Ram ...Appellant
Versus
Smt. Kusum Sood & others ..Respondents

FAO No. 145 of 2007
Decided on : 19.12.2014.

Motor Vehicle Act, 1988—Section 166- Claimant sustained injury in the collision between the bus and Swaraj Mazada- his claim petition was dismissed on the ground that bus was not involved in the accident but the accident was caused by the Driver of Swaraj Mazada- it was established that the driver of Swaraj Majda had died in the accident- a closure report was filed before the Court- held, that it was the duty of the Presiding Officer of the Claim Tribunal to provide an opportunity to claimant to array the owner and insurer of the vehicle as respondent in the claim petition- hence, matter remanded with the direction to afford an opportunity to the claimant to array the owner and insurer in the claim petition. (Para- 7 to 10)

For the appellant: Mr. Anupinder Rohal, Advocate vice
Mr. Tek Chand Sharma, Advocate.
For the respondents: Mr. Suneet Goel, Advocate, for respondent No. 1.
Nemo for respondent No. 2.
Mr. Harish Behl, Advocate, for respondent No. 3.
ASI Krishan Lal, I/O, Police Station Sadar, Kullu in person.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Challenge in this appeal is to the award, dated 26.02.2007, passed by Motor Accident Claims Tribunal-II, Fast Track Court, Kullu, Himachal Pradesh, (for short, 'the Tribunal'), in M.A.C. Petition No. 93/2004, RBT No. 19-2005, titled as Kaula Ram versus Smt. Kusum Sood & others, whereby the claim petition came to be dismissed (for short, the 'impugned award').

Brief facts:

2. Shri Kaula Ram became victim of a vehicular accident, which was allegedly caused by Dhan Raj, driver, while driving bus bearing registration No. HP-34-A-1025, rashly and negligently, on 16.11.2003, at about 2.45. p.m., at village Dhunkhra, near Village Pirdi, Tehsil and District Kullu, which collided with Swaraj Mazda bearing registration No. HP-32-5758, in which the claimant sustained injuries. The claimant filed the claim petition, seeking compensation to the tune of Rs.2.00 lacs, as per the break-ups given in the claim petition.

3. The respondents, i.e. the insured-owner, the driver and the insurer-United India Insurance Company contested the claim petition on the grounds taken in their memo of objections.

4. Following issues came to be framed by the Tribunal on 21.06.2005:

"1. Whether the petitioner suffered injuries due to rash and negligent driving of the bus No. HP-34-A-1025 by respondent No. 2?... OPP

2. If issue No. 1 is proved in affirmative, to what amount of the compensation, the petitioner is entitled to and from whom?...OPP

3. Whether the respondent No. 2 was not holding a valid and effective driving licence at the time of accident?...OPR-3

4. Whether the petition is bad for non-joinder of the necessary parties?...OPR-3

5. Relief."

5. After scanning the evidence, oral as well as documentary, the Tribunal dismissed the claim petition on the ground that the bus was not involved in the accident, but the same was caused by driver Suresh Kumar, who was driving Swaraj Mazda bearing registration No. HP-32-5758.

6. I have gone through the impugned award and the record of the claim petition.

7. It is a fact that FIR No. 522/2003 was lodged in Police Station, Kullu, District Kullu. Investigation was conducted and during investigation, it was found that driver of the Swaraj Mazda, namely, Suresh Kumar, was involved in the accident, but he had died in the said accident. Challan, i.e. closure report was filed in the Court for the reason that the driver of the offending vehicle had died in the accident.

8. It appears that the Presiding Officer has not taken into consideration the aim and object of granting compensation. It was for the Tribunal to provide an opportunity to the claimant to array the owner and insurer of the offending vehicle, as party respondents, in the claim petition, in view of the mandate of Section 158(6) read with Section 166 (4) of the Motor Vehicles Act, 1988.

9. In the given circumstances, I deem it proper to set aside the impugned award and remand the case to the Tribunal, with a direction to afford an opportunity to the claimant to lay a motion for arraying the owner and insurer of the offending vehicle, as party respondents, in the claim petition.

10. The Investigating Officer, ASI Krishan Lal, Police Station, Sadar, Kullu, who is present in the Court, is directed to submit the copy of final report of FIR No. 522/2003 alongwith particulars of the owner and the insurer of the offending vehicle before the Tribunal, on the next date of hearing, enabling the claimant to do the needful.

11. The present respondents are deleted from the array of the respondents.

12. The claimant, through his counsel, is directed to cause appearance before the Tribunal on **2nd March, 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 TARLOK SINGH CHAUHAN, J.

Man Mohan Singh(deceased) through his LRs Smt. Asha Devi and others
...Appellants/Plaintiffs

Versus

Gopi Chand (deceased) through his LRs Sh. Daneshwar Singh and others.
.....Respondents/Defendants

R.S.A. No. 504 of 2001
Date of decision: 19.12.2014

Specific Relief Act, 1963- Section 38- Plaintiff claimed that suit land had fallen to the share of the plaintiff in the family partition and was bifurcated into two parts after the construction of Oddi-Bithal horticultural link road- settlement official carved out a new khasra number out of two khasra numbers and made the land compact, which was not permissible - plaintiff relied upon mutation in support of this submission- plaintiff had not examined the revenue official who had prepared field map of old khasra of mutation- held, that mutation entries do not confer any title- plaintiff had also not produced the report of the demarcation- hence, an adverse inference has to be drawn against him.

(Para-10 to 15)

Cases referred:

Sawarni (Smt.) vs. Inder Kaur (Smt.) and others (1996) 6 SCC 223

Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi, AIR 1917 PC 6

Hiralal & Ors. v. Badkulal & Ors., AIR 1953 SC 225

A Raghavamma & Anr. V. A. Chenchamma & Anr., AIR 1964 SC 136

The Union of India v. Mahadeolal Prabhu Dayal, AIR 1965 SC 1755

Gopal Krishnaji Ketkar v. Mohamed Haji Latif & Ors., AIR 1968 SC 1413

M/s Bharat Heavy Electrical Ltd. v. State of U.P. & ors., AIR 2003 SC 3024

Musauddin Ahmed v. State of Assam, AIR 2010 SC 3813

Khatri Hotels Pvt. Ltd. & Anr. v. Union of India & Anr. (2011) 9 SCC 126

For the Appellants : Ms. Nisha Thakur, Advocate, vice
Mr. Mohan Singh, Advocate.

For the Respondents : Mr. Surinder Parkash Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (oral)

The plaintiffs are the appellants and have come up in appeal against concurrent findings recorded against them by the learned Courts below.

2. The facts, in brief, are that the predecessor-in-interest of the appellants late Sh. Man Mohan Singh filed a suit for permanent injunction against the predecessors-in-interest of the respondents on the allegations that he had been owner in possession of the land described in Khata Khatauni No. 42 min/86, Khasra Nos. 983/491 measuring 0-3 bigha and 984/491 measuring 0-13 bighas situated in Mauza Dalan, Pargana Kepu, Tehsil Kumarsain, District Shimla(hereinafter referred to as the 'suit land'). The suit land was owned and possessed by the plaintiff and other co-sharers. However, in family partition, the suit land had fallen to the share of the plaintiff. The plaintiff had been utilizing the usufruct of the suit land. In 1970-71 Oddi-Bithal horticultural link road stood constructed through old Khasra No. 491. As a result of construction of the said link road, Khasra No. 491 (old) owned and possessed by the plaintiff and other co-sharers had been bifurcated into two parts. Khasra No. 983/491 measuring 0-3 bigha had fallen on the upper side of Oddi-Bithal horticultural link road and Khasra No.984/491 measuring 0-13 bigha had fallen on the lower side of the said link road. Revenue estate Dalan had been subjected to settlement operation in 1994-95. At the time of the last settlement in 1994-95, new Khasra No.1075 measuring 0-06-73 hectares had been carved out of old Khasra No. 983/491 and 984/491 both measuring 0-16 bigha. It was averred that the settlement official had fallen into error in carving out new khasra No. 1075 out of 2 old Khasra Nos. 983/491 and 984/491 as these two old khasra numbers were not contiguous and could not have been formed one compact piece of land. Oddi-Bithal horticultural link road had bifurcated old Khasra No. 983/491 and 984/491. The defendants had no right, title or interest in the suit

land described in Khasra No. 983/491 measuring 0-3 bigha. On 5.5.1998, the defendants had trespassed into the suit land and had threatened to take away grass therefrom. The defendants had been requested not to commit mischief but without any result. The plaintiff prayed that the defendants be restrained from interfering with the ownership and possession of the plaintiff over the suit land.

3. The respondents/defendants contested the suit of the plaintiff by filing written statement. The defendants denied the ownership and possession of the plaintiff over the suit land described in Khasra No. 983/491 measuring 0-3 bigha situated on upper side of Oddi-Bithal horticultural link road. It was averred that the plaintiff had been owner in possession of Khasra No. 983/491 and 984/491 both measuring 0-16 bighas situated on the lower side of Oddi-Bithal horticultural link road. The defendants pleaded that they are owners in possession of the land described in Khasra Nos. 967, 968, 969, 970 and 974 measuring 0-14-31 hectares in revenue estate Dalan on the upper side of Oddi-Bithal horticultural link road. The plaintiff had not been owner in possession of any land above the aforesaid link road. The defendants had denied having interfered with the ownership and possession of the plaintiff on the suit land on 5.5.1998. The settlement official had rightly carved Khasra No. 1075 measuring 0-06-73 hectares out of two old khasra Nos. 983/491 and 984/491 measuring 0-16 bigha. The defendants had denied bifurcation of old khasra No. 491 as a result of construction of Oddi-Bithal horticultural link road so as to divide the remaining area of Khasra No. 491 into two parts viz., 983/491 on the upper side of the highway and Khasra No. 984/491 on the lower side of the highway. The defendants averred that no cause of action accrued in favour of the plaintiff to institute the suit. The plaintiff was not entitled to any relief much less to the discretionary relief of permanent injunction.

4. The plaintiff filed replication to the written statement filed by the defendants and the averments as made in the written statement were denied and those of the plaint were reiterated and re-affirmed.

5. On 17.11.1998 the learned trial Court framed the following issues:

1. *Whether the plaintiff is entitled to the relief of injunction, prayed for? OPP.*
2. *Whether during the settlement operation, the settlement agency wrongly and illegally denoted Khasra No. 983/491 and 984/491 as Khasra No. 1075 and that too below the road, as alleged? OPP*
3. *Whether middle portion of Khasra No. 491 was acquired by the Govt. and the portion that remained on the upper side of the road was given khasra No. 983/491 and the portion which remained on the lower side of the road was given khasra No. 984/491, as alleged? OPP*
4. *Whether the plaintiff has got no cause of action to file the present suit? OPD*
5. *Relief.*

6. The learned trial Court vide judgment and decree dated 22.11.1999 dismissed the suit of the plaintiff. Aggrieved by the judgment and decree passed by the learned trial Court, the plaintiff/appellants filed an appeal before the learned lower Appellate Court, who too vide judgment and decree dated 11.9.2000 has been pleased to dismiss the same.

7. Aggrieved by the judgments and decrees passed by the learned Courts below, the appellants/plaintiff is before this Court by way of present regular second appeal.

8. This Court vide order dated 16.11.2001 admitted the appeal on the following substantial question of law:

> *"Whether the learned Court below is justified in ignoring the contents of Ex.PC which is a certified copy of revenue record, attestation of mutation showing the exact location of the suit land and to which presumption of truth is attached under the Evidence Act?"*

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

10. Ms. Nisha Thakur, Advocate, learned vice counsel for the appellants has strenuously argued that as a result of construction of Oddi-Bithal horticultural link road, old khasra No. 491 of the plaintiff and other co-sharers got divided into two parts. Khasra No.983/491 measuring 0-3 bighas was on the upper side of the aforesaid road whereas khasra No. 984/491 measuring 0-13 bighas was on the lower side of the highway. She invited my attention to mutation No. 464 Ex.PC which shows that khasra No. 491 had been divided into two parts. The middle portion of khasra No. 491 had been acquired by the State for construction of the road leaving behind khasra No. 983/491 and 984/491 on left and right side of the road. At the time of settlement operations, new khasra No. 1075 measuring 0-06-73 hectares was shown to have been carved out of the two old khasra No. 983/491 and 984/491 measuring 0-16 bighas and shown to have constituted a compact piece of land. The learned trial Court as also the learned lower appellate Court discarded the record prepared during the settlement operation as admittedly there was a road in between these two khasra numbers. They further discarded mutation No. 464 (Ex.PC) by holding that too much importance could not attach to the field map since the dimensions of area had not been reflected therein. In absence of such dimensions of khasra Nos. 983/491 and 984/491 correctness of field map was open to question. .

11. A close scrutiny of the evidence on record shows that the plaintiff has not cared to examine the revenue official, who had prepared field map of old khasra No. 491 of mutation Ex.PC.

12. Even otherwise, it is settled law that mutation entries do not confer title and reference in this regard can conveniently be made to ***Sawarni (Smt.) vs. Inder Kaur (Smt.) and others (1996) 6 SCC 223*** wherein the Hon'ble Court held that "*mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. The learned Additional District Judge was wholly in error in coming to a conclusion that mutation in favour of Inder Kaur conveys title in her favour. This erroneous conclusion has vitiated the entire judgment".*

13. The learned counsel for the appellants would then contend that alongwith this appeal an application bearing CMP No. 843 of 2001 had been filed by the appellants for permission to adduce additional evidence and vide order dated 16.11.2001 this application had been ordered to be heard alongwith the appeal. I have gone through the application wherein it has been contended that the appellants had already produced on record the mutation Ex.PC and it was reasonably expected that the revenue record would reflect the exact measurements and it is now that the appellants have managed to get the exact measurements of the land trifurcated vide mutation Ex.PC.

14. As observed earlier, there is no presumption of truth attached to the mutation and the appellant/plaintiff was therefore, required to lead clear, convincing and cogent evidence to establish his claim. The appellant appears to be under misconception that mutation entries have presumptive value of title.

15. At this stage, it may be noted that the plaintiff in his evidence has admitted having got the suit land demarcated more than once. However, the plaintiff did not choose to place on record the copies of such demarcation which were admittedly prepared at his instance. Therefore, irresistible conclusion is that the demarcation of the suit land had gone against the plaintiff or else he would have produced the same.

Section 114 (g) of the Evidence Act, reads as under:

"114. Court may presume existence of certain facts.- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

The Court may presume –

(a) to (f) xx xx xx

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."

Generally, it is the duty of the party to lead the best evidence in his favour, which could throw light on the issue in controversy and in case such material evidence is withheld, the Court may draw adverse inference under Section 114 (g) of the Evidence Act notwithstanding, that the onus of proof did not lie on such party and it was not called upon to produce the said evidence. (See: ***Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi, AIR 1917 PC 6; Hiralal & Ors. v. Badkulal & Ors., AIR 1953 SC 225 ; A Raghavamma & Anr. V. A. Chenchamma & Anr., AIR 1964 SC 136; The Union of India v. Mahadeolal Prabhu Dayal, AIR 1965 SC 1755; Gopal Krishnaji Ketkar v. Mohamed Haji Latif & Ors., AIR 1968 SC 1413 ; M/s Bharat Heavy Electrical Ltd. v. State of U.P. & ors., AIR 2003 SC 3024; Musauddin Ahmed v. State of Assam, AIR 2010 SC 3813 and Khatri Hotels Pvt. Ltd. & Anr. v. Union of India & Anr. (2011) 9 SCC 126).***

The substantial question of law is accordingly answered against the appellants.

16. In view of detailed discussion above, I find no merit in the appeal and the same is dismissed, so also the pending applications. The parties are left to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Ltd ...Appellant
Versus
Smt. Rikta alias Kritka & others ..Respondents

FAO No. 523 of 2007
Reserved on : 05.12.2014.
Decided on : 19.12.2014

Motor Vehicle Act, 1988- Section 149- Tribunal held that driver/insured was not having a driving licence- record showed that insured/driver possessed a learner's licence- RW-1 deposed that he was travelling in the scooter as an instructor and was sitting behind the insured in the scooter- held, that driver was having a valid driving licence and was competent to drive the vehicle - he

was accompanied by an instructor, and it cannot be said that driver was not competent to drive the vehicle.

Motor Vehicle Act, 1988—Section 149- Claimants pleaded that deceased was travelling in the vehicle as an employee of the owner to deliver the goods- the vehicle met with an accident when he was returning after delivering the goods- driver also admitted that deceased was travelling in the vehicle as an employee of the owner- held, that when a person had hired the vehicle for transporting his goods and was returning in the same vehicle, then he cannot be held to be an unauthorized passenger. (Para- 16 to 20)

Cases referred:

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

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

National Insurance Co. Ltd. versus Kamla and others, 2011 ACJ 1550

National Insurance Co. Ltd. versus Cholleti Bharatamma, 2008 ACJ 268 (SC)

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

For the respondents: Mr. Shashi Bhushan Singh, Advocate, for respondents No. 1 to 3.

Nemo for respondents No. 4 & 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

By the medium of this appeal, the appellant has questioned the award, dated 20th September, 2007, passed by the Motor Accident Claims Tribunal, Kullu, H.P., (hereinafter referred to as "the Tribunal") in Claim Petition No. 74 of 2006, whereby compensation to the tune of ` 2,66,000/- with interest at the rate of 7% per annum, from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimants-respondents 1 to 3 herein, with costs and the appellant-Oriental Insurance Company was saddled with the liability (for short, the "impugned award").

Brief Facts:

2. The claimants, being parents and minor brother of deceased Surjeet Singh, filed claim petition before the Tribunal, for grant of compensation to the tune of Rs.9,00,000/-, as per the break-ups given in the claim petition.

3. Precisely, the case of the claimants was that deceased Surjeet Singh was travelling in Mahindra Jeep bearing registration No. HP-34-3632, on 18.05.2006, with goods, which were to be delivered to consignee Shri Budh Ram, son of Shri Bhomti. After the said goods were delivered to said Shri Budh Ram, the driver lost control over the said vehicle, at Chowuki near B.S.N.L. Tower, at about 6.00 p.m. and the vehicle rolled down. Surjeet Singh sustained injuries, was taken to Primary Health Centre, Jari and thereafter was referred to Zonal Hospital Kullu, but died on the way. FIR No. 227/2006, under Sections 279 & 337 of the Indian Penal Code was registered against the driver and final charge-sheet was filed before the Chief Judicial Magistrate, Kullu. The deceased was 19 years of age at the time of accident and was earning Rs.3,500/- per month.

4. The respondents, i.e. the insured-owner, the driver and the insurer-Insurance Company contested the claim petition on the grounds taken in their memo of objections. Following issues came to be framed by the Tribunal on 01.03.2007:-

"1. *Whether the deceased Surjit died in a motor accident caused on 18.5.06 at Chowuki near BSNL Tower due to the rash and negligent driving of the jeep No. HP-34-3632 by its driver-respondent No. 2? ...OPP*

2. *If issue No. 1 is proved in affirmative to what amount of compensation the petitioners are entitled and from whom? ....OPP*

3. *Whether the driver of the offending vehicle was not holding a valid and effective driving licence at the time of the accident? OPR-3*

4. *Whether the vehicle was being plied in violation of the terms and conditions of insurance policy at the time of accident? ....OPR -3*

5. *Whether the deceased was traveling as an unauthorized/gratuitous passenger in the vehicle at the time of accident? If so, its effect? OPR-3*

6. *Relief."*

5. The claimants examined Head Constable Manoj Kumari (PW-1), Sher Singh (PW-3), Dr. Rituvesh Negi (PW-4), Gopi Chand (PW-5) and Dr. S.S. Pujara (PW-6). Claimant Rikta @ Kritka herself appeared in the witness box as PW-2. Respondents also examined Davinder Singh (RW-1), Kumari Aashita (RW-4) and ASI Khem Chand (RW-5). Owner Gopi Chand and driver Devinder Pal Singh also appeared in the witness box as RW-2 and RW-3, respectively. Parties also placed on record copies of FIR (Ext. PW-1/A), pariwar register (Ext. PW-2/A), death certificate (Ext. PW-2/B), MLC (Ext. PW-4/A), post mortem report (Ext. PW-6/A), driving licence (Ext. RW1/A), R.C. (Ext. RW-2/A), insurance cover note (Ext. RW-2/B) and insurance policy (Ext. R.X.).

6. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved that the accident was outcome of the rash and negligent driving of driver, namely, Devinder Pal Singh, in which the deceased sustained injuries and succumbed to the injuries.

Issue No. 1

7. The appellant or any other party to the lis has not questioned the impugned award relating to this issue. Accordingly, the findings returned by the Tribunal on this issue are upheld.

Issue No. 2.

8. The claimants have proved by leading evidence, oral as well as documentary, that the age of the deceased was 19 years at the time of accident and was earning Rs.3,500 per month. The Tribunal, after making assessment, held that the loss of dependency towards the claimants was not less than Rs.16,000/- per annum. Thus, the multiplier of '16' was just and appropriate, while keeping in view the age of the deceased and the claimants.

9. The insured-owner, driver and the claimants have not questioned the assessment of the compensation made by the Tribunal, thus is not disputed.

10. After examining the evidence available on the record, I am of the considered view that the Tribunal has granted just and appropriate compensation to the tune of `2,56,000/- under the head "loss of dependency", Rs.5,000/- under the head "funeral expenses" and Rs. 5,000/- under the head "loss of estate", total amounting to Rs. 2,66,000/-, to the claimants. Accordingly, the findings returned by the Tribunal on this issue are upheld.

Issue No. 3.

11. The driver was having the driving licence to drive the "light motor vehicle", as per driving licence Ext. RW-1/A and the Mahindra Jeep is also a

"light motor vehicle" as held by this Court in **FAO No. 33 of 2010**, titled as the **United India Insurance Company Ltd.** versus **Shri Madan Lal & others** alongwith another connected matter, decided on 17.10.2014. The insurer has not led any evidence to prove this issue. Accordingly, the findings returned by the Tribunal on this issue are also upheld.

Issue No. 4.

12. The insurer has not led any evidence to prove that the offending vehicle was being driven in violation of the terms and conditions of the Insurance Policy read with the mandate of Section 149 of the Motor Vehicles Act, 1988, hereinafter referred to as "the Act".

13. It is a beaten law of land that the insurer has to plead and prove that the owner of the offending vehicle has committed willful breach of the terms contained in the Insurance Policy and mere plea here and there cannot be a ground for seeking exoneration.

14. My this view is fortified by the Apex Court judgment in a case titled as **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 SC 1531**. It is apt to reproduce the relevant portion of para 105 of the judgment, *supra,* herein: :

> *105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> (iii) .....
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

15. It is also profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** 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 Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

Accordingly, the findings returned by the Tribunal on this issue are upheld.

Issue No. 5.

16. Admittedly, the claimants have pleaded in the claim petition that deceased Surjeet Singh was travelling in the offending vehicle as an employee of the owner in order to deliver the goods to consignee Shri Budh Ram, son of Shri Bhomti, resident of Village Malana; while returning back after delivering the goods, the vehicle met with an accident and the deceased lost his life. The claimants have pleaded and proved the said fact. The insured-owner and the driver have also admitted that the deceased was travelling in the said vehicle as an employee of owner Gopi Chand and met with the accident after delivering the goods.

17. This Court in a case titled as **National Insurance Co. Ltd. versus Kamla and others,** reported in **2011 ACJ 1550,** has also discussed the same issue while referring to the judgment of the Apex Court in **National Insurance Co. Ltd. versus Cholleti Bharatamma,** reported in **2008 ACJ 268 (SC)** and held that a person who had hired the vehicle for transporting his goods for sale and was returning in the same vehicle, cannot be held to be an unauthorized/gratuitous passenger till he reaches the place of destination. It is apt to reproduce paras 8 to 11 of the judgment herein:

"8. Coming to the second plea taken by the learned counsel for the appellant that the deceased was a gratuitous passenger, a perusal of the reply filed by respondent No. 2, insurance company shows that they had only pleaded that the deceased was admittedly not employee of the insured and was traveling in the truck as a gratuitous passenger. Thus, it was submitted that the Insurance Company was not liable. Reliance was also placed upon the decision in ***National Insurance Co. Ltd. v. Cholleti Bharatamma, 2008 ACJ 268 (SC)*** *wherein the plea was taken that the owner himself travel in the cabin of the vehicle and not with the goods so as to be covered under Section 147. However, in case the driver permits a passenger to travel in the tool box, he cannot escape from the liability that he was negligent in driving the vehicle and moreover, in a petition under Section 163-A of the Motor Vehicles Act, rash or negligent driving is not to be proved and, therefore, this decision does not help the appellant.*

*9. Learned counsel for the appellant had also relied upon the decision in **National Insurance Co. Ltd. v. Maghi Ram Ram**, 2010 ACJ 2096 (HP), wherein a learned Judge of this Court has considered the question and had observed that the Insurance Company is liable in respect of death or bodily injury to any person including the owner of goods or his authorized representative carried in the vehicle. It was observed that it is apparent that the goods must normally be carried in the vehicle at the time of accident.*

*10. The allegations made by the petitioners in the petition as well as in the evidence were that the deceased had gone after hiring the truck with his vegetable and was coming in the same vehicle when the accident took place. The learned counsel for the claimants/respondents No. 1 to 4 had relied upon the decision of Hon'ble Punjab & Haryana High Court in **National Insurance Co. Ltd. v. Urmila Urmila, 2008 ACJ 1381 (P&H) H)**, wherein, it was observed that a passenger was returning after selling his goods when the vehicle turned turtle due to rash and negligent driving. Insurance Company seeks to avoid its liability on the ground that the deceased was no longer owner of the goods as he had sold them off. It was observed that the deceased had hired the vehicle for transporting his animals for selling and was returning in the same vehicle. It was held that the deceased was not an unauthorized/gratuitous passenger in the vehicle till he reached the place from where he had hired the vehicle.*

11. The above decision clearly applies to the present facts, which are similar to the facts of the case and accordingly, I am inclined to hold that the deceased was not an unauthorized/ gratuitous passenger. No conditions of the insurance policy have been proved that the risk of the owner of goods was not covered in the insurance policy and as such, there is no substance in the plea raised by the learned counsel for the appellant, which is rejected accordingly."

18. This Court has also laid down the same principle in **FAO No. 9 of 2007**, titled as **National Insurance Company Limited** versus **Smt. Teji Devi & others**, alongwith another connected matter, decided on **22.08.2014.**

19. It was for the insurer to plead and prove that the deceased was travelling in the offending vehicle as a gratuitous passenger, has not led any evidence to this effect and has failed to prove it.

20. It is an admitted case of the parties that the deceased was travelling in the said vehicle at the time of accident; he was deputed as a representative of goods in the said vehicle by the owner in order to deliver the same to one Shri Budh Ram and while returning back after consigning the goods, the vehicle met with an accident. Thus, it cannot be said that the deceased was travelling in the offending vehicle as a gratuitous passenger. The Tribunal has rightly made discussion in para-14 of the impugned judgment and decided it against the insurer and in favour of the claimants. Accordingly, the findings returned by the Tribunal on this issue are upheld.

21. Having said so, the Tribunal has rightly passed the impugned award. Accordingly, the impugned award is upheld and the appeal is dismissed.

22. 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.

23. 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.

Oriental Insurance Company ...Appellant
Versus
Smt. Tanu Chauhan & others ...Respondents

FAO No. 186 of 2011 &
Cross Objections No. 365 of 2011
Reserved on : 05.12.2014
Decided on : 19.12.2014

Motor Vehicle Act, 1988—Section 171- Tribunal had granted interest on compensation at the rate of 9% per annum- held, that the rate of interest has to be granted at the rate of 7.5% per annum- accordingly, rate of interest reduced to 7.5% per annum. (Para-16)

For the appellant: Mr. G.C. Gupta, Senior non-objector Advocate with Ms. Meera Devi, Advocate.

For respondents: Mr. Sanjeev Kuthiala and Ms. and cross objectors Ambika Kotwal, Advocates. No. 1 to 3.
Nemo for respondents No. 4 & 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Challenge in this appeal is to the award, dated 1st March, 2011, passed by the Motor Accident Claims Tribunal, (1), Mandi, H.P. (hereinafter referred to as "the Tribunal") in Claim Petition No. 91 of 2007, whereby compensation to the tune of Rs. 4,39,000/- with interest at the rate of 9% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimants-respondents 1 to 3 herein and against the owner-insured, the driver and the insurer-appellant herein, (for short, the "impugned award").

Brief Facts:

2. The claimants, being the widow, son and mother of deceased Anil Kumar, filed claim petition before the Tribunal, for grant of compensation, as per the break-ups given in the claim petition, on the ground that driver Ishwar Chand, was driving bus bearing registration No. HP-68-0203, rashly and negligently, on 04.11.2006, at about 1.00 a.m., at Nabai Nag near Baijnath, District Kangra, H.P., caused the accident; one Anil Kumar, who was travelling in the said bus, sustained injuries and succumbed to the injuries and FIR No. 177/2006 was registered in Police Station, Baijnath, District Kangra.

3. The respondents, i.e. the insured-owner, the driver and the insurer-Insurance Company contested the claim petition on the grounds taken in their memo of objections. Following issues came to be framed by the Tribunal on 17.02.2009:-

"1. *Whether the bus No. HP-68-0203 was involved in the accident resulting into death of Anil Kumar? ...OPP*

2. *If issue No. 1 is proved, to what amount of compensation the petitioners are entitled to and from whom? ...OPP*

3. *Whether the driver of bus No. HP-68-0203 was not holding valid and effective driving licence to drive the bus at the time of accident? ...OPR*

4. *Whether the driver was driving the bus No. HP-68-0203 without registration cum fitness certificate and route permit in violation of the terms and conditions of the insurance policy? ....OPR*

5. *Relief."*

4. Claimants have examined Shri Guldev Singh (PW-2) and claimant Smt. Tanu Chauhan also appeared in the witness box as PW-1. The respondents examined Hakam Singh (RW-1) and the insured-owner Anupam Pal also appeared in the witness box as RW-2.

5. The claimants have filed the claim petition in terms of the mandate of Section 163-A of the Motor Vehicles Act, 1988, hereinafter referred to as "the Act", thus the question of driving the offending vehicle, rashly and negligently, cannot be gone through.

Issue No. 1.

6. The claimants have specifically pleaded in para-23 of the claim petition that deceased Anil Kumar was conductor by profession; was travelling in the said vehicle, which was being driven by driver Ishwar Chand, rashly and negligently; met with an accident and Anil Kumar sustained injuries and succumbed to the injuries.

7. The claimants have placed on record copies of FIR (Ex. PA), postmortem report (Ext. PB), birth certificates (Ext. PC & Ext. PD), marriage certificate (Ext. PE), abstract of family register (Mark-A) and experience certificate (Mark-B).

8. Claimant Tanu Chauhan and Guldev Singh, have stated that the deceased died in the road accident, on the fateful day, while travelling in the offending vehicle, which was being driven by driver Ishwar Chand, rashly and negligently.

9. The respondents have not led any evidence in rebuttal, but have stated that the deceased had stolen the offending vehicle and caused the accident.

10. It is an admitted case of the parties that the deceased had lost his life in the traffic accident by the use of the offending vehicle. Accordingly, the findings returned by the Tribunal on this issue are upheld.

11. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 & 4.

Issue No. 3 & 4:

12. The onus to prove these issues was upon the insurer. It has not led any evidence to the effect that driver of the offending bus was not having valid and effective driving licence to drive it, at the relevant time; the offending vehicle was being driven without registration-cum-fitness certificate and route permit and in violation of the terms and conditions of the Insurance Policy read with the mandate of Section 149 of the Act. Thus, the Insurance Company has failed to discharge the onus. Accordingly, the Tribunal has rightly decided these issues against the insurer and in favour of the claimants.

Issue No. 2.

13. The Tribunal, after taking note of the pleadings, the evidence, particularly the statement of PW-2 Guldev Singh and the documents available on the record, held that the deceased was earning Rs.3,000/- per month and the loss of dependency towards the claimants was not less than Rs.2,000/- per month or Rs.24,000/- per annum.

14. The claimants have pleaded in the claim petition that the age of the deceased, at the time of accident, was 25 years. As per the matriculation certificate, Ext. PC, the date of birth of the deceased is 20.09.1981. The accident occurred on 04.11.2006. Thus, the deceased was 25 years of age at the relevant time and the Tribunal has rightly determined the age of the deceased and applied the multiplier of '18', while assessing the compensation.

15. Having said so, I am of the considered opinion, that the Tribunal has rightly awarded compensation to the tune of Rs.4,32,000/- under the head "loss of dependency", Rs.5,000/- under the head "loss of consortium" and Rs.2,000/- under the head "last rites", to the claimants.

16. In the given circumstances, the amount awarded is not excessive, in any way. However, the Tribunal has fallen in error in granting interest at the rate of 9% per annum instead of 7.5% per annum. Accordingly, the rate of interest is reduced to 7.5% per annum.

17. Having said so, the claimants are entitled to compensation to the tune of Rs.4,39,000/- with interest at the rate of 7.5% per annum from the date of the claim petition.

18. 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. The excess amount be refunded to the insurer.

19. Accordingly, the impugned award is modified and the appeal is disposed of.

20. Send down the records after placing copy of the judgment on record.

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

Rama Nand Rathore
Vs.
State of H.P. & Others

Cr.MMO No. 276 of 2014
Decided on: 19th December, 2014

Code of Criminal Procedure, 1973- Section 154- Petitioner had applied for the copy of FIR but the copy was not supplied to him- held that, FIR is a public document and the accused is entitled to a copy of the same- he can file an application himself or through his representatives for getting the certified copy on which copy shall be supplied to him within 24 hours - accused can also get copy of FIR from a Magistrate within two working days- police directed to upload the FIR on the website except where a decision not to upload is taken by Deputy Superintendent of Police by a speaking order - a person can file an appeal before Superintendent of Police which shall be decided within three working days by a Committee of three higher Officer. (Para-2 to 21)

Cases referred:

Shyam Lal Vs. State of U.P. and others, 1998 Crl.L.J 2879

Chnnappa Andanappa Siddareddy and other Vs. State, 1980 Crl.L.J. 1022

Munna Singh Vs. State of M.P., 1989 Crl.L.J. 580

Sardar Dapinder Singh Bath Vs. State of West Bengal

Present: Mr. Y.P.S. Dhaulta and Mr.Bhim Raj Sharma, Advocates, for the petitioner.

Ms.Meenakshi Sharma and Mr.Rupinder Singh, Additional Advocate Generals with Ms.Parul Negi, Deputy Advocate General, for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, J.

Democracy expects openness and openness is a concomitant of a free society and sunlight is the best disinfectant. It cannot be disputed that ordinary rule is that secrecy must be an exception, justifiable only when it is demanded by the requirement of public interest.

2. These observations are being made in context of the present petition which seeks quashment of FIR No. 145 of 2014, dated 29.11.2014, registered under Sections 447 and 341 of the Indian Penal Code (for short 'IPC'), registered at Police Station East, Chhota Shimla. However, the copy of the FIR has not been placed on record. In response to the query as to why the copy of FIR has not been placed on record, the petitioner, who is present in person, has stated that he is senior citizen of 70 years of age and retired as Assistant Commissioner from the Department of Excise and Taxation, Himachal Pradesh. Being a respectable person, he is too scared to go to the Police Station to get a copy of the FIR, because he may be arrested, since the complainant happens to be none other, than the Superintendent of Police at Shimla. He further apprised this Court that he has already applied for the copy of the same through his counsel on 4.12.2014 under the Right to Information Act, 2005, but the copy thereof has not been made available to him ostensibly because as per the usual practice, the outer limit of 30 days for supplying information as provided under Section 7 of the Right to Information Act is always considered to be the inner limit by those in the helm of affairs.

3. Indisputably, for the present, there is no provision for providing First Information Report under the codified limit, but then the liberty of an individual is inextricably linked with his right to be aware how he has been booked, under which law and what are the allegations set out against him. Liberty in freedom is the strongest passion of men and many have sacrificed their lives for the cause of liberty.

4. At this stage, it would be appropriate to take note of the various provisions of the Code of Criminal Procedure (for short 'Code'):-

> ***"154:- Information in cognizable cases:-***
>
> *(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.*
>
> *(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant. (3) Any person, aggrieved by a refusal on the part of an officer in*

charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

5. Section 154 of the Code provides for information as to the cognizable cases and investigation of such cases, whereas Section 156 of the Code provides for police officer's power to investigate cognizable cases. After investigation, final report is submitted by the police to the Magistrate having territorial jurisdiction. After completion of investigation and submission of charge-sheet, before trial, the accused is entitled to copies of the police report as provided in Section 207 of the Code. The said Section reads as follows:-

"207. ***Supply to the accused of copy of police report and other documents:-*** *In any case where the proceedings has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-*

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub-section (3) of section 161 of all the persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173;

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused.

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect if either personally or through pleader in Court."

6. Section 207 of the Code, therefore, mandates that after completion of investigation and submission of final form before the learned Magistrate, it is the duty of the learned Magistrate to furnish the accused a free copy of the documents, which includes police report, FIR, statements recorded under Sections 161 and 164 of the Code etc. However, this provision comes into play only after the investigation is over and after submission of the final form. Prior to that, as noted above, there is no

provision under the Code for an accused to be supplied with a copy of the F.I.R.

7. Now in absence of copy of F.I.R., does the accused have an effective right to defend himself, especially when he is not in possession to know the nature of allegations so that he can approach an appropriate form for obtaining necessary relief for protecting his right and liberty. Is not the copy of FIR a public document?

8. Section 74 of the Indian Evidence Act (for short 'Act') deals with public documents and reads as follows:-

> ***"74. Public documents. The following documents are public documents:-***
>
> *(1) documents forming the acts, or records of the acts:-*
>
> *(i) of the sovereign authority,*
>
> *(ii) of official bodies and tribunals, and*
>
> *(iii) of public officers, legislative, judicial and executive, (of any part of India or of the Commonwealth), or of a foreign country;*
>
> *(2) public records kept (in any State) of private documents."*

9. Section 76 of the 'Act' deals with certified copies of public documents and reads thus:-

> *"76.* ***Certified copies of Public Documents****- Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal frees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.*
>
> *Explanation- Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section."*

10. A Division Bench of Allahabad High Court in ***Shyam Lal Vs. State of U.P. and others,*** 1998 Crl.L.J 2879 has ruled that the First Information Report is a public document.

11. In ***Chnnappa Andanappa Siddareddy and other Vs. State,*** 1980 Crl.L.J. 1022 has held thus:-

> *"The FIR being a record of the acts of the public officers prepared in discharge of the official duty is such a public document as defined under Section 74 of the Evidence Act. Under Section 76 of the Evidence Act, every public officer having the custody of a public document, which any person has a right to inspect is bound to give such person on demand a copy of it on payment of the legal fees therefor."*

12. A Division bench of Madhya Pradesh High Court in ***Munna Singh Vs. State of M.P.,*** 1989 Crl.L.J. 580 has opined that a First Information Report is not a privilege document under the Evidence Act.

13. Learned Single Judge of the Calcutta High Court in ***Sardar Dapinder Singh Bath Vs. State of West Bengal*** writ petition (W) No. 5474 of 2007 has held that as soon as an FIR is registered, it becomes a public document and members of the public are entitled to have certified copy thereof. Thus there can be no trace of doubt that FIR is a public document as defined under Section 74 of the Evidence Act.

14. Now once it is concluded that FIR is a public document, then the accused at least should be entitled to the copy thereof. At this stage, it will be advantageous to make reference to a Division Bench of Delhi High Court in ***Court on its own Motion Vs. State,*** Writ Petition (Cr.) Nol. 468 of 2010, wherein the Court was seized with the same question and it was held as follows:-

> *"22. Presently, coming to the entitlement of the accused to get a copy of FIR, we may notice few decisions in the field.* ***In Dhanpat Singh v. Emperor****, AIR 1917 Patna 625, it has been held thus:*
>
> > *"… It is vitally necessary that an accused person should be granted a copy of the first information at the earliest possible state in order that he may get the benefit of legal advice. To put difficulties in the way of his obtaining such a copy is only creating a temptation in the way of the officers who are in possession of the originals."*
>
> *23. The High Court of Calcutta in* ***Panchanan Mondal v. The State****, 1971 Crl.L.J. 875 has opined that the accused is entitled to a copy of the FIR on payment of legal fees at any stage. After so opining, the learned Judge proceeded to deal with the facet of prejudice in the following terms:*
>
> > *"The question of prejudice of the accused on account of the denial of the copy of the FIR at the earlier stage therefore assumes greater importance and on a proper consideration thereof, I hold that it is expedient in the interests of justice that a certified copy of the first information report, which is a public document, should be granted to the accused on his payment of the legal fees therefor at any stage even earlier than the stage of S.173(4) of the Code of Criminal Procedure. At the later stage of accused will have the right to have a free copy but the same would not take away the right he already has in law to have a certified copy of the first information report on payment of the legal fees."*
>
> *24. In* ***Jayantibhai Lalubhai Patel v. The State of Gujarat****, 1992 Crl. L.J. 2377, the High Court of Gujarat has ruled thus:*
>
> > *"6. …whenever FIR is registered against the accused, a copy of it is forwarded to the Court under provisions of the Code; Thus it becomes a public document. Considering (1) of the provisions of Art.21 of the Constitution of India, (2) First Information Report is a public document in view of S.74 of the Evidence Act; (3) Accused gets right as allegations are made against him under provisions of S.76 of the Indian Evidence Act, and (4) FIR is a document to which S.162 of the Code does not apply and is of*

considerable value as on that basis investigation commenced and that is the first version of the prosecution, as and when application is made by accused for a certified copy of the complaint, the Court to which it is forwarded should give certified copy of the FIR, if the application and legal fees thereof have been tendered for the same in the Court of law..."

25. The situation can be viewed from the constitutional perspective. Article 21 of the Constitution of India uses the expression 'personal liberty'. The said expression is not restricted to freedom from physical restraint but Includes a full range of rights which has been interpreted and conferred by the Apex Court in a host of decisions. It is worth noting, the great philosopher Socrates gave immense emphasis on 'personal liberty'. The State has a sacrosanct duty to preserve the liberties of citizens and every act touching the liberty of a citizen has to be tested on the anvil and touchstone of Article 21 of the Constitution of India, both substantive and also on the canons of procedural or adjective law. Article 22 of the Constitution of India also has significant relevance in the present context inasmuch as it deals with protection against arrest and detention in certain cases. For the sake of completeness, we think it apposite to reproduce Articles 21 and 22 of the Constitution of India:

"21. Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law.

22. Protection against arrest and detention in certain cases –

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply-

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-(a) an Advisory Board consisting of persons who are, or have been, or

are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under subclauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).”

26. The Constitution Bench in ***Shri Gurbaksh Singh Sibbia and others v. State of Punjab****, (1980) 2 SCC 565 has held thus:*

“26. … No doubt can linger after the decision in Maneka Gandhi v. Union of India, (1978) 1 SCC 248, that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein.”

27. In ***Gudikanti Narasimhulu v. Public Prosecutor****, (1978) 1 SCC 240, it has been held thus:*

> *"…the issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process…. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law. The last four words of Article 21 are the life of that human right."*

28. In ***Ranjitsing Brahmajeetsingh Sharma v. State of Maharashtra and another****, (2005) 5 SCC 294, while reiterating that presumption of innocence is a human right, the three-Judge Bench has held thus:*

> *"35. …Article 21 in view of its expansive meaning not only protects life and liberty but also envisages a fair procedure. Liberty of a person should not ordinarily be interfered with unless there exit cogent grounds therefor."*

29. In ***State of West Bengal and others v. Committee for Protection of Democratic Rights, West Bengal and others****, (2010) 3 SCC 571, the Apex Court has expressed thus:*

> *"68(ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State."*

30. In ***Narendra Singh and another v. State of M.P.****, (2004) 10 SCC 699, the Apex Court has observed that presumption of innocence is a human right.*

31. In this context, we may refer with profit the decision in Som ***Mittal v. Government of Karnataka****, (2008) 3 SCC 753, wherein it has been stated thus:*

> *"46. The right of liberty under Article 21 of the Constitution is a valuable right, and hence should not be lightly interfered with. It was won by the people of Europe and America after tremendous historical struggles and sacrifices. One is reminded to Charles Dickens's novel A Tale of Two Cities in which Dr. Manette was incarcerated in the Bastille for 18 years on a mere lettre de cachet of a French aristocrat, although he was innocent."*

32. The Apex Court in ***D.K. Basu v. State of West Bengal****, AIR 1997 SC 610, while emphasizing on personal liberty in*

a civilized society on the backdrop of constitutional philosophy especially enshrined under Articles 21 and 22(1) of the Constitution of India, has expressed thus:

> *"22. … The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law."*

In the said case, regard being had to the difficulties faced by the accused persons and keeping in view the concept that the action of the State must be "right, just and fair" and that there should not be any kind of torture, their Lordships issued the following directions:

> *"36. We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:*
>
> *(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.*
>
> *(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.*
>
> *(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock-up, shall be entitled to have one friend or relative or other person known to*

him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a penal for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

33. Recently, in the decision rendered in ***Siddharam Satlingappa Mhetre v. State of Maharashtra and others*** *(Criminal Appeal No.2271/2010 decided on*

2.12.2010), the Apex Court, while dealing with the concept of liberty, has opined thus:

> *"41. All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty.*
>
> *42. Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why "liberty" is called the very quintessence of a civilized existence.*
>
> *43. Origin of "liberty"' can be traced in the ancient Greek civilization. The Greeks distinguished between the liberty of the group and the liberty of the individual. In 431 B.C., an Athenian statesman described that the concept of liberty was the outcome of two notions, firstly, protection of group from attack and secondly, the ambition of the group to realize itself as fully as possible through the self-realization of the individual by way of human reason. Greeks assigned the duty of protecting their liberties to the State. According to Aristotle, as the state was a means to fulfil certain fundamental needs of human nature and was a means for development of individuals' personality in association of fellow citizens so it was natural and necessary to man. Plato found his "republic" as the best source for the achievement of the self-realization of the people."*

After so holding, their Lordships referred to various jurisprudential thought expounded by eminent jurists which we think it condign to reproduce:

> *"53. Roscoe Pound, an eminent and one of the greatest American Law Professors aptly observed in his book "The Development of Constitutional Guarantee of Liberty" that whatever, `liberty' may mean today, the liberty is guaranteed by our bills of rights, "is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from arbitrary and unreasonable exercise of the power and authority of those who are designated or chosen in a politically organized society to adjust that society to individuals."*
>
> *54. Blackstone in "Commentaries on the Laws of England", Vol.I, p.134 aptly observed that "Personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due process of law".*
>
> *X X X X X X X X*

> *57. Eminent former Judge of this Court, Justice H.R. Khanna in a speech as published in 2 IJIL, Vol.18 (1978), p.133 observed that "liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein, there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body".*

Thereafter, their Lordships referred to life and liberty under our Constitution and opined thus:

> *"61. Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society."*

In this regard, we think it seemly to reproduce paragraphs 71 and 72 of the said decision:

> *"71. The object of Article 21 is to prevent encroachment upon personal liberty in any manner. Article 21 is repository of all human rights essentially for a person or a citizen. A fruitful and meaningful life presupposes full of dignity, honour, health and welfare. In the modern "Welfare Philosophy", it is for the State to ensure these essentials of life to all its citizens, and if possible to non-citizens. While invoking the provisions of Article 21, and by referring to the oft-quoted statement of Joseph Addision, "Better to die ten thousand deaths than wound my honour", the Apex court in Khedat Mazdoor Chetana Sangath v. State of M.P. and Others (1994) 6 SCC 260 posed to itself a question "If dignity or honour vanishes what remains of life"? This is the significance of the Right to Life and Personal Liberty guaranteed under the Constitution of India in its third part.*
>
> *72. This court in Central Inland Water Transport Corporation Ltd. and Another v. Brojo Nath Ganguly and Another (1986) 3 SCC 156 observed that the law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and justice, and unless there is anything to the contrary in the statute, Court must take cognizance of that fact and act accordingly."*

34. From the aforesaid enunciation of law, it is graphically vivid that fair and impartial investigation is a facet of Article 21 of the Constitution of India and presumption as regards the innocence of an accused is a human right. Therefore, a person who is booked under criminal law has a right to know the nature of allegations so that he can take necessary steps to safeguard his liberty. It is imperative in a country governed by Rule of Law as crusaders of liberty have pronounced 'Give me liberty, or give me death'.

Not for nothing it has been said that when a dent is created in t he spine of liberty, it leads to a rainbow of chaos.

35. At this juncture, we may profitably refer to a part of the first Menon & Pai Foundation Law Lecture delivered at Cochin by Lord David Pannick, Queen's Counsel, wherein he has spoken thus:

> *"We should respect human rights in difficult times as well as in tolerable times because we are battling against terrorism precisely so that we can maintain a democratic society in which we enjoy individual liberty, the right to debate and dissent, and all the other freedoms that we cherish and which the terrorists abhor. To discard those values even temporarily, devalues all of us. And it would hand a victory to the terrorists, part of whose goal is to destroy the values we cherish and they despise"*

The aforesaid luminously throws the laser beam on the cherished value of liberty.

36. In this context, it is apt to note that the right to know has its own signification. The protagonists of modern democracy plead and preach with immense enthusiasm and rationally support the principle that the collective has a basic and fundamental right to know about things which are supposed to be known by the society. In ***The State of Uttar Pradesh v. Raj Narain and others****, AIR 1975 SC 865, while dealing with a claim of privilege under Section 123 of the Evidence Act, their Lordships have held as follows:*

> *"41. The several decisions to which reference has already been made establish that the foundation of the law behind Sections 123 and 162 of the Evidence Act is the same as in English law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. The court will proprio motu exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. <u>Confidentiality is not a head of privilege. It is a consideration to bear in mind</u>. It is not that the contents contain material which it would be damaging to the national interest to divulge but rather that the documents would be of class which demand protection. (See 1973 AC 388 (supra) at p. 40). To illustrate, the class of documents would embrace Cabinet papers, Foreign Office dispatches, papers regarding the security to the State and high level inter-departmental minutes. In the ultimate analysis the contents of the document are so described that it could be seen at*

> *once that in the public interest the documents are to be withheld. (See Merricks v. Nott Bower. [1964] 1 All ER 717."*

We have referred to the same only to show how a larger interest will prevail over the private interest. It is basically in the realm of the doctrine of striking of balance.

37. In ***S.P. Gupta v. Union of India and others****, AIR 1982 SC 149, their Lordships opined thus:*

> *"73. …Now we agree with the learned counsel on behalf of the petitioners that this immunity should not be lightly extended to any other class of documents, but, at the same time, boundaries cannot be regarded as immutably fixed. The principle is that whenever it is clearly contrary to the public interest for a document to be disclosed, then it is in law immune from disclosure. If a new class comes into existence to which this principle applies, then that class would enjoy the same immunity."*

Thereafter, their Lordships proceeded to state as follows:

> *"74. …It is necessary to repeat and re-emphasize that this claim of immunity can be justifiably made only, if it is felt that the disclosure of the document would be injurious to public interest. Where the State is a party to an action in which disclosure of a document is sought by the opposite party, it is possible that the decision to withhold the document may be influenced by the apprehension that such disclosure may adversely affect the head of the department or the department itself or the minister or even the Government or that it may provoke public criticism or censure in the legislature or in the press, but it is essential that such considerations should be totally kept out in reaching the decision whether or not to disclose the document. So also the effect of the document on the ultimate course of the litigation whether its disclosure would hurt the State in its defence - should have no relevance in making a claim for immunity against disclosure. <u>The sole and only consideration must be whether the disclosure of the document would be detrimental to public interest in the particular case before the Court."</u>*
>
> *[Emphasis supplied]*

38. In ***Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd. and others****, AIR 1989 SC 190, their Lordships, while dealing with the said issue, have ruled thus:*

> *"9. Elaborate arguments were advanced by counsel for both sides. It was contended that there was no contempt of Courts involved herein and furthermore, it was contended that pre-stoppage of newspaper article or publication on matters of public importance was uncalled for and contrary to freedom of Press enshrined in our Constitution and in our laws. The publication was on a public matter, so public debate*

> *cannot and should not be stopped. On the other hand, it was submitted that due administration of justice must be unimpaired. We have to balance in the words of Lord Scarman in the House of WP(Crl.) No.468/2010 Page 26 of 35 Lords in Attorney-General v. British Broadcasting Corporation, 1981 A.C. 303 at page 354, between the two interests of great public importance, freedom of speech and administration of justice. A balance, in our opinion, has to be struck between the requirements of free press and fair trial in the words of the Justice Black in Harry Bridges v. State of California, (86 Led 252 at page 260)."*

39. Thereafter, their Lordships referred to the decisions rendered in ***Express Newspapers (Pvt.) Ltd. v. The Union of India****, AIR 1958 SC 578,* ***State of Bombay v. R.M.D. Chamarbaugwala,*** *AIR 1957 SC 699,* ***In Re:*** *P.C. Sen, AIR 1970 SC 1821,* ***C.K. Daphtary v. O.P. Gupta****, AIR 1971 SC 1132****, Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India****, AIR 1986 SC 515,* ***Harry Bridges v. State of California****, 1941-86 Law ed 192,* ***Abrams v. United States****, (1918) 63 Law ed 1173,* ***John D. Pennekamp v. State of Flordia,*** *(1945) 90 Law ed 1295,* ***Nebraska Press Association v. Hugh Stuart,*** *(1976) 49 Law ed 2d 683,* ***Attorney General v. British Broadcasting Corpn****., (1979) 3 All ER 45,* ***Attorney General v. B.B.C.****, 1981 AC 303,* ***Attorney General v. Times Newspapers Ltd.,*** *(1974) AC 273,* ***Bread Manufacturers Ltd.****, (1937) 37 SR (NSW) 242 and eventually came to hold as under:*

> *"38. In this peculiar situation our task has been difficult and complex. The task of a modern Judge, as has been said, is increasingly becoming complex. Furthermore, the lot of a democratic Judge is heavier and thus nobler. We cannot escape the burden of individual responsibilities in a particular situation in view of the peculiar facts and circumstances of the case. There is no escape in absolute. Having regard, however, to different aspects of law and the several decisions, by which though we are not bound, except the decisions of this Court referred to hereinbefore, about which we have mentioned, there is no decision dealing with this particular problem, we are of the opinion that as the Issue is not going to affect the general public or public life nor any jury is involved, it would be proper and legal, on an appraisal of the balance of convenience between the risk which will be caused by the publication of the article and the damage to the fundamental right of freedom of knowledge of the people concerned and the obligation of Press to keep people informed, that the injunction should not continue any further."*

40. In ***Dinesh Trivedi, M.P. and others v. Union of India and others****, (1997) 4 SCC 306, while dealing with the facet of right to know, their Lordships have expressed thus:*

> *"16. In modern constitutional democracies, it is axiomatic that citizens have a right to know about*

the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognised limitations; it is, by no means, absolute. This Court has had many an opportunity to express itself upon this issue. In the case of State of U.P. v. Raj Narain, (1975) 4 SCC 428, Mathew, J. eloquently expressed this proposition in the following words:

> *"In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal selfinterest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption." [Emphasis added]*

41. Be it noted, in the said case, their Lordships referred to the decision in S.P. Gupta (supra) opining that the ordinary rule is that secrecy must be an exception, justifiable only when it is demanded by the requirement of public interest and eventually came to hold that to ensure the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the Government and the basis thereof. Democracy, therefore, expects openness and openness is a concomitant of a free society and sunlight is the best disinfectant. After so stating, their Lordships have proceeded to state as follows:

> *"19. But it is equally important to be alive to the dangers that lie ahead. It is important to realise that undue popular pressure brought to bear on decision-makers in Government can have frightening side-effects. If every action taken by the political or executive functionary is transformed into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision-maker who may find it safer not to take any decision. It will paralyse the entire system and bring it to a grinding halt. So we have two conflicting situations almost enigmatic and we think the answer is to*

maintain a fine balance which would serve public interest."

15. Articles 21 and 22 of the Constitution of India provide that liberty of a citizen cannot be interfered or curtailed lightly by the authorities, which reads as follows:-

"21. ***Protection of life and personal liberty:-*** *No person shall be deprived of his life or personal liberty except according to procedure established by law.*

22. ***Protection against arrest and detention in certain cases-***

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply-

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).”

16. The expression ‘personal liberty’ is not restricted to freedom from physical restraint but includes a full range of rights which has been interpreted and conferred by the Apex Court in a host of decisions. The State has a sacrosanct duty to preserve the liberties of citizens and every act touching the liberty of a citizen has to be tested on the anvil and touchstone of Article 21 of the Constitution of India, both substantive and also on the cannons of procedural or adjective law.

17. At this stage, it has be to be noted that a Right to Information Act, 2005 is in place, which has been enacted in order to ensure secure and more effective access to information. It is an act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authorities. It is specifically stated that democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed.

18. The Division bench of Delhi High court after taking into consideration large number of cases and Rules, has held that the accused is entitled to receive a copy of FIR even from the police, since FIR was a public document and therefore, persons who is in custody of the same is liable to give a copy thereof to the person who has interest in the same or whose interest is adversely affected by the same.

19. The Delhi High Court then issued directions regarding making available copy of First Information Report to the accused at an earlier state, as prescribed under Section 207 Cr.P.C. and also uploading the copies of FIR on the official website of the police. The decision of Delhi High Court inturn was followed by a Division Bench of Orrisa High Court in ***Arun Kumar Budhia Vs. State of Orissa and another*** (W.P.(Crl.) No. 1096 of 2011), and based on those two decisions, the Maharashtra Chief Information Commissioner (SCIC) directed the Director General of Police to publish all the First Information Reports (FIRs) except those decided by an Officer of Deputy Superintendent of Police level on its website. The Division Bench judgment of Delhi High Court has subsequently been followed by the Punjab and Haryana High Court and directions were issued to upload the FIRs on the official website of Police Department w.e.f. 1st July, 2013.

20. Now once it cannot be disputed that FIR is a public document, then why the same should be kept out from public domain. Notably, the FIRs are already uploaded on the official website of the Police Department, but with restrictive usage for intra departmental purpose only. Being a public document, the FIR cannot be withheld from public domain and

would not only lend credence but would bring transparency in the working of the Police Department in case the same is put in public domain.

21. In this background, it has become imperative that certain directions be issued. Therefore, taking cue from the judgment passed by the learned Division Bench of Delhi High Court, the following directions are issued:-

(i) The accused is entitled to get a copy of the First Information report at an earlier stage as prescribed under Section 207 of the Cr.P.C.

(ii) An accused who has reasons to suspect that he has been roped in a criminal case and his name may be finding place in a First Information Report can submit an application through his representative/agent/parokar for grant of a certified copy before the concerned police officer or to the Superintendent of Police on payment of such fee which is payable for obtaining such a copy from the court. On such application being made, the copy shall be supplied within twenty-four hours.

(iii) Once the First Information Report is forwarded by the police station to the concerned Magistrate or any Special Judge, on an application being filed for certified copy on behalf of the accused, the same shall be given by the court concerned within two working days. The aforesaid direction has nothing to do with the statutory mandate inhered under Section 207 of the Cr.P.C.

(iv) The copies of FIR, unless reasons recorded regard being had to the nature of the offence that the same is sensitive in nature, should be uploaded on the Himachal Pradesh Police website within twenty-four hours of lodging of the FIR so that the accused or any person connected with the same can download the FIR and file appropriate application before the court as per law for redressal of his grievances.

(v) The decision not to upload the copy of the FIR on the website of H.P. Police shall not be taken by an officer below the rank of Deputy Superintendent of Police and that too by way of a speaking order. A decision so taken by the Deputy Superintendent of Police shall also be duly communicated to the Area magistrate.

(vi) The word 'sensitive' apart from the other aspects which may be thought of being sensitive by the competent authority as stated hereinbefore would also include concept of privacy regard being had to the nature of the FIR.

(vii) In case a copy of the FIR is not provided on the ground of sensitive nature of the case, a person grieved by the said action, after disclosing his identity, can submit a representation with the Superintendent of Police who shall constitute a committee of three high officers and the committee shall deal with the said grievance within three days from the date of receipt of the representation and communicate it to the grieved person.

(viii) The Superintendent of Police shall constitute the committee within eight weeks from today.

(ix) In cases wherein decisions have been taken not to give copies of the FIR regard being had to the sensitive nature of the case, it will be open to the accused/his authorized representative/parokar to file an application for grant of certified copy before the court to which the FIR has been sent and the same shall be provided in quite promptitude by the concerned court not beyond three days of the submission of the application.

(x) The directions for uploading the FIR on the website of H.P. Police shall be given effect from 26.01.2015.

22. A copy of this order be sent to the Chief Secretary, Principal Secretary (Home) and the Director General of Police to take appropriate action to effectuate the directions in an apposite manner so that grievances of this nature do not travel to Court.

23. Compliance report on behalf of the Chief Secretary to the Government of Himachal Pradesh be filed before this Court on or before ***30.1.2015*** when the case for this purpose shall be listed before the Hon'ble Vacation Judge. Notice to respondent No. 5 returnable on ***8.1.2015*** be issued. Steps for service of said respondent be taken within one day.

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

Sanjeev Kumar .....Petitioner.

VERSUS

State of H.P. & others. .....Respondents.

Cr.W.P. No. 24 of 2014.
Decided on: 19.12.2014

Constitution of India, 1950- Article 226- Daughter of the petitioner was missing - petitioner lodged a missing report in Police Station, Bangana- petitioner suspected that respondent No. 7 had unlawfully detained his daughter with the help of respondents No. 8 to 15- direction was issued to the police to produce the daughter of the petitioner but the police failed to do so- police directed to hand over the complete record to CBI who will complete the investigation within the period of 15 days and will produce the daughter of the petitioner before the Court on 8.1.2015.

Cases referred:

State of West Bengal and others *vs.* Committee for Protection of Democratic Rights, West Bengal and others *(2010) 3 SCC 571*

Central Bureau of Investigation through S.P. Jaipur *vs.* State of Rajasthan and another, *(2001) 3 SCC 333*

For the Petitioner:	Mr. Sumit Sharma, Advocate vice Mr. Sandeep Dutta, Advocate.
For Respondents:	Mr.Anup Rattan, Addl.A.G. for the Respodnets-State. Mr. Ashok Sharma, ASGI, for Central Bureau of Investigation. Mr. N.K.Thakur, Sr. Advocate with Mr. Ramesh Sharma, Advocate for respondents No. 8 to 10.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

At the oral request of the learned counsel for the petitioner, Superintendent of Police, Central Bureau of Investigation, Shimla is arrayed as party-respondent. Mr. Ashok Sharma, learned ASGI, appears and waives service of notice on behalf of the said respondent. The Registry is directed to carry out necessary correction in the memo of parties.

The writ petitioner is father of one Indu Bala, who is averred to have completed 18 years of age on 6.9.2014. She is averred to have joined Computer Centre owned by respondent No. 15 for the last five months and after completion of her computer classes, she is averred to have joined tailoring classes. Besides, the computer classes, she is averred to have joined a beautician course in Tehsil Bangana, two kilometers away from her native village. The father of Indu Bala was taken to carry in his car his daughter daily in the morning to the Computer Centre at 9.00 a.m. and after completion of tailoring classes, carry her back in his private car. However, on the fateful day on 1.11.2014, when the petitioner proceeded to the institution where his daughter was being imparted training in tailoring, he was apprised that she had not come to receive training in tailoring which led the petitioner to proceed to the Computer Centre, manned by respondent No. 15, who apprised the petitioner that she had left the Computer Centre at about 10.30 a.m. Since the daughter of the petitioner was found missing both from the Tailoring Institute as well as from Computer Centre, a missing report was lodged by the petitioner at Police Station, Bangana. However, the whereabouts of the daughter of the petitioner having remained unearthed, constrained the petitioner to institute the instant writ petition with a direction to the respondent-State to produce Indu Bala in Court. The petitioner avers that he suspected that the respondent No.7 Manjeet Kumar, aged about 19 years, has coaxed his daughter in his company and unlawfully detained her alongwith respondents No. 8 to 15. The petitioner also avers that respondent No.7 in connivance with respondents No.8 to 15, has facilitated the unlawful joining of his daughter in his company. Since a petition for habeas corpus is an ultra sensitive impinging upon the liberty of an individual, as such, bearing in mind its ultra sensitivity and also the prized asset of liberty of an individual, this Court was constrained to on 11.12.2014 direct respondent No.3 to produce Indu Bala by 12.12.2014 at 10.00 a.m. On 12.12.2014, the respondent No. 3 omitted to produce Indu Bala in Court. Therefore, a direction was rendered on 12.12.2014 to respondent No.2 to produce the girl in Court on 17.12.2014. On that day a detailed status report was filed by respondent No. 2, whose perusal constrained this Court to record that prima facie concerted efforts are being made by respondents aforesaid to produce Indu Bala in Court, nonetheless, respondent No. 3 Superintendent of Police was directed to produce the girl on 19.12.2014. She in compliance with the directions rendered by this Court to produce her remained un-produced at the instance of respondent No.3. However, a status report has been filed by respondent No.3, elucidating therein the measures and efforts made by them to locate and trace Indu Bala and then produce her in Court. However, without decommending the efforts made by respondent No.3, nonetheless it appears that for want of state of art wherewithals besides for want of state of art apparatus with respondent No.3, has defacilitated respondent No. 3 to locate and trace Indu Bala. The constraints of wherewithals as well as state of art apparatus with respondent No. 3 does hence affect as well as trammel respondent No.3 to trace and locate her. Hence, without construing that there has been any ineptitude or lack of concert on the part of respondent No.3 to locate the whereabouts of Indu Bala, this Court merely for the added leverage which the Central Bureau of Investigation has with it, it being a specialized agency having a nation wide rallying to hence carry out a nation wide effort to locate and trace Indu Bala. Besides with its being empowered with state of art apparatus and state of art wherewithals with which the respondent No. 3 is neither empowered with nor

possessed hence, constraining its effort to locate Indu Bala. Consequently, this Court deems it fit, just and proper especially in the interest of justice to while treating it as a singular case to direct that the investigation be henceforth to locate missing Indu Bala be carried out by Superintendent of Police, Central Bureau of Investigation, Shimla. The exceptionality ingrained in the instant case which prods it to handover henceforth investigation to the Central Bureau of Investigation is that it is an ultra sensitive matter pertaining to the liberty of an individual. Therefore, given the ultra sensitivity aforesaid as also for facilitating justice to the parties besides for enforcing the direction initially rendered for production of Indu Bala before the Court, this Court with the exceptionality of the apparatus and wherewithals with the Central Bureau of Investigation does feel constrained to render the aforesaid directions to the Superintendent of Police, Central Bureau of Investigation, Shimla. For taking the above view, this Court is supported by the judgments reported in **State of West Bengal and others *vs.* Committee for Protection of Democratic Rights, West Bengal and others *(2010) 3 SCC 571,* Central Bureau of Investigation through S.P. Jaipur *vs.* State of Rajasthan and another, *(2001) 3 SCC 333***

Respondent No. 3 is directed to handover within a period of two days complete records to the Central Bureau of Investigation, Shimla. Thereafter, the Superintendent of Police, CBI, Shimla shall carry out and complete the investigation within a period of fortnight and on conclusion whereof Ms. Indu Bala be produced in Court on 8.1.2015. However, it is expected that the Superintendent of Police, Central Bureau of Investigation, Shimla, shall carry out scientific investigation into the matter and as ventilated by Mr. Naresh Kumar Thakur, Sr. Advocate not subject any of the private respondents to any kind of torture.

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

Ashok Chauhan .....Applicant/plaintiff

Versus

M/s S.S.J.V Projects Pvt. Ltd., (a Body Cooperate) and others.

.....Respondents/defendants.

OMP No. 244 of 2012 in Civil Suit No. 63 of 2010
Order Reserved on 24.11.2014
Decided on: 23rd December, 2014

Indian Evidence Act, 1872- Section 65- An application was filed to permit the plaintiff to prove office note dated 31.3.2009 by leading secondary evidence- defendant denied the execution of the note and stated that no such office note is available in the record- the persons stated to have executed the note were not employees of the defendant and they had no power to make any financial commitment on behalf of defendant- held, that the denial of the defendant is not regarding the execution of the document but regarding the competency of the officer to execute any such note- question of leading the secondary evidence will only arise during the stage of the evidence and not prior to the same- application dismissed. (Para-7 to 9)

For the applicant/plaintiff: Mr. G.S. Rathore, Advocate.

For the respondents/ defendants: Mr. Karan Singh Kanwar, Advocate for respondents No. 1 and 2.

Ms. Shilpa Sood, Advocate for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

In this application, a prayer has been made to allow the applicant-plaintiff to prove office note dated 31st March, 2009 by way of leading secondary evidence. The relief has been sought on the ground that the plaintiff, a Company engaged in the business of doing construction work was awarded the job of mucking of intermediate adit of (U/S & D/S) of Uhl Project @ Rs.150/- and Rs.190/- per cubic meter in October, 2003 by defendant No. 1-Company. The plaintiff executed the work and submitted his claim in the month of July, 2008 in respect of the work to the tune of Rs.1,58,16,429/- to defendant No. 1-Company for payment. During the course of verbal negotiations held between Sh. Ashok Chauhan, a proprietor of the plaintiff-Company and Sh. N.N. Shetty, Director (projects) of defendant No. 1-Company, a consolidated sum of Rs.48,56,380/- was payable to the plaintiff in lumpsum towards its claim. An office note, dated 31.03.2009 duly signed by said Sh. N.N. Sheety, Sh. Ashok Chauhan, the proprietor of the plaintiff-Company witnessed by S/Sh. R.S. Kamal, General Manager, Sh. Dinesh Shetty, Project Manager of defendant No. 1-Company, defendants No. 3 and 4 respectively was executed to this effect. A copy of the note is Ext. AW1/A. Complaint is that the defendant-Company in the written statement to the suit has denied the execution of any such note and as regards, defendants No. 3 and 4 in written statement they filed have come-forward with the version that they never executed any such note dated 31.03.2009 and rather appended their signatures on the office note in the capacity of witnesses on the request and at the instance of Sh. N.N. Sheety, hence this application.

2. The defendant-Company by denying the execution of any such note has come forward with the version that no such office note is available in the record maintained by the Company. A copy of office note does not bear any number of the Company nor typed out on its letter head, hence not binding on the defendants. Sh. R.S. Kamal was never the employee of the Company and as regards, Sh. Dinesh Shetty, he had no power to make any financial commitment. In the written statement, the stand of defendant No.1-Company is that the office note dated 31.03.2009 is contrary to the terms of work order and was never executed with the express knowledge or approval of the replying defendant. The office note, according to defendant, No. 1, seems to be result of some kind of undue influence exercised by the plaintiff on the erstwhile officers of defendant No. 1, hence has no legal value nor binding on the defendants.

3. On the pleadings of the parties, following issues were framed in this application on 26.02.2014:

1. Whether the applicant/plaintiff is entitled to prove office note dated 31.3.2009, said to have been executed by him, defendants No. 3 and 4 and one Sh. N.N. Shetty, Director(P) of defendant No. 1-company, by way of secondary evidence under Section 65 of the Evidence Act? OPA.
2. Relief.

4. On behalf of the applicant-plaintiff its proprietor, Sh. Ashok Chauhan, has appeared in the witness box as AW-1 and proved the office note Ext. AW-1/A. On the other hand, the defendants examined Sh. Chandra Sekhar Das, Director, P&A as RW-1.

5. The evidence as has come on record by way of AW-1 and RW-1 is equally balanced because while AW-1 has supported the case as set out in the application, RW-1 has supported the case as pleaded in the reply to the application. There being nothing new in their statements, hence need not to be discussed in detail.

6. On hearing learned counsel on both sides and taking into consideration the evidence produced in this application, the findings on the above issues are as under:

ISSUE NO. 1

7. The onus to prove this issue is on the applicant-plaintiff. The plaintiff has set-up the plea of execution of the office note Ext. AW-1/A by Sh. N.N. Shetty, Director (Projects) of defendant No. 1-Company and S/Sh. R.S. Kamal, General Manager, Dinesh Shetty, Project Manager of defendant No. 1-Company. It is seen that defendant No. 1 has not disputed the execution of this document in the written statement and rather while denying the execution thereof by defendant No. 1, such note executed by Sh. N.N. Shetty, R.S. Kamal and Dinesh Shetty is not binding on the defendants for the reasons that neither of them had any financial power to make any financial commitment. Therefore, *prima-facie* the denial is not to the execution of the document, but the dispute is qua the competency of the officer to execute any such note and thereby to make financial commitment and bind defendant No. 1.

8. Significantly, the parties have not yet stepped into the witness box because the suit presently is at the stage of recording plaintiff's evidence. It is thereafter the defendants including defendants No. 3 and 4 will produce the evidence. The plaintiff can produce this office note at an appropriate stage in the suit i.e. at the time of producing evidence in support of its case. The plaintiff can put this document to the witnesses to be examined by the defendants including defendants No. 3 and 4. It is thereafter, if the execution of this document is disputed, the plaintiff may have an occasion to seek remedy in accordance with law including the one under Section 65 of the Indian Evidence Act. At this stage, when the existence of this document is not disputed and rather as per own version of defendant No.1 this document bearing signatures of Sh. N.N. Shetty, S/Sh. R.S. Kamal, General Manager, Sh. Dinesh Shetty, Project Manager of defendant No. 1-Company is not binding on it, in view of they were not having any authority to execute any such document and make any financial commitment binding thereby defendant No. 1-Company lead to the only conclusion that the existence of this document has not been disputed but it is the authority of the person who entered the same has been questioned in reply to this application and also the written statement. Above all, defendants No. 3 and 4, admit their signature on this document, however, as per their version in written statement, they put their signatures at the instance of Sh. N.N. Shetty in the capacity of witnesses. There was no occasion to the plaintiff to have filed this application at this stage.

9. As pointed out supra, occasion, if any, will arise at an appropriate stage i.e. on and after the parties produce the evidence in the main suit. The application at this stage, therefore, is mis-conceived and deserves to be dismissed. If not shocking it is painful to point out that it is on account of pendency of this application instituted on 30th August, 2012, the proceedings in the main suit are held up for a period over two years.

RELIEF:

10. With the above observations, this application fails and the same is accordingly dismissed.

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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.

Mustkeen son of Mr.Karimulla. ....Respondent.

Cr. Appeal No.488 of 2009
Judgment reserved on:8.10.2014.
Date of Decision: December 23, 2014.

N.D.P.S. Act, 1985- Section 20- Petitioner was found in possession of 150 grams of charas- independent witness did not support the prosecution version- there was contradiction between site plan and the seizure memo regarding the place of recovery- original seal was not produced before the Court for comparison- there was difference in weight of sample mentioned in the seizure memo and the sample received in the laboratory- there was contradiction regarding the re-seal impression, therefore, in these circumstances, acquittal of the accused was justified. (Para-12 to 16)

Cases referred:
Nanha Vs. State HLJ 2011 115
State of Rajasthan Vs. Gopal, 1998 8 SCC 449
Bhagwan Singh Vs. State of Rajasthan,1976 Cri.L.J 713
Gian Chand Vs. State of Rajasthan 1993 Cri. L.J. 3716
Anjlus Dungdung Vs. State of Jharkhand (2005) 9 SCC 765
Nanhar Vs. State of Haryana (2010) 11 SCC 423
Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116
Charan Singh Vs. The State of Uttar Pradesh, AIR 1967 SC 520
Gian Mahtani Vs. State of Maharashtra AIR 1971 SC 1898
State (Delhi Administration) Vs. Gulzarilal Tandon AIR 1979 SC 1382
Bhugdomal Gangaram and others Vs. The State of Gujarat AIR 1983 SC 906
State of UP Vs. Sukhbasi and others AIR 1985 SC 1224
Mookkiah and another Vs. State (2013) 2 SCC 89
State of Rajashthan Vs. Talevar and another 2011 (11) SCC 666
Surendra Vs. State of Rajasthan AIR 2012 SC (Supp) 78
State of Rajasthan Vs. Shera Ram @ Vishnu Dutt 2012 (1) SCC 602
Balak Ram and another Vs. State of UP AIR 1974 SC 2165
Allarakha K. Mansuri Vs. State of Gujarat (2002) 3 SCC 57
Raghunath Vs. State of Haryana (2003) 1 SCC 398
State of U.P Vs. Ram Veer Singh and others AIR 2007 SC 3075
S.Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others, AIR 2008 SC 2066,
Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra (2008) 11 SCC 186
Arulvelu and another Vs. State, (2009) 10 SCC 206
Perla Somasekhara Reddy and others Vs. State of A.P, (2009) 16 SCC 98
Ram Singh @ Chhaju Vs. State of Himachal Pradesh (2010) 2 SCC 445

For the appellant:	Mr.B.S.Parmar, Addl.A.G. with Mr.Ashok Chaudhary, Addl. AG Mr.Vikram Thakur, Dy.A.G and Mr.J.S.Guleria, Asstt.A.G.
For the respondent:	Mr.G.D.Verma, Sr. Advocate with Mr.B.C.Verma, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment passed by the learned Sessions Judge, Solan HP in case No.3-S/7 of 2008 titled State of HP Vs. Mushtkeen under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the 'Act')

BRIEF FACTS OF THE PROSECUTION CASE:

2. It is alleged by prosecution that on dated 2.3.2008 at about 2.10 PM near Kasauli Chowk Dharampur accused was found in exclusive and conscious possession of 150 grams of charas. It is alleged by prosecution that on dated 2.3.2008 PW8 Krishan Chand along with HHC Kanshi Ram and PW2

Constable Anil Kumar were on patrolling duty vide daily diary report Ext PW3/G. It is alleged by prosecution that on dated 2.3.2008 at about 2.10 PM when said patrolling party reached near Kasauli Chowk it noticed that accused was coming from Sukijohri side towards Kalka on National Highway No.22 and was in possession of red colour envelope in his left hand. It is alleged by prosecution that when accused saw police officials accused got frightened and suddenly turned towards Kasauli road and thereafter accused was apprehended. It is alleged by prosecution that PW8 Krishan Chand inquired from accused but accused could not give satisfactory answer to the question put by PW8 Krishan Chand and in the meantime PW1 Som Dutt and Chand Kishore Shopkeepers and other people also gathered at the spot. It is alleged by prosecution that on suspicion PW8 Krishan Chand conducted the search of the accused and charas was found inside the plastic envelope. It is alleged by prosecution that thereafter Chand Kishore was sent to bring weights and scales who brought the same and charas was weighed which was found 150 grams. It is alleged by prosecution that thereafter two samples of 25 grams charas were took out and remaining charas was also sealed in a parcel. It is alleged by prosecution that the sample impression of seal was obtained upon a piece of cloth Ext PW1/B and thereafter seal was handed over to PW1 Som Dutt. It is alleged by prosecution that seizure memo and NCB forms were prepared and rukka was sent through constable PW2 Anil Kumar to Police Station Dharampur for registration of FIR. It is alleged by prosecution that spot map Ext PW8/A was prepared. It is alleged by prosecution that special report was also handed over to Superintendent of Police Solan and report of chemical analyst was also sought from Forensic Science Laboratory Junga. Charge was framed against the accused under Sections 20 (b) (B) of the Narcotic Drugs and Psychotropic Substances Act, 1985. Accused did not plead guilty and claimed trial.

3. Prosecution examined as many as nine witnesses in support of its case:-

Sr.No.	Name of Witness
PW1	Som Dutt
PW2	Anil Kumar
PW3	Parveen Kumar
PW4	Rakesh Kumar
PW5	Padam Dev
PW6	Chaitanya Swroop
PW7	Prem Lal
PW8	Krishan Chand
PW9	Brijesh Sood

4. Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	*Description.*
Ext.PW1/A	*Search memo*
Ext PW1/B	*Sample seal*
Ext PW1/C	*Arrest memo*

Ext PY	*Examination report*
Ext.PZ	*Specimen seal.*
Ext.PW2/A	*Rukka*
Ext.PW3/A.	*FIR*
Ext.PW3/B.	*Endorsement*
Ext.PW3/C.	*Copy of RO*
Ext.PW3/D.	*Copy of Malkhana Register.*
Ext.PW3/D1	*Copy of Malkhana Register.*
Ext.PW3/E	*Special Report.*
Ext.PW3/F	*Test Memo.*
Ext.PZ 1	*Signature of police official*
Ext.PW3/G	*Copy of G.D. entry No.19 (a).*
Ext.PW3/H	*Certificate*
Ext.D1	*Statement constable Anil Kumar u/s 161Cr.PC.*
Ext.PW5/A.	*Signature*
Ext.PW6/A.	*Copy of G.D entry No. 27(A).*
Ext.PW6/B.	*Copy of G.D entry No.31(A)*
Ext.PW6/C	*Copy of G.D. entry No.7(A)*
Ext.PW6/D	*Copy of G.D entry No.13(A)*
Ext.PW6/E	*Copy of G.D entry No.41(A)*
Ext.PW8/A.	*Spot Map.*
Ext.PW8/B	*Seizer Memo.*
Ext.PW8/C	*Arrest Memo.*
Ext.PW9/A.	*Sample seal.*

5. Statement of the accused was also recorded under Section 313 Cr.P.C. Accused did not lead any defence evidence. Learned trial Court acquitted the accused under Section 20-B of the Narcotic Drugs and Psychotropic Substances Act 1985.

6. Feeling aggrieved against the judgment passed by the learned Sessions Judge Solan appellant-State filed present appeal.

7. We have heard learned Additional Advocate General appearing on behalf of the State and learned Advocate appearing on behalf of the respondent and also perused entire record carefully.

8. Point for determination in the present appeal is whether learned trial Court did not properly appreciate the oral as well as documentary evidence adduced by the parties and caused miscarriage of justice to the appellant as alleged in memorandum of grounds of appeal.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

9. PW1 Som Dutt has stated that he is shopkeeper and running a tea shop at Kasauli Chowk Dharampur for the last two years. He has stated that on dated 2.3.2008 at about 3 PM a person came from Sukhijohari side to Kasauli Chowk holding a plastic bag in his hand. He has stated that he could not state with certainty whether that person was accused or some other person. He has stated that police officials checked the plastic bag which was in the hand of accused. He has stated that bag was containing one muffler, one shawl, one handkerchief and some sticks. He has stated that he does not know what was those sticks. He has stated that when search took place by police officials he and Chand Kishore were present at the spot. He has stated that thereafter police officials sent Chand Kishore to bring weights and scales. He has stated that thereafter weights and scales were brought. He has stated that from the recovered contraband 50 grams contraband was divided into 25 grams each. He has stated that two samples were put into two packets separately and rest contraband was kept in another packet separately. He has stated that thereafter packets were sealed separately. He has stated that police arrested the accused and took him into custody. He has stated that arrest memo Ext PW1/C bears his signature. He has denied suggestion that he has deposed falsely in the present case at the instance of police officials. He denied suggestion that police did not recover any polythene bag from accused. He denied suggestion that no contraband was recovered from the accused. He denied suggestion that entire proceedings were took place in police station. He denied suggestion that nothing was done in the rain shelter. He denied suggestion that his signatures were obtained in police station.

9.1 PW2 Anil Kumar has stated that he remained posted in Police Station Dharampur in the year 2007-2008. He has stated that on dated 2.3.2008 he along with HHC Kanshi Ram and PW8 Krishan Kumar were on patrolling duty and were going towards Dharampur market. He has stated that they started from police station Dharampur at about 2.10 PM and stated that accused came from Sukhi Johari side and was going towards Kalka on National Highway No. 22. He has stated that accused was holding a red colour polythene envelope on his right hand and when accused saw police officials he turned towards Kasauli road and tried to run away from the spot. He has stated that thereafter accused was apprehended. He has stated that on inquiry from accused he could not give satisfactory answer about his whereabouts. He has stated that in the meanwhile people gathered at the spot. He has stated that Som Dutt and Chand Kishore shopkeepers also reached at the spot. He has stated that on suspicion the search of the plastic bag of accused was conducted. He has stated that during the search of the bag one shawl, a muffler, a handkerchief and a polythene bag containing charas in the form of sticks were recovered. He has stated that accused was brought to a rain shelter nearby the spot and Chand Kishore was deputed to bring weights and scales from the shop. He has stated that on weighing the charas it was found 150 grams. He has stated that out of the total recovered charas two samples 25 grams each were separated and same were kept into two packets. He has stated that thereafter bag and packets of charas was sealed with seal impression 'N'. He has stated that thereafter rukka was sent to police station and NCB form was also filled at the spot. He has denied suggestion that no charas was recovered from the accused. He denied suggestion that no search of the bag was conducted. He denied suggestion that Som Dutt was not present in the rain shelter. He denied suggestion that police officials demanded free bed sheets from the accused. He denied suggestion that accused refused to give bed sheets free of cost. He denied suggestion that accused was falsely implicated in the present case. He denied suggestion that no proceedings took place in the rain shelter. He denied suggestion that no sealing took place in the rain shelter. He denied suggestion that entire proceedings took place in the police station. He denied suggestion that accused was not apprehended. He denied suggestion that nothing was recovered from exclusive and conscious possession of the accused.

9.2 PW3 Parveen Kumar has stated that he was posted as MHC in Police Station Dharampur since February 2008. He has stated that on dated 2.3.2008 at about 3.20 PM constable Anil Kumar deposited with him rukka Ext PW2/A which was sent by Head Constable Krishan Chand Police Station Dharampur. He has stated that on the basis of rukka FIR Ext PW3/A was recorded. He has stated that thereafter file was sent to Investigating Officer through aforesaid constable. He has stated that on the same day at about 6.30 PM SHO Brijesh Sood Police Station Dharmpur deposited with him three parcels along with NCB form in triplicate. He has stated that parcels were deposited in malkhana. He has stated that entry was recorded in the malkhana register at serial No.327. He has stated that thereafter on dated 3.3.2008 he deputed constable Rakesh Kumar to deposit sample of charas in Forensic Science Laboratory Junga for analysis vide RC No. 160 of 2008. He has stated that thereafter chemical report and NCB form were handed over to him and he made entry qua receipt in malkhana register. He has stated that on dated 3.3.2008 Station House Officer Police Station Dharampur had handed over special report to him. He has stated that attested copy of RC No. 160 of 2008 Ext PW3/C is true and correct as per original record. He has stated that attested copy of malkhana register Ext PW3/D and Ext PW3/D1 are true and correct as per original record. He has stated that sample parcels remained intact in his custody. He has denied suggestion that Station House Officer did not deposit with him anything. He denied suggestion that he did not send any document to the laboratory. He has denied suggestion that he did not receive anything from laboratory. He denied suggestion that he did not record daily diary No.19. He denied suggestion that he has deposed falsely being police officials.

9.3 PW4 Rakesh Kumar has stated that he was posted in Police Station Dharampur since 2006. He has stated that on dated 3.3.2008 he was deputed by MHC Police Station to deposit a parcel containing 25 grams charas sealed with four seal impressions 'H' in Forensic Science Laboratory Junga for analysis along with NCB form in triplicate vide RC No.160 of 2008. He has stated that on dated 11.4.2008 he was again deputed by MHC to collect sample parcel from FSL Junga and thereafter he collected the parcel from laboratory and thereafter handed over the same to MHC on the same day. He has stated that till the parcel remained with him no tampering was conducted. He has denied suggestion that no sample was given to him. He denied suggestion that sample was not deposited in the laboratory.

9.4 PW5 Padam Dev has stated that he remained posted in Police Station Dharampur since May 2005 to May 2008. He has stated that on dated 3.3.2008 special report of present case was handed over to him by MHC Parveen Kumar Police Station Dharampur which was placed before Superintendent of Police Solan. He has stated that on dated 3.3.2008 at about 11 AM he presented special report to S.P Solan and thereafter one copy of special report was handed over to him. He has stated that thereafter a copy of special report was also handed over by him to Investigating Officer Krishan Chand in Police Station. He has stated that copy of special report is Ext PW3/E and signature encircled at 'A' Ext PW5/A was made by S.P Solan in his presence.

9.5 PW6 Chaitanya Swroop has stated that he was posted as MC in Police Station Dharampur since 2006. He has stated that daily reports which were entered in the computer was handled by him and the same were also typed by him. He has stated that DD No.19 Ext PW3/G was entered in computer by him and copy which was attested by him bears his signature. He has stated that similarly rapat No.27 Ext PW6/A, rapat No.31 Ext PW6/B, rapat No.7 Ext PW6/C, rapat No.13 Ext PW6/D and rapat No.41 Ext PW6/E were attested by him and all bear his signatures and the same are true and correct as per original record.

9.6 PW7 Prem Lal has stated that he remained posted as Reader to S.P Solan w.e.f. June 2007 till March 2008. He has stated that on dated

3.3.2008 a special report in the present case under Section 20 of the Narcotic Drugs and Psychotropic Substance Act was submitted by Constable Padam Dev Police Station Dharampur to S.P Solan at about 11 AM. He has stated that after receipt of the same S.P Solan made his endorsement on the report and thereafter one copy was handed over to aforesaid constable and other copy was handed over to him by S.P Solan. He has stated that he affixed diary number upon both reports and kept one copy in his record. He has stated that special report Ext PW3/E and endorsement Ext PW5/A was made by S.P Solan in his presence. He has stated that he brought office copy Ext PW3/E which bears his signature.

9.7 PW8 Krishan Chand has stated that he remained posted as Investigating Officer in Police Station Dharampur since 2006 to May 2008. He has stated that on dated 2.3.2008 he along with HHC Kanshi Ram and Constable Anil Kumar were on patrolling duty. He has stated that at about 2.20 PM when he reached at Kasauli Chowk nearby Police Station Dharampur then from Sukhi Johari side accused was coming towards Kalka on National Highway No.22 who was holding a red colour envelope in his left hand. He has stated that as soon as accused saw police official accused got frightened and suddenly turned towards Kasauli road. He has stated that accused was apprehended near Kasauli chowk. He has stated that on inquiry from accused he could not answer satisfactorily. He has stated that in the meantime Som Dutt and Chand Kishore shopkeepers and other people also gathered at the spot. He has stated that on suspicion he conducted search of red colour envelope of accused. He has stated that during search of the envelope a muffler, shawl and a handkerchief including charas which was kept in a plastic envelope were found. He has stated that Chand Kishore was sent to bring weights and scales. He has stated that thereafter he brought weights and scales and recovered charas was weighed which was found to be 150 grams. He has stated that out of two samples of charas 25 grams each were separately taken and kept into two packets. He has stated that remaining charas, shawl, handkerchief and muffler were sealed in other parcels. He has stated that recovered material was took into possession vide seizure memo Ext PW1/A. He has stated that sample of seal Ext PW1/B bears his signature and the signature of the witness. He has stated that NCB form was also filled. He has stated that he also prepared rukka Ext PW2/A. He has stated that he inspected the spot and site plan Ext PW8/A was prepared. He has stated that marginal notes are correct as per spot position. He has stated that the value of the recovered charas was Rs.15,000/- (Rupee fifteen thousand). He has stated that he handed over case property along with sample parcels including sample of seal and NCB form in triplicate to SHO Police Station Dharampur. He has stated that he recorded the statements of the prosecution witnesses as per their versions and also prepared special report Ext PW3/E which bears his signature. He has stated that he obtained copy of RC Ext PW3/C and also obtained abstract Ext PW3/D and Ext PW3/D1 from MHC Police Station Dharampur. He has stated that he also obtained rapats Ext PW6/A to Ext PW6/E and Ext PW6/G. He has stated that after the receipt of FSL report Ext PZ1 and Ext PY and after completion of investigation he handed over case file to SHO Police Station Dharampur. He has denied suggestion that police officials demanded bed sheets from accused. He denied suggestion that accused refused to give bed sheets. He denied suggestion that accused was falsely implicated in the present case. He denied suggestion that no seal was handed over to Som Dutt. He denied suggestion that no sealing was conducted at the spot. He denied suggestion that he recorded the statement of the witness at his own. He denied suggestion that he did not hand over the case property to Station House Officer. He denied suggestion that a false case has been filed against accused. He denied suggestion that Som Dutt and Chand Kishore were not present at the spot. He denied suggestion that all the proceedings were conducted in Police Station. He denied suggestion that present case filed against the accused due to revengeful attitude.

9.8 PW9 Brijesh Sood has stated that he was posted as SHO Police Station Dharampur till 2008. He has stated that on dated 2.3.2008 HC Krishan Chand presented three parcels sealed with seal impressions 'N' containing 100 grams charas, a muffler, shawl and handkerchief in bigger parcel which was sealed with nine seal impressions 'N' and remaining two parcels containing five seals of 'N' stated to have contained 25 grams sample of charas along with NCB forms in triplicate. He has stated that seals were found intact and tallied with sample of seal. He has stated that columns No. 9, 10 and 11 of NCB forms were filled in which bears his signature. He has stated that he deposited all the three parcels along with NCB forms in triplicate. He has stated that rapat Ext PW6/B was also recorded. He has stated that facsimile of seal 'H' was also affixed on the NCB form. He has stated that special report Ext PW3/E was also presented to him. He has stated that he has submitted the same to S.P Solan. He has stated that on the receipt of FSL report Ext PZ1 and Ext PY and after completion of investigation he prepared chargesheet and presented the same in Court. He has stated that report under Section 173 Cr PC bears his signature. He denied suggestion that case property was not produced by the Investigating Officer. He denied suggestion that he did not reseal the case property. He denied suggestion that he did not submit the case property to S.P Solan. He denied suggestion that accused was falsely implicated in the present case. He denied suggestion that entire proceedings were conducted in Police Station at his instance.

10. Statement of the accused under Section 313 Cr.PC was recorded. He has stated that a false case has been foisted against him. He has stated that he is innocent and falsely implicated in present case. Accused did not lead any defence evidence.

Contradictory testimony of independent eye witness PW1 Som Dutt in examination in chief and cross examination is fatal to prosecution case

11. In the present case as per prosecution story PW1 Som Dutt is the eye witness of the recovery of contraband. We have carefully perused the testimony of PW1 Som Dutt. PW1 has stated in positive manner in examination in chief that he could not state with certainty whether the person from whom the contraband was recovered was accused or some other person because he had seen the accused only for once. The above stated testimony of PW1 Som Dutt is fatal to the prosecution in examination in chief. We are of the opinion that testimony of PW1 is not sufficient to convict the accused and the testimony of PW1 did not inspire confidence of the Court in view of the contradictory statement given by PW1 in his testimony in examination in chief and cross examination.

Contradiction between the place of recovery in the site plan and seizure memo is also fatal to the prosecution.

12. We have carefully perused the search and seizure memo Ext PW1/A. In column No. 4 of seizure memo it has been specifically mentioned that contraband was recovered at National Highway No. 22 Dharampur Kasauli Chowk on dated 2.3.2008 at about 2.15 PM but in the site plan Ext PW8/A in column No. 4 it has been shown that recovery was effected in rain shelter shown at mark 'D' in the site plan. We are of the opinion that in view of the contradictory location of recovery shown in the seizure memo and site plan Ext PW8/A i.e. rain shelter it is not expedient in the ends of justice to convict accused in the present case.

Non production of original seal for comparison in Court is also fatal to prosecution case

13. As per prosecution story the original seal after use was handed over to PW1 Som Dutt. PW8 HC Krishan Chand has stated that original seal was handed over to PW1 Som Dutt but on the contrary PW1 Som Dutt has stated that he does not know where the seal was kept by the investigating agency. In view of the contradictory statement qua the original seal between PW1 Som Dutt

and PW8 Krishan Chand it is not expedient in the ends of justice to convict the accused in the present case. It was held in case report in Latest HLJ 2011 115 Nanha Vs. State that if the original seal is not produced in Court for comparison then conviction could not be recorded. Also see 1998 8 SCC 449 titled State of Rajasthan Vs. Gopal.

Investigation of the entire case by the complainant himself has caused miscarriage of justice to accused in the present case.

14. As per FIR Ext PW3/A complainant in the present case is Head Constable Krishan Chand. In the present case complainant has himself conducted the entire proceedings of the investigation i.e. preparation of search and seizure memo and NCB form from column No. 1 to 8. Complainant himself recorded the statement of the prosecution witnesses under Section 161 Cr.PC and complainant himself prepared site plan Ext PW8/A. Such practice of investigation is deprecated by the Hon'ble Supreme Court of India. In the present case complainant Krishan Chand himself investigated the entire present case and seized the contraband himself. He prepared the sample and sealed the same himself. He sealed the parcels himself and sent rukka himself. He prepared site plan and recorded the statement of the witness himself. He also himself deposited the seized contraband with MHC. In the present case whole investigation of the present case was contrary to criminal jurisprudence and ipso facto contrary to law. See 1976 Cri.L.J 713 titled Bhagwan Singh Vs. State of Rajasthan**.** Also see 1993 Cri. L.J. 3716 titled Gian Chand Vs. State of Rajasthan**.** It is not the case of prosecution that another investigating officer was not available. Criminal law requires that investigation of criminal case should be conducted by independent investigating officer. Complainant himself could not be independent investigating officer when punishment in criminal case is grave in nature.

Contradiction between the weights of sample of contraband sealed in a parcel and contradiction between the weights of contraband received in FSL Junga is also fatal to the prosecution case

15. As per prosecution story 25 grams of contraband was sealed for sample purpose and as per prosecution the parcel of sample of contraband was sent to the office of chemical analyst for chemical examination. As per prosecution story 25 grams of contraband was sealed in a parcel of sample but as per report of chemical analyst Ext PY 25.081 grams of sample was received in the State Forensic Science Laboratory Junga on dated 3.3.2008. We are of the opinion that above stated contradiction between the weights of sealed parcel mentioned in the seizure memo and receipt parcel in the office of State Forensic Science Laboratory Junga qua weight is also fatal to the prosecution in the present case.

Contradiction between the descriptions of reseal in the NCB form and report of chemical analyst is fatal to the prosecution case

16. As per NCB form the description of seal impression of reseal was 'H' but as per chemical analyst report the description of reseal was 'N'. The above stated contradiction qua reseal between NCB form and examination report submitted by FSL Junga is fatal to the prosecution.

17. Submission of learned Addl. Advocate General appearing on behalf of the State that the judgment passed by learned trial Court is wrong on facts as well as law and is based upon hypothetical reasoning, surmises and conjectures and learned trial Court has not properly appreciated the oral as well as documentary evidence placed on record and has not evaluated direct and cogent prosecution evidence is rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused oral as well as documentary evidence adduced by the prosecution in the present case. As per prosecution story 150 grams charas was found in the exclusive and conscious possession of

the accused on dated 2.3.2008 at about 2.30 PM at National Highway No. 22 Dharampur Kasauli Chowk. The prosecution has prepared the seizure memo Ext PW1/A placed on record. We have carefully perused seizure memo Ext PW1/A placed on record. As per seizure memo the witness of seizure memo are Som Dutt and Chand Kishore. The testimony of Som Dutt is not trustworthy, reliable and inspires confidence of the Court because PW1 Som Dutt has given contradictory statement in the examination in chief and cross examination. PW1 has stated in examination in chief in positive manner that he could not state with certainty whether the person from whom the contraband was recovered was accused or some other person. The above stated testimony of PW1 is not sufficient to convict the accused in the present case. Although the prosecution did not examine another independent witness i.e. Chand Kishore in the present case. Although on dated 20.11.2008 Sh Chand Kishore independent witness was present in Court but learned Public Prosecutor has given statement before the Court that he does not want to examine Chand Kishore another independent eye witness of the seizure memo being won over by the accused. It is well settled law that search and seizure memo is the substantive piece of evidence. Seizure memo Ext PW1/A is a substantive documentary evidence relied by the prosecution. It is well settled law that the contents of the documents should be proved by the testimony of witnesses who are signatory to search and seizure memo Ext PW1/A. Other prosecution witnesses PW2 Constable Anil Kumar and PW3 Parveen Kumar are not signatory to seizure memo Ext PW1/A placed on record and signatures of PW2 Anil Kumar and PW3 Parveen Kumar did not figure in search and seizure memo Ext PW1/A placed on record. It is well settled law that as per Chapter V of Indian Evidence Act 1872 contents of the documents should be proved by way of a person who is signatory to the document. Hence we are of the opinion that testimonies of PW2 Anil Kumar and PW3 Parveen Kumar are not helpful to prosecution for proving contents of document seizure memo because PW2 and PW3 are not signatory to seizure memo relied by prosecution.

18. Another submission of learned Additional Advocate General that learned trial Court has discarded the testimony of official witnesses without assigning any reason and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We are of the opinion that official witnesses are not signatory to search and seizure memo Ext PW1/A. We are of the opinion that contents of search and seizure memo could not be proved by way of official witnesses who are not signatory to seizure memo document. It is well settled law that search and seizure memo in Narcotic Drugs and Psychotropic Substance should be proved in accordance with law. Although Ext PW1/A has signed by Krishan Chand Investigating Officer but we are of the opinion that Krishan Chand Investigating Officer is a interested witness and is not impartial witness because he himself took active part in the preparation of search and seizure memo, sealing of charas parcels, preparation of site plan and recording statement of witnesses.

19. Another submission of learned Additional Advocate General that learned trial Court has wrongly given the benefit of doubt to accused regarding the place of recovery is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the search and seizure memo and site plan submitted by the prosecution. As per search and seizure memo Ext PW1/A the contraband was recovered from the possession of accused at National Highway No. 22 Dharampur Kasauli Chowk. Investigating Officer has specifically mentioned in column No.4 of search and seizure memo qua the place where the search and seizure memo was prepared. There is no reference in search and seizure memo that proceedings were conducted in the rain shelter. The word rain shelter is missing in search and seizure memo Ext PW1/A placed on record. On the contrary in the site plan Ext PW8/A the Investigating Officer has specifically mentioned that recovery was effected in the rain shelter and no reason has been assigned by the Investigating Officer as to why he did not

mention the word rain shelter in column No.4 of search and seizure memo. Non mentioning of word rain shelter in the search and seizure memo has cast doubt in the prosecution story.

20. Another submission of learned Additional Advocate General appearing on behalf of the appellant that there was bonafide mistake of chemical examiner qua mentioning reseal impression in chemical examination report is also rejected being devoid of any force for the reason hereinafter mentioned. In the present case the prosecution did not examine chemical examiner in order to prove that mentioning of description of reseal in the chemical examiner report was by mistake. No reason has been assigned by the prosecution as to why the prosecution did not examine the chemical examiner in order to prove that entry in the chemical analyst report qua description of reseal was by mistake.

21. Another submission of learned Additional Advocate General appearing on behalf of the State that there is no enmity with the accused and in view of the testimony of PW1 Som Dutt read as a whole appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We are of the opinion that prosecution is under legal obligation to prove its case beyond reasonable doubt. The testimony of PW1 Som Dutt qua identity of accused is not proved beyond reasonable doubt in the present case. PW1 has given contradictory statement in his testimony in examination in chief and cross examination when he appeared in Court qua the identity of the accused. It was held in case reported (2005) 9 SCC 765 titled Anjlus Dungdung Vs. State of Jharkhand that suspicion however strong cannot take place of proof. It was held in case reported in (2010) 11 SCC 423 titled Nanhar Vs. State of Haryana that prosecution must stand or fall on its own leg and it cannot derive any strength from the weakness of the defense. Also See: (1984) 4 SCC 116 Sharad Birdhichand Sarda Vs. State of Maharashtra**.** It is well settled law that conjecture or suspicion cannot take place of legal proof. See: AIR 1967 SC 520 Charan Singh Vs. The State of Uttar Pradesh**.** *Also See:* AIR 1971 SC 1898 Gian Mahtani Vs. State of Maharashtra**.** It was held in case reported in AIR 1979 SC 1382 State (Delhi Administration) Vs. Gulzarilal Tandon that suspicion however strong cannot take the place of legal proof. Also See: AIR 1983 SC 906 titled Bhugdomal Gangaram and others Vs. The State of Gujarat See: AIR 1985 SC 1224 titled State of UP Vs. Sukhbasi and others. It is well settled principle of law that vested right accrued in favour of the accused with the judgment of acquittal by learned trial Court. (See (2013) 2 SCC 89 titled Mookkiah and another Vs. State. See 2011 (11) SCC 666 titled State of Rajashthan Vs. Talevar and another. See AIR 2012 SC (Supp) 78 titled Surendra Vs. State of Rajasthan. See 2012 (1) SCC 602 titled State of Rajasthan Vs. Shera Ram @ Vishnu Dutt). It is well settled principle of law (i) That appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible though the view of the appellate Court may be more probable. (ii) That while dealing with a judgment of acquittal the appellate Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned trial Court are perverse or otherwise unsustainable (iii) That appellate Court is entitled to consider whether in arriving at a finding of fact, learned trial Court failed to take into consideration any admissible fact (iv) That learned trial court took into consideration evidence brought on record contrary to law. (See AIR 1974 SC 2165 titled Balak Ram and another Vs. State of UP, See (2002) 3 SCC 57 titled Allarakha K. Mansuri Vs. State of Gujarat, See (2003) 1 SCC 398 titled Raghunath Vs. State of Haryana, See AIR 2007 SC 3075 State of U.P Vs. Ram Veer Singh and others, See AIR 2008 SC 2066, (2008) 11 SCC 186 S.Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others. Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, See (2009) 10 SCC 206 titled Arulvelu and another Vs. State, See (2009) 16 SCC 98 titled Perla Somasekhara Reddy and others Vs. State of A.P,See:(2010) 2 SCC 445 titled Ram Singh @ Chhaju Vs. State of Himachal Pradesh).

22. In view of the above stated facts and case law cited supra we affirm the judgment passed by learned trial Court and dismiss the appeal filed by the State of Himachal Pradesh. Pending application(s) if any are also disposed of. Record of learned trial Court along with certified copy of judgment be sent back forthwith.

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

Union of India through its Secretary (Home)
to the Govt. of India and others ....Appellants.
Versus
Bali Ram .....Respondent.

LPA No.25 of 2009.
Judgment reserved on : 16.12.2014.
Date of decision: December 23, 2014.

Constitution of India, 1950- Article 226- Petitioner was enrolled in the Central Reserve Police Force as Constable- petitioner suffered from eye problem- he was found blind in left eye and partially blind in the right eye- he was found to be permanently incapacitated for further service and was invalidated from service - held that, petitioner had acquired disability during his service and he could not have been invalidated from the service on account of disability in view of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. (Para- 7 to 17)

Cases referred:

Dharamvir Singh versus Union of India and others (2013) 7 SCC 316

Kunal Singh versus Union of India and another (2003) 4 SCC 524

National Federation of Blind versus Union Public Service Commission and others (1993) 2 SCC 411

Javed Abidi versus Union of India (1999) 1 SCC 467,

Indian Banks' Association , Bombay and others versus Devkala Consultancy Service and others (2004) 11 SCC 1

For the Appellants : Mr.Ashok Sharma, Assistant Solicitor General of India.
For the Respondent : Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This Letters Patent Appeal is directed against the judgment passed by the learned writ Court whereby the writ petition filed by the writ petitioner came to be allowed and he was directed to be reinstated in service and the amount of terminal benefits received by him was ordered to be adjusted against the amount of his salary from 11.03.1998 onwards.

The facts, in brief, may be noticed thus.

2. The respondent is the writ petitioner (hereinafter referred to as writ petitioner) was enrolled in the Central Reserve Police Force (for short 'CRPF') as a constable driver on 31.07.1985. At the time of enrollment, he was physically examined and found fit. In 1996, the writ petitioner suffered some problem in his eye and was medically examined at Government Medical College

and Hospital, Jammu, where he was found suffering from Disseminated Choroiditis and Retinal Atrophic Patihics Macular involvement left eye. His visual acuity was 6/12 in right and 6/60 in left eye with no improvement with glasses i.e. he was found blind by left eye and partially blind in right eye. The Chief Medical Officer (NFSG) Station Hospital, GC, CRPF, Jammu, recommended his case to be put up before the Departmental Rehabilitation Board. The writ petitioner was declared unfit for driving as well as combatant duties and referred to Medical Invalidation Board on 17.01.1997 as per circulation order 28/29. The Medical Board constituted by Base Hospital-II, CRPF, Hyderabad, examined the writ petitioner on 10.04.1997 and found him to be permanently incapacitated for further service of any kind in the department. On the basis of such recommendations, a notice dated 12.02.1998 was served upon the writ petitioner by the respondent No.4 asking him to submit representation against the order of his medical invalidation. On 26.02.1998, the writ petitioner submitted application to the respondent No.4 wherein he sought full 100% financial benefits from the department on his invalidation from service. Vide order dated 11.03.1998, the writ petitioner was invalidated from service with effect from 11.03.1998. The writ petitioner on 15.10.2000 made a representation to the respondents which was rejected in December, 2000.

3. The writ petitioner thereafter approached this Court by filing CWP No.206/2003 which came up for consideration before this Court on 05.01.2005 and the following orders came to be passed:-

> *"When this case was taken up today, it was not disputed on behalf of the parties that after receipt of legal notice on behalf of the petitioner from his counsel Shri Sanjay Kalia, Advocate, Dharamshala, no decision had been taken on it till the date of swearing of affidavit, i.e. 12th July, 2004. Shri Baldev Singh, learned Addl. Central Government Standing Counsel, was not in a position to inform the Court whether any reply to this notice has been sent and/or whether the petitioner was found entitled to any relief in accordance with relevant rules and regulations.*
>
> *In this view of the matter and without having gone into merits of the case, this writ petition is disposed of by directing the respondents to take decision on the legal notice admittedly received by them. Decision will be taken by or before 15th February, 2005, and shall then be conveyed to the petitioner. In case petitioner is found entitled to any relief in accordance with law, needful will be done by the respondents by or before 31st March, 2005. In case legal notice has already been examined and decision taken on it before today, in such a situation, respondents are directed to forthwith convey such decision to the petitioner. If he (the petitioner) feels dissatisfied with the same, he will be entitled to have such recourse as available to him in law and in that event, this order will not come in his way.*
>
> *Writ petition is finally disposed of in these terms."*

4. In compliance to the orders passed by this Court on 31.03.2005, the respondents vide order dated 27.06.2005 again rejected the case of writ petitioner by according the following reasons:-

> *"2. You are hereby informed that your legal notice has been ignored being devoid of any merit as the disease suffered by you was not caused or attributable to service conditions. As per risk fund rules, you were entitled to Rs.15000/- only which has been paid to you in lumpsum and you are not entitled to Rs.1000/- PM as claimed by you. This is for your information."*

5. The learned writ Court after invoking the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, (for short the 'Act of 1995') allowed the writ petition by

holding that the writ petitioner would be deemed to be in service and entitled to all annual increments till the date of his retirement. The amount received by way of terminal benefits was ordered to be adjusted against the amount of his salary from 11.03.1998 and he was directed to be continued in service till the actual date of his superannuation according to service record.

6. The writ respondents, who are appellants, (hereinafter referred to as writ respondents) have challenged the judgment passed by the learned writ Court on the ground that the services of the writ petitioner could not be utilized anyway in the department since he was totally disabled. It is further contended that the writ respondents could not be compelled to pay a person while sitting idle and that pension has already been paid to the writ petitioner. It was also stated that the provisions of the Act were not applicable to the Armed Forces and a specific notification exempting the Armed Forces from applicability of this Act had been issued by the Central Government.

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

7. It is not disputed that the writ petitioner was hale and hearty at the time of his enrollment with the writ respondents and, therefore, in absence of disability or disease noted or recorded at the time of entry into service/Armed Forces, there would be a presumption of sound physical and mental condition at the time of said entry in service and any disability, disease suffered by the writ petitioner later on would be deemed to be attributable or aggravated by the service.

8. In taking this view, we are fortified by the judgment of the Hon'ble Apex Court in ***Dharamvir Singh*** *versus* ***Union of India and others (2013) 7 SCC 316*** wherein after discussing relevant law on the subject, the Hon'ble Supreme Court culled out the following principles:-

> ***"29. A conjoint reading of various provisions, reproduced above, makes it clear that:***
>
> ***29.1. Disability pension to be granted to an individual who is invalidated from service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20% or over. The question whether a disability is attributable or aggravated by military service to be determined under the Entitlement Rules for Casualty Pensionary Awards, 1982 of Appendix II (Regulation 173).***
>
> ***29.2. A member is to be presumed in sound physical and mental condition upon entering service if there is no note or record at the time of entrance. In the event of his subsequently being discharged from service on medical grounds any deterioration in his health is to be presumed due to service. [Rule 5 read with Rule 14(b)].***
>
> ***29.3. The onus of proof is not on the claimant (employee), the corollary is that onus of proof that the condition for non-entitlement is with the employer. A claimant has a right to derive benefit of any reasonable doubt and is entitled for pensionary benefit more liberally. (Rule 9).***
>
> ***29.4. If a disease is accepted to have been as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstances of duty in military service. [Rule 14(c)].***

29.5. If no note of any disability or disease was made at the time of individual's acceptance for military service, a disease which has led to an individual's discharge or death will be deemed to have arisen in service. [14(b)].

29.6. If medical opinion holds that the disease could not have been detected on medical examination prior to the acceptance for service and that disease will not be deemed to have arisen during service, the Medical Board is required to state the reasons. [14(b)]; and

29.7. It is mandatory for the Medical Board to follow the guidelines laid down in Chapter-II of the Guide to Medical Officers (Military Pensions), 2002-"Entitlement: General Principles", including Paras 7, 8 and 9 as referred to above (para 27).”

9. The need for a comprehensive legislation for safeguarding the rights of persons with disabilities and enabling them to enjoy equal opportunities and to help them to fully participate in national life was felt for a long time. The Disability Rights Movement in India commenced in 1977 of which National Federation of the Blind was an active participant. To realize the object that people with disabilities should have equal opportunities and keeping their hopes and aspirations in view, a meeting called the “Meet to Launch the Asian and Pacific Decades of Disabled Persons” was held in Beijing in the first week of December, 1992, by the Asian and Pacific countries to ensure “full participation and equality of people with disabilities in the Asian and Pacific Regions. A proclamation was adopted in the said meeting to which India was a signatory and they agreed to give effect to the same.

10. The launch of the Asian and Pacific Decade of Disabled Persons in 1993-2002 gave a definite boost to the movement. The main need that emerged from the meet was comprehensive legislation to protect the rights of persons with disabilities. In this light, the crucial legislation was enacted in 1995, viz. the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, which empowers persons with disabilities and ensures protection of their rights. This Act provides some sort of succor to the disabled persons.

11. Employment is a key factor in the empowerment and inclusion of people with disabilities. It is an alarming reality that the disabled people are out of job not because their disability comes in the way of their functioning rather it is social and practical barriers that prevent them from joining the workforce. As a result, many disabled people live in poverty and in deplorable conditions. They are denied the right to make a useful contribution to their own lives and to the lives of their families and community.

12. The learned Assistant Solicitor General of India has argued that the learned writ Court has wrongly applied the provisions of Act of 1995. The applicability whereof had been specifically excluded to the Armed Forces including the writ respondents.

13. It would be seen that the Act of 1995 came into force with effect from 7th February, 1996, while the writ petitioner was found unfit for driving and combatant duty by the Departmental Rehabilitation Board in its meeting held on 17.01.1997. Therefore, on the date on which the writ petitioner’s medical condition had been adjudged, undisputedly, the provisions of Act of 1995 had already come into force. It was only on 28.03.2002 that the Ministry of Social Justice and Empowerment issued notification whereby in its exercise of powers conferred under Section 47 of the Act, the Central Government having regard to the type of work carried out, exempted all the categories of posts of the combatant of the Armed Forces from the provisions of Section 47.

Undisputedly, the notification was only prospective in nature. Thus, it can safely be concluded that the Act of 1995 was applicable to the CRPF at the time when the decision was taken by the writ respondents to invalidate the writ petitioner with effect from 11.03.1998.

14. The learned Assistant Solicitor General thereafter has strenuously argued that the writ petitioner had already been paid the entire retiral benefits and was getting full pension and, therefore, was not entitled to re-employment. We are afraid that these submissions cannot be countenanced and have to be rejected outrightly in view of the following observations of the Hon'ble Supreme Court in ***Kunal Singh*** *versus* ***Union of India and another (2003) 4 SCC 524*** wherein the Hon'ble Supreme Court observed as under:-

> ***"11.We have to notice one more aspect in relation to the appellant getting invalidity pension as per Rule 38 of the CCS Pensions Rules. The Act is a special Legislation dealing with persons with disabilities to provide equal opportunities, protection of rights and full participation to them. It being a special enactment, doctrine of generalia specialibus non derogant would apply. Hence Rule 38 of the Central Civil Services (Pension) Rules cannot override Section 47 of the Act. Further, Section 72 of the Act also supports the case of the appellant, which reads:-***
>
> > ***"72. Act to be in addition to and not in derogation of any other law:- The provisions of this Act, or the rules made thereunder shall be in addition to, and not in derogation of any other law for the time being in force or any rules, order or any instructions issued thereunder, enacted or issued for the benefits of persons with disabilities."***
>
> ***12.Merely because under Rule 38 of CCS (Pension) Rules, 1972, the appellant got invalidity-pension is no ground to deny the protection, mandatorily made available to the appellant under Section 47 of the Act. Once it is held that the appellant has acquired disability during his service and if found not suitable for the post he was holding, he could be shifted to some other post with same pay-scale and service benefits; if it was not possible to adjust him against any post, he could be kept on a supernumerary post until a suitable post was available or he attains the age of superannuation, whichever is earlier. It appears no such efforts were made by the respondents. They have proceeded to hold that he was permanently incapacitated to continue in service without considering the effect of other provisions of Section 47 of the Act."***

15. We cannot be insensitive to the cases like that of the writ petitioner. In ***National Federation of Blind*** *versus* ***Union Public Service Commission and others (1993) 2 SCC 411***, the Hon'ble Supreme Court directed the Government and the UPSC to permit blind and partially blind eligible candidates to compete and write in Civil Services Examination in Braille script or with the help of a scribe. It also recommended to the Government to decide the question of providing reservations to visually handicapped persons in Group 'A' and 'B' posts in the government and public sector enterprises.

16. In ***Javed Abidi*** *versus* ***Union of India (1999) 1 SCC 467***, the Hon'ble Supreme Court directed the Indian Airlines to give concessions to orthopaedically handicapped persons suffering from locomotor disability to the extent of 80% for travelling by air in India. The Court was mindful of the financial position of Indian Airlines and yet felt that this direction was in keeping with the objectives of the Act and was in consonance with the concession already given by the Indian Airlines to visually disabled persons.

17. In ***Kunal Singh's case*** (supra), the Hon'ble Supreme Court was seen as interpreting the Disabilities Act in the manner so as to further its objectives when the Hon'ble Supreme Court held that Section 47 of the Act mandates that an employee, who acquires disability during service must be protected. If such an employee is not protected, he would not only suffer himself, but all his dependants would also undergo sufferings. Therefore, merely granting him pension would not suffice, but there must also be an attempt to secure him alternative employment.

18. In ***Indian Banks' Association , Bombay and others*** *versus* ***Devkala Consultancy Service and others (2004) 11 SCC 1***, the Hon'ble Supreme Court expressed its dismay over the implementation of the Act of 1995 by observing that "*despite the progressive stance of the Court and the initiatives taken by the Government, the implementation of the Disabilities Act is far from satisfactory. The disabled are victims of discrimination inspite of the beneficial provisions of the Act*". The Court further went on to create a fund for the aforesaid purpose for the implementation of the Act and the Comptroller and Auditor General of India was requested to effect recoveries of all the excess amount realized by the Union of India by way of interest tax and interest by the banks and other financial institutions and create the corpus of such fund therefrom. The Indian Banks' Association and other appellants in the case were also directed to contribute to the extent of `50 lacs each in the said fund. The Comptroller and Auditor General of India was made Chairman of the said Trust and the Finance Secretary and the Law Secretary of the Union of India were made its ex-officio members. The corpus so created could invest in such a manner so as to enable the trustees to apply the same for the purpose of giving effect to the provisions of the Act.

19. Reverting to the case, it can safely be concluded that merely granting invalidity pension is no ground to deny the protection mandatorily made available to the writ petitioner under Section 47 of the Act. Further, once it is held that the writ petitioner had acquired disability during his service and he was not suitable for the post he was holding, he could be shifted to some other post with same pay scale and service benefits. If it was not possible to adjust the writ petitioner against any post, even then he could be kept on a supernumerary post until a suitable post was available or he attains the age of superannuation, whichever is earlier. This being the mandate of law, the writ respondents cannot contend that the writ petitioner being under disability, his services cannot be utilized anyway in the department.

20. In view of the aforesaid discussion, we find no infirmity in the judgment passed by the learned writ Court and the appeal being devoid of any merit is dismissed as such leaving the parties to bear their own costs. The pending application (s), if any, also stands disposed of.

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

Smt. Dashoda alias Yashoda Devi & another ..Appellants

Versus

Shri Ramesh and others ..Respondents

RSA No.312 of 2003
Judgment reserved on: 19.11.2014
Date of Decision: 24.12.2014

Indian Succession Act, 1925- Section 63- Will was witnessed by one marginal witness- the other person had put his signature above the words "***Shinakhat Karta***, (identifier)- held, that even if it is believed that Lambardar was only an Identifier, one of the marginal witness had stepped into witness box and had

deposed about the execution and attestation of the Will- execution and attestation of the Will was duly proved. (Para-29 to 30)

Cases referred:

Swapan Kumara and others Vs. Sanjay Kumar and another, 2002(3) Shim. L.C. 294

S.R. Srinivasa and others Vs. S. Padmavathamma, (2010) 5 SCC 274

N. Kamalam (dead) and another Vs. Ayyasamy and another, (2001) & SCC 503

For the Appellants:	Mr. Bhupender Gupta, Senior Advocate with Mr. Janesh Gupta, Advocate.
For the Respondents:	Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate for respondents No.1 to 4. Respondent No.6 ex parte.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge *(oral)*

Plaintiffs No.1 and 2 Shri Ram Singh and Smt. Dashoda alias Yashoda Devi are in second appeal before this Court. They are aggrieved by the judgment and decree dated 5.5.2003, passed by learned District Judge, Solan in Civil Appeal No.40-S/13 of 2001, whereby the judgment and decree passed by learned Sub Judge, 1st Class, Arki, dated 29.6.2001 in Civil Suit No.192/1 of 1994, has been affirmed and the appeal dismissed.

2. The challenge to the impugned judgment and decree is on the grounds, inter alia, that both Courts below have committed material illegality and irregularity while returning findings on issues No.4 and 5 in ignorance of cogent and reliable evidence comprising oral as well as documentary available on record. Both Courts allegedly erred while recording the findings that the Will Ext.DW1/A is a valid document duly executed by Shri Geeta Ram in violation of the provisions contained under Section 63 of the Indian Succession Act. In this regard, it is pointed out that one of the witnesses Shri Shiv Ram is not an attesting witness and rather he has signed the Will in the capacity of an identifier as he was Numberdar at the relevant time. The signature of the scribe on the Will is also in the capacity of a document writer and not as an attesting witness. Since the Will was signed only by one of the attesting witnesses, therefore, it could have not been held as a legal and valid document. Also that in the absence of the pleadings and the evidence, it cannot be said that Shri Shiv Ram DW4 had animus to sign the Will in the capacity of a marginal witness. The plaintiffs, except for plaintiff No.1 Ram Singh, had not stepped into the witness box and as such an adverse inference should have been drawn against them. The Courts below allegedly got influenced merely by the fact that the Will Ext.DW1/A was a registered document. Affidavit Ext.PW2/A of testator Shri Geeta Ram that he had cordial relations with the plaintiffs has erroneously been ignored. On the other hand, the defendants have miserably failed to prove that it is they alone who were rendering services to the deceased during his life time. This aspect of the matter has not been appreciated. The factum of the suit land being in possession of plaintiff No.1 in the capacity of a tenant duly proved on record has also not been appreciated in its right perspective and recorded the findings to the contrary which has resulted in miscarriage of justice to the appellants-plaintiffs.

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

1. Whether the Will in question has not been duly executed and attested in accordance with law?

4 It is thus seen that the only legal question, which needs adjudication in the present lis is as to whether the Will Ext.DW1/A has been executed in accordance with law or not. The adjudication thereof takes us to the given facts and circumstances of the case and also the evidence available on record.

5 The dispute pertains to the inheritance of the estate of deceased Geeta Ram. He was exclusive owner in possession of land measuring 6 Biswas, bearing Khasra No.54 and co-owner of land measuring 37 bighas 14 biswas bearing Khasra Nos.49, 52, 56, 57, 62, 67, 69, 72 and 81 to the extent of ½ share, co-owner-cum-mortgagor of land measuring 1 Bigha 6 Biswas, bearing Khasra Nos.74 and 82 to the extent of ½ share and co-owner of land measuring 5 Bighas 14 Biswas, bearing Khasra No.78 to the extent of 1/6th share, situated in village Rehawan, Pargana Sendhurath, Tehsil Arki District Solan. He had two wives. Plaintiffs No.2 and 3 were born to him out of his wedlock with his previous wife. On her death, he married with defendant No.5 Smt. Mahantu Devi. Kanshi Ram was real brother of deceased Geeta Ram. Defendants No.1 to 4 are sons of said Shri Kanshi Ram. Defendant No.5 Mahantu Devi had cordial relations with Kanshi Ram. Defendants No.1 to 4 taking undue advantage of the relations of defendant No.5 with their father, managed to execute the Will by deceased Geeta Ram qua the suit land on 26.4.1994, in their favour. It is on 31.7.1994, defendants No.1 to 4 threatened the plaintiffs to take over the possession of the suit land forcibly on the basis of Will in question.

6 While according to the plaintiffs, the Will is a forged and fictitious document having not been executed by deceased Geeta Ram in favour of defendants No.1 to 4 and that the suit land was in possession of plaintiff No.1 in the capacity of tenant and hence, the defendants have nothing to do therewith, at the same time, the defendants claimed that it is they who used to look after and maintain deceased Geeta Ram during his life time and as such, he being happy and satisfied with the services rendered by them, executed the Will in their favour voluntarily while in a sound disposing mind. According to them, the execution of the Will has been witnessed by two witnesses and hence, is a legally and validly executed document.

7 On such pleading of the parties, learned trial Court has framed the following issues:

1. Whether the plaintiffs are entitled for the relief of permanent prohibitory injunction, as claimed? OPP.
2. Whether the plaintiffs are entitled for the relief of declaration, as alleged? OPP.
3. Whether the plaintiff was tenant of deceased Geeta Ram in the suit land, as claimed? OPP
4. Whether late Shri Geeta Ram had executed a legal and valid Will on 224.4.1994? OPD
5. Whether the will is result of mis-representation, fraud etc.? OPD
6. Whether the suit is not maintainable? OPD
7. Whether the suit is bad for mis-description of the parties? OPD
8. Whether the plaintiffs have no locus-standi to file the present suit? OPD
9. Whether the plaintiffs are estopped to file the present suit by their own acts and conduct and acquiescences? OPD

10. Whether the suit is bad for the non-joinder of necessary parties? OPD

11. Whether the suit is properly valued for the purpose of court fee and jurisdiction? OPD

11A. Whether the plaintiffs are entitled to the relief of possession by way of alternative relief as alleged? OPP.

12. Relief.

8. The parties, when put to trial, have produced oral as well as documentary evidence, in support of their respective case. S/Shri Krishan Chand and Sushil Kumar, PW-1 and PW-2, respectively, have examined themselves to prove the factum of transfer of a gun by Geeta Ram in the name of plaintiff No.1, who himself has stepped into the witness box as PW-3 in support of the case, as set out in the plaint. The plaintiffs have also examined Mohan Lal PW-4 to prove that it is they who used to cultivate the suit land and maintain deceased Geeta Ram during his life time.

9. In rebuttal, plaintiff No.1 has again stepped into the witness box and also examined one more witness PW-5 Dina Nath. They also placed reliance on the affidavit Ext.DW1/A of deceased Geeta Ram.

10. On the other hand, Shri Kamlesh Kumar, Document Writer has stepped into the witness box as DW-1 and proved Will Ext.DW1/A. The attesting witnesses S/Shri Prem Lal and Shiv Ram have also stepped into the witness box as DW-3 and DW-4 respectively. Defendant No.1 Shri Chet Ram while in the witness box as DW-2 has also supported the entire case as set out in the written statement.

11. Learned trial Judge, while deciding issues No.4 and 5 in favour of defendants has arrived at a conclusion that the defendants have successfully pleaded and proved the execution of Will Ext.DW1/A by Shri Geeta Ram in a sound disposing mind in presence of the witnesses. This document, therefore, has been held to be legal and valid. The suit, therefore, was dismissed.

12. Though the judgment and decree passed by learned trial Court was assailed in learned lower appellate Court, however, unsuccessfully, as the appeal has been dismissed vide the judgment and decree, which is under challenge in the present appeal.

13. Shri Bhupender Gupta, learned Senior Advocate has emphasized mainly that the Will in question is not at all proved, as according to him, even if it is presumed to be executed by deceased Geeta Ram, the execution thereof has been witnessed only by one marginal witness, i.e. DW-3 Prem Lal, as according to Mr. Gupta, the other witness DW-4 Shiv Ram has signed the will in the capacity of an identifier. There is no clarification given by the scribe DW-1 Kamlesh Kumar that words "***Shinakhat Karta***, (identifier) below the signature of Shiv Ram came to be recorded by way of an inadvertent mistake. As regards the scribe DW-1 Kamlesh Kumar, it is pointed out that the scribe may be a witness; however, there must be animus to append his signature on the Will like a marginal witness. The scribe, according to Mr. Gupta, has not signed the Will with an intention to witness the execution thereof in the capacity of a marginal witness. Since Shiv Ram belongs to a distant place, his testimony cannot be relied upon.

14 On the other hand, Shri G.D. Verma, learned Senior Advocate, while repelling the contentions raised on behalf of the appellants-plaintiffs has strenuously contended that without there being any evidence available on record, it cannot be said that the plaintiff was in possession of the suit land in the capacity of a tenant. Plaintiff No.1, according to Mr. Verma, has no locus-

standi to assail the legality and validity of the Will as he had nothing to do with the property belonging to Shri Geeta Ram. It is only the daughters of deceased Geeta Ram, plaintiffs No.2 and 3 alone, who had the cause of action and locus-standi, if any, to have challenged the same. It has also been pointed out that the validity of a Will is not a question of law, but facts. The genuineness and authenticity of the Will, in question, cannot be doubted on the ground that only one marginal witness is associated or examined. According to Mr. Verma, otherwise also, the concurrent findings recorded by both Courts below on appreciation of the pleadings and evidence available on record, cannot be interfered with in a second appeal.

15. Thus, the only legal question, which needs adjudication in the present lis is as to whether the Will Ext.DW1/A has not been executed and attested in accordance with law. The pre-requisites for execution of a legal and valid Will find mention in Section 63 of the Indian Succession Act, which reads as follows:

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

16. Another legal provision to constitute the execution of a legal and valid Will is enshrined under Section 68 of the Evidence Act, which reads as follows:

> **68. Proof of execution of document required by law to be attested.**
>
> If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.
>
> Provided that it shall be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

17 Besides, Section 30 of the Hindu Succession Act provides that any Hindu may dispose of by Will or other testamentary disposition any property, which is capable of being so disposed of by him in accordance with the

provision of the Indian Succession Act or any other law for the time being in force and applicable to Hindus.

18 Now, if the execution and attestation of the Will in question is seen in the light of the above legal proposition and the evidence available on record, the defendants have examined the scribe of the Will DW-1 Kamlesh Kumar. As per his version, the Will was reduced into writing at the instance of the testator deceased Geeta Ram. The same was read over and explained to him in vernacular. He, on hearing the contents of the Will and admitting the same to be correct, thumb marked the same. The marginal witnesses DW-4 Shiv Ram, Numberdar and DW-3 Prem Lal were also present. They both also signed the Will after going through the contents thereof. Shri Geeta Ram, the testator had thumb-marked the Will in the presence of the witnesses, who had also put their signatures on the Will in the presence of said Shri Geeta Ram. Although DW-1 Kamlesh Kumar has been cross-examined, however, in sundry and not qua the aspect that the testator was seen by the witnesses while putting his thumb mark on the Will and he saw the witnesses putting their signatures on this document.

19 DW-3 Prem Lal one of the marginal witnesses also tells us that he had seen Geeta Ram while putting his thumb impression on the Will who, according to this witness, was illiterate. As per his further version, the contents of the Will were read over and explained to him and that he had signed the same in the presence of Geeta Ram and Shiv Ram, Numberdar. He has also identified his signature and also that of Shiv Ram on the Will, in question. He further tells us that the Will thereafter was produced by Shri Geeta Ram in his presence and that of Shiv Ram, Numberdar before the Tehsildar for attestation by informing the Tehsildar and he had executed the Will in favour of the children of his brother. On this the Tehsildar attested the Will. He signed the Will as a witness before the Tehsildar at point “F” encircled red. He also identified the thumb mark of Geeta Ram at point “G” encircled red on the Will which he had put on the Will in the presence of Tehsildar. He has also identified the signatures of Shiv Ram, Numberdar at point “H” encircled red, which he had put on the Will before the Tehsildar.

20 DW-3 Prem Lal has also been subjected to lengthy cross-examination, however, again in sundry and not qua the relevant aspect, i.e. mode and manner in which the Will was executed and produced before Tehsildar, Arki, for attestation.

21 Shiv Ram has stepped into the witness box as DW-4. According to him also, the Will was reduced into writing at the instance of Geeta Ram, who had put his thumb impression on the Will, after admitting the contents thereof to be true and correct in their presence and he as well as DW-3 Prem Lal both had seen him while putting his thumb impression thereon. Similarly, Geeta Ram had also seen them putting their signatures on the Will. As per his version also, it was about 3 p.m. when the Will was produced for attestation before the Tehsildar by Geeta Ram. The Tehsildar had enquired from Geeta Ram as to what he was doing to which he answered that he was executing a Will in favour of his nephews. He has identified Geeta Ram’s thumb impression, which he had put on the Will in the presence of Tehsildar and also his signatures as well as that of DW3 Prem Lal.

22 The Will in question is Ext.DW1/A. The original thereof is also available on record. The same has been thumb marked by the testator on each and every page and also before the Tehsildar.

23 Although the plaintiffs claim that deceased Geeta Ram used to put his signature and not thumb mark, yet plaintiff No.1 Ram Singh while in the witness box as PW-3 has admitted that Geeta Ram was illiterate. If coming to affidavit Ext.PW2/A, the same though bears signature allegedly that of Geeta

Ram, however, no cogent and reliable evidence has come on record that these are the signatures of Geeta Ram alone.

24 True it is that plaintiffs No.2 and 3 are the daughters of Geeta Ram from his previous wife and it is they who alone could have inherited his estate and not the plaintiff No.1, however, plaintiffs No.1 and 2 have not opted for stepping into the witness box and it is plaintiff No.1 who has appeared as PW-1. Even one of the plaintiffs, i.e. plaintiff No.3 Smt. Ajudhia Devi has not opted to file any appeal in this Court, as she is proforma respondent herein. Moreover, had the exclusion of plaintiffs No.2 and 3 from the suit property by way of Will Ext.DW1/A been not correct or if the Will was result of fraud, mis-representation or shrouded by suspicious circumstances, it is the plaintiffs No.2 and 3, who would have entered into the witness box and deposed so on oath. Non appearance of the said plaintiffs as witnesses, leads to the only conclusion that Will Ext.DW1/A was the last will of deceased Geeta Ram and executed by him in favour of his nephews, the defendants No.1 to 4.

25 Interestingly, deceased Geeta Ram as per own admission of plaintiff No.1 Ram Singh was hale and hearty at the time of his death and according to him, he died due to stomach ache. Though he claims that Geeta Ram was not in sound disposing mind, however, he has not produced any evidence in this regard.

26 As regards the plea that it is plaintiff No.1 who had been cultivating the suit land for the last 25-26 years, the same has no grain of truth and rather palpably false.

27 Therefore, in the given facts and circumstances of this case and also the evidence available on record as well as the legal provisions discussed hereinabove, the execution and attestation of Will Ext.DW1/A stands duly proved in accordance with law.

28 In ***Swapan Kumara and others*** *Vs.* ***Sanjay Kumar and another, 2002(3) Shim. L.C. 294***, having identical question of law formulated for adjudication, a coordinate Bench of this Court found the question of law so framed of no avail and held that the question whether a Will can be believed or not is not a question of law nor the High Court will re-appraise the evidence to ascertain whether the Will should be believed or not.

29 Learned counsel, representing the appellants has placed reliance on the judgment of Apex Court in ***S.R. Srinivasa and others*** *Vs.* ***S. Padmavathamma***, ***(2010) 5 SCC 274***, The ratio of law laid down by the Apex Court in this judgment is, however, not attracted in the given facts and circumstances of the case for the reason that none of the attesting witnesses were examined in that case and the statement of the scribe, who alone stepped into the witness box, was not taken to be that of an attesting witness, as he never signed the Will in the capacity of an attesting witness. This, however, is not the position in the case in hand, as even if it is believed that Shiv Ram Numberdar was only an identifier, one of the marginal witnesses DW3 Prem Lal has appeared into the witness box and categorically deposed about the execution and attestation of the Will in so many unambiguous words. To the similar effect is the ratio of judgment of the Apex Court in ***N. Kamalam (dead) and another*** *Vs.* ***Ayyasamy and another***, ***(2001) & SCC 503,*** which is also of no help to the case of the appellants-plaintiffs.

30 In view of what has been said hereinabove, the execution and attestation of the Will in question stands satisfactorily proved in the case in hand. There is no question of law, much less a substantial question of law involved for adjudication in the present appeal. The judgments and decrees passed by both Courts below call for no interference and deserve to be upheld.

31 For all the above reasons, this appeal fails and the same is accordingly dismissed, however, with no order as to costs.

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

Dinesh Kumar S/o Sh. Ratti Ram Sharma. ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1332 of 2014
Order Reserved on 12th December, 2014
Date of Order 24th December, 2014

Code of Criminal Procedure, 1973 - Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 147, 148, 149, 323, 353, 332, 506, 427 and 307 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- object of bail is to secure the presence of the accused during the trial- in the present case, investigation is complete and challan has already been filed in the Court- other accused have already been released on bail- mere pendency of criminal cases against the petitioner is not sufficient to decline the bail to the petitioner-considering that petitioner had joined the investigation, petitioner is ordered to be released on bail.

(Para-7 and 8)

Cases referred:

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

The State Vs. Captain Jagjit Singh AIR 1962 SC 253

Sanjay Chandra vs. Central Bureau of Investigation (Apex Court)2012 Criminal Law Journal 702

Manoj Narula vs. Union of India 2014 (9) SCC

For the Applicant: Mr. B.R. Sharma, Advocate
For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General with Mr. Puneet Razta, Deputy Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 78 of 2014 dated 9.6.2014 registered under Sections 147, 148, 149, 323, 353, 332, 506, 427 and 307 of IPC registered with police of Police Station Theog, District Shimla, H.P.

2. It is pleaded that applicant is innocent and has been falsely implicated in the present case. It is further pleaded that investigation is complete and applicant is not required for any other purpose. It is further pleaded that nothing is to be recovered from the applicant and it is further pleaded that the applicant is ready and willing to join the investigation of the case and undertakes that applicant will not tamper with the prosecution witnesses in any manner. Prayer for acceptance of bail application is sought.

3. Per contra police report filed. There is recital in the police report that FIR No. 78 of 2014 dated 9.6.2014 was registered against the applicant under Sections 147, 148, 149, 323, 353, 332, 506, 427 and 307 of IPC registered with police of Police Station Theog District Shimla H.P. There is further recital in the police report that on 8.6.2014 at about 11.05 in the night a telephone received that one person is dealing in illegal business of wine. There is further recital in the police report that after receipt of information ASI Sunil Kumar along with HHC Madan Singh No. 1046 went to the place of incident and when they were standing in front of house of Sanjay Chauhan at 12.30 a.m. one Balwant Singh @ Danu along with 15/18 persons came at the spot. There is further recital in the police that Balwant Singh @ Danu and other 15/18 persons were having sticks in their hands and they attacked the complainant Sh. Brij Lal and also attacked Sandeep and Manohar Singh. There is further recital in the police report that when the police officials tried to rescue then accused persons also quarrel with ASI Sunil Kumar. There is further recital in police report that ASI Sunil Kumar also sustained incised injuries. There is further recital in the police report that accused also broken the mirror of motor vehicle No. HP 09B-0906. After registration of the FIR criminal was investigated. Site Plan was also prepared. Photographs took place and statements of witnesses were also recorded. There is further recital in the police report that during investigation complainant Brij Lal told that by mistake he mentioned the name of Balwant Singh @ Danu as prime accused instead of Dinesh Kumar @ Guddu. There is further recital in the police report that nine criminal cases have been registered against the applicant. There is further recital in the police report that other co-accused have been released on bail by learned Additional Sessions Judge CBI. There is further recital in the police report that challan already stood filed on 30.9.2014 before the Court of learned Additional Chief Judicial Magistrate Theog. There is further recital in the police report that applicant is a quarrelsome person and if he is released on bail then applicant will induce and threat the prosecution witnesses and prayer for rejection of bail application sought.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the State and also perused the record carefully.

5. Following points arise for determination in this bail application:-

Point No. 1

Whether bail application filed under Section

439 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail application?

Point No. 2

Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and he did not commit any offence cannot be decided at this stage. Same facts will be decided by learned trial Court after giving due opportunity to both the parties to adduce evidence in support of their version.

7. Submission of learned Advocate appearing on behalf of the applicant that challan already stood filed in the Court and no recovery is to be effected from the applicant and on this ground bail application filed under Section 439 Cr.P.C. 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 Criminal Law Journal 702 titled Sanjay Chandra vs. Central Bureau of Investigation*** **(Apex Court)** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period. In view of the fact that investigation is already completed in the present case and in view of the fact that challan already stood filed in the criminal Court and in view of the fact that other co-accused already stood released on bail by the competent Court of law and in view of the fact that trial in present case will be concluded in due course of time Court is of the opinion that it is expedient in the ends of justice to release the applicant on bail. Court is of opinion that if the applicant is released on bail at this stage then interest of State and general public will not be adversely affected.

8. Submission of learned Additional Advocate General appearing on behalf of non-applicant that nine criminal cases are still pending against the applicant and on this ground bail application filed by the applicant be rejected is devoid any force for the reasons hereinafter mentioned. It is well settled law that accused is presumed to be innocent till convicted by the competent Court of law. There is no recital in the police report that applicant has been convicted by any criminal Court of law. It was held in case reported ***2014 (9) SCC titled Manoj Narula*** vs. ***Union of India*** that accused is presumed to be innocent until convicted by competent Court of law. It was held that this concept would apply to a person accused of one or multiple offences.

9. Submission of learned Additional Advocate General that if the applicant is released on bail then applicant will induce and threat the prosecution witnesses and will also commit the similar offence and on this ground bail application be rejected is devoid of any force for the reasons hereinafter mentioned. Conditional bail will be granted to applicant. Court is of the opinion that if the applicant will flout the terms and conditions of bail order then prosecution will be at liberty to file application for cancellation of bail order in accordance with law. In view of the above stated facts point No.1 is answered in affirmative.

Point No. 2

Final Order

10. In view of my findings on point No.1 bail application filed by applicant under Section 439 Cr.P.C. is allowed and applicant is ordered to be released on bail subject to furnishing personal bond to the tune of Rs. 1 lac with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That applicant will join the proceedings of learned trial Court regularly till conclusion of trial in accordance with law and will also join the investigation whenever and wherever directed to do so. (ii) That applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That the applicant will not leave India without the prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will give his residential address in written manner to the Investigating Officer and Court. (vi) That applicant will not quarrel with complainant Brij Lal. (vii) That applicant will not damage the vehicle of the complainant in any manner. Applicant be released only if he is not required in any other criminal

case. Bail application filed under Section 439 Cr.P.C. stands disposed of. My observations made in this order will not affect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of.

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

Gulchen Singh son of Suram Singh. ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1331 of 2014
Order Reserved on 10.12.2014
Date of Order 24th December, 2014

Code of Criminal Procedure, 1973 - Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 363 and 366 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused during the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- In the present case, investigation was complete- challan has been filed- therefore, it would not be proper to keep applicant in custody- bail granted. (Para-7)

Cases referred:

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

The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

Sanjay Chandra vs. Central Bureau of Investigation, 2012 Criminal Law Journal page 702 Apex Court

For the Applicant: Mr. S.C. Sharma, Advocate
For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General with Mr. Puneet Razta, Deputy Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with FIR No. 142 of 2014 dated 10.7.2014 registered under Sections 363 and 366 of the Indian Penal Code at Police Station Nalagarh District Solan H.P.

2. It is pleaded that applicant has been falsely implicated in the present case and it is further pleaded that applicant has nothing to do with the alleged criminal offences. It is further pleaded that the applicant belongs to a reputed family in the locality. It is further pleaded that applicant has old parents dependent upon him and applicant is only bread earner in the family. It is further pleaded that prosecutrix in her statement clearly stated that she left her house at her own. It is further pleaded that applicant is not required for investigation purpose. It is further pleaded that no recovery is to be effected from the applicant and it is further pleaded that applicant will not tamper the

prosecution evidence in any manner. Prayer for acceptance of bail application is sought.

3. Per contra police report filed. As per police report case FIR No. 142 of 2014 dated 10.7.2014 under Sections 363 and 366 was registered at Police Station Nalagarh District Solan H.P. There is recital in the police report that during investigation medical examination of the prosecutrix was conducted and as per report of Medical Officer no sexual intercourse was committed. There is further recital in the police report that accused was working in Himachal Pradesh and was tenant in the house of parents of prosecutrix. There is further recital in the police report that accused and prosecutrix were familiar with each other for 6/7 months. There is further recital in the police report that on 7.7.2014 accused called the prosecutrix from his mobile phone to Pathankot and thereafter took the prosecutrix to Jammu. There is further recital in the police report that thereafter accused took the prosecutrix to Delhi. There is further recital in the police report that accused and prosecutrix were caught at Delhi. There is further recital in the police report that learned Additional Chief Judicial Magistrate refused to record the statement of prosecutrix under Section 164 Cr.P.C. and there is further recital in the police report that thereafter birth certificate of the prosecutrix was obtained from Panchayat and Primary School. There is further recital in the police report that challan already stood filed in the competent Court of law on 27.9.2014 and there is further recital in the police report that accused is lodged in Sub Jail, Solan. There is further recital in the police report that if accused is released on bail then he would again took prosecutrix. Prayer for rejection of bail application sought.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the State and also perused the record carefully.

5. Following points arise for determination in this bail application:-

Point No. 1

Whether bail application filed under Section 439 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail application?

Point No. 2

Final Order.

Findings on Point No.1

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

7. Another submission of learned Advocate appearing on behalf of the applicant that no recovery is to be effected from the applicant and investigation is complete and challan already stood filed in the competent Court of law and on this ground bail application filed under Section 439 Cr.P.C. 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 Criminal Law Journal page 702 Apex Court, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure

the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period. In view of the fact that investigation is already completed in the present case and in view of the fact that challan already stood filed in the criminal Court and in view of the fact that Medical Officer has opined that no sexual intercourse was committed upon the prosecutrix and in view of the fact that accused is presumed to be innocent till convicted by competent Court of law and in view of the fact that trial in present case will be concluded in due course of time it is expedient in the ends of justice to release the applicant on bail. Court is of the opinion that if the applicant is released on bail at this stage then interest of State and general public will not be adversely affected.

8. Submission of learned Additional Advocate General appearing on behalf of non-applicant that if the applicant is released on bail at this stage then applicant will induce and threat the prosecution witnesses and will also commit the similar offence and on this ground bail application be rejected is devoid of any force for the reasons hereinafter mentioned. Conditional bail will be granted to applicant. Court is of the opinion that if the applicant will flout the terms and conditions of conditional bail order then prosecution will be at liberty to file application for cancellation of bail order in accordance with law. In view of the above stated facts point No.1 is answered in affirmative.

Point No. 2

Final Order

9. In view of my findings on point No.1 bail application filed by applicant under Section 439 Cr.P.C. is allowed and applicant is ordered to be released on bail subject to furnishing personal bond to the tune of Rs. 1 lac with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That the applicant will join the proceedings of learned trial Court regularly till conclusion of trial in accordance with law and will also join the investigation whenever and wherever directed to do so. (ii) That applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That the applicant will not leave India without the prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will give his residential address in written manner to the Investigating Officer and Court. (vi) That applicant will not meet or take away prosecutrix during the trial of the case in any manner. Applicant will be released only if he is not required in any other criminal case. Bail application filed under Section 439 Cr.P.C. disposed of. My observations made in this order will not affect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of.

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

Hans Raj son of Sh Gokal Ram. .....Petitioner.

Vs.

HPSEB and another. ...Respondents.

CWP No. 9844 of 2012.
Order reserved on:31.10.2014
Date of Order: December 24, 2014.

Constitution of India, 1950- Article 226- Petitioner was appointed as temporary employee in the year 1981- his service was regularized w.e.f. 9.9.1997 – he was retired from service in July 2003, the period from 1981 to 9.9.1997 was not counted for pay fixation, increments and pensionary benefits- it was proved on record that petitioner was appointed as T-mate on work charge basis- petitioner challenged the status of T-mate after the gap of 15 years- held that service rendered by government employee as daily wages cannot be counted for pensionary benefits- further, no representation was filed for redressal of the grievances by the petitioner- no explanation was given for the delay- in these circumstances, petitioner was not entitled for any relief- petition dismissed.

(Para-5)

Cases referred:

State Bank of India Vs. L. Kannaiah and others, AIR 2003 SC 3860

P.S.Sadasivaswamy Vs. State of Tamil Nadu (Apex Court of India), 1976 (1) Service Law Reporter 53

Satija Rajesh Vs. State of Himachal Pradesh and others, AIR 2014 (Suppl.) Him L.R. (DB) 2422

M/s Rup Diamonds and others Vs. Union of India, AIR 1989 SC 674

State of Karnataka and others Vs. S.M.Kotrayya and others, 1996 (6) SCC 267

Jagdish Lal and others Vs. Vs. State of Haryana, AIR 1997 SC 2366

For the petitioner: Mr. A.K.Gupta, Advocate.
For respondents: Mr.Rajpal Singh Thakur, Advocate.

The following judgment of the Court was delivered:

P.S.Rana,Judge.

Present petition is filed under Article 226 of the Constitution of India. It is pleaded that petitioner was appointed as temporary employee in the year 1981. It is pleaded that services of the petitioner was regularized w.e.f. 9.9.1997. It is pleaded that petitioner was retired from service in July 2003. It is pleaded that petitioner was illegally treated as daily wage employee. It is pleaded that period w.e.f. 1981 to 9.9.1997 has not been counted for pay fixation, increments and pensionary benefits. It is pleaded that entire period of service of the petitioner w.e.f. 1981 to 9.9.1997 should be treated for pay fixation, increment and grant of pay scale and allowances from the initial appointment till the services of the petitioner was regularized. It is pleaded that period of service of the petitioner w.e.f. 1981 to 9.9.1997 be also counted for the purpose of pensionary benefits. Prayer for acceptance of writ petition sought.

2. Per contra reply filed on behalf of the respondents pleaded therein that present petition is barred on the concept of delay and laches. It is pleaded that petitioner is estopped to file present petition on his act and conduct. It is pleaded that petitioner has not completed qualifying service of ten years. It is further pleaded that petitioner is not entitled for the benefit of pensionary benefits in view of the decision rendered by Division Bench of Hon'ble High Court of HP in CWP No. 3493 of 2011 and in view of settlement arrived by Hon'ble Apex Court of India in civil writ petition Nos. 788 of 1987, 705 of 1987 and 398 of 1981. It is further pleaded that petitioner was appointed as work charge T-mate vide order dated September 1997 and petitioner was offered work charge status. It is pleaded that work charge employee is not entitled for pensionary benefits. Prayer for dismissal of writ petition sought.

3. Court heard learned Advocate appearing on behalf of petitioner and learned counsel appearing on behalf of respondents and also perused the record carefully.

4. Following points arise for determination in the present writ petition.

(1) Whether relief after fifteen years from date of cause of action is barred on the concept of delay, laches and acquiescence as alleged?

(2) Final order.

Finding upon point No.1.

5. Submission of learned Advocate appearing on behalf of the petitioner that the services of the petitioners for the period w.e.f. 1981 to 9.9.1997 be counted for the purpose of pay fixation and increment and the said period be also counted for the purpose of pensionary benefits is rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that petitioner was appointed as T-Mate on work charge basis. It is proved on record that thereafter petitioner voluntarily accepted the post of T-Mate on work charge basis. Petitioner did not challenge the status of T-Mate on work charge from 1997 till 11.11.2012. It is proved on record that petitioner has challenged the status of T-Mate after a gap of fifteen years. It is also proved on record that petitioner has voluntarily received the salary of T-Mate on work charge status. It was held in case reported in AIR 2014 Patna 208 titled The State of Bihar Vs. Bhagwan Singh (since dead) by legal heirs that service rendered by government employee as daily wages could not be counted for pension benefit and it was held that service of the employee for pension benefit would be calculated from the date of appointment of the employee upon a substantive post. It was held by Division Bench of Hon'ble High Court of HP in CWP No. 180 of 2001 titled State of HP and another Vs. Ram Lal and others decided on 31.5.2012 that Pension Chapter of the Civil Service Regulations which governed the employees earlier stood repealed after the enforcement of the Central Civil Service (Pension) Rules, 1972 and the savings portion of Rule 89 of the 1972 Rules does not save the office Memorandum No. F.12(1)E.V/68 dated 14.5.1968 and it was held that the service rendered on daily wages basis by the employees before their regularization/grant of work charged status could not be counted for their qualifying service for grant of pension under the Central Civil Services (Pension) Rules, 1972. It was held in case reported in AIR 2003 SC 3860 titled State Bank of India Vs. L. Kannaiah and others that clubbing of past service for the purpose of pension in the absence of rule is not permissible. In the present case petitioner did not challenge the status of his service even after his regularization on 9.9.1997. It was held in case reported in 1976 (1) Service Law Reporter 53 titled P.S.Sadasivaswamy Vs. State of Tamil Nadu (Apex Court of India) that relief should be declined to the petitioner if writ petition is not filed expeditiously. It was held that normally writ petition should be filed within six months or at the most within one year after the arisen of cause action. It was held in case reported in AIR 2014 (Suppl.) Him L.R. (DB) 2422 titled Satija Rajesh Vs. State of Himachal Pradesh and others that delay is important factor in writ petition and it was held that delay defeats equity and it was held that delay could not be brushed aside without plausible explanation. In view of the above stated facts it is not expedient in the ends of justice to grant relief to the petitioner on the concept of delay, laches and acquiescence. There is no plausible explanation of delay for about fifteen years after cause of action given by petitioner. Petitioner did not place on record any document in order to prove that petitioner had filed any representation before competent authority of law in order to redress his grievance in order to condone delay from date of cause of action. It was held in case reported in AIR 1989 SC 674 titled M/s Rup Diamonds and others Vs. Union of India that Court has consistently rejected the contention that petition should be considered ignoring delay and laches in case petitioner approaches the Court after coming to know of the relief granted by Court in similar case. It was held that the same is not proper explanation of delay and laches. It was held that litigant could not wake up from deep slumber

and could not claim impetus from the judgment in cases where some diligent person had approached within reasonable time. See 1996 (6) SCC 267 titled State of Karnataka and others Vs. S.M.Kotrayya and others See AIR 1997 SC 2366 titled Jagdish Lal and others Vs. Vs. State of Haryana. Hence point No.1 is decided against the petitioner and in favour of respondents.

Final Order.

6. In view of my findings upon point No.1 civil writ petition filed under Article 226 of the Constitution of India is dismissed on the concept of delay, laches and acquiescence. In the present case delay of more than fifteen years is writ large from the date of cause of action. No order as to costs. Writ petition disposed of. Pending application(s) if any are also disposed of.

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

Kali Dass & ors. ..... Petitioners.

Vs.

Shobha Ram & anr. ..... Respondents

Cr.MMO No.170 of 2014.
Judgement reserved on: 19.12.2014
Date of decision: 24.12.2014.

Code of Criminal Procedure, 1973- Section 482- Complaint was filed against the petitioners for the commission of offences punishable under Sections 451, 323, 506 and 141 read with Section 149 of IPC- Magistrate found sufficient grounds to summon the petitioners for the commission of offences punishable under Sections 451, 323, 506 and 141 read with Section 149 of IPC- it was contended that the order passed by the magistrate was bad as no reasons were given for summoning the accused- held, that there is no legal requirement to pass a detailed and speaking order while issuing the process- however, when the Investigating Agency had submitted a closure report, it was appropriate though not imperative for the Magistrate to record reasons but the order is not vitiated merely because of absence of reasons- petition dismissed. (Para-8 to 21)

Cases referred:

Dhanalakshmi vs. R.Prasanna Kumar and others 1990 Supp 1 SCC 686

Chand Dhawan vs. Jawahar Lal and Ors. 1992 AIR (SC) 1379

Radhey Shyam Khemka vs.State of Bihar, (1993) 3 SCC 54

Mushtaq Ahmad vs. Mohd. Habibur Rehman Faizi and others (1996) 7 SCC 440

Binod Kumar & Ors. vs. State of Bihar & Anr. JT 2014 (12) SC 286

Kanti Bhadra Shah vs. State of W.B. (2000) 1 SCC 722

U.P. Pollution Control Board vs. Mohan Meakins Ltd. (2000) 3 SCC 745

Chief Controller of Imports & Exports vs. Roshanlal Agarwal (2003) 4 SCC 139

Bhushan Kumar vs. State (NCT of Delhi) (2012) 5 SCC 424.

Nupur Talwar vs. Central Bureau of Investigation and another (2012) 11 SCC 465

For the petitioner : Mr. Sanjeev Kuthiala, Advocate.

For the respondents : Mr. Ajay Sharma, Advocate, for respondent No.1.
Ms. Meenakshi Sharma and Mr. Rupinder Singh, Additional Advocate Generals with Ms. Parul Negi, Dy. Advocate General, for respondent No. 2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This petition, under section 482 of the Code of Criminal Procedure (for short, the Code) read with Article 227 of the Constitution of India seeks quashment and setting –aside the complaint dated 12.6.2007 (Annexure P-3) made by respondent No. 1 before the learned Judicial Magistrate Ist Class, Amb, District Una, H.P., order dated 6.5.2008 (Annexure P-8) issued by the learned Magistrate whereby he issued process against the petitioners and order dated 10.3.2011 (Annexure P-11) whereby the petitioners were summoned for offences, under sections 451, 323, 506, 148 read with section 149 IPC and lastly the order dated 30.6.2014 (Annexure P-16) passed by learned Additional Sessions Judge (II), Una, whereby the revision petition preferred by the petitioners against the summoning order has been ordered to be dismissed.

2. The parties are co-owners of certain land situate in Lower Lohara, Tehsil Amb, District Una. Respondent No. 1 appears to have initiated partition proceedings with respect to the land during the course whereof it is alleged that respondent No. 1 alongwith his son was seeking to change the nature of joint land which constrained respondent No.2 to file a suit for permanent injunction. The suit was instituted on 31.5.2007 and order of status quo was passed by the learned court on 11.6.2006, which order was subsequently confirmed on 3.8.2007.

3. Case of the complainant who is respondent No. 1 herein is that on 1.6.2007, while he was lying in the verandah of his house, the petitioners came there and gave him beatings. The petitioners No. 1 to 5 were having dandas in their hands, whereas petitioner No. 6 was alleged to be armed with Drat. They hurled filthy abuses upon respondent No.1 and his mother and sisters and it is also alleged that petitioner No. 1 gave "Lathi" blows to the wife of respondent No.1. It is further alleged that all the petitioners ran behind her and after entering the house of the complainant they again gave "Lathi" blows to respondent No.1. It is also alleged that respondent No. 1 went to lodge an FIR at the police station on 1.6.2007, but was asked to come on 3.6.2007. When he went again on 3.6.2007, he was asked to come on 5.6.2007 and thereafter lastly on 8.6.2007 when the police refused to take any action and asked respondent No.1 to file a complaint.

4. On the basis of such allegations complaint (Annexure P-3) came to be filed on 12.6.2007. The learned Magistrate recorded the statement of the complainant and one Ashok Kumar on 2.6.2007, while the statement of another witness Sh. Desh Kumar was recorded on 29.6.2007. The Magistrate thereafter sent the copy of the complaint for investigation to the police under section 202 of the Code. The police reported that allegations made in the complaint were totally unsubstantiated and the complainant was wasting the time of the court. The respondent No. 1 filed objections to the report and thereafter the Magistrate summoned the petitioners under sections 148, 451, 323 read with section 149 IPC and held that there was no ground for proceeding against the petitioners under section 147, 323, 452 and 341 IPC. This order of the Magistrate was challenged in revision before the Additional Sessions Judge, Una, who vide order dated 19.11.2009 allowed the revision by relegating the parties to the position as it existed on 7.3.2008 and Magistrate was directed to proceed from the aforesaid date in order to determine whether sufficient grounds exist to proceed against the petitioners.

5. The Magistrate vide order dated 10.3.2011 found sufficient grounds to summon the petitioners for offence under sections 451, 323, 506, 148 read with section 149 IPC. This order too came to be challenged in revision before th learned Additional Sessions Judge, who vide order dated 30.6.2014 dismissed the same.

6. It is contended by the learned counsel for the petitioners that allowing the criminal proceedings to continue against the petitioners, when pre-summoning evidence does not make out any offence would tantamount to abuse of process of court, inasmuch as, a false case has been made out against the petitioners. It is further contended that in the teeth of the order passed by the then Additional Sessions Judge, whereby specific directions had been issued to the Magistrate to record reasons for issuing process, the order was not sustainable for want of reasons. It is also argued that impugned order does not reflect that the Magistrate has recorded his satisfaction before summoning the petitioners.

7. Sh. Ajay Sharma, learned counsel for respondent No.1 on the other hand has contended that present petition under section 482 of the Code read with Article 227 of Constitution which is akin to a second revision is not maintainable in view of specific bar imposed under the Code. He further submitted that since there is no irregularity much-less illegality committed by the courts below, therefore, these orders should not be interfered with.

8. Indisputably judicial process should not be an instrument of oppression or needless harassment. The court should be circumvent and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of private complainant as vendetta to harass the persons needlessly.

9. It is equally well settled that summoning of an accused in a criminal case is a serious matter and the order taking cognizance by the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. Section 482 of the Code empowers this court to exercise its inherent powers to prevent abuse of process of the court and to quash the proceedings instituted on complaint, but such powers can be exercised only in cases where the complaint does not disclose any offence or is vexatious or oppressive. If the allegations as set out in the complaint do not constitute the offence for which cognizance is taken by the Magistrate, it is open to this court to quash the same in exercise of powers, under sections 482 of the Code.

10. In the Case of **Dhanalakshmi** vs. **R.Prasanna Kumar and others 1990 Supp 1 SCC 686,** a three Judge Bench of Hon'ble Supreme Court held as under:-

> "3. Section 482 of the Code of Criminal Procedure empowers the High Court to exercise its inherent powers to prevent abuse of the process of the Court. In proceedings instituted on complaint exercise of the inherent power to quash the proceedings is called for only in cases where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which the cognizance is taken by the Magistrate it is open to the High Court to quash the same in exercise of the inherent powers under Section 482. It is not, however, necessary that there should be a meticulous analysis of the case, before the trial to find out whether the case would end in conviction or not. The complaint has to be read as a whole. If it appears on a consideration of the allegations, in the light of the statement on oath of the complainant that ingredients of the offence/offences are disclosed, and there is no material to show that the complaint is mala fide frivolous or vexatious, in that event there would be no justification for interference by the High Court**."**

11. In the case of **Chand Dhawan** vs. **Jawahar Lal and Ors. 1992 AIR (SC) 1379,** the Hon'ble Supreme Court while considering the power of the High Court under Section 482 Code of Criminal Procedure and quashing the

criminal proceedings, observed that when the High Court is called upon to exercise its jurisdiction to quash the proceedings at the stage of the Magistrate taking cognizance of the offence, the High Court is guided by the allegations, whether those allegations, set out in the complaint or the charge-sheet, do not in law constitute or spell out any offence and that resort to criminal proceedings would, in the circumstances, amount to an abuse of the process of Court or not.

12. In **Radhey Shyam Khemka** vs.**State of Bihar, (1993) 3 SCC 54,** the Hon'ble Supreme Court held as under:-

> **"**8. The complaint made by the Deputy secretary to the government of India to the CBI mentions different circumstances to show that the appellants did not intend to carry on any business. In spite of the rejection of the application by the Stock Exchange, Calcutta they retained the share moneys of the applicants with dishonest intention. Those allegations were investigated by the CBI and ultimately charge-sheet-has been submitted. On basis of that charge-sheet cognizance has been taken. In such a situation the quashing of the prosecution pending against the appellants only on the ground that it was open to the applicants for shares to take recourse to the provisions of the Companies Act, cannot be accepted. It is a futile attempt on the part of the appellants, to close the chapter before it has unfolded itself. It will be for the trial court to examine whether on the materials produced on behalf of the prosecution it is established that the appellants had issued the prospectus inviting applications in respect of shares of the Company aforesaid with a dishonest intention, or having received the moneys from the applicants they had dishonestly retained or misappropriated the same. That exercise cannot be performed either by the High court or by this court. If accepting the allegations made and charges levelled on their face value, the court had come to conclusion that no offence under the Penal Code was disclosed the matter would have been different. This court has repeatedly pointed out that the High court should not, while exercising power under Section 482 of the Code, usurp the jurisdiction of the trial court. The power under Section 482 of the Code has been vested in the High court to quash a prosecution which amounts to abuse of the process of the court. But that power cannot be exercised by the High court to hold a parallel trial, only on basis of the statements and documents collected during investigation or inquiry, for purpose of expressing an opinion whether the accused concerned is likely to be punished if the trial is allowed to proceed."

13. In the case of **Mushtaq Ahmad** vs. **Mohd. Habibur Rehman Faizi and others (1996) 7 SCC 440,** the Hon'ble Supreme Court made the following observations:-

> *"3. Having perused the impugned judgment in the light of the complaint and its accompaniments we are constrained to say, that the High Court exceeded its jurisdiction under Section 482, Cr. P.C. in passing the impugned judgment and order. It is rather unfortunate that though the High Court referred to the decision in State of Haryana v. Bhajan Lal, 1992 Supp(1) SCC 335: (1992 AIR SCW 237), wherein this Court has enumerated by way of illustration the categories of cases in which power to quash complaint or FIR can be exercised, it did not keep in mind-much less adhered to-the following note of caution given therein (SCC p.379, para 103)*
>
> *"We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or*

genuineness or other wise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice".

14. The scope of exercising of powers under section 482 Cr.P.C. was subject matter of recent decision of the Hon'ble Supreme Court in **Binod Kumar & Ors.** vs. **State of Bihar & Anr. JT 2014 (12) SC 286** wherein it has been observed as follows:-

"9. In proceedings instituted on criminal complaint, exercise of the inherent powers to quash the proceedings is called for only in case where the complaint does not disclose any offence or is frivolous. It is well settled that the power under Section 482 Cr.P.C. should be sparingly invoked with circumspection, it should be exercised to see that the process of law is not abused or misused. The settled principle of law is that at the stage of quashing the complaint/FIR, the High Court is not to embark upon an enquiry as to the probability, reliability or the genuineness of the allegations made therein. In Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi (1976) 3 SCC 736, this Court enumerated the cases where an order of the Magistrate issuing process against the accused can be quashed or set aside as under:

"(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complainant does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is a sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects such as, want of sanction, or absence of a complaint by legally competent authority and the like."

9.1. The Supreme Court pointed out that the cases mentioned are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash the proceedings.

10. In Indian Oil Corporation vs. NEPC India Ltd. And Ors. , (2006) 6 SCC 736, this Court has summarized the principles relating to exercise of jurisdiction under Section 482 Cr.P.C. to quash complaints and criminal proceedings as under:-

"The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few— Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre [JT 1988 (1) SC 279], State of Haryana v. Bhajan Lal ,1992 Supp (1) SCC 335; Rupan Deol Bajaj v. Kanwar Pal Singh Gill (1995) 6 SCC 194, Central Bureau of Investigation v. Duncans Agro Industries Ltd (1996) 5 SCC 591;State of Bihar v. Rajendra Agrawalla (1996) 8 SCC 164 , Rajesh Bajaj v. State NCT of Delhi, (1999) 3 SCC 259; Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd (2000) 3 SCC 269 Hridaya Ranjan Prasad Verma

v. State of Bihar (2000) 4 SCC 168 , M. Krishnan v. Vijay Singh (2001) 8 SCC 645 and Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque (2005) 1 SCC 122 . The principles, relevant to our purpose are:

(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides /malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not."

15 The learned counsel for the petitioners has strenuously argued that once the learned Additional Sessions Judge vide his order dated 19.11.2009 had set-aside summoning order of the Magistrate dated 6.5.2008, it was not open to the learned Magistrate to have passed the subsequent order in complete defiance of the order of learned Additional Sessions Judge.

16. Here it shall be apt to reproduce the reasons recorded by the then learned Additional Sessions Judge for setting aside the order passed by the learned Magistrate on 6.5.2008:-

> *"9. No doubt, even if the police report states that no case was made out, still the Magistrate can take cognizance and issue process. But before resorting to the said action, the Ld. Magistrate will have to pass a speaking order holding that the findings of the inquiry conducted by the police were incorrect and not worth any credence. As is the present case, the Ld. Magistrate could have either suo-motu passed a reasoned order*

differing with the report of the police or allowed the protest preferred by the complainant. Moreso, the allegations in the complaint and the testimony of two witnesses were already on record before the Ld. Magistrate. After assessing the merits of the two conflicting premises the Ld. Magistrate had to come to a specific finding either relying on the inquiry report or rejecting it before proceeding any further. The Ld. Magistrate could not have read both simultaneously. Only after having brushed aside the findings of the inquiry, the Ld. Magistrate could have summoned the other witnesses of the complainant. To this limited extent, the Ld. Court below has failed to exercise discretion vested in him under law."

17 It is settled law that there is no legal requirement imposed on a Magistrate for passing a detailed and speaking order while issuing process. As a matter of fact at the stage of issuing process to the accused, the Magistrate is not required to record any reasons. (Ref: **Kanti Bhadra Shah** vs. **State of W.B. (2000) 1 SCC 722, U.P. Pollution Control Board** vs. **Mohan Meakins Ltd. (2000) 3 SCC 745, Chief Controller of Imports & Exports** vs. **Roshanlal Agarwal (2003) 4 SCC 139** and **Bhushan Kumar** vs. **State (NCT of Delhi) (2012) 5 SCC 424.**

18. But the question which arises for determination is as to whether the Magistrate while differing with the report filed by the Investigating Agency is required to record reasons while issuing process. This precise question has been dealt with in detail in **Nupur Talwar** vs. **Central Bureau of Investigation and another (2012) 11 SCC 465** wherein it has been categorically held that where the Investigating Agency had submitted a closure report, it was only appropriate though no imperative for the Magistrate to record reasons for differing with the prayer made in the closure report. But at the same time, it was also emphasized that an order issuing process cannot be vitiated merely because of absence of reasons.

19 The Code of Criminal Procedure expressly delineates irregularities in procedure which would vitiate proceedings. Section 461 thereof, lists irregularities which could lead to annulment of proceedings. Section 461 aforesaid is extracted hereinunder:

"461. Irregularities which vitiate proceedings- If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely:-

(a) attaches and sells property under section 83;

(b) issues a search-warrant for a document, parcel or other thing in the custody of a postal or telegraph authority;

(c) demands security to keep the peace;

(d) demands security for good behaviour;

(e) discharges a person lawfully bound to be of good behaviour;

(f) cancels a bond to keep the peace;

(g) makes an order for maintenance;

(h) makes an order under section 133 as to a local nuisance;

(i) prohibits, under section 143, the repetition or continuance of a public nuisance;

(j) makes an order under Part C or Part D of Chapter X;

(k) takes cognizance of an offence under clause (c) of sub- section (1) of section 190;

(l) tries an offender;

(m) tries an offender summarily;

(n) passes a sentence, under section 325, on proceedings recorded by another Magistrate;

(o) decides an appeal;

(p) calls, under section 397, for proceedings; or

(q) revises an order passed under section 446, his proceedings shall be void."

20 In a situation as the one in hand, Section 465(1) of the Code, protects orders from errors, omissions or irregularities unless "a failure of justice" has been occasioned thereby. Most certainly an order delineating reasons cannot be faulted on the ground that it has occasioned failure of justice. **[**Ref: **Nupur Talwar** vs. **Central Bureau of Investigation and another** (supra) **].**

21. In view of the aforesaid detailed discussion, I find no illegality or infirmity with the orders of the learned courts below and the present petition being devoid of any merit is dismissed.

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

Kehar Singh ...Appellant.
Versus
State of H.P. ...Respondent.

Cr.Appeal No.3 of 2012
Reserved on: 18.12.2014.
Decided on: 24.12.2014

Indian Penal Code, 1860- Section 376- Prosecutrix returned with her friends- she forgot her bag and returned to retrieve it-Accused met her with his friends on the way and told her that he had not seen any bag- Accused took prosecutrix on his scooter - he stopped the scooter on the way and raped the prosecutrix in the jungle- prosecutrix narrated the incident to her aunt and her parents- held that none of the friends of the prosecutrix was examined to corroborate her version- prosecution had also not examined the persons with whom accused was present- thus, genesis of the occurrence had become doubtful and leads to an inference that prosecutrix had met the accused alone for a specific purpose- testimony of the aunt was not satisfactory, which creates doubt that she had ever met prosecutrix or the prosecutrix had narrated any incident to her- prosecutrix admitted that she had fallen down the scooter which shows that prosecutrix had inculpated the accused when an inquiry was made from her by her parents-no injuries were found on the private parts of the prosecutrix which shows that she was a consenting party. (Para-10 to 13)

For the Appellant: Mr.N.K Thakur, Sr. Advocate with Mr. Rohit Bharol, Advocate.
For the Respondent: Mr. P.M.Negi, Deputy Advocate General with Mr. Ramesh Thakur and Mr. J.S Guleria, Assistant Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed against the judgment, rendered on 30.11.2011, by the learned Additional Sessions Judge (I), Kangra at Dharamshala, H.P. in Sessions Case No. 43 of 2011, whereby, the accused/appellant has been convicted and sentenced to undergo rigorous

imprisonment for ten years and to pay a fine of Rs.30,000/- under Section 376 IPC and in default of payment of fine, he has been sentenced to further undergo simple imprisonment for a period of six months.

2. The brief facts of the case are that prosecutrix PW-1 was attending tailoring session at Dadasiba with her aunt, Smt. Meena Kumari (PW-7). It is alleged that on 24.11.2010 the prosecutrix had gone with her aunt for training but her aunt had returned home around 12.00 a.m. and the prosecutrix was returning home around 3.00 p.m. with her friends in a tractor trolley and alighted at Gurala, as they did not find a bus. At that time, the prosecutrix found that her bag was missing and thereafter she proceeded on foot towards Dadasiba. It is further alleged that around 3-3.30 p.m. Tarsem Singh (PW-8) Pammi, Subhash and accused Kehar Singh were sitting by the road side, some two kilometers behind Dadasiba towards Gurala. It is alleged that on her way, the prosecutrix met the above persons and accused Kehar Singh and they asked her as to where she was going, on which the prosecutrix told that she was going in search of her bag. It is alleged that thereafter these persons told that they had come from that side and they did not find her bag. Thereafter, Pammu asked accused Kehar Singh to take the prosecutrix to village Gurala on his scooter. It is alleged that though the accused took the prosecutrix on his scooter, but at some distance he stopped the scooter in the jungle, where there were bushes. It is alleged that thereafter accused Kehar Singh caught hold of the prosecutrix from her arms and took her towards the jungle even though, she objected to the act of the accused. Thereafter the accused laid the prosecutrix on the ground and committed rape on her. It is further alleged that thereafter accused brought the prosecutrix on his scooter up to Gurala and pushed her down from the scooter and fled away on his scooter. It is alleged that on her way to her home, the prosecutrix met her aunt (PW-7) Meena Kumari and wife of Tarsem, while she was weeping and told them about the above incident. It is alleged that Tilak Raj (the father of the prosecutrix) reached his home around 6-6.30 p.m and the prosecutrix also came weeping home and she told her father and mother about the entire incident. It is further alleged that Tilak Raj talked about the incident with Ward Panch Kashmir Singh and after arranging a vehicle Tilak Raj alongwith Kashmir Singh, the prosecutrix and her aunt went to Police Station, Dehra and lodged F.I.R Ext.PW-1/A around 12 in the night. It is alleged that the prosecutrix was got medically examined at Civil Hospital, Dehra and Dr. Anita Mahajan opined that the possibility of sexual intercourse could not be ruled out, as per MLC Ex.PW-1/B. It is alleged that the police came to prosecutrix's house on the next day and she produced her clothes i.e. Salwar Ex.P1 and Kameej Ex.P2, which were taken into possession vide memo Ext.PW-1/C by the I.O. in the presence of witnesses. It is alleged that the accused took the police to the spot and the police took photographs of spot and prepared spot map. The police had also taken into possession the birth certificate of the prosecutrix. It is alleged that the clothes of the prosecutrix and accused were seized and sent to the FSL for examination and human semen was detected on shirt and salwar of the prosecutrix and underwear of accused Kehar Singh.

3. On conclusion of investigation into the offences, allegedly committed by the appellant/accused, challan was filed under Section 173 of the Code of Criminal Procedure.

4. The accused was charged for his having committed offence punishable under Section 376 IPC by the learned trial Court, to which he pleaded not guilty and claimed trial.

5. In proof of the prosecution case, the prosecution examined as many as 14 witnesses. On closure of the prosecution evidence, statement of appellant/accused under Section 313 Cr.P.C. was recorded by the Court in which he claimed false implication and pleaded innocence. He did not choose to lead evidence in defence.

6. On appraisal of evidence on record, the learned trial Court convicted and sentenced the accused for his having committed the offence, aforesaid.

7. The appellant/accused is aggrieved by the judgment of conviction, recorded by the learned trial Court. The learned counsel for the appellant/accused, has concertedly and vigorously contended that the findings of conviction, recorded by the learned trial Court, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of conviction be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

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

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

10. The prosecution case can succeed in the event an incisive discernment of the testimony of the prosecutrix unravels the fact of her testimony being both inspiring credible and trustworthy. Trustworthiness in its entirety would be imbued to her deposition comprised in her examination in chief in the event of hers having not contradicted it in her deposition comprised in her cross-examination. Besides even the deposition of the prosecutrix comprised in her examination-in-chief has also to be subjected to an incisive analysis for unearthing whether the story propounded by her therein is bereft of unnaturalness as also does not smack of any prevarication so as to erode the genesis of the prosecution version. The prosecutrix in her examination-in-chief had portrayed therein that on the fateful day she had gone with her aunt for receiving training in tailoring at Dadasiba. However, her aunt had returned home at about 12.00 a.m. She proceeds to depose that their class ended around 3.00 p.m and that on closure of the training session for the day she alongwith her friends Shilpa and others were waiting for alighting a bus at Dadashiba for its commuting them to their native place. However, since the bus did not arrive, they boarded a tractor Trolley wherefrom they alighted at Gurala. She deposes that since she there noticed that her bag was missing, she hence proceeded towards Dadasiba on foot to locate it. However the genesis of the prosecution version of hers returning in the company of Shilpa and others after closure of training session in tailoring at 3 p.m. and theirs having waited for a bus at Dadasiba, which however not having arrived, they were constrained to board a Tractor Trolley which they alighted at Gurala, where she has noticed her bag to be missing which constrained her to proceed on foot towards Dadsiba, to gain credibility necessitated recording of the statements by the Investigating Officer of Shilpa and other friends in whose company she boarded the tractor trolley which they alighted at Gurala, at which latter place the prosecutrix having noticed that her bag was missing, constrained her for locating/detecting to proceed on foot towards Dadasiba. The recording of the statements of aforesaid Shilpa and other friends and their consequent examinations-in-chief would have given immense weight, probative force and sinew to the version as disclosed by the prosecutrix in her examination-in-chief of hers having alighted at Gurala from a Tractor Trolley which they boarded in the face of non-arrival of bus to commute them to their respective homes, she there having noticed that a bag was missing led her to retrace on foot towards Dadasiba to detect it. Consequently, the non-recording of the statements of the aforesaid and their consequent non-examination rather fillips an inference that as a matter of fact the prosecutrix had not on the fateful day on closure of the training sessions in

tailoring returned home in the company of Shilpa and others nor also it can boost the further concomitant inference that she alighted from the tractor trolley at Gurala where she noticed that her bag was missing for whose detection she retraced her steps towards Dadasiba. Consequently, the genesis of the prosecution story which dominantly portrays the factum of hers having alighted the tractor trolley at Gurala where she noticed a bag was missing, for whose detection she retraced her steps towards Dadasiba, comes to suffer emasculation. Further more, if the above inference or deduction is ensueable, the further factum of hers having met on her retracing her steps towards Dadasiba for detecting her bag, the accused, along with Subhash Chand, Billu and Pammu, also loses credibility. Moreso, in the face of the Investigating Officer having omitted to examine Subhash Chand, Billu and Pammu in whose company the accused was when on hers retracing her steps towards Dadasiba for locating her missing bag she met him. As a corollary the non-recording of the statements of the aforesaid by the Investigating Officer and their non-examination, hence constrains this Court to conclude that the accused when admitted by the prosecutrix to be known to her for the last 3-4 years had met the prosecutrix alone. Besides an inference also ought to be drawn especially in the face of genesis of the prosecution story for want of recording of the statements of class mates in whose company she was purportedly returning home in a tractor trolley till Gurala where she alighted and detected that her bag was missing and for whose detection she retraced her steps towards Dadasiba and the consequent non-examination, as such, renders the said factum to have remained unsubstantiated. The ensuing deduction is that the meeting interse the prosecutrix and the accused was prearranged and that too for a specific purpose. Though the prosecution has examined one Tarsem Singh (PW-8) to portray the fact in substantiation of the version in the examination-in-chief of the prosecutrix of hers having while she was retracing her steps towards Dadasiba on hers alighting at Gurala where she met PW-8 alongwith accused and Subhash Chand, Billu and Pammu where the accused offered the prosecutrix a seat on his scooter for detecting her missing bag. Nonetheless when the prosecutrix has omitted to name PW-8 to be one of the persons in whose company the accused was when she met him renders his deposition qua the factum in purported corroboration of the deposition of PW-1 of hers having lost her bag, she having detected the factum of its being lost at Gurala which led her to retrace her steps towards Dadasiba to locate it, wherein she met the accused along with PW-8, , to be incredible. It appears that PW-8 is merely a planted witness to lend corroboration to the slanted version of PW-1.

11. Consequently, hence reinforcingly, it can be concluded that as a matter of fact the prosecutrix was un-accompanied by her class mates on closure of training Sessions in tailoring for the day, besides a conclusion can also be formed that she did not meet the accused at Gurala rather she met him outside the premises of the institute where she received training in tailoring. With renewable vigour, it can be said that the prosecutrix has invented a false pretext of hers having alighted from the Tractor Trolley alongwith her classmates at Gurala where she detected the factum of her bag being lost for whose location she retraced her steps towards Dadasiba for locating it and enroute she having met the accused. Rather, when this Court concludes that the said factum is invented and manufactured, it can be firmly concluded that the meeting interse the prosecutrix and the accused was prearranged at a place other than Gurala.

12. The prosecutrix discloses in her examination in chief that on the consummation of the offence at the instance of the accused in a Jungle whereto both proceeded when they both alighted from the scooter, while she was returning home, she having met her aunt named Meena Kumari to whom a disclosure qua the incident was made also appears to be prevaricated and invented especially in the face of the appraisal of the examination-in-chief of PW-7 Meena Kumari portraying that the prosecutrix met her around 4-4.30 p.m. whereas it appears in the cross-examination of PW-7 and also in the

examination in chief of PW-2 (the father of the prosecutrix) that the prosecutrix had returned home at about 6-6.30 p.m., hence, rendering untruthful the factum of hers having met PW-7 on consummation of the offence at a time much prior to the returning home of the prosecutrix. Consequently, in face thereof, more especially when the prosecution has not brought home any evidence portraying that the distance of the shops near Gurala where PW-7 met the prosecutrix and where the latter disclosed the occurrence to her and the home of the prosecutrix where she had returned at about 6-6.30 p.m. is improximately located so as to consume 2-2 ½ hours therefrom till her home. Obviously, in the absence of above evidence a firm conclusion which is to be drawn that PW-7 never met the prosecutrix near the shop at Gurala at 4-4.30 p.m., besides it has also to be concluded that no disclosure of the occurrence was made by PW-1 to PW-7. Moreover what aggravates an inference of the prosecutrix having never met PW-7 is the factum as divulged in the cross-examination of PW-7 of hers not having on the day the police visited the village disclosed to them the factum of a disclosure having been made by the prosecutrix to her of the occurrence. Omission by PW-7 to disclose to the police immediately on theirs visiting the village rather her statement having come to be recorded 2 days subsequent to the occurrence constitutes it to be gripped with the vice of premeditation and concoction rendering hence the version as deposed by her in unison with PW-1 of the former having disclosed to the latter the factum of the alleged occurrence having taken place to be also incredible. In face thereof, the deposition of the prosecutrix qua the fact aforesaid comes to be ridden with falsity.

13. The prosecutrix in her cross-examination deposes that while she was astride the scooter, she fell down and sustained injuries. The factum of existence of injury on her face was noticed by her parents. It appears hence that when she apprised them the cause of the injuries inasmuch as hers having gained them while having fallen from the scooter of the accused on which she was astride enraged them, besides it appears that it led to an incisive effort on the part of her parents to elicit from her the factum of the occurrence, on such elicitation it appears that the prosecutrix contrived a version so as to inculpate the accused. Besides the factum of as emanating on a reading of the cross-examination of PW-4 of one Gyan Chand having seen the factum of the prosecutrix occupying the scooter along with the accused aroused the sense of honour and indignity of the family which constrained the prosecutrix to inculpate the accused. However such inculpation is a sheer machination on the part of the prosecutrix, in the face of aforesaid discussion unfolding the factum of hers while having known the accused for the last 3-4 years, she having had a prearranged encounter with him where-after she given the evident fact of hers having arrived at the age of consent consensually succumbed to his sexual overtures. The testimony of PW-9, the Doctor, though unfolds the factum of sexual intercourse having taken place nonetheless the further factum of absence of injuries other than injury No.1 which was noticed on the face and had occurred demonstrably as apparent from a disclosure in the cross-examination of the prosecutrix of her having fallen from the scooter of the accused on which she was astride repulses the factum of the accused having perpetrated forcible sexual intercourse on the victim. Besides no injury having been noticed on the private part of the prosecutrix personificatory of the prosecutrix having consented to the sexual overtures of the accused does impel this Court to conclude that the prosecutrix did not resist the sexual overtures of the accused rather she consensually succumbed to the same. In sequel when she was a consensual partner to the sexual overtures of the accused no inference of the accused having committed the offence can be drawn.

14. In view of the above discussion, the appeal is allowed and the impugned judgment is set aside. The appellant is acquitted of the offence charged. He be set at liberty forthwith, if not required in any other case.

15. The Registry is directed to prepare the release warrant of the appellant and send it to the Superintendent of the Jail concerned, in conformity with this judgment forthwith. Records of the trial Court be sent down forthwith.

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

Sh. Krishan Chand son of late Sh. Ram Rakhu. ....Petitioner.

Vs.

HPSEB Limited and another ....Respondents.

CWP No. 1893 of 2013.
Order reserved on:31.10.2014
Date of Order: December 24,2014.

Constitution of India, 1950- Article 226- Petitioner claimed that he was appointed as temporary employee- he is entitled for the pay and allowances at par with the temporary employees and his entire services should be counted for the purpose of pension, gratuity and other service benefits- petitioner was regularized on 14.2.1992 and he filed writ petition on 2.4.2913, after the gap of 21 years- no explanation was given for the delay- hence, petition is liable to be dismissed on this short ground alone. (Para-5)

Cases referred:

P.S.Sadasivaswamy Vs. State of Tamil Nadu (Apex Court of India), 1976 (1) Service Law Reporter 53

Satija Rajesh Vs. State State of Himachal Pradesh 2014 (Suppl) Him L.R. (DB) 2422

M/s Rup Diamonds and others Vs. Union of India, AIR 1989 SC 674

State of Karnataka and others Vs. S.M.Kotrayya and others, 1996 (6) SCC 267

Jagdish Lal and others Vs. Vs. State of Haryana AIR 1997 SC 2366

For the petitioner: Mr. A.K.Gupta, Advocate.
For respondents: Mr.Raj Pal Thakur, Advocate.

The following judgment of the Court was delivered:

P.S.Rana,Judge.

Present petition is filed under Article 226 of the Constitution of India. It is pleaded that petitioner was working continuously in the regular establishment of HP State Electricity Board (HPSEB) from the date of his initial engagement w.e.f. 21.12.1984 till his services were regularized in the year 1992. It is pleaded that petitioner was not a daily wage employee but petitioner was temporary employee in the regular establishment and he is legally entitled for the pay and allowances at par with the temporary employees. It is pleaded that entire services of the petitioner be counted for the purpose of pension, gratuity and other service benefits and entire arrears be ordered to be paid to petitioner. Prayer for acceptance of petition sought.

2. Per contra reply filed on behalf of respondents pleaded therein that writ petition is not maintainable. It is pleaded that petition suffers from delay and laches and the same is barred by limitation. It is pleaded that petitioner was engaged on daily wages and worked w.e.f. 21.12.1984 to 13.2.1992. It is pleaded that thereafter the services of the petitioner were regularized on 14.2.1992. It is pleaded that petitioner is estopped to file present petition in view of his act and conduct and acquiescence. It is pleaded that petitioner was engaged as lower division Clerk on daily wages w.e.f. 21.12.1984

and thereafter petitioner was regularized on and w.e.f. 14.2.1992. Prayer for dismissal of petition sought.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Advocate appearing on behalf of respondents and also perused the record carefully.

4. Following points arise for determination in the present writ petition.

(1) Whether relief is barred after twenty one years from date of cause of action on the concept of delay, laches and acquiescence as alleged?

(2) Final order.

Finding upon point No.1.

5. Submission of learned Advocate appearing on behalf of the petitioner that service of petitioner be treated w.e.f 21.12.1984 to 13.2.1992 for pay fixation, pension, gratuity and other service benefits is rejected being devoid of any force for the reason hereinafter mentioned. In the present case petitioner was regularized on dated 14.2.1992. Petitioner filed present petition on dated 2.4.2013 after a gap of twenty one years for fixation of pay scale relating to his service tenure. No plausible explanation given by petitioner for filing present civil writ petition at belated stage from the date of cause of action. It was held in case reported in 1976 (1) Service Law Reporter 53 titled P.S.Sadasivaswamy Vs. State of Tamil Nadu (Apex Court of India) that relief should be declined to the petitioner if writ petition is not filed expeditiously. It was held that normally writ petition should be filed within six months or at the most within one year after the arisen of cause action It was held in case reported in 2014 (Suppl) Him L.R. (DB) 2422 titled Satija Rajesh Vs. State State of Himachal Pradesh that delay is important factor in writ petition and it was held that delay defeat the equity. It was further held that delay could not be brushed aside without plausible explanation. In the present case petitioner did not place on record any document in order to prove that he had filed any representation before competent authority of law for redressal of his grievance in order to condone delay. It was held in case reported in AIR 1989 SC 674 titled M/s Rup Diamonds and others Vs. Union of India that Court has consistently rejected the contention that petition should be considered ignoring delay and laches in case petitioner approaches the Court after coming to know of the relief granted by Court in similar case. It was held that the same is not proper explanation of delay and laches. It was held that litigant could not wake up from deep slumber and could not claim impetus from the judgment in cases where some diligent person had approached within reasonable time. See 1996 (6) SCC 267 titled State of Karnataka and others Vs. S.M.Kotrayya and others See AIR 1997 SC 2366 titled Jagdish Lal and others Vs. Vs. State of Haryana. Hence point No.1 is decided against the petitioner and in favour of respondents.

Final order.

6. In view of my findings upon point No.1 civil writ petition filed under Article 226 of the Constitution of India is dismissed on the concept of delay, laches and acquiescence. In the present case delay of more than twenty one years is writ large from the date of cause of action. No order as to costs. Writ petition disposed of. Pending application(s) if any are also disposed of.

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

Kunal Jaggi S/o Sh Ajay Jaggi ....Applicant.
Vs.
State of Himachal Pradesh. ....Non-applicant.

Cr.MP(M) No.1297 of 2014.
Order reserved on:5.12.2014.
Date of Order: December 24 ,2014,

Code of Criminal Procedure, 1973- Section 428- An FIR was registered against the petitioner for commission of offences punishable under Sections 420 and 120-B of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- allegations against the accused are regarding the embezzlement of Rs.1 lac- hence, in these circumstances, custodial interrogation of the accuses is necessary- bail rejected. (Para-7)

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

The State Vs. Captain Jagjit Singh AIR 1962 SC 253

For the applicant: Mr.B.M.Chauhan, Advocate.
For the respondent: Mr.R.P.Singh, Asstt. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present petition filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with FIR No. 66 of 2014 dated 28.10.2014 registered under Sections 420 and 120-B of the Indian Penal Code at Police Station Darlaghat District Solan HP.

2. It is pleaded that applicant is innocent and he has been falsely implicated in the present case. It is pleaded that no recovery is to be effected from the applicant. It is pleaded that applicant is a student of Civil Engineering. It is pleaded that applicant will join investigation of the case. It is pleaded that applicant will not tamper with prosecution evidence. It is pleaded that applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report in connection with FIR No. 66 of 2014 dated 28.10.2014 registered under Sections 420 and 120-B of the Indian penal Code at Police Station Darlaghat, District Solan HP filed. There is recital in police report that applicant Kunal Jaggi is the prime accused and he has connection with other co-accused who recorded entry of pet coke trucks illegally. There is recital in police report that factually the pet coke truck did not unload in the office of Company. There is recital in police report that applicant upon his mobile No. 8557880001 remained practically in contact with other co-accused Harish and truck driver Sunil Kumar since 19.10.2014. There is recital in police report that applicant has caused financial loss to the Company to the tune of Rs.8,00,000/- (Rupee eight lacs) by way of committing cheating in furtherance of criminal conspiracy. There is recital in police report that custodial investigation

of the applicant is essential in the present case in order to ascertain the involvement of other co-accused persons in the criminal offence of cheating and criminal conspiracy. Prayer for rejection of anticipatory bail application sought.

4. Following points arise for determination in the present bail application:

(1) Whether anticipatory bail application filed under Section 438 of the Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of bail application.

(2) Final Order.

5. Court heard learned Advocate appearing on behalf of applicant and learned Assistant Advocate General appearing on behalf of State and also perused entire record carefully.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case and on this ground present anticipatory bail application be allowed is rejected being devoid of any force for the reason hereinafter mentioned. Fact whether applicant is innocent or not cannot be decided at this stage. Same fact will be decided when the case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties.

7. Another submission of learned Advocate appearing on behalf of the applicant that applicant is a student and he will join the investigation as and when required by the investigating agency and applicant will not tamper with the prosecution witness and will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case and on this ground anticipatory bail application be allowed is rejected being devoid of any force for the reason hereinafter mentioned. 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) 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.*** In the present case allegations against the applicant are very heinous and grave in nature qua embezzlement of Rs.8,00,000/- (Rupee eight lac). Court is of the opinion that custodial investigation of the applicant is essential in the present case in order to ascertain the involvement of other co-accused persons in the commission of offence punishable under Section 420 read with Section 120-B IPC. Court is of the opinion that if anticipatory bail application is granted to the applicant at this stage then investigation of the case will be adversely effected. Court is also of the opinion that if anticipatory bail application is allowed at this stage then interest of the State and general public will also be adversely effected.

8. Submission of learned Assistant Advocate General appearing on behalf of the State that if the applicant is released on bail at this stage then applicant will induce and threat the prosecution witness is accepted for the reason hereinafter mentioned. There is apprehension in the mind of the Court that if the applicant is released on bail at this stage then applicant will induce and threat the prosecution witness. In view of the fact that investigation is in initial stage of case and in view of the fact that allegations against the applicant are very serious and grave in nature qua cheating and criminal conspiracy of huge amount of Rs.8,00,000/- (Rupee eight lacs) it is not expedient in the ends of justice to release the applicant on anticipatory bail at the initial stage of the investigation. Court is of the opinion that custodial investigation of the applicant

is essential in the ends of justice because an amount of Rs.8,00,000/- (Rupee eight lacs) is involved in the present case. Hence Point No.1 is answered in negative.

Final Order

9. In view of my findings upon point No.1 present anticipatory bail application filed under Section 438 of the Code of Criminal Procedure 1973 by the applicant is rejected. Observation made hereinabove is strictly for the purpose of deciding the present bail application and it shall not effect merits of case in any manner. All pending application(s) if any are also disposed of.

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

Moti Ram Kainthla son of late Shri Rulda Ram ....Petitioner

Versus

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

CWP No. 6363 of 2013

Order Reserved on 28st November,2014

Date of Order 24th December, 2014

Constitution of India, 1950- Article 14- Petitioner pleaded that he was asked to perform duty of Assistant Collector (Printing) w.e.f. 5.10.1992 till 21.2.1994 and no benefit of pay as granted to him- petitioner made representation but no decision was conveyed to him- he applied under RTI and was informed that his case was rejected on the ground that no ex-post-facto sanction could be granted in case of promotion- however, such ex-post-facto was granted to one 'S'- petitioner claimed the benefit of higher scale- respondent stated that 'S' had performed the duties of Assistant Collector till his retirement and no order was passed directing the petitioner to hold the charge of Assistant Controller- it was proved on record that the petitioner had performed the duties of Assistant Collector in addition to his work- held, that the petitioner is entitled to the salary of Assistant Controller on the principle of equal pay for equal work.

(Para-5)

Cases referred:

Vijay Kumar and others vs. State of Punjab and others, AIR 1994 SC 265

Harbans Lal and others vs. State of H.P. and others (1989)4 SCC 459

Grih Kalyan Kendra Workers' Union vs. Union of India and others AIR 1991 SC 1173

State of Madhya Pradesh and another vs. Pramod Bhartiya and others AIR 1993 SC 286

U.P. Rajya Sahakari Bhoomi Vikas Bank Ltd., U.P. vs. Its Workmen AIR 1990 SC 495

For the Petitioner: Mr. R.K. Gautam Sr. Advocate with Mr. Gaurav Gautam, Advocate.

For Respondents: Mr. Puneet Razta, Deputy Advocate General with Mr. J.S. Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present civil writ petition is filed under Article 226 of the Constitution of India pleaded therein that on dated 15.12.1954 petitioner was appointed as compositor in the Printing and Stationery Department which is Class III post and on dated 16.12.1961 petitioner joined the department of

Industry Government of Himachal Pradesh and served there till the year 1972. It is pleaded that on dated 30.11.1972 petitioner joined back the Printing and Stationery Department as computer and thereafter petitioner was promoted as Assistant Section Holder in July 1973. It is also pleaded that on dated 28.10.1978 petitioner was promoted as Section Holder on adhoc basis and thereafter on regular basis on 19.11.1979 and thereafter petitioner was promoted as General Foreman on dated 27.2.1986. It is pleaded that on dated 5.10.1992 one Shri Gurbachan Singh Assistant Controller (Printing) had attack of paralyses and he could not join back his duties till his retirement and due to this reason petitioner was asked to perform the duty of Assistant Controller (Printing) being the senior most Section Foreman and petitioner performed the duty of Assistant Controller (Printing) till dated 31.3.1994 but no benefit of additional pay was granted to petitioner as provided under the provision of FR 49 (iii) by the respondent department. It is pleaded that on dated 31.3.1994 petitioner retired from the service of respondent department after attaining the age of superannuation. It is also pleaded that on dated 29.8.1994 petitioner submitted a representation to the Hon'ble Chief Minister of Himachal Pradesh for the payment of officiating pay against the post of Assistant Controller (Printing) w.e.f. 3.10.1992 to 31.3.1994 and on dated 4.3.1996 petitioner once again made a representation on the same ground as was submitted on dated 29.8.1994 but nothing was conveyed to the petitioner. It is pleaded that petitioner sought information from the State Government regarding his case which was supplied to petitioner vide letter dated 9.5.2013 and after perusal of information petitioner came to know that case of petitioner was rejected on the ground that no ex-post-facto sanction could be granted in the matter of promotion. It is pleaded that on dated 15.6.2013 petitioner was informed by the respondent department under RTI that ex-post-facto sanction was granted to one Shri Som Dutt Sharma against the post of Controller w.e.f. 28.11.1990 vide notification dated 26.9.2012. It is pleaded that rejection of claim by respondent department for grant of ex-post-facto sanction to the post of Assistant Controller (Printing) be quashed and further pleaded that respondent be directed to give all benefits to the petitioner to the post of Assistant Controller (Printing) w.e.f. 3.10.1992 to 31.3.1994 and petitioner be granted all service consequential benefits. Prayer for acceptance of writ petition sought.

2. Per contra reply filed on behalf of respondents Nos. 1 to 3 pleaded therein that petitioner has retired from service on dated 31.3.1994 after serving for 34 years and further pleaded that present petition is filed after 20 years of superannuation which is barred by delay and latches. It is admitted that petitioner was promoted on regular basis to the post of Section Holder in the year 1978. It is pleaded that Shri Gurbachan Sharma remained on medical leave w.e.f. 3.10.1992 to 7.7.1994 and thereafter retired on medical ground on 8.7.1994. It is pleaded that during medical leave of Deputy Controller Shri Som Dutt performed the duties of Assistant Controller (Printing) upto his retirement on dated 31.1.1993. It is pleaded that no orders were issued by the competent authority directing the petitioner to hold the charge of Assistant Controller (Printing). It is pleaded that petitioner could not be allowed to get the benefit of higher post. Prayer for dismissal of petition sought.

3. Court heard learned Advocate appearing on behalf of the petitioner and learned Deputy Advocate General appearing on behalf of the respondents and Court also perused the entire record carefully.

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

1. Whether petitioner is entitled for the salary for the post of Assistant Controller (Printing) w.e.f. 1.2.1993 to 31.3.1994 as alleged?

2. Final Order.

Findings on point No.1

5. Submission of learned Advocate appearing on behalf of the petitioner that petitioner had worked as officiating Assistant Controller (Printing) w.e.f. 1.2.1993 to 31.3.1994 and he is entitled for the salary of the post of Assistant Controller (Printing) on the concept of equal pay for equal work is accepted for the reasons to be recorded hereinafter. It is proved on record that Moti Ram Kainthla petitioner was Senior General Foreman in the department of Printing and Stationery department and he retired from service on 31.3.1994. It is also proved on record that Shri Gurbachan Sharma the then Assistant Controller (Printing) had applied for two days casual leave for 3.10.1992 and 5.10.1992. It is pleaded that thereafter Gurbachan Sharma suffered the paralyses attack and he remained on leave upto 7.7.1994 and thereafter he took voluntary retirement on dated 8.7.1994. It is also proved on record that during the leave period of Gurbachan Sharma Moti Ram Kainthla petitioner worked as Assistant Controller (Printing) in addition to his duties and it is also proved on record that petitioner received the information under RTI Act from the department and department had submitted written report that Shri Moti Ram Kainthla had worked upon the post of Assistant Controller (Printing) w.e.f. 1.2.1993 to 31.3.1994. Thereafter case was forwarded for additional salary to the petitioner qua additional charge of post of Assistant Controller (Printing). Thereafter competent authority observed that retrospective promotion should not be encouraged. Thereafter case of petitioner for payment of additional salary for the post of Assistant Controller (Printing) was rejected. After rejection of case petitioner filed present civil writ petition. It was held in case reported in ***AIR 1994 SC 265 titled Vijay Kumar and others vs. State of Punjab and others*** that as per Article 39(d) of the Constitution of India there shall be equal pay for equal work for both men and women. It was held in case reported in ***(1989)4 SCC 459 titled Harbans Lal and others vs. State of H.P. and others*** that as per Articles 14 and 16 and 39(d) of Constitution of India there should be equal pay for equal work. It was held in case reported in ***AIR 1991 SC 1173 titled Grih Kalyan Kendra Workers' Union vs. Union of India and others*** that as per Articles 14, 16, 12 39(d) of Constitution of India there should be equal pay for equal work. It was held that this right has assumed the status of fundamental right and it was held that this right is applicable to the establishment of State. It was held in case reported in ***AIR 1993 SC 286 titled State of Madhya Pradesh and another vs. Pramod Bhartiya and others*** that employee is entitled for equal pay for equal work in view of Articles 14, 16(1) and 39(d) of Constitution of India. It was held in case reported in ***AIR 1990 SC 495 titled U.P. Rajya Sahakari Bhoomi Vikas Bank Ltd., U.P. vs. Its Workmen*** that employee is entitled for equal pay for equal work. In view of admission of fact by competent authority in the information given under RTI Act that petitioner had worked as Assistant Controller (Printing) w.e.f. 1.2.1993 to 31.3.1994 in addition to his own work it is held that petitioner is entitled for additional salary for the post of Assistant Controller (Printing) w.e.f. 1.2.1993 to 31.3.1994.

6. Submission of learned Deputy Advocate General appearing on behalf of the respondents that petition has been filed at belated stage and same be dismissed on the concept of delay and latches and acquiescence is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that representation was filed by the petitioner before the competent authority for redressal of his grievances and it is also proved on record that result of representation was not communicated to the petitioner with reasons and thereafter petitioner obtained the information under RTI Act and thereafter after obtaining the information under RTI Act petitioner had filed present petition expeditiously. Hence delay is properly explained in present petition and delay if any is condoned in the ends of justice keeping in view the fact that petitioner is an old and senior citizen of India and keeping in view that representation was filed by petitioner within time and decision of representation was not communicated to petitioner. Point No. 1 is answered in affirmative.

Final Order

7. In view of findings on point No. 1 it is held (1) That petitioner is entitled for salary for the post of Assistant Controller (Printing) w.e.f. 1.2.1993 to 31.3.1994 with interest at the rate of 9% per annum. It is further held that salary already received by the petitioner as General Foreman during the aforesaid period will be calculated for determining the salary for the post of Assistant Controller (Printing). Rejection of claim of petitioner for the salary by respondent is quashed. Arrears of salary will be paid to petitioner within one month from today with interest at the rate of 9% per annum. (2) It is further held that petitioner will not be entitled to any other service benefits because no promotional order of petitioner was passed by competent authority upon the post of Assistant Controller (Printing). Petition stands disposed of. No order as to costs. Pending miscellaneous application(s) if any also stands disposed of.

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

State of Himachal Pradesh. .....Appellant.

Vs.

Ajay Shakti and another. ....Respondents.

Cr. Appeal No.754 of 2008.
Judgment reserved on: 28.10.2014
Date of Decision: December 24, 2014.

Indian Penal Code, 1860- Sections 382, 341, 506 and 323 read with Section 34 IPC- Accused had committed theft of Rs. 6,700/- after having made preparation for causing hurt- testimony of eye-witness was contradictory in examination-in-chief and cross-examination- recovery witness also denied the recovery- FIR was not lodged immediately on the date of incident- held, that in these circumstances, prosecution version was not proved and the acquittal of the accused was justified. (Para-11 to 14)

Cases referred:

Anjlus Dungdung Vs. State of Jharkhand, (2005) 9 SCC 765
Nanhar Vs. State of Haryana, (2010) 11 SCC 423
Sharad Birdhichand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116
Charan Singh Vs. The State of Uttar Pradesh AIR 1967 SC 520
Gian Mahtani Vs. State of Maharashtra, AIR 1971 SC 1898
State (Delhi Administration) Vs. Gulzarilal Tandon AIR 1979 SC 1382
Bhugdomal Gangaram and others Vs. The State of Gujarat, AIR 1983 SC 906
State of UP Vs. Sukhbasi and others, AIR 1985 SC 1224
Mookkiah and another Vs. State (2013) 2 SCC 89
State of Rajashthan Vs. Talevar and another, 2011 (11) SCC 666
Surendra Vs. State of Rajasthan, AIR 2012 SC (Supp) 78
State of Rajasthan Vs. Shera Ram @ Vishnu Dutt, 2012 (1) SCC 602
Balak Ram and another Vs. State of UP AIR 1974 SC 2165
Allarakha K. Mansuri Vs. State of Gujarat (2002) 3 SCC 57
Raghunath Vs. State of Haryana (2003) 1 SCC 398
State of U.P Vs. Ram Veer Singh and others AIR 2007 SC 3075
S.Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others, AIR 2008 SC 2066,
Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, (2008) 11 SCC 186.
Arulvelu and another Vs. State (2009) 10 SCC 206

Perla Somasekhara Reddy and others Vs. State of A.P. (2009) 16 SCC 98
Ram Singh @ Chhaju Vs. State of Himachal Pradesh (2010) 2 SCC 445

For the appellant: Mr.Ashok Chaudhary, Addl. AG Mr. Vikram Thakur, Dy.A.G and Mr.Puneet Razta, Dy.A.G and Mr. J.S.Guleria, Asstt.A.G.

For the respondent: Mr.Anup Chitkara, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment passed by the learned Sessions Judge Hamirpur in Criminal Appeal No. 22 of 2008 titled Ajay Shakti and another Vs. State of HP.

BRIEF FACTS OF THE PROSECUTION CASE:

2. It is alleged by prosecution that on dated 10.12.2004 at about 8.30 PM near Sankat Mochan temple police station Sujanpur H.P accused persons in furtherance of common intention had committed theft of Rs.6,700/- (Six thousand seven hundred) from the property of complainant Baldev Singh after having made preparation for causing hurt. It is alleged by prosecution that on the same date, time and place accused persons have wrongfully restrained complainant Baldev Singh from proceeding further on his way. It is alleged by prosecution that thereafter accused persons in furtherance of common intention had voluntarily caused hurt to complainant Baldev Singh and beaten him. It is alleged by prosecution that thereafter accused persons in furtherance of common intention threatened complainant Baldev Singh to do away with his life. It is alleged by prosecution that FIR Ext PW4/A was registered against accused persons and spot map Ext PW12/A was prepared and MLC of complainant Baldev Singh Ext PW12/B was obtained. It is alleged by prosecution that jacket took into possession vide seizure memo Ext PW4/A and cash to the tune of Rs.6,700/- (Six thousand seven hundred) was also took into possession vide seizure memo Ext PW7/A. It is alleged by prosecution that sample of seal on a piece of cloth Ext PW12/C and Ext PW12/D also obtained and statements of prosecution witnesses recorded as per their versions. It is alleged by prosecution that complainant Baldev Singh was medically examined by medical officer Rajinder Kumar CHC Hamirpur who issued MLC Ext PW7/A and X-ray Ext PW7/B was obtained. It is alleged by prosecution that radiologist report Ext PW7/C and dental X-ray report Ext PW7/D were also obtained. Charge was framed against accused persons under Sections 382, 341, 506 and 323 read with Section 34 IPC. Accused persons did not plead guilty and claimed trial.

3. Prosecution examined as many as thirteen witnesses in support of its case.

Sr.No.	Name of Witness
PW1	Kamal Singh
PW2	Rakesh Verma
PW3	Surjit Kumar
PW4	Baldev Singh
PW5	Raj Kumar
PW6	Goldi
PW7	Rajinder Singh

PW8	Ajay Kumar
PW9	Ram Dayal
PW10	Vijay Kumar
PW11	Vijay Kumar
PW12	Parkash Chand
PW13	Balwant Singh

4. Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	*Description.*
Ext PW4/A	*Copy of FIR*
Ext PW12/A	*Spot map*
Ext PW7/C	*X-ray form of Baldev Singh*
Ext.PW13/D	*X-ray film of Baldev Singh*
Ext PW7/B	*X-ray film of Baldev Singh*
Ext PW7/A	*MLC of complainant Baldev Singh*
Ext PW12/B	*Application*
Ext PW4/B	*Recovery memo*
Ext PW7/A	*Recovery memo*
Ext PW13/A	*Recovery memo*
Ext PW12/C &Ext.PW12/A	*Sample of seal on cloth*
Ext PW12/E	*Statement of Vijay Kumar*
Ext PW12/F	*Statement of Surjit Kumar*

5. Statement of accused persons also recorded under Section 313 Cr.PC. Accused persons did not lead any defence evidence. Learned trial Court convicted the accused persons under Sections 382, 341, 323, 506 read with Section 34 IPC and sentenced both accused persons with simple imprisonment for one year for the commission of offence punishable under Section 382 IPC and also imposed fine to the tune of Rs.5,000/- (Five thousand) to each. Learned trial Court further directed that in default of payment of fine both accused persons would undergo simple imprisonment for three months. Learned trial Court also sentenced both accused persons with simple imprisonment for six months for the offence punishable under Section 341 IPC and also sentenced both accused persons with simple imprisonment for six months each for the offence punishable under Section 506 IPC and also sentenced both accused persons with simple imprisonment for six months for the offence punishable under Section 323 IPC. Learned trial Court further directed that sentence would run concurrently.

6. Feeling aggrieved against the judgment and sentence passed by learned trial Court co-accused Ajay Shakti and co-accused Sanjeev Kumar filed criminal appeal before learned Sessions Judge Hamirpur under Section 374 of the Code of Criminal Procedure 1973 titled Ajay Shakti and another Vs. State of HP who accepted the appeal and quashed judgment of conviction and sentence

passed by learned trial Court and acquitted the accused persons from all the charges framed against them.

7. Feeling aggrieved against the judgment passed by learned Sessions Judge Hamirpur State of HP filed present appeal.

8. We have heard learned Additional Advocate General appearing on behalf of the State and learned Advocate appearing on behalf of the respondents and also perused entire record carefully.

9. Point for determination in the present appeal is whether learned Sessions Judge Hamirpur H.P did not properly appreciate the oral as well as documentary evidence adduced by the parties and caused miscarriage of justice by way of acquitting both accused persons as pleaded in memorandum of grounds of appeal.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

10. PW1 Kamal Singh has stated that about 6/7 months ago complainant Baldev Singh had gone to village Sandhol and when Baldev Singh came back at about 9 PM his path was blocked at place Bhaleth through Maruti van. He has stated that two persons were travelling in the Maruti Van. He has stated that he did not remember the registration number of the vehicle. He has stated that he does not remember thereafter what happened. He has stated that his brother Baldev Singh reached at Hamirpur at about 11.30 PM along with Raj Kumar and told that at place Bhaleth incident took place with Baldev Singh. He has stated that Baldev Singh was beaten by accused persons and amount of Rs.6,700/- (Six thousand seven hundred) was snatched from Baldev Singh. He has stated that Baldev Singh was also beaten by accused persons and also stated that accused persons have threatened Baldev Singh that they would kill Baldev Singh. He denied suggestion that his brother himself committed embezzlement of Rs.6,700/- (Six thousand seven hundred). He denied suggestion that complainant Baldev Singh has filed a false complaint in order to escape himself from criminal liability. PW1 is not eye witness of incident. PW1 has narrated hear say story.

10.1 PW2 Rakesh Verma has stated that he is running a shop of Electronic. He has stated that he made payment of Rs.2500/- (Two thousand five hundred) to the complainant Baldev Singh. Witness was declared hostile by prosecution. In cross examination he has admitted that he has not kept the record of payment but obtained signature on a copy of receipt. He has denied suggestion that he did not pay any money to Baldev Singh. He denied suggestion that complainant did not come to him. PW2 is also not eye witness of incident.

10.2 PW3 Surjit has stated that he does not know about the case. He has stated that no theft was committed in his presence. He has stated that he does not know that he has given payment of Rs.1700/- (One thousand seven hundred) to Baldev Singh on dated 10.12.2004. Witness was declared hostile by prosecution.

10.3 PW4 Baldev Singh has stated that on dated 10.12.2004 at about 9 PM his path was blocked through Maruti Van. He has stated that accused persons have beaten him. He has stated that there were three persons along with driver of the Van. He has stated that some intoxication was given to him. He has stated that accused persons also snatched Rs.6,700/- (Six thousand seven hundred) from his pocket. He has stated that he had also sustained injury upon his teeth. He has stated that his jacket with blood clots was also took into possession by investigating agency vide seizure memo Ext PW4/B. He has stated that jacket is Ext P2. He has stated that a quarrel took place for half an hour. He has denied suggestion that his money was not snatched. He denied suggestion that he was not beaten by accused persons. He denied suggestion that no incident took place.

10.4 PW5 Raj Kumar has stated that on dated 10.12.2004 complainant Baldev Singh came to him at about 11 PM and told that he was beaten by accused persons and his money snatched. He has stated that clothes of Baldev Singh were clotted with blood. He has stated that investigating agency took into possession jacket of complainant Baldev Singh vide seizure memo Ext PW5/A. He has stated that he signed the seizure memo. He has stated that complainant Baldev Singh used to work along with him. He has stated that Baldev Singh came at Hamirpur on scooter at about 11.30 AM. He has stated that he does not know that complainant Baldev Singh was driving the vehicle in an intoxication condition. He has denied suggestion that complainant himself has committed embezzlement of the amount and a false case has been filed against accused persons.

10.5 PW6 Goldy star independent eye witness of alleged incident has stated that two boys met him. He has stated that the name of one boy is Bholu. He has stated that both boys told him that they would go to Hamirpur as their relative was sick. He has stated in examination in chief recorded on dated 21.8.2006 that when they reached 3/4 Kms ahead from Sujanpur towards Hamirpur side one scooter owner was standing there. He has stated that thereafter accused persons have beaten him and also snatched his articles. He has stated that accused persons have also threatened to kill him. Thereafter cross examination of witness was deferred and cross examination of witness was recorded on 4.5.2007 by learned trial Court. In cross examination PW6 Goldy has stated that no quarrel and beating took place in his presence. He has stated in cross examination that complainant Baldev Singh was intoxicated. He has stated that scooter of complainant Baldev Singh skidded and fell into drain. He has stated that accused persons did not snatch money from complainant Baldev Singh.

10.6 PW7 Dr. Rajinder has stated that he examined complainant Baldev Singh on dated 11.12.2004 at 3.20 PM and found seven abrasions and contusion injuries**.** He has stated that weapon used was blunt and has stated that injuries Nos. 1,2,4,5 and 6 were simple in nature. He has stated that opinion qua injury No.3 was to be given after expert dental opinion. He proved MLC Ext PW7/A placed on record. In cross examination he has admitted that all injuries mentioned in MLC are possible by way of fall from scooter.

10.7 PW8 Raj Kumar has stated that he has joined the investigation. He has stated that a sum of Rs.6,700/- (Six thousand seven hundred) was recovered at the instance of co-accused Ajay Shakti. He has stated that seizure memo Ext PW8/A was prepared and he signed the same as a marginal witness. He has denied suggestion that no recovery of Rs.6,700/- (Six thousand seven hundred) was effected as per disclosure statement of co-accused Ajay Shakti.

10.8 PW9 Ram Dayal has stated that he was posted as Station House Officer Police Station Sujanpur. He has stated that after completion of investigation he prepared challan.

10.9 PW10 Vijay Kumar has stated that he has signed seizure memo Ext PW7/A. He has stated that no recovery was effected in his presence. Witness was declared hostile. He has stated that he did not join investigation of present case. He has stated that he was summoned to Police Station. He has denied suggestion that he deposed falsely in order to save the accused persons.

10.10 PW11 Vijay Kumar has stated that in the year 2005 he was posted as S.I in Police Station Sujanpur. He has stated that case file was handed over to him for investigation. He has stated that he obtained X-ray report of injured from Hamirpur.

10.11 PW12 Parkash Chand has stated that he was posted as ASI in Police Station Sujanpur. He has stated that on the complaint of Baldev Singh he registered FIR Ext PW4/D on dated 11.12.2004 and investigated present case.

He has stated that he prepared site plan Ext PW12/A. He has stated that medical examination of complainant Baldev Singh was also got conducted. He has stated that he filed application to obtain MLC Ext PW12/B. He has stated that he took into possession jacket of the complainant vide seizure memo Ext PW4/B. He has stated that he also recovered Rs.6,700/- (Six thousand seven hundred) and also recorded the statement of prosecution witness. He has denied suggestion that he has not recorded the statement of prosecution witness as per his own version.

10.12 PW13 Balwant Singh has stated that on dated 10.12.2004 he came from Sujanpur H.P at about 8 PM in vehicle No. HP-22-6763. He has stated that PW6 Goldy was also along with him. He has stated that he parked his vehicle at bus stand Sujanpur. He has stated that when he came at 9 PM the vehicle and driver was not available at the bus stand. He has stated that on dated 11.12.2004 driver PW6 Goldy came to him and told that two boys namely Ajay Shakti and Sanjeev Kumar @ Bholu told him to take the vehicle to Hamirpur H.P. He has stated that his driver told him that he refused to take the vehicle to Hamirpur H.P but accused persons forcibly directed his driver PW6 Goldy to take the vehicle to Hamirpur H.P. He has stated that when the driver of the vehicle PW6 Goldy covered some distance of road then accused persons told PW6 Goldy to stop the vehicle. He has stated that PW6 Goldy told him that thereafter accused persons have beaten the scooter driver and also stolen Rs.6,700/-(Six thousand seven hundred) from scooter driver. He has stated that PW6 Goldy told him that thereafter accused persons also beaten PW6 Goldy driver of Maruti van and took the vehicle towards Hamirpur H.P and thereafter vehicle rolled down at place Anu near Hamirpur H.P. He has stated that Investigating agency took into possession clothes of complainant Baldev Singh and memo Ext PW13/A was prepared. He has stated that police took into possession mobile phone, driving license, identity card and diary. He has stated that complainant Baldev Singh was not known to him. He has denied suggestion that clothes were not sealed in his presence. He denied suggestion that accident was caused by the driver of Maruti van. He denied suggestion that complainant Baldev Singh was in intoxication condition. He denied suggestion that complainant Baldev Singh tried to overtake his scooter and fallen down in the drain from his scooter. He denied suggestion that he deposed falsely in order to save PW6 Goldy.

Testimony of PW6 Goldy only eye witness of incident is fatal to the prosecution case being contradictory testimony in examination in chief and in cross examination.

11. It is the case of the prosecution that PW6 Goldy is the eye witness of the incident. We have carefully perused the testimony of PW6 Goldy in examination in chief and cross examination. Statement of PW6 Goldy in examination in chief was recorded by learned trial Court on 21.8.2006 and cross examination of PW6 Goldy was recorded by learned trial Court on dated 4.5.2007. In examination in chief PW6 Goldy has stated that accused persons have beaten injured Baldev Singh and also snatched his articles and money. Thereafter when the cross examination of PW6 Goldy was recorded on 4.5.2007 he has stated in cross examination that no quarrel took place in his presence. He has stated that no beating was given in his presence to complainant Baldev Singh by accused persons. He has stated that scooter of the injured was skidded and fell in a drain. He has stated that Baldev Singh had abused accused persons. He has stated in cross examination that accused persons did not snatch money from complainant Baldev Singh. In view of contradictory testimony of PW6 in examination in chief and cross examination we are of the opinion that testimony of PW6 Goldy is not trustworthy and reliable and it is not expedient in the ends of justice to convict the accused persons on the contradictory testimony of PW6 in examination in chief and cross examination.

Testimony of PW10 Vijay Kumar is also fatal to prosecution case

12. It is the case of the prosecution that an amount to the tune of Rs.6,700/- (Six thousand seven hundred) was recovered from co-accused Ajay Shakti in the presence of Ajay Kumar and Vijay Kumar. PW10 Vijay Kumar has specifically stated that no recovery was effected in his presence and he has specifically stated in positive manner that he was called in Police Station and his signatures were obtained in police station. There are two witnesses of the recovery of Rs.6,700/- (Six thousand seven hundred) i.e. PW8 Ajay Kumar and PW10 Vijay Kumar. In view of the contradictory testimony of recovery witness i.e. PW8 Ajay Kumar and PW10 Vijay Kumar we are of the opinion that it is not expedient in the ends of justice to convict the accused persons on the ground of recovery of Rs.6,700/- (Six thousand seven hundred) from co-accused Ajay Shakti.

Testimony of PW2 Rakesh Verma is fatal to the prosecution qua payment of Rs.2500/- to injured Baldev Singh.

13. It is the story of prosecution that Rs.2500/- (Two thousand five hundred) was paid by PW2 Rakesh Verma to injured Baldev Singh for the supply of spare parts on the date of incident. We have carefully perused the testimony of PW2 Rakesh Verma. PW2 Rekesh Verma has specifically stated in examination in chief that he does not know who took the money from his shop thereafter witness was declared hostile by the prosecution and in cross examination he has stated that injured took Rs.2000/- (Two thousand) from him. In view of the contradictory testimony of witness in examination in chief and cross examination we are of the opinion that it is not expedient in the ends of justice to convict the accused persons.

Non filing of FIR in Police Station Sujanpur H.P immediately is also fatal to the prosecution

14. As per prosecution story incident took place on 10.12.2004 between 8.30 PM and 8.35 PM at Bhaleth near Sankat Mochan Temple Police Station Sujanpur District Hamirpur HP. As per copy of FIR Ext PW4/A placed on record the distance of Police Station Sujanpur Tira from the place of incident is 6 Kms. only. FIR was recorded on 11.12.2004 at 2.40 PM. No explanation has been given by the prosecution as to why injured Baldev Singh did not record FIR in Police Station Sujanpur H.P which was situated at a distance of 6 Kms only from alleged place of incident. It is proved on record that Baldev Singh preferred to go to Hamirpur H.P which is situated at the distance of more than 20 Kms. from the place of incident and stayed during night period at Hamirpur H.P. Hence delay in lodging FIR is also fatal to the prosecution case in the present case and delay has not been satisfactorily explained by complainant Baldev Singh in the present case. It is not the case of the prosecution that Baldev Singh became unconscious after the incident. On the contrary it is the case of the prosecution that Baldev Singh himself went to Hamirpur H.P in his vehicle which was situated at a distance of more than 20 Kms. from the place of alleged incident.

15. Submission of learned Additional Advocate General that learned Sessions Judge has illegally discarded the version of official witness and on this ground appeal be accepted is rejected being devoid of any force for the reason hereinafter mentioned. In the present case official witnesses are not eye witness of the incident and they are only corroborative witnesses. In the present case as per prosecution story the eye witness of the incident is PW6 Goldy. The testimony of PW6 is not trustworthy and reliable because PW6 Goldy has given contradictory testimony in examination in chief and cross examination qua the infliction of injury upon complainant Baldev Singh.

16. Another submission of learned Additional Advocate General appearing on behalf of the State that learned Sessions Judge Hamirpur has illegally disbelieved the testimony of Baldev Singh is also rejected being devoid of

any force for the reason hereinafter mentioned. As per prosecution story the eye witness of the incident is PW6 Goldy. In view of contradictory testimony of PW4 Baldev Singh and PW6 Goldy who are eye witness of incident it is not expedient in the ends of justice to convict accused persons. It is well settled law that benefit of doubt is always given to accused persons in criminal law.

17. Another submission of learned Additional Advocate General appearing on behalf of the State that delay has been properly explained by the prosecution because Baldev Singh has reported the matter in Police Station Hamirpur H.P is rejected being devoid of any force for the reason hereinafter mentioned. Prosecution did not place on record any FIR which was reported by Baldev Singh at Police Station Hamirpur H.P. Even prosecution did not examine any police officials from Police Station Hamirpur H.P in order to prove that FIR was lodged at Police Station Hamirpur H.P by complainant Baldev Singh. No copy of FIR registered at Police Station Hamirpur H.P placed on record by prosecution.

18. Another submission of learned Additional Advocate General appearing on behalf of the State that learned Sessions Judge has committed grave miscarriage of justice by way of not properly appreciating the testimony of PW6 Goldy driver of the Van and PW13 Balwant Singh owner of the Maruti Van is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of PW6 Goldy and PW13 Balwant Singh. PW6 Goldy driver of the Van has given contradictory testimony in his examination in chief and cross examination and his testimony is not trustworthy and reliable in view of the contradictory testimony in examination in chief and cross examination. PW13 Balwant Singh is not the eye witness of the incident and he was not present at the time of incident. His testimony is based upon hearsay evidence. It was held in case reported (2005) 9 SCC 765 titled Anjlus Dungdung Vs. State of Jharkhand that suspicion however strong cannot take place of proof. It was held in case reported in (2010) 11 SCC 423 titled Nanhar Vs. State of Haryana that prosecution must stand or fall on its own leg and it cannot derive any strength from the weakness of the defense. Also See: (1984) 4 SCC 116 Sharad Birdhichand Sarda Vs. State of Maharashtra. It is well settled law that conjecture or suspicion cannot take place of legal proof. See: AIR 1967 SC 520 Charan Singh Vs. The State of Uttar Pradesh. *Also See:* AIR 1971 SC 1898 Gian Mahtani Vs. State of Maharashtra. It was held in case reported in AIR 1979 SC 1382 State (Delhi Administration) Vs. Gulzarilal Tandon that even where the circumstances raise a serious suspicion against the accused it cannot take the place of legal proof. Also See: AIR 1983 SC 906 titled Bhugdomal Gangaram and others Vs. The State of Gujarat See: AIR 1985 SC 1224 titled State of UP Vs. Sukhbasi and others**.** It is well settled principle of law that vested right accrued in favour of the accused with the judgment of acquittal by learned Sessions Court. (See (2013) 2 SCC 89 titled Mookkiah and another Vs. State. See 2011 (11) SCC 666 titled State of Rajashthan Vs. Talevar and another. See AIR 2012 SC (Supp) 78 titled Surendra Vs. State of Rajasthan. See 2012 (1) SCC 602 titled State of Rajasthan Vs. Shera Ram @ Vishnu Dutt). It is well settled principle of law (i) That appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible though the view of the appellate Court may be more probable. (ii) That while dealing with a judgment of acquittal the appellate Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned Courts below are perverse or otherwise unsustainable (iii) That appellate Court is entitled to consider whether in arriving at a finding of fact, learned Courts below failed to take into consideration any admissible fact (iv) That learned courts below took into consideration evidence brought on record contrary to law. (See AIR 1974 SC 2165 titled Balak Ram and another Vs. State of UP, See (2002) 3 SCC 57 titled Allarakha K. Mansuri Vs. State of Gujarat, See (2003) 1 SCC 398 titled Raghunath Vs. State of Haryana, See AIR 2007 SC 3075 State of U.P Vs. Ram Veer Singh and others, See AIR 2008 SC 2066, (2008) 11 SCC 186 S.Rama

Krishna Vs. S. Rami Raddy (D) by his LRs. & others. Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, See (2009) 10 SCC 206 titled Arulvelu and another Vs. State, See (2009) 16 SCC 98 titled Perla Somasekhara Reddy and others Vs. State of A.P. See: (2010) 2 SCC 445 titled Ram Singh @ Chhaju Vs. State of Himachal Pradesh).

19. In view of the above stated facts and case law cited supra we dismiss the appeal filed by the State of HP and affirm the judgment passed by learned Sessions Judge Hamirpur H.P. It is held that judgment passed by learned Sessions Judge Hamirpur H.P is based upon oral as well as documentary evidence placed on record. It is held that no miscarriage of justice is caused to appellant. Pending application(s) if any are also disposed of. Records of learned trial Court and Sessions Judge Hamirpur H.P be sent back forthwith along with certify copy of judgment. Appeal filed by State of HP is disposed of.

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

State of H.P. .....Appellant.
Versus
Jai Ram and others ...Respondents.

Cr. Appeal No.: 225 of 2013
Reserved on: 19.12.2014.
Date of Decision : 24.12.2014

Indian Penal Code, 1860- Section 306 read with Section 34- Deceased was married to 'A'- 'A' remained in the matrimonial home for 1-2 months- she was dropped at her parent's home- thereafter efforts were made to call her but she did not come- accused raised demand of Rs. 5 lacs- PW-1 had not stated before investigating officer that demand of Rs. 5 lacs was made- PW-2 deposed that demand of Rs. 3.5 lacs was raised- deceased had committed suicide after 3 years of raising demand - held, that there was no proximity in the demand and the suicide- therefore, it cannot be said that demand was an instigatory factor for the deceased to commit suicide. (Para-9)

For the Appellant: Mr. J.S.Guleria, Asstt. Advocate General.
For the respondents: Mr. Ashwani K. Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge*

This appeal is directed against the judgement of acquittal rendered on 29.12.2012 by the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P. in Sessions trial No. 7/7 of 2012 whereby he acquitted the respondents for theirs having committed offence punishable under Section 306 IPC read with Section 34 IPC.

2. The prosecution story, in brief, is that marriage of Jitender Kumar (deceased) was solemnized with Anita Kumari on 10.3.2007. Anita Kumari remained in the matrimonial home only for 1-2 months and thereafter on 29.5.2007 she was dropped at her parent's house in Ghumarwin. Thereafter, PW-1 (Amar Singh) alongwith PW-2 (Ramesh Chand), PW-3 (Ram Pal) and PW-10 (Onkar Singh) went to call Anita Kumari but she did not come. Accused Jai Ram and Veena Devi raised demand for money i.e. a sum of Rs.5 lacs and also sought transfer of property in the name of Anita Kumari. The accused party

have also demanded a sum of Rs.5 lacs for compromising the matter and getting divorce and thus alleging that Jitender Kumar was harassed by accused persons and he committed suicide on account of harassment caused to him by consuming poison on 28.5.2010 in village Kapahara. He was taken to C.H.Gumarwin for treatment. Dr. Sumit Verma (PW-5) had medically examined Jitender Kumar. He was thereafter referred for further treatment to Bilaspur, where ASI Pushp Raj (PW-11) recorded statement of Amar Singh and sent Rukka through constable Raj Kumar for registration of F.I.R. on which F.I.R. Ext.PW-8/A was registered. One suicide note Ext.PW-1/B was handed over to the police by Amar Singh which was taken into possession by the police vide recovery memo Ext.PW-1/C. Amar Singh had also produced admitted handwriting of Jitender Kumar to the police which are Ext.PW-1/D and Ext.PW-1/E and Ext.PW-1/G. In August, 2010 Amar Singh had found another suicide note Ext.PW-1/K written by his son addressed to him, which was also handed over to the police and taken through memo Ext.PW-1/J in the presence of Nirmla Devi and Raj Kumar. Dr. S.Sharad (PW-7) conducted post mortem examination of the dead body on 29.5.2010. Post mortem report Ext.PW-7/D given by him which reveals the cause of death was Coma due to poisoning. Dr. Minakshi Mahajan(PW-12) examined questioned item Ext.PW-1/B, suicide note and admitted items Ext.PW-1/D, Ext.PW-1/E and Ext.PW-1/G and given her report Ext.PW-11/C. Report reveals that admitted hand writings/signature and questioned item/suicide note, all have been written by one and the same person.

3. After completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court. The trial Court charged the accused for theirs having committed offence punishable under Section 306 read with Section 34 IPC, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 13 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.

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

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

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

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

9. The deceased (Jitender Kumar) was married to Anita Kumari. She stayed in her matrimonial home for one and half months. Thereafter she settled at her parental house. Concerted attempts on the part of the PW-1 Amar Singh father of deceased Jitender Kumar to retrieve her to her matrimonial

home remained unsuccessful. The deceased committed suicide by consumption of poison, as is apparent on perusal of post mortem report Ext.PW-7/D. The ill-treatment and maltreatment which instigated and actuated the deceased to commit suicide is comprised in the testimonies of PW-1(Amar Singh), PW-2 (Ramesh Chand), PW-3 (Ram Pal) and PW-10 (Onkar Singh). The instigatory factor, which propelled the deceased to commit suicide is comprised in the factum as deposed by PW-1 of on his having visited the parental home of Anita Kumari, the latter having raised a demand of Rs.5 lacs and of transfer of land in her name for settling the marital issue inter se Jitender Kumar and his wife Anita Kumari. However, the occurrence of a statement in the examination-in-chief of PW-1 of the parents of the accused having raised a demand of Rs.5 lacs in lieu of settling the marital issue inter se Anita Kumari and Jitender Kumar appears to be an embellishment and an improvement, hence incredible in the face of PW-1 having omitted to state the fact aforesaid to the Investigating Officer. Consequently, the raising of a demand of Rs.5 lacs by the accused from PW-1 in lieu of settling the marital issue inter se deceased Jitender Kumar and Anita Kumari acquires no potency rather is prevaricated. Even PW-2 in contradistinction to PW-1 who deposed qua the factum of the accused having raised a demand of Rs. Five lacs from PW-1 in lieu of settling the marital issue inter se deceased Jitender Kumar and Anita Kumari, has deposed that a demand rather of Rs.3.50 lacs was raised by the accused for putting to rest the strife raging the matrimonial life of Jitender Kumar and Anita Kumari. Contradistinction, inter se the quantum of demand raised by the accused for settling the marital ties inter se Jitender Kumar and Anita Kumari propels an inference that hence PW-2 never accompanied PW-1 besides the testimony of PW-1 qua the factum of a demand having been raised to the tune of Rs. 5 lacs by the accused to douse the estranged marital ties inter se Jitender Kumar and Anita Kumari, stands dispelled. Moreover, existence of a statement, in the deposition of PW-1, of the accused having raised a demand from PW-1 of property being transferred in the name of Anita Kumari, too stands not corroborated by PW-2, hence for lack of corroboration to the said factum by PW-2 to the said fact as deposed by PW-1, renders it also incredible. In face of rife contradictions existing inter se PW-1 and PW-2 qua the demands raised by the accused to ebb the marital strife inter se the deceased Jitender Kumar and Anita Kumari, which contradiction hence belies the presence of PW-2 alongwith PW-1 at the house of the accused, consequently when PW-10 and PW-3 depose qua the factum of PW-2 accompanying him to the house of the accused, their presence, too at the house of the accused alongwith PW-1 garners an aura of doubt. PW-10 too has deposed in purported corroboration to the testimony of PW-1 qua the demands raised by the accused to settle the marital issue inter se deceased Jitender Kumar and accused Anita Kumari, nonetheless when he in his examination-in-chief omits to name PW-3 to be also the person accompanying him to the house of the accused for improving the marital relations inter se deceased Jitender Kumar and accused Anita Kumari, an obvious conclusion which is to be formed is that PW-10 and PW-2 did not accompany PW-1 to the house of the accused. In sequel the version rendered by PW-2, PW-3 and PW-10 in purported corroboration to the deposition of PW-1, appears to be incredible. Even otherwise assuming that confabulations were underway inter se PW-1 and accused for ebbing the strife in the estranged marital relations inter se Jitender Kumar and Anita Kumari and assuming that some demand was raised by the accused to settle the marital strife, inter se them, nonetheless the demands as purportedly raised appear to have been raised to secure the future marital prospects of accused Anita Kumari, as such, when there is no colour of untenability or illegality, imbueable to the demands, as such, they cannot constitute any actuatory factor for the deceased to take his life. Moreso, when it has not been established that even if such demands were raised, either PW-1 or the deceased Jitender Kumar were financially disempowered to meet or comply with the demands of the accused, as such, they felt the pressure of the demands and Jitender Kumar reeling under the

pressure of the demands was instigated to hence commit suicide, does not render the purported demands to be acquiring the potency to foment the deceased to commit suicide. Besides, when the demand as purportedly raised by the accused was made on the purported visit of PW-1 purportedly alongwith PW-2, PW-3 and PW-10 to the house of the accused on 11.11.2007. However, the deceased committed suicide on 28.05.2010. Consequently, given the improximity in time inter se the purported demand and the accused ultimately taking to commit suicide, an apt conclusion which is to be formed is that the demand as purportedly raised by the accused from PW-1 for making accused Anita Kumari relent to join her matrimonial home did not constitute the instigatory or actuatory factor for the deceased to commit suicide especially when proximity inter se the demand and Jitender Kumar having been purportedly instigated by them to commit suicide, is the germane probative factor to be borne in mind by courts of law to construe that hence the purported demand inflamed Jitender Kumar to commit suicide.

10. The prosecution anvils its case on Ext.PW-1/B purportedly attributed to the deceased in which he inculpates the accused. However, even if PW-12 has in her report comprised in Ext.PW-11/C opined therein that the admitted writings of the deceased comprised in Ext.PW-1/D, Ext.PW-1/E and Ext.PW-1/G on comparison with writings of the deceased comprised in Ext.PW-1/B portray that all are authored by the same person. However, the report of the handwriting expert would carry immense probative worth only in the event of it having come to be established by cogent evidence comprised in the deposition of persons acquainted with his handwritings and theirs deposing that the purported admitted handwritings attributed to the deceased belonged to him, besides in best evidence comprised in the Investigating Officer, given the employment of the deceased in the territorial army having procured from the place of service of the deceased, the admitted handwriting of the deceased. However, PW-11 the Investigating Officer has deposed that he omitted to verify from any of the relatives of the deceased, acquainted with the handwriting of the deceased, the fact which the handwriting purportedly attributed to the deceased comprised in Ext.PW-1/D, Ext.PW-1/E, and Ext.PW-1/G, belonged to him. Besides there is no endeavour on the part of the Investigating Officer to collect the admitting handwritings of the deceased from the place of his service. Absence of the aforesaid concerted efforts on the part of the Investigating Officer to elicit the aforesaid best evidence qua the factum of the admitted handwritings purportedly attributed to the deceased comprised in Ext.PW-1/D, Ext.PW-1/E and Ext.PW-1/G belonging to him constrains this Court to conclude that the purported admitted handwritings ascribed to the accused comprised in Ext.PW1/D, Ext.PW1/E and Ext.PW-1/G were not his admitted handwritings. Consequently, for want of cogent and best evidence displaying that Ext.PW1/D, Ext.PW1/E and Ext.PW-1/G are the admitted handwriting of the deceased, their comparison, if any, with the suicide note not constituting the admitted handwriting of the deceased was untenable. Besides the opinion rendered by the handwriting expert comprised in Ext.PW-11/C conveying that the handwritings borne on Ext.PW-1/B on comparison with the purported admitted handwritings of the deceased comprised in Ext.PW-1/D, Ext.PW-1/E and Ext.PW-1/G are authored by the same person does not lend credibility to the factum of the suicide note having been authored by the deceased.

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

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

1.Sh.Sukhdarshan Singh son of
Late Sh Ishwar Singh.
2. Sh. Balbir Singh son of
Sh. Netar Singh .....Petitioners.

Vs.

HPSEB Limited and another. ....Respondents.

CWP No. 5701 of 2013.
Order reserved on: 31.10.2014.
Date of Order: December 24, 2014.

Constitution of India, 1950- Article 226- Petitioners claimed that they were appointed as temporary employees w.e.f. 1.11.1986 and 13.12.1985 respectively- petitioners were conferred the work charge status w.e.f. 3.1.1998- they claimed that services rendered by them till conferment of work charge status should be counted for the purpose of pay fixation, increments and other benefits as well as pensionary benefits- it was proved on record that petitioners were offered the post of T-mate on work charge status –work charge status would come to an end after the completion of the work- petitioners had not challenged the work charge status for 15 years- no explanation was given for the delay- petition dismissed on this short ground alone. (Para-5)

Cases referred:

P.S.Sadasivaswamy Vs. State of Tamil Nadu (Apex Court of India), 1976 (1) Service Law Reporter 53

Satija Rajesh Vs. State of Himachal Pradesh and others, 2014 (Suppl.) Him L.R. (DB) 2422

State of Bihar and another Vs. Bhagwan Singh, AIR 2014 Patna 208 (Full Bench)

M/s Rup Diamonds and others Vs. Union of India, AIR 1989 SC 674

State of Karnataka and others Vs. S.M.Kotrayya and others 1996 (6) SCC 267

Jagdish Lal and others Vs. Vs. State of Haryana AIR 1997 SC 2366

For the petitioner: Mr. A.K.Gupta, Advocate.
For respondents: Mr. Raj Pal Thakur, Advocate.

The following judgment of the Court was delivered:

P.S.Rana,Judge.

Present petition is filed under Article 226 of the Constitution of India. It is pleaded that petitioners were appointed as temporary employees in the permanent establishment w.e.f. 1.11.1986 and 13.12.1985 respectively. It is pleaded that services of the petitioners were brought on work charge establishment w.e.f. 3.1.1998 and thereafter petitioners were retired from service. It is pleaded that period of service rendered by the petitioners from the dates of their joining till their regularization w.e.f. 3.1.1998 be treated as service for the purpose of pay fixation, increments and other service allowances and for purpose of pensionary benefits. Prayer for acceptance of petition sought.

2. Per contra reply filed on behalf of the respondents pleaded therein that writ petition suffers from delay and laches. It is pleaded that writ petition has been filed after a lapse of fifteen years from the date of cause of action. It is pleaded that petitioners are estopped to file present petition due to their act and conduct. It is pleaded that petitioners were offered the post of T-Mate on work

charge basis vide offer dated 2.1.1998 and the said offer was accepted by the petitioners. It is pleaded that petitioners were engaged on daily wage basis and thereafter respondent-Board regularized the daily wage workmen on various categories against the available vacancies. It is pleaded that petitioners were regularized on 3.1.1998. Prayer for dismissal of petition sought.

3. Court heard learned Advocate appearing on behalf of petitioners and learned Advocate appearing on behalf of respondents and also perused the record carefully.

4. Following points arise for determination in the present writ petition.

(1) Whether relief is barred after fifteen years from date of cause of action on the concept of delay, laches and acquiescence as alleged?

(2) Final order.

Finding upon point No.1.

5. Submission of learned Advocate appearing on behalf of the petitioners that services of the petitioners be counted w.e.f. 1.11.1986 and 13.12.1985 till their services were regularized on dated 3.1.1998 for the purpose of pay fixation, increments and pensionary benefits is rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that offers were given to the petitioners for the post of T-Mates on work charge status and petitioners have accepted the post of T-Mates on work charge status in the year 1998. It is well settled law that there is difference between the status of work charge employee and the status of temporary employee. It is well settled law that the services of the work charge employee would automatically come to an end after the completion of specific work. It is proved on record that petitioners themselves have accepted the post of T-Mates on work charge status and thereafter petitioners have also received the salary of T-Mates on work charge status. Petitioners did not challenge the post of T-Mates on work charge status for about fifteen years. It was held in case reported in ***1976 (1) Service Law Reporter 53 titled P.S.Sadasivaswamy Vs. State of Tamil Nadu (Apex Court of India)*** that relief should be declined to the petitioner if writ petition is not filed expeditiously. It was held that normally writ petition should be filed within six months or at the most within one year after the arisen of cause action. It was held in case reported in ***2014 (Suppl.) Him L.R. (DB) 2422 titled Satija Rajesh Vs. State of Himachal Pradesh and others*** that delay is important factor in writ petition and it was held that delay defeats equity and it was also held that delay should not be brushed aside without plausible explanation. It was held that principle of waiver and estoppel also applies in the writ petition. Petitioners did not challenge their status even after the regularization of their services on dated 3.1.1998. Petitioners have challenged their status of service on dated 29.7.2013 after a gap of more than fifteen years. It was held in case reported in ***AIR 2014 Patna 208 (Full Bench) titled State of Bihar and another Vs. Bhagwan Singh*** that service rendered by government employee as daily wages could not be counted for pension benefit. It was held that service of employee for pension benefit would be calculated from the date of appointment of the employee upon the substantive post. Petitioners did not challenge their status of service w.e.f. 3.1.1998 till 29.7.2013. No plausible explanation given by petitioners for filing of present writ petition after more than fifteen years after cause of action. There is no evidence on record in order to prove that petitioners have also filed any representation before competent authority of law for redressal of their grievance w.e.f. 3.1.1998 to 29.7.2013. Hence it is held that it is not expedient in the ends of justice to grant relief to the petitioners on the concept of delay, laches and acquiescence. It was held in case reported in ***AIR 1989 SC 674 titled M/s Rup Diamonds and others Vs. Union of India*** that Court has consistently rejected the contention

that petition should be considered ignoring delay and laches in case petitioner approaches the Court after coming to know of the relief granted by Court in similar case. It was held that the same is not proper explanation of delay and laches. It was held that litigant could not wake up from deep slumber and could not claim impetus from the judgment in cases where some diligent person had approached within reasonable time. See ***1996 (6) SCC 267 titled State of Karnataka and others Vs. S.M.Kotrayya and others*** See ***AIR 1997 SC 2366 titled Jagdish Lal and others Vs. Vs. State of Haryana***. Hence point No.1 is decided against the petitioners and in favour of the respondents.

Final Order.

6. In view of my findings upon point No.1 civil writ petition filed under Article 226 of the Constitution of India is dismissed and relief sought is declined on the concept of delay, laches and acquiescence after fifteen years from date of cause of action. In the present case delay of more than fifteen years is writ large from the date of cause of action. No order as to costs. Writ petition disposed of Pending application(s) if any are also disposed of.

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

Surjit Singh .....Petitioner.
Versus
Sachin Raizada & ors. .....Respondents.

CMPMO No. 06 of 2014.
Reserved on: 17.11.2014.
Decided on: 24.12.2014.

H.P. Court Fees Act, 1968- Article 13(vi)- Plaintiff filed a suit for partition of the land claiming that land is coparcenary property and that the plaintiff had acquired a right in it by birth- defendant claimed that suit was not properly valued and market value of the suit is not less than Rs. 2,53,83,000/- held, that plaintiff would be deemed to be in constructive joint possession of the suit property- plaintiff is liable to pay the Court fees in accordance with Section 13(vi) and not in accordance with Section 7(iv)(b) or Section 7(v) of the Court Fees Act. (Para- 8 to 18)

Cases referred:

Asa Ram and others vrs. Jagan Nath and ors., AIR 1934 Lahore 563 (Full Bench),

Shankar Maruti Girme vrs. Bhagwant Gunaji Girme and others, AIR (34) 1947 Bombay 259

Nagorao Bapu and ors. Vrs. Mahadeo Bapu Doma Bapu and others, AIR (37) 1950 Nagpur 81

Onkar Mal and others vrs. Ram Sarup and others, AIR 1954 Allahabad 722

Mahadeo Ganesh and another vrs. Sadashiv Khanderao and ors., AIR 1953 M.B 151

Karibasappa vrs. Jademallappa & ors., AIR 1955 Mysore 140

Mina Ram vrs Amolak Ram & ors, AIR 1966 Himachal Pradesh 4

For the petitioner: Mr. N.K.Thakur, Sr. Advocate, with Mr. Rohit Bharoll, Advocate.

For the respondents: Mr. Ajay Kumar Sr. Advocate, with Mr. Dheeraj K. Vashista, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition has been filed for modification of order dated 31.10.2013, rendered by the learned Civil Judge (Jr. Divn.), Court No. IV, Una in CMA No. 155 of 2013 in Civil Suit No. 30 of 2013.

2. Key facts, necessary for the adjudication of this petition are that the respondent-plaintiff (hereinafter referred to as the plaintiff for convenience sake) has filed suit for partition of land measuring 1-69-22 hectares, as per the details given in the plaint against the petitioner and proforma respondents. The petitioner is father of respondents. The relevant pedigree table as per the plaint is as under:

Tarlok Singh
|
Ran Singh
|
Ram Rakha
|
Surjit Singh
|

| | |
Sachin Monika Vandana

3. The land was owned and possessed by Tarlok Singh, common ancestor. It devolved upon Ran Singh, thereafter on Ram Rakha and thereafter on Surjit Singh-petitioner. The plaintiff, by virtue of Hindu Law (Mitakshra School), has acquired the right in the property by birth. The suit property is coparcenary property in the hands of the petitioner. The plaintiff and proforma respondens, being coparceners have 1/4th share each in the coparcenary property. The plaintiff wanted the partition of the coparcenary property.

4. The written statement was filed by the petitioner. A preliminary objection was taken that the suit property was not properly valued for the purpose of court-fee and jurisdiction. The value of the suit is not less than Rs. 2,53,83,000/- (Two crores fifty three lacs eighty three thousands). It was denied that the parties were governed by the Hindu Mitakshara Law. According to the petitioner, the parties were governed by Hindu Succession Act, 1956. He is the only son, who succeeded to the property from his father under Hindu Succession Act, 1956. It was denied that the property in dispute was coparcenary property. His father has executed a registered "Will" in favour of three sons, including the petitioner. The mutation to this effect was sanctioned in the revenue record vide mutation No. 2018. All the coparceners including the petitioner partitioned the land and mutation to that effect was sanctioned in the revenue record in respect of co-owners including the petitioner and the suit land fell into the share of the petitioner.

5. The petitioner filed an application under Order 7 Rule 11 CPC for rejection of the plaint. It was specifically averred in the application that the minimum market value of the property was Rs. 1500/- per sq. meter and total gross value of the suit land comes to Rs. 2,53,83,000/-. According to the petitioner, the plaintiff was required to correct the valuation of the suit land and to affix the *ad valorem* court-fee on the market value of the suit property. The application was contested by the plaintiff. The learned trial Court passed the order in CMA No. 155 of 2013 dated 31.10.2013. According to the operative portion of the order dated 31.10.2013, the present case was covered as per Section 7(v) and the plaintiff was required to properly value the suit. The

application was allowed as per the operative portion and the plaintiff was asked to make proper valuation of the suit by affixing necessary court-fee.

6. The core issue involved in this petition is whether the court-fee was payable under Section 7 (iv)(b) or Section 7(v) or Schedule II, Article 13(vi) of the H.P. Court Fees Act, 1968.

7. The case of the plaintiff, precisely, is that the suit land is a coparcenary property. The parties are governed under the Mitakshara Law. The petitioner is the *'Karta'* of the family. He started alienating the suit property. According to the plaintiff, he along with proforma respondents have 1/4th share in the suit land and they wanted separate share of the property. According to the petitioner, the suit property was not coparcenary property. He has got this property on the basis of the registered "Will' executed by his father.

8. Section 7 (iv) (b) of the H.P. Court Fees Act, 1968 (hereinafter referred to as "the Act") reads as under:

> "**7. Computation of fees payable in certain suits-**
>
> **.....**
>
> **(iv)-in suits-**
>
> **(b) to enforce a right to share in joint family property;** to enforce the right to share in any property on the ground that it is joint family property;"

9. Section 7(v) and Schedule II-13 (vi) of the Act reads as under:

> "**7 (v). for possession of land, houses and gardens;** In suits for the possession of land houses and gardens- according to the value of the subject matter and such value shall be deemed to be-
>
> Where the subject matter is land, and-
>
> (a) where the land forms an entire estate, or a definite share of an estate paying annual revenue to Government; or
>
> forms part of such an estate and is recorded in the Collector's register as separately assessed with such revenue,
>
> and such revenue is permanently settled-ten times the revenue so payable;
>
> (b) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government or forms part of such estate and is recorded as aforesaid;
>
> and such revenue is settled, but not permanently- ten times the revenue so payable;
>
> (c) where the land pays no such revenue, or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue;
>
> and net profits have arisen from the land during the year next before the date of presenting the plaint fifteen times such net profits, but where no such net profits have arisen therefrom-the amount at which the court shall estimate the land with reference to the value of similar land in the neighbourhood;
>
> (d) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed as above mentioned-the market-value of the land;

Explanation- The word "estate", as used, in this paragraph means any land subject to the payment of revenue, for which the proprietor or a farmer or ryot shall have executed as separate engagement to Government, or which, in the absence of such engagement, shall have been separately assessed with revenue;

(e) **for houses and gardens;** where the subject matter is house or garden-according to the market-value of the house or garden;

....

THE SECOND SCHEDULE

13. Plaint or memorandum of appeal in each of the following suits:-

(i).....

.....

(vi) every other suit where it is not possible to estimate at a money value the subject matter in dispute and which is not otherwise provided for by this Act."	Nineteen rupees fifty paise.

10. In the case of ***Asa Ram and others vrs. Jagan Nath and ors.,*** reported in ***AIR 1934 Lahore 563 (Full Bench),*** the Full Bench has held that in a suit to enforce the right to share in joint family property, i.e., a suit to be restored to joint possession or enjoyment of joint family property, court-fee would be payable under S. 7(iv)(b), ad valorem on the value of the relief as fixed by the plaintiff; and in a suit for partition of joint property, whether owned by a joint family or otherwise, where the plaintiff alleges that he is in actual or constructive possession thereof, court-fee payable would be Rs. 10 under Art. 17(vi), Sch. 2, Court-fees Act.

11. In the present case, the case of the plaintiff is that the suit property is coparcenary property. He would be deemed to be in constructive joint possession of the suit property. He has merely asked for partition of the joint Hindu property.

12. In the case of ***Shankar Maruti Girme vrs. Bhagwant Gunaji Girme and others,*** reported in ***AIR (34) 1947 Bombay 259,*** the Full Bench has held that a partition suit, where the plaintiff under accepted principles of Hindu law is in constructive joint possession of the whole property, is not a suit in ejectment in the ordinary sense of the term. The plaintiff in constructive possession of the whole seeks that the mode of enjoyment of the property by himself and by other members of his family shall be changed, and that, instead of enjoying joint possession of the whole, his possession shall be altered to separate possession of a part. Hence a suit for partition of joint family property, when the plaintiff is in constructive possession, is not a suit for the possession of property within the meaning of para (v) of S. 7, Court-fees Act. As such a suit falls under Sch. II, Art. 17, cl. (vii). It has been held as follows:

> "4. As to whether a suit for partition of joint family property can properly be said to be a suit for possession of property, a suit for possession of immovable property is usually termed a suit in ejectment, and its ordinary significance is that the plaintiff is out of possession, that the defendant is wrongfully in possession, and that the plaintiff seeks that possession should be taken from the defendant and be given to him. But a partition suit, where the plaintiff under accepted principles of Hindu law is in constructive joint possession of the whole property is certainly not a suit in ejectment in the ordinary sense of the term. The plaintiff in constructive possession of the whole seeks that the mode of enjoyment of the property by himself and by other members of his family shall be

changed, and that, instead of enjoying joint possession of the whole, his possession shall be altered to separate possession of a part. An extreme and no doubt unusual but by no means impossible example of partition suit is one by a manager in physical possession of the whole of the joint family property who nevertheless may seek the assistance of the Court for partition and for his separate possession of only a fraction of the property. All the High Courts other than Bombay, on the above line of reasoning, have accepted that a suit for partition of joint family property, when the plaintiff is in constructive possession, is not a suit for the possession of property within the meaning of para (v) of Section 7 of the Court-fees Act, and this reasoning may also be applied to cases where the joint family property is entirely movable property.

Candy J. then went on to hold that, as the plaintiffs claimed partition and possession of a definite share in certain lands and houses, which could be valued, ad valorem court-fee was leviable on the principle laid down in Mahadeva Balwant Karandikar v. Laxuman Balwant Karandikar. In Dagdu v. Tolaram (1909) I.L.R. 33 Bom. 658, S.C. 11 Bom. L.R. 1074 reference was not made either to Mahadeva Balwant Karandikar v. Laxuman Balwant Karandikar or to Balwant Ganesh v. Nana Chintamon. It appears that, between the time of the decision in Balwant Ganesh v. Nana Chintamon and the year 1909, when Dagdu's case came up, opinion had been expressed in one case, Motibhai v. Haridas (1896) I.L.R. 22 Bom. 315, that a partition suit falls within Section 7(iv)(b) of the Court-fees Act. The point in Motibhai v. Hondas was not really one of court-fees, but of jurisdiction. Batchelor J. dealt with Motihbai's case in Dagdu v. Totaram and held that the suit contemplated by Section 7(iv)(b) was one to enforce the right to "share" in property, and not the right to "a share" in property, and expressed the opinion that a suit falling under Clause (b) is one for the enforcement of what one might call an abstract claim or right, which conclusion, as he pointed out, brings Clause (b) into proper logical neighbourhood with the other clauses of paragraph (iv). Having rejected the only argument which appears to have been addressed, namely, that the decision in Motibhai v. Haridas should be followed, Batchelor J. seems to have concluded that the suit then must necessarily fall under paragraph (v) of Section 7 as being a suit for the possession of land. Of course as Clause (vi) of Article 17 of Schedule II is a residuary clause, if the suit can properly be brought under any of the sections of the Act, the question of this clause does not arise, but it may at least be said that the existence of a residuary clause was not at all considered in Dagdu's case.. The Calcutta High Court, in a series of decisions ending with Nandalal Mukherji v. Kalipada Mukherji (1931) I.L.R. 59 Cal. 313 already referred to, but also apparently based on Kirty Churn Mitter v. Aunath Nath Deb. has held that Article 17, el. (vi), Schedule II applies to a suit such as the present. It is a matter for some surprise that one decision, namely, that in Kitty Churn Mitter v. Aunath Nath Deb, appears to be the foundation stone of the two opposing views taken by the Calcutta and the Bombay High Courts, for the difference between the Dayabhaga and Mitakshara schools in that under the former the share of a coparcener is defined while under the latter it is not, does not appear to be substantial, if any, ground for general distinction. In Bengal the Legislature in the year 1935, by amendment of the Court-fees Act, accepted and adopted the view which the Calcutta High Court had always taken. By Bengal Act VII of 1935, among other amendments to Section 7 of the Court-fees Act was added a el. (vi)(A) which provides that in suits for partition and separate possession of a share of joint family property, or of joint property, or to enforce a right to "a share" in any property on the ground that it is joint family property or joint property, if the plaintiff has been excluded from possession of the property in which he claims to be a coparcener or coowner, the court-fee is to be according

> to the market value of the share in respect of which the suit was instituted. Also to Article 17 of Schedule II of the Act, after the entry (v) was added an entry (v)-A, whereby a fee of Rs. 15 is prescribed as the court-fee in suits for partition and separate possession of a share of joint family property or of joint property or to enforce a right to a share in any property on the ground that it is joint family property or joint property if the plaintiff is in possession of the property in which he claims to be a coparcener or co-owner. The decisions of the other High Courts on the point are set out at length in the latest Madras full bench ruling, and no possible distinction can be made to these cases on grounds of differences in the Mitakshara and Dayabhaga schools of law. It appears that, before this latest decision, the 'Madras High Court had held in accordance with the one Bombay decision, Motibhai v. Haridas, that suits such as the present fell within Section 7(iv)(b) of the Court-fees Act. The view expressed by Batchelor J. in Dagdu's ease as to the inapplicability of Clause (b) of paragraph (iv) of Section 7 was approved by the full bench, but the Bombay view that partition suits fall under Section 7, paragraph (v), was emphatically dissented from. As I have already stated, the basis of all the decisions of the other High Courts is that a suit for partition is not a suit for possession when a plaintiff in constructive possession seeks to have the mode of his possession changed, and it is held that paragraph (v) of Section 7 must be restricted to the suits which of their essential nature are suits for possession. It is also held by those High Courts that the second condition of Article 17 (vi) of the second schedule, or Clause (vii) as it is by the recent Bombay amendment of the second schedule, that it is; not possible to estimate at A money-value the subject-matter in dispute, is also satisfied; for the value of a change in the mode of possession is not capable of being expressed in money. I think that these decisions are right, and it does appear that the Bombay view, although it has stood for so many years is based on three decisions, two of which rest upon a Calcutta decision, which appears itself to suggest the opposite result, and a third which appears to have been given without taking into consideration Article 17 of Schedule II, and where it seems to have been assumed that, if suits of this nature do not fall under Clause (b) of paragraph (iv) of Section 7 of the Court-fees Act, they must necessarily fall under paragraph (v) of that section. In these circumstances, in view of the weight of authority, I think that it should now be declared that the Bombay decisions are not good law, and that this Court should fall into line with all other High Courts, and should hold that, where in a suit for partition the plaintiff claims to be in constructive possession with the other coparceners of the joint property, the suit falls under Schedule II, Article 17, Clause (vii) (according to the Bombay amendment) and the court-fee payable is the fixed fee, which under the present Act is Rs. 15."

13. In the case of ***Nagorao Bapu and ors. Vrs. Mahadeo Bapu Doma Bapu and others,*** reported in ***AIR (37) 1950 Nagpur 81,*** the learned Single Judge has held that where the plaint in a suit asserts a separation in status before the suit and prays for partition and separate possession of joint family property but the plaintiff does not admit that there is any denial of title, the position is exactly the same as the one which occurs when the family is joint. In such a case, the plaintiff merely seeks a change in the mode of enjoyment and that is incapable of valuation. Therefore, Art. 17(vi) is applicable and the court fee paid under that Article would be proper in the first instance. It has been held as follows:

> "(11) But that does not settle the matter because the plaintiffs do not admit that there has been any denial of title. All they say is that the defendants have evaded partition. Even if they had refused partition that would not have amounted to ouster unless the plaintiff's title was denied.

Therefore the position is exactly the same as the one which occurs when the family is joint. In such a case it has been held that the plaintiff merely seeks a change in the mode of enjoyment and that that is incapable of valuation. Therefore Art. 17 (vi) is applied. See Santosh v. Rama, I.L.R. (1949) Nag. 35 at pp. 46, 48; (A.I.R. (86) 1949 Nag. 805). It follows that the court fee paid on the plaint was proper in the first instance.

(12) But, as explained in Santosh v. Rama I.L.R. (1949) Nag. 85: (A.I.R. (36) 1949. Nag. 805), it is also necessary to scan the defendants' written statement to see whether there is any allegation of ouster before suit. On looking through the written statements, I do not find any such allegation. The defendants deny the plaintiff's title to certain items of property and allege that they have no title because according to the defendants, these items were partitioned in 1939. But that is not enough to constitute ouster. It is not enough, as in a case of adverse possession, merely to deny the plaintiff's title and keep them out of possession , it is necessary to bring this home to the plaintiffs. See Santosh v. Rama, I.L.R. (1949) Nag. 35; (A.I.R. (86) 1949 Nag. 805). Tehre is no allegation to that effect in the written statement. Then against the ouster must have been before the suit ore ise ad valorem court fees are not payable. There is no allegation here that there was any denial of title before suit. In the circumstances I hold that Art. 17(vi) applies and that the fixed court fee of Rs. 20 paid on the plaint was proper."

14. In the case of ***Onkar Mal and others vrs. Ram Sarup and others,*** reported in ***AIR 1954 Allahabad 722,*** the Full Bench has held that the allegations in the plaint determine the court-fee. It has been held as follows:

"14. In the matter of computation of court-fee the aforesaid general principle cannot have so wide a scope as it has in determining the nature of the suit. After the category of the suit has been ascertained, the Court has to find out whether the plaintiff has correctly valued the relief for purposes of court-fees in the manner laid down in Section 7 of the Court-fees Act. This process also involves the examination of the plaint allegations and, if there is nothing to indicate otherwise, the plaintiff's valuation 'prima facie' is accepted as correct. Ordinarily, the Court would accept court-fee paid in the first instance as correct, but if it transpires subsequently that an allegation of fact on the basis of Which the court-fee was computed is not correct, then it is within the power of the Court to demand additional court-fee before the judgment is pronounced.

Section 6, Court-fees Act directs that no document (which term includes a plaint) which is not properly stamped shall be received unless it bears proper court-fee paid according to the provisions of the Court-fees Act. It was with a view to recognise the power of a Court to realise additional court-fee that the Legislature thought it proper to enact Order 7, Rule II (c) as also Section 149, Civil P. C. Take for instance a case in which the plaintiff sues for possession of a house which he values at its. 500/-. If the defendant contests this valuation, the Court must first determine the market value of tile house in the manner laid down in Section 10, Court-fees Act, and if it comes to the conclusion that the market value of the house for the purpose of court-fee is Rs. 1,000/-, it has the power to demand the additional court-fee which if not paid would entitle the Court to reject the plaint.

It is thus evident that the general rule that the payment of the court-fee must abide by the allegations in the plaint in all circumstances cannot be accepted as correct. Where the court has reason to think on the material placed before it that the plaintiff has made false or incorrect allegations with a view to avoid payment of Court-fee, the Court has

power to intervene and realise court-fee at any stage of the proceedings in the case. If, however, the mistake is not detected by the trial Court and also by the appellate Court, the power of the High Court to require payment of the court-fees that should have been paid in the lower Courts is expressly recognised in the second part of Section 12, Court-fees Act. It is, therefore, not correct to say that even in the matter of computation of court-fee, plaint allegations should be accepted as the last word on the question of the payment of court-fee."

15. In the case of ***Mahadeo Ganesh and another vrs. Sadashiv Khanderao and ors.,*** reported in ***AIR 1953 M.B 151,*** the Division Bench has held that the expression "to enforce the right to share in the property", imply that plaintiff has been excluded from enjoyment of common property. Clause does not apply to a suit for partition by co-owner who has not been excluded from enjoyment of common property. Such a suit comes under clause (vi) of Art. 17 of Schedule II corresponding to Art. 11(vi) of Indore Court-fees Act. It has been held as follows:

"(5) Turning now to the ground urged by Mr. Kulkarni we may point out that under Art. 11 of the Indore Court-fees Act the amount of court-fee payable by a defendant who is a party to the suit for partition and files an appeal against the decision given against him would depend entirely on the amount of the court-fee that was paid by the plaintiff. Article 11 opens with these words:

"Plaint or memorandum of appeal in each of the following suits."

It is cl. VI of this Article which according to Mr. Newaskar applies to this case. It runs:

"Every other suit where it is not possible to estimate at a money-value(?) the subject-matter in dispute and which is not otherwise provided for by this Act.":

As observed by Chitaley and Rao in their commentary on the Court-fees Act, 1944 Edition page 128 (notes on section 7 (IV)(b) note (2), it is now generally settled in most of the High Courts that this clause (clause 7(IV)(b) does not apply to a suit for partition by a co-owner who has not been excluded from the enjoyment of the common property. This view, the commentators added is based on the ground that the words in the clause "to enforce the right to share in the property" imply that the plaintiff has been excluded from the enjoyment of such property and are inapplicable to a case in which he has not been so excluded. Reference in support of this view is made to a number of cases including – "Kameshwar Singh v. Rajbansi Singh'. AIR 1943 Pat 433 (438) (A); -- 'In re Nandlal' AIR Nath', AIR 1934 Lah 563 (573) (FB) (C) and – 'Bhagwan Appa Wani v. Shivalla Wani' AIR 1927 Nag 248 (249) (D). See also in – 'Ma Ma Nyun v. Maung Mya', AIR 1938 Rang 76 (78) (E). It has been held by Madras and Allahabad High Courts as well as in Sind that such a suit comes under cl. (VI) of Art. 17 of the II schedule which is the same as article 11 (VI) of the Indore Court-fees Act. See – 'Mallayya v. Jagannadhamma', AIR 1942 Mad 10-3 (1) (F); -- 'Narain ohan Dev v. Mt. Krishna Ballabhi Dvi ', AIR 1935 All 292-293 (G) and – 'Haji Yusuf v. Ghulam Hussain Kassim', 16 Ind case 771 (772) (Sind)(H). We respectfully agree with the view taken in these decisions as to the applicability art. 17 of II schedule to such cases. In the case before us admittedly Keshav was in joint possession and accordingly a court-fee of Rs.15/- was paid."

16. In the case of ***Karibasappa vrs. Jademallappa & ors.,*** reported in ***AIR 1955 Mysore 140,*** the learned Single Judge has held that a member of the joint family who files a suit for a declaration that he is entitled to a share in

the joint family properties and seeks for division of the properties by metes and bounds and alleges that he is in constructive possession of the properties is liable to pay fixed court fee under Sech. II Art. 17(vi). It has been held as follows:

> "3. The short question that arises for consideration in this revision petition is whether a member of the joint family who files a suit fur a declaration that he is entitled to a share in the joint family properties and seeks for division of the properties by metes and bounds and alleges that he is in constructive possession of the properties described in the schedule is liable to pay ad valorem Court fee or fixed Court fee under Article 11-B, Schedule II. Mysore Court Fees Act (Article 17 of the Central Act).
>
> The Petitioner had alleged in his plaint in unequivocal terms that he was in joint possession of the properties along with Defendants 1 to 5. What the Petitioner wanted was division of the properties by metes and bounds and delivery of his 1/3 share. The question whether the Plaintiff is in possession of the joint family propertied constructively or otherwise for the purposes of levying Court fee should be determined oh the allegations made in the plaint.
>
> Merely because the defendants deny that the Plaintiff was in joint possession of the suit schedule properties, the nature of the suit i3 not altered. (Vide -- 'Asa Bam v. Jagan Nath,' AIR 1934 Lah 563 (FB) (A), and In the matter of Nand Lal Mukherjee, AIR 1932 Cal 227 (B). It is fairly well settled law that it is the allegation in the plaint that should be looked into and that the denial of the allegation by the defendants does not in any way take away the suit out of of the scope of Article 11-B, Schedule II Court Fees Act (Vide --- 'Manghamnal v. Tolaram,' 16 Ind Cas 773 (Sind) (C).
>
> Therefore the learned District Judge was not justified in taking into, consideration the statements made by the Defendants in their written statement that the Petitioner was not in actual or constructive possession of any of the suit schedule items and proceeding to hold an enquiry as to whether he was in possession of all the suit items and whether the Court fee paid by him was sufficient. The learned District Judge has been entirely influenced by the fact that the Defendants denied that the Plaintiff was in constructive possession of any of the items and by the evidence adduced by them to establish that the Petitioner was In possession of only a house belonging to the joint family and was not in actual physical possession of the other items.
>
> He seems to have been further influenced by the fact that the Petitioner had omitted to give a full description of the suit schedule items attached to the plaint in his suit that he had filed before the Munsiff, Tarikere at the first instance.
>
> The fact that it is the substance of the plaint and not to the mere shape given to it in the plaint that has to be looked into for purposes of assessment of Court-fee has been decided in --'Aswathanarayana Rao v. Makam Suriya Setty,' 56 Mys. H. C. R. 67 (D). The fact that the order passed by the learned District Judge directing payment of ad valorem Court fee on the value of the 1/3 share of the Petitioner is erroneous is clear from the decision of this Court reported in -- 'Krishnappa v. Bhasyam Iyengar,' 44 Mys H. C. R. 203 (E).
>
> It was held in that case that where a co-owner, co-sharer or co-tenant alleges that he is in joint possession of the property in suit and wants his share to be separated and put into his possession, a fixed Court-fee under Article 11-B is sufficient. The several decisions of the other High Courts in India have all been reviewed in the above case and this Court

has laid down that when a suit is for partition by a Plaintiff who is in possession of the property, there is no question that Article 17 (11-B of our Act) would apply. It has been further held that even when the propertv is not joint family property and the Plaintiff is not a coparcener, is only a co-sharer he is entitled to maintain a suit for partition without paying ad valorem Court-fee, if his possession of the Joint property is admitted or can be gathered by the allegations made in the plaint. To the same effect is the decision reported in -- 'Nagendriah v. Ramachandriah,' AIR 1953 Mys 108 (F).

It is laid down by this Court in this case that if a Plaintiff alleges himself to be a co-sharer and to be in joint possession of the plaint schedule properties with the defendants and brings a suit for partition and possession of his snare he is entitled to pay a fixed Court fee under Article 11-B, Court Pees Act (Article 17 of the Central Act). It has been further laid down that even after the trial Court found that the Plaintiff was not in possession of some of the items of the suit schedule properties and was not entitled to claim or get any share in them and the suit in respect of those properties is dismissed the Plaintiff is entitled to pay a fix Court fee on the memorandum of appeal against the decree.

The several decisions of the other High Courts in India including a decision of this High Court reported in 44 Mys HCR 203 (E), have all been reviewed in the above case. In the light of the above decisions, the order passed by the learned District Judge that because the Defendants had denied that the Plaintiff was in possession of the properties or that the evidence recorded by him disclosed that the Plaintiff was not in actual physical possession of the suit schedule properties he is liable to pay ad valorem Court fee on the value of his share is untenable.

Reference in this connection may also ba made to a decision reported in -- 'Premananda v. Dhirendra Nath,' (G) Wherein it has been observed:

'The question as to what Court fees are payable on a plaint has to be decided on the allegation in the plaint and the nature of the relief claimed, whatever may transpire in the evidence, the plaint remains the same until and unless it is amended".

It has been further held in this Calcutta case that so long as the plaint is not amended, no ad valorem Court fee is payable. All that the Defendants pleaded, in their written statement was that they had given away a share to the Petitioner in all the suit schedule properties. They had not disclosed what items of the suit schedule properties had actually fallen to the share of the Petitioner and were in his actual physical possession.

On a consideration, therefore, of the several authorities, I am of opinion that the Order passed by the learned District Judge, Shimoga directing the Petitioner to pay ad valorem Court fee calculated on the value of his share cannot be supported and is liable to be set aside. The Petitioner is entitled to pay a fixed Court fee under Article 11-B of Schedule II, Court Fees Act and maintain his suit."

17. In the case of ***Mina Ram vrs Amolak Ram & ors,*** reported in ***AIR 1966 Himachal Pradesh 4,*** it was held that court-fee is to be determined in the light of averments made in the plaint, uninfluenced by the pleas in the written statement. Where the allegations in the plaint, read as a whole, amount to an averment that the plaintiff is in actual possession of some property and in constructive possession of the other, the relief of partition which is claimed by him, does not fall within either S. 7(iv)(b) or S. 7(v). The relief falls within the four corners of Article 17(vi) of Schedule -II. It has been held as under:

"14. The learned counsel for respondent No. 1 invited the attention of the Court to paragraph 11 of the plaint wherein it is stated that respondent

No. 1 had refused to render accounts after 1960 and to paragraph 12 wherein it is stated that respondent No. 1 had denied the right of the petitioner, and contended that the clear inference from the aforesaid statements was that the petitioner admitted in the plaint that he had been ousted from the enjoyment of the joint property, and that, therefore, either Section 7 (iv) (b) or Section 7 (v), and not Article 17(vi), Schedule II, of the Court-Fees Act, was applicable to the relief of partition. The contention of the learned counsel does not appear to be correct. A reading of the plaint, as a whole, shows that the allegations of the petitioner were that he had been occasionally visiting the property in suit which was being managed by respondent No. 1, on behalf of and for the benefit of the joint Hindu family, that he had been receiving profits of the orchard and that it had become difficult to enjoy the property jointly. The petitioner did not state in the plaint that he had been ousted from possession of the property. The refusal to render accounts and denial of title, by respondent No. 1, had furnished cause of action to the petitioner, for the suit. Those facts were stated, in the plaint, in that context. The allegations, in the plaint, read as a whole, amounted to an averment that the petitioner was in actual possession of some property and in constructive possession of the other. Therefore, the relief of partition, claimed by the petitioner, did not fall within the ambit of either Section 7 (iv) (b) or Section 7 (v) of the Court-Fees Act, but fell within the four corners of Article 17 (vi), Schedule II."

18. The case projected by the plaintiff is that he was in constructive possession of the suit property under the joint family property and he wanted his separate share for enjoyment of the same. Thus, his case would not fall either under Section 7 (iv)(b) or Section 7(v) of the Act. It would fall under Article 13 (vi) of Schedule II of the H.P. Court Fees Act, 1968. The learned trial Court has not correctly appreciated the legal position in view of the averments made in the plaint and has passed a very vague order.

19. Accordingly, the petition is dismissed. The trial Court is directed to proceed with the matter in accordance with the observations made hereinabove with regard to the payment of the court-fee under the H.P. Court Fees Act, 1968, by the plaintiff.

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

Susheel Kumar ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Criminal Appeal No.432 of 2009
Reserved on : 10.12.2014
Date of Decision : December 29, 2014

Indian Penal Code, 1860- Section 376(2)(f) – Accused took the prosecutrix to the back side of the temple and sexually assaulted her- PW-2 heard the cries of the prosecutrix and went to the spot- accused ran away on seeing PW-2- prosecutrix was minor- medical evidence proved that blood detected on vaginal swab was on account of micro haemorrhage, which could be caused by the sexual attempt- held, that mere absence of injury cannot be a ground to disbelieve the testimony of the prosecutrix- testimony of the prosecutrix was corroborated by PW-1, Pardhan who deposed that in the meeting of the Panchayat, accused had admitted his mistake- in these circumstances, conviction of the accused was justified. (Para-10 to 27)

Cases referred:
State of M.P. v. Pappu, (2008) 16b SCC 758
State of M.P. v. Ghanshyam Singh, (2003) 8 SCC 13
State of M.P. v. Babbu Barkare, (2005) 5 SCC 413
State of M.P. v. Sk. Shahid, (2009) 12 SCC 715
State of M.P. v. Munna Choubey, (2005) 2 SCC 710
Pushpanjali Sahu v. State of Orissa and another, (2012) 9 SCC 705
Tulshidas Kanolkar v. State of Goa, (2003) 8 SCC 590
Ramesh v. State through Inspector of Police, (2014) 9 SCC 392
Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546
Perminder alias Ladka Pola v. State of Delhi, (2014) 2 SCC 592
State of H.P. v. Gian Chand, (2001) 6 SCC 71
Puran Chand v. State of Himachal Pradesh, (2014) 5 SCC 689
Rai Sandeep alias Deepu v. State (NCT of Delhi), (2012) 8 SCC 21
State of H.P. v. Asha Ram, (2005) 13 SCC 766
Narender Kumar v. State (NCT of Delhi), (2012) 7 SCC 171
State of M.P. v. Ramesh, (2011) 4 SCC 786
Rajkumar v. State of Madhya Pradesh, (2014) 5 SCC 353

For the Appellant : Mr. Ajay Sharma, Advocate.
For the Respondent : Mr. B.S. Parmar,, Mr. V.S. Chauhan, Additional Advocates General, Mr. Vikram Thakur & Mr. Puneet Rajta, Deputy Advocates General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Susheel Kumar, hereinafter referred to as the accused, has assailed the judgment dated 20.11.2009, passed by Additional Sessions Judge, Fast Track Court, Hamirpur, Himachal Pradesh, in Sessions Trial No.12 of 2009, titled as *State of H.P. v. Sushil Kumar*, whereby he stands convicted of the offence punishable under the provisions of Section 376(2)(f) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of ten years and pay a fine of Rs.10,000/- and in default thereof to further undergo simple imprisonment for a period of four months.

2. It is the case of prosecution that on 30.5.2009, prosecutrix (PW-3), aged six years, had gone to pay obeisance at the temple of Lord Shiva in her village Baleta Khurd. Finding her to be alone, accused took her to the back side of the temple and sexually assaulted her. Ms Sapna (PW-2), who independently had gone to the temple, heard cries of the prosecutrix and went where prosecutrix was sitting. Seeing her, accused ran away. Thereafter, Sapna led the prosecutrix to her house. When Smt. Meera Devi (PW-1), mother of the prosecutrix, learnt about the incident, she immediately called her husband Sunil Kumar (PW-4), who lodged report with the Panchayat in the shape of complaint (Ex. PW-4/A). Meeting of Panchayat took place, where after on 31.5.2009, Smt. Meera Devi (PW-1) moved an application (Ex. PW-1/A) before the District Police Officer, District Hamirpur, on the basis of which FIR No.172, dated 31.5.2009 (Ex.PW-14/A), under the provisions of Section 376/511 of the Indian Penal Code, was registered at Police Station, Sadar, District Hamirpur. Same day, prosecutrix was got medically examined from Dr. Archana Soni, who after receiving report (Ex. PA) of the Forensic Science Laboratory, pertaining to the vaginal swab (containing human blood) and other material, issued report (Ex.PW-7/D), opining that possibility of sexual assault could not be ruled out. Police conducted investigation on the spot. Accused was also arrested and got

medically examined from Dr. K.S. Dogra, who issued MLC (Ex. PW-6/B). For determining the age of the prosecutrix, police took on record her birth certificate (Ex. PW-8/B). Her radiological age was also got determined from Dr. Sanjiv Sharma (PW-10). With the completion of investigation, which revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Section 376(1) of the Indian Penal Code, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as 17 witnesses and statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which he pleaded innocence and false implication. No evidence in defence was led.

5. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused for having committed an offence punishable under the provisions of Section 376(2)(g) of the Indian Penal Code and sentenced him as aforesaid. Hence, the present appeal by the accused.

6. We have heard learned counsel for the parties as also perused the record.

7. Relying upon its earlier decisions rendered in ***State of M.P. v. Pappu, (2008) 16b SCC 758***; ***State of M.P. v. Ghanshyam Singh, (2003) 8 SCC 13***; ***State of M.P. v. Babbu Barkare, (2005) 5 SCC 413***; ***State of M.P. v. Sk. Shahid, (2009) 12 SCC 715***; and ***State of M.P. v. Munna Choubey, (2005) 2 SCC 710***, Hon'ble the Supreme Court of Indiathe Apex Court in ***Pushpanjali Sahu v. State of Orissa and another, (2012) 9 SCC 705***, has held that

> "12. Before parting, we wish to reflect upon the dehumanizing act of physical violence on women escalating in the society. Sexual violence is not only an unlawful invasion of the right of privacy and sanctity of a woman but also a serious blow to her honour. It leaves a traumatic and humiliating impression on her conscience- offending her self-esteem and dignity. This Court in State of H.P. v. Shree Kant Shekari, (2004) 8 SCC 153 has viewed rape as not only a crime against the person of a woman, but a crime against the entire society. It indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. It destroys, as noted by this Court in Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 SCC 490 the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative of the victim's most cherished of the fundamental rights, namely, the right to life contained in Article 21 of the Constitution. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely."
>
> (Also see: *State of Uttar Pradesh v. Munesh,* (2012) 9 SCC 742; and *Jugendra Singh v. State of Uttar Pradesh,* (2012) 6 SCC 297).

8. The Apex Court in ***Tulshidas Kanolkar v. State of Goa, (2003) 8 SCC 590***, has drawn difference between "consent" and "submission" in a case of rape. An act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in when the faculty is either clouded by fear or vitiated by duress or impaired due to mental retardation or deficiency cannot be considered to be a case of consent.

9. The Apex Court in ***Ramesh v. State through Inspector of Police, (2014) 9 SCC 392***, while dealing with a case where even though name of

the accused was initially not recorded in the FIR, but however, on the basis of last seen theory and another incriminating circumstance of the accused leading to recovery of incriminating material, on the basis of circumstantial evidence, accused was convicted for having committed an offence punishable under the provisions of Sections 376 & 302 of the Indian Penal Code. (See also: ***Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546***).

10. That prosecutrix was a minor is not disputed before us. In any event, Shri Ajay Kumar (PW-8), Assistant Secretary, Gram Panchayat Neri, Tehsil and District Hamirpur, Himachal Pradesh, has proved Birth Certificate (Ex. PW-8/B) of the prosecutrix, issued under the provisions of Registration of Birth and Deaths Act, 1969 and Rules framed thereunder. Prosecutrix was born on 25.10.2003. Dr. Sanjiv Sharma (PW-10) determined the radiological age of the prosecutrix to be between 4 and 8 years. Report (Ex.PW-7/B) and X-Ray (Ex. PW-10/A to D), conducted by Shri Suresh Guleria (PW-11) are on record to such effect.

11. Thus, it stands proved that as on the date of commission of crime, prosecutrix was six years old, which fact is also corroborated by her mother.

12. From the version of Dr. Archana Soni (PW-7), who issued the MLC (Ex.PW-7/D), pertaining to the prosecutrix, it is evidently clear that hymen was intact, but congestion was present on the inner side of labia minora. Child was well oriented to time, place and responding to verbal commands. Even though child was uncooperative, yet she disclosed being molested by Sushil Kumar (accused) on 30.5.2009, who also committed "bad act". The doctor opined that human blood detected on the vaginal swab was on account of "micro haemorrhage", which "could be caused by the sexual attempt". She categorically states that she noticed redness, though there was no swelling on the private parts of the prosecutrix. She states that from clinical examination, there was no evidence of penetration, but clarifies that touch of male organ with the private part amounts to rape. Suggestion though preposterous, that redness on the private part of the prosecutrix was on account of an ant bite or rubbing by fingers, is not supported by her.

13. In the instant case, the doctor has not found any traces of semen either on the clothes or private parts of the prosecutrix, but absence thereof would not negate the prosecution version of accused having committed an act of sexual assault, for we find other incriminating material on record against the accused. Proof of penetration is not necessarily linked to presence of spermatozoa in the private part of the victim.

14. Either non-rupture of hymen or absence of signs of injury on the body of the prosecutrix, in itself, cannot be a ground to disbelieve the otherwise inspiring testimony of the prosecutrix. In ***Perminder alias Ladka Pola v. State of Delhi, (2014) 2 SCC 592***, the Hon'ble Supreme Court of India has held as under:

> 10. PW-15, the doctor who conducted the medical examination of the prosecutrix on 31.01.2001, however, has stated that there was no sign of injury on the prosecutrix and the hymen was found intact. The High Court has considered this evidence and has held that the non-rupture of hymen is not sufficient to dislodge the theory of rape and has relied on the following passage from Modi in Medical Jurisprudence and Toxicology (Twenty First Edition):
>
> > "Thus, to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite

sufficient for the purpose of the law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genital or leaving any seminal stains."

11. Section 375, IPC, defines the offence of 'rape' and the Explanation to Section 375, IPC, states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. This Court has accordingly held in Wahid Khan v. State of Madhya Pradesh [(2010) 2 SCC 9] that even the slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial. In the aforesaid case, this Court has relied on the very same passage from Modi in Medical Jurisprudence and Toxicology (Twenty Second Edition) quoted above. In the present case, even though the hymen of the prosecutrix was not ruptured the High Court has held that there was penetration which has caused bleeding in the private parts of the prosecutrix as would be evident from the fact that the underwear of the prosecutrix was stained by blood. In our considered opinion, the High Court was right in holding the appellant guilty of the offence of rape and there is no merit in the contention of the learned counsel for the appellant that there was only an attempt to rape and not rape by the appellant.

15. In ***State of H.P. v. Gian Chand, (2001) 6 SCC 71***, the Apex Court has held as under:

"17. In State of Punjab v. Gurmit Singh, (1996) 2 SCC 384 : (1996 AIR SCW 998 : AIR 1996 SC 1393 : 1996 Cri LJ 1728) , one of us, Dr. A.S. Anand, J. (as His Lordship then was) has thus spoken for the Court "A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case." The approach adopted by the High Court runs into the teeth of law so stated and hence stands vitiated."

16. In ***Puran Chand v. State of Himachal Pradesh, (2014) 5 SCC 689***, the apex Court held that:

"15. In fact, at this stage, the amendment introduced in the Indian Evidence Act, 1872 in Section 114-A laying down as follows is worthwhile to be referred to:-

> "**114-A.** ***Presumption as to absence of consent in certain prosecutions for rape***.-In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub- section (2) of section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent."

16. Section 114-A no doubt addresses on the consent part of the woman only when the offence of rape is proved but it also impliedly would be applicable in a matter of this nature where the victim girl had gone to the extent of committing suicide due to the trauma of rape and yet is sought to be disbelieved at the instance of the defence that she weaved out a concocted story even though she suffered the risk of death after consuming poison. If this were to be accepted, we fail to understand and lament as to what is the need of incorporating an amendment into the Indian Evidence Act by incorporating Section 114A

which clearly has been added to add weight and credence to the statement of the victim woman who suffers the offence of rape and a claustrophobic interpretation of this amended provision cannot be made to infer that the version of the victim should be believed relating merely to consent in a case where the offence of rape is proved by other evidence on record. If this view of the matter is taken into account relying upon the amended Section 114-A of the Indian Evidence Act which we clearly do, then even if there had been a doubt about the medical evidence regarding non rupture of hymen the same would be of no consequence as it is well settled by now that the offence of rape would be held to have been proved even if there is an attempt of rape on the woman and not the actual commission of rape. Thus, if the version of the victim girl is fit to be believed due to the attending circumstances that she was subjected to sexual assault of rape and the trauma of this offence on her mind was so acute which led her to the extent of committing suicide which she miraculously escaped, it would be a travesty of justice if we were to disbelieve her version which would render the amendment and incorporation of Section 114A into the Indian Evidence Act as a futile exercise on the part of the Legislature which in its wisdom has incorporated the amendment in the Indian Evidence Act clearly implying and expecting the Court to give utmost weightage to the version of the victim of the offence of rape which definition includes also the attempt to rape."

17. In ***Rai Sandeep alias Deepu v. State (NCT of Delhi), (2012) 8 SCC 21***, the Apex Court has reiterated its decision in ***State of H.P. v. Asha Ram, (2005) 13 SCC 766***, wherein it is held that even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. (See also: ***Narender Kumar v. State (NCT of Delhi), (2012) 7 SCC 171***).

18. Relying upon its earlier decision in ***State of M.P. v. Ramesh, (2011) 4 SCC 786***, the Apex Court in ***Rajkumar v. State of Madhya Pradesh, (2014) 5 SCC 353***, has held that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age or extreme old age or disease or because of his mental or physical condition. Therefore, Court has to form an opinion from the circumstances as to whether the witness is able to understand the duty of speaking the truth, and further in a case of child witness, Court has to ascertain whether the witness is tutored or not. Evidence of a child witness must be evaluated more carefully and with greater circumspection as a child is susceptible to be swayed by others sayings. Trial court must ascertain whether child is able to discern between the right and/or wrong, which can be so done only by putting questions to such witness. Deposition of a child witness may require corroboration, but in case deposition inspires confidence, and there is no embellishment or improvement therein, Court may rely upon his testimony. Only in case where there is evidence on record to show that a child has been tutored, Court can reject his statement either in part of wholly. As to whether child stands tutored or not, can be inferred from the contents of his deposition.

19. Since much emphasis has been laid on the version of prosecutrix, we deem it to be appropriate to reproduce her entire testimony as under:

"Question: Do you know the accused Sushil Kumar present in the Court?

Ans. (No answer given. The child started weeping.

Question: What do you know about the case?

Ans. One Golu has put his 'Lari' (penis) on my place of urination. I felt pain. Golu had also touched my place of urinatin. This was done behind the temple of "Shiva", which is away from my house. I had worn shirt and Salwar on that day. The salwar Ext. P.1 belongs to me. Golu had put off my salwar. I had wept. Sapna had reached the spot who is present in the court today. Kumari Sapna had sent me to my house. My mother had met me outside my house. I narrated these facts to my mother. Golu is present in the Court. (witness pointed out towards the accused in attendance).

XXX XXX XXX

(By Shri Madan Chauhan, counsel for the accused).

I had gone to the temple all alone. No other person was present in the temple at that time. It is correct that I offered water in the temple and then returned. It is correct that police people had told me that Golu had done like this. It is correct that my mother had also tought me such statement. It is incorrect that I had fall on the material date and I felt pain. It is correct that the ant had given bite at the place of my urination. (The child witness admitted the suggestion by gestures).

20. Though the trial Court recorded the child not to have understood the sanctity of oath, yet finding the witness to be capable of being examined in Court, recorded here statement. Also, her statement has to be read, understood and appreciated as a whole. There cannot be part dissection, as the learned counsel wants us to do so. On a Court query, as to whether accused was present in the Court or not, child started weeping, and then clearly, confidently and unequivocally deposed that Golu (here she refers to the accused) had touched her place of urination behind the temple of Shiva. After putting off her salwar, when he put his 'Lari' (penis) on her place of urination, she wept. Sapna (PW-2) reached the spot and sent her home. When she met her mother outside her house, she narrated the entire incident to her. In our considered view, witness has withstood the test of cross-examination. She is categorical of having gone to the temple alone and none was present there at that time. Though in her innocence, she does state that police and her mother had "told" and "taught" her to make her statement, but then this fact itself would not establish that the witness is tutored. After all she is a child. The incident took place on 30.5.2009 and she was deposing in the Court on 8.10.2009. Refreshing one's memory cannot be said to be tutoring.

21. We find that presence of accused and the prosecutrix, at the time of occurrence of crime, at the temple, situated in the village, is corroborated by Ms Sapna (PW-2), who also states that prosecutrix, who was weeping, asked her to leave her home and she led her to the path to her house.

22. Now, Smt. Meera Devi (PW-1) categorically states that on 30.5.2009 at about 8/9 a.m., prosecutrix had gone to the temple. Finding her not to have returned home, she went towards the temple and on way met her. Prosecutrix, who was weeping, informed that behind the temple, accused after opening her salwar, put his penis on her vagina. She was told that when Sapna saw them, accused ran away. On checking private parts of the prosecutrix, she noticed redness. She immediately informed her husband Shri Sunil Kumar (PW-4), who after reaching home, informed Pradhan of the Gram Panchayat, Neri. The Panchayat advised that the matter be reported to the police. Accordingly, on 31.5.2009, application (Ex. PW-1/A) was filed.

23. Testimony of Smt. Meera Devi stands corroborated by her husband Shri Sunil Kumar (PW-4), who clarifies that the incident was inquired into by members of the Panchayat.

24. Now, when we examine testimony of Pradhan Ms Pushpa Thakur (PW-5), we find that meeting of Panchayat was called, in which accused admitted his mistake, and when the Panchayat found the matter to be beyond their competence, decision was taken to report the matter to the police. Witness clarifies that though accused disappeared in the midst of proceedings, his grandfather remained present throughout.

25. Mere delay in lodging the FIR, if satisfactorily explained, is not a mitigating circumstance, in a case of rape. Application (Ex. PW-4/A) moved before the Panchayat, statements of Rafi Ram (Ex.PW-5/A) (grandfather of the accused) and Ms Sapna (Ex.PW-5/B), recorded during the proceedings before the Panchayat, were taken on record by the police vide memo (Ex. PW-5/C). We have not lent much credence to such statements, but however from the testimonies of Smt. Meera Devi,Shri Sunil Kumar and Smt. Pushpa Thakur, and the proceedings which took place before the Panchayat, it is evidently clear that the matter was immediately reported to the authorities and thus delay of one day in reporting the matter to the police, in the instant case, stands sufficiently explained. Pradhan has explained that her house is at a distance of 2 kms from the place of occurrence of crime and the Panchayat proceedings, which went on for two hours, commenced only at 1.30-2 p.m. After all, one cannot ignore the fact that parties hail from rural background and are not fully educated. Father of the prosecutrix has studied only upto 8th Class and mother not studied beyond 12th Class.

26. Much emphasis is laid on the admission made by the prosecutrix and Inspector Kamla Devi (PW-17), who investigated the matter, that there are houses of persons near the temple and persons were found working in the fields, at the time of occurrence. In our considered view, this fact by itself would not be sufficient to render the prosecution story to be doubtful, for it has not come on record that in the fields, adjoining to the temple, tillers/ owners were present, who could hear cries of prosecutrix and/or see the temple. Through the uncontroverted testimony of the prosecutrix and Sapna, it has come on record that none other than the accused and the prosecutrix were in the temple, at the time of occurrence of incident. Trial Court has rightly observed that had Ms Sapna not reached the spot, perhaps accused would have fully penetrated the private part of the prosecutrix, which would have been extremely fatal.

27. Thus, in our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that on 30.5.2009 at Temple of Shiva, situated in village Baleta Khurd, he committed rape on the prosecutrix, who was a minor.

28. We find that there is one glaring error in the judgment and that is the accused, who was charged for having committed an offence punishable under the provisions of Section 376(1), stands convicted for having committed an offence under the provisions of Section 376(2)(f) of the Indian Penal Code, which in fact was also not the case of prosecution. There is no evidence on record that accused committed rape during communal or sectarian violence. As such, we modify the order of conviction and hold the accused guilty of offence punishable under the provisions of Section 376(1) of the Indian Penal Code.

29. For all the aforesaid reasons, we find no reason to interfere with the findings returned by the Court below, except for a limited extent, as noted above. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is disposed of accordingly.

Appeal stands disposed of, so also pending application(s), if any.

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

Cr. Appeal No. 114 of 2011 a/w
Cr. Appeal No. 131 of 2011
Judgment reserved on: 10.12.2014
Date of Decision: December 30, 2014

1. **Cr.Appeal No.114 of 2011**
Manoj Kumar ...Appellant.
Versus
State of Himachal Pradesh. ...Respondent.

2. **Cr.Appeal No.131 of 2011**
Ashok Kumar ...Appellant.
Versus
State of Himachal Pradesh. ...Respondent.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3.5 kg of charas in the vehicle- independent witness had not supported the prosecution version- there are material contradictions in the improvement, embellishment and falsehood in the testimonies of the police officials- there is contradiction regarding the handing over of the case property to MHC- held, that in these circumstances, prosecution version cannot be relied upon- accused acquitted. (Para-10 to 24)

Cases referred:
Lal Mandi v. State of W.B., (1995) 3 SCC 603
Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722
Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760
Girja Prasad v. State of M.P., (2007) 7 SCC 625
Aher Raja Khima v. State of Saurashtra, AIR 1956
Tahir v. State (Delhi), (1996) 3 SCC 338

For the Appellants: Mr.P.P. Chauhan and Mr.V.K. Vashishta, Advocates, for the appellants.
For the Respondent: M/s B.S. Parmar, Ashok Chaudhary and V.S.Chauhan, Addl. AGs., with M/s Vikram Thakur and Mr.Puneet Rajta, Dy. AGs., for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In these appeals filed under Section 374 Cr.P.C., convicts Manoj Kumar and Ashok Kumar have assailed judgment dated 09.05.2011, passed by Special Judge, Una, District Una, H.P., in Sessions Case No.23/2010, titled as State of Himachal Pradesh Versus Ashok Kumar & another, whereby they stand convicted for having committed an offence punishable under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act) and sentenced to undergo rigorous imprisonment for a period of ten years each and pay fine of `1,00,000/- (rupees one lac) each and in default thereof, further undergo rigorous imprisonment for a period of three years.

2 It is the case of prosecution that on 07.09.2010, police party headed by SI Harjit Singh (PW.8) of Police Station, Sadar, Una, accompanied by Albel Singh (PW.1) and Purshotam Lal (not examined), was on routine patrol duty. While they were standing on the road at a place known as Pir Nigah Talab, a vehicle (Tata Sumo) bearing No.HP-01B-0326 came from Pir Nigah side, which on signal stopped and on enquiry, driver disclosed his name as Manoj Kumar and the passenger sitting next to him disclosed his name as Ashok Kumar. On suspicion, police party, after joining Piare Lal (PW.7), an independent person present on the spot, searched the vehicle. One red coloured bag concealed below the driver's seat was recovered. Ashok Kumar (accused) also got down from the vehicle. Just as the bag was about to be checked, Manoj Kumar (accused) drove the vehicle away. On the asking of Harjit Singh, Albel Singh followed Manoj Kumar, but after some time returned empty handed. Harjit Singh telephonically requested SHO, Police Station, Bilaspur, to apprehend Manoj Kumar. Thereafter, in the presence of witnesses, bag was searched from which contraband substance, which appeared to be charas, in the shape of sticks, was recovered. When weighed it was found to be 3.5 kgs. The entire parcel was sealed with seal bearing impression 'A' and taken into possession vide seizure memo (Ex.PB). Impression of seal was taken on a piece of cloth (Ex.PC), also NCB forms filled up. Original seal was entrusted to Albel Singh vide memo (Ex.PD). Rukka (Ex.PW.8/A) was sent through Constable Purshotam Lal, on the basis of which FIR No.288 dated 07.09.2010 (Ex.PW.9/A) was registered at Police Station, Sadar, Una, H.P., under the provisions of Section 20 of the NDPS Act, against the accused. Accused Ashok Kumar was arrested on 08.09.2010 vide memo (Ex.PW.8/D) and searched vide memo (Ex.DB), information pertaining to which was furnished to his brother Ashwani Kumar vide memo (Ex.PW.8/D). Harjit Singh entrusted case property to SHO, Ruldu Ram (PW.9), who resealed it with his seal bearing impression 'B' and after making entries in the NCB forms, handed over the same to MHC Ajaib Singh (PW.2). For getting the stuff chemically examined Ajaib Singh handed over the bulk parcel to Constable Naveen Kumar (PW.3), who deposited the same at the State Forensic Science Laboratory, Junga. Harjit Singh, then proceeded to Bilaspur, where accused Manoj Kumar was apprehended and detained by ASI Ajit Singh (PW.6). Manoj Kumar was then arrested on 08.09.2010 vide memo (Ex.PW.8/E) and searched vide memo (Ex.DC). Report of the Chemical Analyst (Ex.PD) was obtained by the police. With the completion of investigation, which *prima facie* revealed complicity of the accused in the alleged crime, *Challan* was presented in the Court for trial.

3 The accused were charged for having committed an offence punishable under the provisions of Section 20 of the NDPS Act, to which they did not plead guilty and claimed trial.

4 In order to establish its case, in all, prosecution examined as many as nine witnesses. Statements of the accused under Section 313 of the Code of Criminal Procedure were also recorded, in which they took plea of innocence and false implication. No evidence in defence was led.

5 Trial Court, after appreciating the testimony of prosecution witnesses, convicted the accused of the charged offence and sentenced them as aforesaid. Hence the present appeal.

6 We have heard Mr. P.P. Chauhan and Mr.A.K. Vashishta, Advocates, on behalf of the convicts as also M/s B.S. Parmar, Ashok Chaudhary, V.S. Chauhan, learned Addl. AGs., assisted by M/s Vikram Thakur and Puneet Rajta, learned Dy. AGs., on behalf of the State. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that the reasoning adopted by the trial Court is perverse and is not based on correct and complete appreciation of testimonies of the witnesses. Judgment in question is not based on correct and complete appreciation of

evidence and material placed on record, causing serious prejudice to the accused, resulting into miscarriage of justice.

7 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 an accused.

8 While convicting the accused two factors heavily weighed with the trial Court: (i) testimonies of police officials, fully inspiring in confidence, proved the prosecution case beyond reasonable doubt. (ii) There was no interpolation of documents i.e. memos (Ex.DB and Ex. DC), of personal search of the accused.

9 We are constrained to observe that in the impugned judgment there is hardly any discussion of the evidence. Only testimonies of witnesses stand reproduced. Clearly from the testimonies of police officials and independent witness two views, rendering the prosecution story to be extremely doubtful have emerged on record.

10 Testimony of the Investigating Officer, is disbelievable on three counts, rendering the genesis of the prosecution story to be false: (i) His version of having associated independent witness, in whose presence search and seizure operations were conducted, stands belied by the very same witness; (ii) His version of having reported the matter to the police officials of Police Station, Bilaspur, outside his District, is neither corroborated nor proved by any documentary evidence; and (iii) His version of having prepared material documents on different dates, stands falsified not only by the documents but oral testimonies of the witnesses.

11 In the instant case, despite extensive cross-examination by the Public Prosecutor, Piare Lal (PW.7) in our considered view, has said nothing in favour of the prosecution. On the contrary he goes to state that he was on his way to the temple, when near bus-stand, Una, Police officials made 3-4 persons sit in a vehicle and took them to Police Station, Una. Unambiguously he states that nothing was recovered in his presence from anyone. Categorically he states that police made him sign documents at the Police Station and no search and seizure operations were conducted in his presence. He was not even aware of contents of the documents pertaining to search and seizure operations (Ex.PA, Ex.PB and Ex.PC) so signed by him. He is an illiterate person and a rustic villager. He stands convicted of an offence under the provisions of NDPS Act, though appeal against such conviction is pending. Now why would police associate such a person as a witness remains unexplained. After all, his place of residence falls within the very same District over which the Investigating Officer had jurisdiction. Police ought to have known his credentials. He categorically states that under threat of false implication in a case, police made him sign the documents in question. Significantly, it has come on record through the testimony of police officials i.e. the Investigating Officer Harjit Singh (PW.8) and his associate Albel Singh (PW.1) that just at a short distance from the place where contraband substance was recovered, there is a Sarai and shops. Also people in large number come to pay obeisance at Pir Nigah which also is closeby. It has also come on record that Police Station, Una was just at a distance of 7-8 kms from there. Now why is it that police did not associate any person other than Piare Lal (PW.7), as an independent witness in carrying out search and seizure operations has not been explained.

12 Significantly, it has come on record through the testimony of Albel Singh that before the bag was searched, Manoj Kumar fled away in the vehicle, leaving Ashok Kumar behind. He chased him and returned after 15 minutes and only thereafter Harjit Singh searched the bag. Harjit Singh could inform Police Station, Bilaspur, for apprehending Manoj Kumar but not call any other person for being associated as an independent person in carrying out

search and seizure operations. Presence of Piare Lal on the spot remains unexplained by the prosecution, for after all he is not a local resident nor has it come on record that he had come to Pir Nigah for some work. He is a resident of Una, which is at a distance of 7-8 kms from the spot. Recovery was not effected during the day, but in the night at 8.30 PM. Thus, prosecution story of having associated Piare Lal as an independent witness, at the time of carrying out search and seizure operations, is rendered to be doubtful, if not false. Through his testimony, in our considered view, two views on the issue of conduct of search and seizure operations have emerged on record. And if recovery itself is in doubt benefit has to go to the accused. However, independently we have analyzed the testimonies of police officials; for after all they have no interest in false implication.

13 It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

14 It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

15 Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction.

[See: *Govindaraju alias Govinda v. State by Srirampuram Police Station and another,* (2012) 4 SCC 722; *Tika Ram v. State of Madhya Pradesh,* (2007) 15 SCC 760; *Girja Prasad v. State of M.P.,* (2007) 7 SCC 625); and *Aher Raja Khima v. State of Saurashtra,* AIR 1956].

16 Apex Court in *Tahir v. State (Delhi)*, (1996) 3 SCC 338, dealing with a similar question, held as under:-

> "6. ... .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some

> independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

17 Even while applying the aforesaid principles of law, on close scrutiny and examination of testimony of police officials Harjit Singh (PW.8) and Albel Singh (PW.1), we find them to be witnesses not worthy of credence or their testimonies believable. There are material contradictions, improvements, embellishments and falsehood in their testimonies further rendering the prosecution case to be doubtful.

18 Harjit Singh states that on 07.09.2010, he was on patrol duty. Police officials Albel Singh and Purshotam Lal (not examined) were with him. But then there is nothing on record to corroborate such version of his. Entry, if any, made at the Police Station, was neither placed nor proved on record, in accordance with law. Harjit Singh further states that on signal, vehicle in question, stopped and two occupants, disclosed their names as Manoj Kumar and Ashok Kumar. One bag lying under the seat of Manoj Kumar, who was on the wheel, was recovered. Also accused Ashok Kumar got down from the vehicle. Just before the bag could be searched, Manoj Kumar fled away in his vehicle. Witness further states that in his personal vehicle, he sent Albel Singh to chase Manoj Kumar, who after some time returned empty handed. "Thereafter", he telephonically informed the SHO, Police Station, Sadar, District Bilaspur, requesting him to apprehend accused Manoj Kumar and his vehicle. Then the bag was opened and checked, from which charas in the shape of sticks was recovered. With the weights and scales kept in the I.O. kit, charas was weighed and found to be 3.5 kgs. The same was packed in a cloth parcel and sealed with seven seals of seal bearing impressing 'A' and taken into possession vide memo (Ex.PB). Original seal was handed over to Albel Singh vide memo (Ex.PD). Rukka (Ex.PW.8/A) sent through Constable Purshotam Lal led to registration of FIR (Ex.PW.9/A). Thereafter, he recorded statement of Piare Lal and arrested accused Ashok Kumar vide memo (Ex.PW.8/D). With the completion of investigation on the spot, he entrusted the case property to SHO, Ruldu Ram (PW.9), who resealed the parcel with his seal bearing impression 'B'. At 5.30 AM (08.09.2010) he reached Police Station, Bilaspur and at 9.30 AM arrested accused Manoj Kumar vide memo (Ex.PW.8/E) Whereafter he brought him back to Police Station, Sadar, Una, "where" he searched him and prepared memo (Ex.DC). Also he handed over special report (Ex.PW.4/A) to Santosh Patial, Superintendent of Police, Una, for perusal.

19 Thus far, he appears to have deposed truthfully. But from the cross-examination part of his testimony, we find it not to be so. He admits that no record of telephonic conversation which he had with the SHO, Police Station, Bilaspur, is placed on record by him. Why so? has not been explained. This was absolutely necessary as we would find from our discussions herein later. He admits to have prepared memos (Ex.DB and Ex.DC) of jamatalashi of accused Manoj Kumar and Ashok Kumar at different times. But however, bare perusal thereof only reveals them to have been prepared at the same time, which fact is so admitted by Albel Singh, who unambiguously, in his unrebutted testimony, states them to have been prepared, at the Police Station, on 07.09.2010. In fact, on memo Ex.DB there is overwriting. Now this totally belies the prosecution version, rendering the testimony of Harjit Singh to be unbelievable, for according to him, he arrested accused Manoj Kumar in the morning of 08.09.2010 at Police Station, Bilaspur, falling within the jurisdiction of another District and is

at a driving distance of three hours from Police Station, Sadar, Una. After all, from there it would have taken him three hours to return to Police Station, Una. We further find that Harjit Singh travelled to Bilaspur from Una in his personal vehicle. Now why would he do such a thing. It is not that no official vehicle was available at Police Station, Una. Also he states to have visited the place of Nakka in his personal vehicle, in which he had sent Albel Singh to hunt for Manoj Kumar. Now there is nothing on record to establish that police party left Police Station, Una, on a patrol duty, in a private vehicle. Witness admits not to have claimed any travelling allowance for said journey. This is very strange, for after all journey was counted in the course of official and not personal business.

20 We also do not find testimony of Harjit Singh to be inspiring in confidence for yet another reason. How did he come to know that accused Manoj Kumar had fled towards District Bilaspur or was its resident, for after all, even according to police officials, if one were to travel from Una/Pir Nigah to Bilaspur (which is another District), one would have to cross several Police Stations, including Bangana, Barsar, Shahtalai, Bharteen, Una and Mehatpur. Strangely this witness did not report the incident with any one of such Police Stations, including his own Police Station i.e. Una. Why did he not do so? He has not explained. It is here absence of record pertaining to telephonic conversation acquires significance. How did he gather information of detention of accused Manoj Kumar at Police Station, Bilaspur? Remains unexplained. It is not the case of prosecution that such information was given by officials of the Police Station. His testimony that he was carrying weights and scales in his investigation kit, cannot be said to be inspiring in confidence, for after all he had not gone for patrol duty in connection with detection of crime. Also witness does not assign reason for not informing the family of accused Ashok Kumar. He simply states that Ashwani Kumar, brother of Ashok Kumar, was at the Police Station. Now how would Ashwani Kumar know about arrest of his brother, has not been explained by the prosecution. Also why seal was not handed over to independent witness, has not been explained at all.

21 Witness Purshotam Lal has not been examined in Court. Why so? has not been explained.

22 Albel Singh (PW.1), in his examination-in-chief, has only deposed what the prosecution wants us to believe. But however, from the cross-examination part of his testimony, we find it not to be inspiring in confidence. Exaggerations are there, rendering him to be a witness, not worthy of credence. When confronted with his previous statement (Ex.DA), so recorded under Section 161 Cr.P.C., he admits not to have got recorded that he travelled in a private vehicle. Theory of having chased accused Manoj appears to have introduced after police gathered information of place of his residence in District Bilaspur. He also admits that just ahead of the Talab (Pond) towards Pir Nigah, there are houses and Sarai. Significantly witness admits that all the police officials present on the spot were having their mobile phones. Yet neither he nor Purshotam attempted to inform the officials at anyone of the Police Stations, including Una. Why so? he does not explain. All this casts serious doubt about the truthfulness of the prosecution case.

23 Purshotam Lal, author of seizure memo (Ex.PB), though a cited witness was not examined in Court. Testimonies of Albel Singh and Harjit Singh are not inspiring in confidence at all. Be that as it may, when independent witness Piare Lal did not support the prosecution, it became incumbent upon the prosecution to have examined Purshotam Lal for establishing the prosecution story of preparation of memo (Ex.PB) on the spot and carrying of Rukka (Ex.PW.8/A) to the Police Station. How did he travel to the Police Station? When he reached there? When did he return to the spot with the file? All this would have been explained by him. His testimony would have only corroborated the otherwise weak and frail testimony of the police officials.

24 It has come on record that Rukka was sent at 10.45 PM and information thereof received at Police Station, Una at 11.20 PM. The FIR was registered at 11.45 PM. There is no time mentioned in the endorsement on the Rukka by the SHO. No time of recovery is mentioned in the memo (Ex.PB). Case property was allegedly produced before the SHO at 1.15 AM. Evidently, resealing was done by the SHO at 1.45 AM (08.09.2010). Significantly, there is cutting on the NCB form. Be that as it may, what renders the prosecution story to be further doubtful is the time, i.e. 1.15 AM, of entrustment of the case property with MHC, as mentioned in Certificate (Ex.PW.9/B) which could not have been prior to 1.45 AM the time when it was resealed by the SHO. Contradiction is writ large and fatal. As per NCB form, recovery was effected at 9.30 PM, then why did police wait for 45 minutes on the spot, has also not been explained. All this renders the prosecution version to be extremely doubtful.

25 There is yet another reason for us to hold that prosecution has not been able to establish its case beyond reasonable doubt. Ajaib Singh (PW.2) is the MHC to whom case property was entrusted by the SHO in the night intervening 7/8.09.2010. He admits that in his statement under Section 161 Cr.P.C., with which he was confronted, there is no mention of filling up of NCB forms in triplicate or the fact that Harjit Singh (PW.8) came to the Police Station alongwith accused Ashok Kumar. Improvements/exaggerations/ are galore. Significantly, he admits that even in the Malkhana register, there is no reference of the NCB forms. He tries to explain that it is not so required to be done under law, but then, has not explained why there is no mention of seal, bearing impression 'B', in the Malkhana register. What is still intriguing, is the fact that name of the depositor or the time of deposit, of the case property is not recorded in the Malkhana register. Why it was not so done, has not been explained. Crucially we find that against the very next entry (1253) name of Harjit Singh, who purportedly deposited the articles recovered pursuant to conduct of personal search of accused Ashok Kumar, is so recorded. Further he states that he sent the contraband substance for chemical analysis to the State Forensic Science Laboratory, Junga, through Naveen Kumar (PW.3), who also verifies such fact. But then, who brought the report from the Laboratory, has not been explained by the prosecution witnesses. Police officials Ajaib Singh, Naveen Kumar, Harjit Singh and Ruldu Ram are silent on this aspect of the matter. Thus, even by way of link evidence, prosecution has not been able to establish its case beyond reasonable doubt.

26 Version of Harjit Singh handing over special report to Santosh Patial, Superintendent of Police, Una, in our considered view, is unbelievable. Santosh Patial, has not been examined in Court and his Reader ASI Surjit Singh (PW.4), admits that no register of receipt of special reports is maintained in the Office of Superintendent of Police, Una and file containing lose sheets (reports) is neither indexed nor paginated. Possibility of interpolation is not ruled out.

27 From the testimony of Constable Roshan Lal (PW.5) of Police Station, Bilaspur, prosecution wants us to believe that they received information of the vehicle, in question, to have been parked near Kandror Bridge (District Bilaspur, near Bilaspur Town). Report, in relation thereto, was recorded by him as Ex.PW.5/A. This document, so prepared on 07.09.2010 at 21.10 (9.10 PM), totally belies the prosecution case. For according to Ajaib Singh, it would take two hours for a vehicle to reach Bilaspur and that too at full speed. How can almost at the same time very same vehicle could be present at two different places, has not been explained. Also who gave information, so recorded in Ex.PW.5/A, has not been proved on record.

28 Through the testimony of ASI Ajit Singh (PW.6), Investigating Officer, Police Station, Sadar, Bilaspur, prosecution wants us to believe that accused Manoj Kumar was arrested from his village Delag (Bilaspur) at about 11.45 PM. Question which arises for consideration is as to how did this witness know that Manoj Kumar was a resident of this village. Except for the name of

the driver, police had no clue of his identity. It is not that Ashok had disclosed the same. Further witness states that based on information of Manoj Kumar being required in a case registered under the provisions of NDPS Act, he detained him at Police Station, till such time, Harjit Singh came and arrested him. Intriguingly no memo of detention was prepared by him. Why so? has not been explained. Further, who gave this information that accused was required in an NDPS case is not proved on record, for it is not the case of prosecution that after the bag was searched and contraband substance recovered, another telephone call was made to SHO, Police Station, Bilaspur, furnishing such. Significantly Albel Singh admits of having called SHO, Police Station Sadar, Bilaspur, much before search of bag and recovery of contraband substance. This also renders the version of Harjit Singh to be unbelievable.

29. Thus for all the aforesaid reasons, 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 stand wrongly convicted for the charged offence.

30. Hence, for all the aforesaid reasons, appeals are allowed and the judgment of conviction and sentence, dated 09.05.2011, passed by Special Judge, Una, District Una, Himachal Pradesh, in Sessions Case No.23/2010, titled as *State of Himachal Pradesh v. Sh.Ashok Kumar & another*, is set aside and both accused Manoj Kumar and Ashok Kumar are acquitted of the charged offences. They be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to them accordingly. Release warrants be immediately prepared.

Appeal stands disposed of, so also pending application(s), if any.

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

ITA No.12 of 2014 with ITA Nos.15, 4 and 13 of 2014.
Reserved on: 09.12.2014.
Pronounced on: December 31, 2014.

1. ITA No.12 of 2014:
Commissioner of Income Tax .....Appellant.
versus
RFCL Limited .....Respondent.

2. ITA No.15 of 2014:
Commissioner of Income Tax .....Appellant.
versus
RFCL Limited .....Respondent.

3. ITA No.4 of 2014:
Commissioner of Income Tax .....Appellant.
versus
RFCL Limited .....Respondent.

4. ITA No.13 of 2014:
Commissioner of Income Tax .....Appellant.
versus
RFCL Limited .....Respondent.

Income Tax Act, 1961- Section 260-A- Assessee is entitled to depreciation on goodwill or other intangible assets. (Para- 8 to 15)

Cases referred:
Techno Shares and Stock Ltd. vs. Commissioner of Income Tax, [2010] 327 ITR 323 (SC)
Commissioner of Income Tax vs. SMIFS Securities Ltd., [2012] 348 ITR 302 (SC)
Areva T and D India Ltd. vs. Deputy Commissioner of Income Tax, [2012] 345 ITR 421 (Delhi)

For the Appellant(s): Mr.Vinay Kuthiala, Senior Advocate, with Ms.Vandana Kuthiala, Advocate.
For the Respondent(s):Mr.R.P. Bhatt, Senior Advocate, with Mr.Vijay Verma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

All these appeals have been preferred by the Commissioner of Income Tax, Shimla, (hereinafter referred to as the Revenue), under Section 260-A of the Income Tax Act, 1961.

2. ITA Nos.12 and 15 of 2014 are directed against the composite order, dated 29th April, 2013, passed by Income Tax Appellate Tribunal, Chandigarh, (for short, the Appellate Tribunal), in ITA Nos.189 & 190/Chd/2013, pertaining to assessment years 2006-07 and 2009-10, while ITA Nos.4 and 13 of 2014 have been preferred by the Revenue against the common order, dated 2nd April, 2013, passed by the Appellate Tribunal, in ITA Nos.293 and 294/Chd/2012, qua the assessment years 2007-08 & 2008-09, whereby the appeals filed by the assessee (respondent herein) came to be allowed in terms of the impugned orders and the Assessing Officer was directed to allow the claim of the assessee vis.-a-vis. the depreciation on goodwill and also depreciation on intangible assets.

3. Feeling aggrieved, the Revenue has challenged the orders of the Appellate Tribunal by the medium of these appeals.

4. All these appeals have been admitted on the following analogous substantial questions of law, on 3rd September, 2014:

1. Whether the ITAT was justified in applying the ratio of the judgment in CIT vs. SMIFS Securities (SC) wherein there was a categorical finding by the CIT(A) that the difference between the cost of asset and total amount paid constituted goodwill whereas in the present case the finding of the CIT (A) is that the amount paid over and above the value of assets is nothing but a premium paid which has been given the nomenclature of 'goodwill' and does not comprise of any type of business or commercial rights u/s 32.

2. Whether the impugned judgment is perverse as the ITAT failed to appreciate that the judgment in SMIFS Securities case was based on the finding of fact of the CIT(A) that the assessee had acquired capital right in the form of "goodwill" whereas in the present case the claim of the assessee of acquiring goodwill has not been accepted by the CIT(A).

5. As common questions of law are involved in all these appeals, we deem it proper to determine all these appeals by this common judgment.

6. We have heard the learned counsel for the parties and have perused the record.

7. Mr.Vinay Kuthiala, learned Senior Advocate, appearing for the appellant-Revenue conceded that the Appellate Tribunal rightly came to the conclusion, in all the appeals, while directing the Assessing Officer to allow the claim(s) in regard to depreciation on goodwill.

8. Mr.Bhatt, learned Senior Advocate appearing for the assessee-respondent, while supporting the impugned orders, argued that in view of the latest judgments of the Apex Court, discussed by the Appellate Tribunal, the assessee was entitled to depreciation on goodwill, which was wrongly taken away by the Authorities below. It was further argued that the assessment came to be reopened, for which the foundation was made the decision of the Bombay High Court in Commissioner of Income Tax vs. Techno Shares and Stocks Ltd., which decision was set aside by the Apex Court, vide judgment dated 9th September, 2010, in **Techno Shares and Stock Ltd. vs. Commissioner of Income Tax, [2010] 327 ITR 323 (SC),** mention of which has been made by the Appellate Tribunal in the impugned order. It is apt to reproduce paragraph 25 of the said decision of the Apex Court hereunder:

> *"We answer the question at page 6 in the affirmative by holding that on the facts and circumstances of these cases the Tribunal was right in holding that depreciation was allowable on the cost of the membership card under Section 31(1)(ii) of the 1961 Act. Accordingly, the impugned judgment(s) of the Bombay High Court is set aside and the appeal(s) filed by the nominated non-defaulting continuing member stands allowed with no order as to costs."*

9. The Appellate Tribunal, after making discussions, in paragraphs 27 & 28 has rightly applied the ratio of the judgment of the Apex Court in **Commissioner of Income Tax vs. SMIFS Securities Ltd., [2012] 348 ITR 302 (SC),** and held that the authorities i.e. the Assessing Officer and the CIT(Appeals) have wrongly made the order and the Assessing Officer was directed to allow the claim of the assessee vis.-a-vis. the depreciation on goodwill. It is apt to reproduce paragraphs No.27 and 28 of the impugned order hereunder:

> *"27. The second aspect of the issue is that the assessee had booked the said consideration of Rs.12.62 crores as goodwill in its books of account. In this regard also the assessee is entitled to the claim of depreciation on the goodwill as the Hon'ble Supreme Court in CIT Vs. SNIFS Securities Ltd. (supra) held that the goodwill by itself was an intangible asset under Explanation 3(b) to section 32(1) of the Act and is eligible for deduction. The relevant portion of the ratio laid down by the Hon'ble Supreme Court is as under:*
>
> "The Assessing Officer held that goodwill was not an asset falling under Explanation 3 to Section 32(1) of the Income Tax Act, 1961 {'Act', for short}. We quote hereinbelow Explanation 3 to Section 32(1) of the Act.
>
> "Explanation 3- For the purpose of this sub-section, the expressions 'assets' and 'block of assets' shall mean- a} tangible assets, being buildings, machinery, plant or Furniture;
>
> {b} intangible assets, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature."
>
> Explanation 3 states that the expression 'asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature.

A reading of the words 'any other business or commercial rights of similar nature' in clause (b) of Explanation 3 indicates that goodwill would fall under the expression 'any other business or commercial right of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b).

In the circumstances, we are of the view that Goodwill' is an asset under Explanation 3(b) to Section 32(1) of the Act"

28. In view of the ratio laid down by the Hon'ble Supreme Court in CIT vs. SNIFS Securities Ltd. (supra), it is held that the goodwill simpliciter was eligible for depreciation and the assessee having paid consideration of Rs.12.74 crores for acquisition of the said goodwill and having accounted for the same in its books of account as goodwill, was entitled to the claim of depreciation. We accordingly direct the Assessing Officer to allow the claim of the assessee vis-a-viz the claim of depreciation on goodwill of Rs.12.74 crores."

10. The learned Senior Counsel appearing for the appellant-Revenue has stated that it is a fact that the judgment of the Bombay High Court stands set aside and the very foundation of the case has lost its efficacy.

11. Now, the only question remains to be determined is whether the respondent-assessee was entitled to depreciation on intangible assets. The Appellate Tribunal, while discussing the facts of the case and the effect of the judgment of the Bombay High Court, read with the judgment of the Apex Court, held that the assessee was also entitled to depreciation on intangible assets. The Appellate Tribunal had made discussion in paragraphs 28, 29, 33, 35 and 38 of the order impugned in ITA Nos.4 and 13 of 2014. We are of the considered view that the discussion made is based on facts, law applicable, read with the judgment of the Apex Court.

12. It is apt to record herein that the Delhi High Court in **Areva T and D India Ltd. vs. Deputy Commissioner of Income Tax, [2012] 345 ITR 421 (Delhi)** discussed and laid down what is the meaning of intangible assets and how the assessee is entitled to depreciation. It is apt to reproduce paragraphs 13, 14, 15 and 16 of the said decision hereunder:

"13. In the present case, applying the principle of ejusdem generis, which provides that where there are general words following particular and specific words, the meaning of the latter words shall be confined to things of the same kind, as specified for interpreting the expression "business or commercial rights of similar nature" specified in Section 32(1)(ii) of the Act. It is seen that such rights need not answer the description of "knowhow, patents, trademarks, licenses or franchises" but must be of similar nature as the specified assets. On a perusal of the meaning of the categories of specific intangible assets referred in Section 32(1)(ii) of the Act preceding the term "business or commercial rights of similar nature", it is seen that the aforesaid intangible assets are not of the same kind and are clearly distinct from one another. The fact that after the specified intangible assets the words "business or commercial rights of similar nature" have been additionally used, clearly demonstrates that the Legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate. In the circumstances, the nature of "business or commercial rights" cannot be restricted to only the aforesaid six categories of assets, viz., knowhow, patents, trademarks, copyrights, licenses or franchises. The nature of "business or commercial rights" can be of the same genus in which all the aforesaid six assets fall. All the above fall in the genus of intangible assets that form part of the tool of

trade of an assessee facilitating smooth carrying on of the business. In the circumstances, it is observed that in case of the assessee, intangible assets, viz., business claims; business information; business records; contracts; employees; and knowhow, are all assets, which are invaluable and result in carrying on the transmission and distribution business by the assessee, which was hitherto being carried out by the transferor, without any interruption. The aforesaid intangible assets are, therefore, comparable to a license to carry out the existing transmission and distribution business of the transferor. In the absence of the aforesaid intangible assets, the assessee would have had to commence business from scratch and go through the gestation period whereas by acquiring the aforesaid business rights along with the tangible assets, the assessee got an up and running business. This view is fortified by the ratio of the decision of the Supreme Court in Techno Shares and Stocks Ltd. [2010] 327 ITR 323 (SC) wherein it was held that intangible assets owned by the assessee and used for the business purpose which enables the assessee to access the market and has an economic and money value is a "license" or "akin to a license" which is one of the items falling in Section 32(1)(ii) of the Act.

14. In view of the above discussion, we are of the view that the specified intangible assets acquired under slump sale agreement were in the nature of "business or commercial rights of similar nature" specified in Section 32(1)(ii) of the Act and were accordingly eligible for depreciation under that Section.

15. In view of the above, it is not necessary to decide the alternative submission made on behalf of the assessee that goodwill per se is eligible for depreciation under Section 32(1)(ii) of the Act. In the circumstances, the substantial question of law is decided in the affirmative and this appeal is allowed in favour of the assessee and against the Revenue and the impugned order is set aside.

ITA No.1151/2010 and ITA No.1152/2010

16. In these appeals, the Income-tax Appellate Tribunal, relying upon the decision in assesse's own case I.T.A. No.336/Del/08 dated July 6, 2009, pertaining to assessment year 2005-06, held:-

> *"5.On careful consideration of rival submission, we are of view that learned Commissioner Income-tax (Appeals) has rightly allowed relief to the assessee after considering relevant facts and circumstances of the case. The assessee has not claimed depreciation on goodwill it acquired commercial rights to sell products under the trade name and paid consideration in dispute for acquiring marketing and territorial rights to sell through dealers and distributors i.e. the network created by the seller for sale in India. Under the agreement. It become entitled to use of infrastructure developed by the seller. Rights were acquired since April 1, 1998 and these rights have all along been treated as an asset entitled to depreciation and depreciation was actually allowed in the past. The learned Assessing Officer, in our view was not correct in making a departure from the past and in holding that payment was made for acquisition of "goodwill". Payment had been made for acquisition of commercial rights on which depreciation is permissible. The Assessing Officer was further not justified in treating entries in the books of account as conclusive and in taking payment in dispute as consideration for acquisition of goodwill. It is now more of less settled that entries in books cannot be treated as conclusive and true nature of transaction has to be determined with reference to law. The learned Commissioner of*

Income-tax (Appeals) in the impugned order examined the issue with reference to agreement and found that payment was made for acquisition of commercial rights. On facts and circumstances of the case, we do not find any error in the approach of the learned Commissioner of Income-tax (Appeals)). His action is hereby confirmed."

13. The judgment of the Delhi High Court supra was assailed by means of Special Leave Petition before the Apex Court, which stands dismissed on 23rd September, 2013 i.e. after the judgment made by the Appellate Tribunal.

14. The Appellate Tribunal has rightly discussed the facts, circumstances, the law applicable, including the judgments of the Bombay High Court and Delhi High Court and various other judgments, in paragraphs No.19, 20, 24, 25 and 26 in the order impugned in ITA Nos.13 and 4 of 2014, which are reproduced hereunder:

"19. The issue arising before us is whether the assessee is entitled to the claim of depreciation on the said acquisition of intangible assets in line with the acquisition of business of Animal Health Care and Diagnostics Business divisions of Ranbaxy and/or also whether the assessee is entitled to the claim of depreciation on the amount booked under the head goodwill simpliciter.

20. Under the amended provisions of section 32 of the Act w.e.f. 1.4.1999, ambit of depreciation has been enlarged to cover both the tangible and intangible assets. The depreciation on buildings, machinery plant of furniture being tangible assets was being allowed subject to satisfaction of the conditions laid down under section 32 of the Act i.e. the assets should be owned wholly or partly by the assessee and used for the purpose of business or profession of the assessee. The rate of depreciation for such assets was provided in Schedule attached to the Income Tax Act. However, after the amendment by the Finance (No.2) Act, 1998, w.e.f. 1.4.1999 the depreciation is also to be allowed on intangible assets i.e. know-how, patent and copyrights, trademarks, licences or franchises or any other business or commercial rights of similar nature. The Hon'ble Delhi High Court in Areva T and D India Ltd. Vs. DCIT (supra) applied the principle of ejusdem generic to interpret the expression "business or commercial rights of similar nature" referred to in section 32(I)(ii) of the Act and held that the Legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate. The Hon'ble Court further held that in the circumstances, the nature of business or commercial rights could be of the same genus in which all the aforesaid six assets fall and thus intangible assets i.e. business claims; business information; business records;, contracts; employees; and know-how, were held to be assets which are invaluable and result in carrying on the business of the assessee, without any interruption and are comparable to a licence or akin to a licence which is one of the items falling in section 32(1)(ii) of the Act.

24. The above said ratio was referred to by Mumbai Bench of the Tribunal in M/s India Capital Markets P. Ltd. Vs DCIT (supra) wherein the purchase of clientele business by the assessee from M/s AFC was held to be right which could be used as a tool to carry on the business and the consideration paid for which was held eligible for depreciation.

25. As pointed out in paras hereinabove the assessee in addition to building plant & machinery, furniture, fixtures, vehicles and net current assets alongwith brands valued at Rs.49.26 crores had also acquired the under mentioned assets:

S.No	*Details of Intangible Assets acquired*	*Paper Book Reference Page Numbers*
1.	*Stockist Agreements*	*51-75*
2.	*Distribution Agreements*	*76-79*
3.	*Lease Agreements*	*81*
4.	*Distribution and Marketing Agreements*	*82*
5.	*List of Employees*	*83-86*
6.	*List of Licenses and Permissions (Export Registrations)*	*126*
7.	*Various Products – Enlarged product range and customer base*	*108-120*
8.	*Name license*	*45*
9.	*Manufacturing know bow, specifications and test methods, manufacturing and packaging instructions, master formulae, validations reports, stability data, analytical methods and any other documents necessary to manufacture, control and release the products.*	*36-37*

26. The perusal of the Schedules to BPA comprising of the above said list of Stockist Agreements, Distribution Agreements, Lease Agreements and also Distribution and Marketing Agreements, alongwith List of Licenses and Permissions and List of various Products, the name license and also the manufacturing know-how etc., alongwith List of employees are assets, which are invaluable and instrumental in carrying on the business of Animal Health Care and Diagnostics Business divisions acquired by the assessee from M/s Ranbaxy Laboratories Ltd. as per BPA. The acquisition of the above said items is bundle of rights acquired by the assessee for which lump sum price was fixed and no break up in the value of price was determined either by the assessee or by the auditors but the same constituted bundle of rights akin to a licence or comparable to a license to carry on the business of Animal Health Care and Diagnostics Business divisions which was being carried on by the seller i.e. M/s Ranbaxy Laboratories Ltd. the above said assets acquired by the assessee were the 'business or commercial rights or licence acquired' in order to carry on new business acquired by the assessee including list of employees and also various licences owned by Ranbaxy Laboratories Ltd. In line with the ratio laid down by the Hon'ble Delhi High Court in Areva T and D India Ltd. Vs. DCIT (supra), we are of the view that the consideration of Rs.12.74 crores paid by the assessee was for acquisition of the intangible assets on which the assessee is entitled to the claim of depreciation under section 32(1) (ii) of the Act."

15. In the given circumstances, the questions framed are decided in favour of the assessee/respondent and against the Revenue/appellant.

16. Having said so, the impugned orders made by the Appellate Tribunal need no interference and the same are upheld. Accordingly, the

appeals are dismissed. The Registry is directed to place a copy of this judgment on each file.

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

Commissioner of Income tax (TDS), Chandigarh. ...Petitioner.

Versus

State Bank of Patiala Sectt. Shimla ...Respondent.

ITA No.17 of 2014
Date of Decision: 31.12.2014

Income Tax Act, 1961- Section 194 A (3) (f)- 'B' and 'H' wholly financed and controlled establishment of the Government, had made certain deposits with the assessee- the assessee had not deducted the income tax at the sources at the time of disbursement- penal action was taken by ITO- assessee filed an appeal and the decision of ITO was reversed- an appeal was preferred before Income Tax Appellate Tribunal Chandigarh, which was also dismissed- Government had issued a notification under Section 194(A) covering any undertaking or body including a Society registered under the Societies Registration Act wholly financed by the Government- held, that once the notification had been issued, it is not necessary for the assessee to seek exemption from the Authorities under the Act or the Central Government or the central Government- therefore, the Appellate Authority had rightly allowed the Appeal and had set aside the order passed by ITO. (Para- 3 to 9)

For the Petitioner: Mr. Vinay Kuthiala, Sr. Advocate with Mr.Diwan Singh Negi, Advocate vice Ms.Vandana Kuthiala, Advocate.

For the Respondent: Mr. Vishal Mohan, Advocate with Mr.Aditya Sood, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral)

This appeal stands admitted on the following substantial question of law:-

> "Whether for the purpose of obtaining exemption under Section 194A(3) (f) of the Income Tax Act, the assessee was required to apply for exemption and the same could only be granted to the assessee after the Central Government issued a notification in this behalf in the official gazette?"

2. Genesis of the dispute emanates with the alleged non-compliance of statutory provisions of Section 194A (1) of the Income Tax Act, 1961 (hereinafter referred to as the Act) by the assessee/respondent herein. M/s Biotech Biobusiness and HP SITEG, wholly financed and controlled establishment of the Government, had made certain deposits with the assessee, who at the time of disbursement did not deduct the component of income tax (TDS).

3. Finding such action of the assessee to be illegal, Revenue initiated proceedings with the issuance of notice under Section 201(1) /201(1A) of the Act. Vide order dated 15.12.2012, for the financial year 2010-11, Income Tax Officer (TDS), Shimla, raised demands and took penal action.

4. In an appeal filed by the assessee, Commissioner of Income Tax (Appeals), Shimla, vide order dated 14.12.2012, reversed such findings, which order stands affirmed by the Income Tax Appellate Tribunal Chandigarh Benches 'A' Chandigarh, vide order dated 10.07.2013, in ITA Nos. 323 & 324/CHD/2013, titled as *The ITO (TDS), Shimla Versus State Bank of Patiala.*

5. For the purposes of adjudication of the present appeal, relevant provisions of the Act, are reproduced as under:-

> "194A. (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident ay income by way of interest other than income [by way of interest on securities], shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force: .....
>
> .....(3) The provisions of sub-section (1) shall not aply—.....
>
> .....(iii) to such income credited or paid to—.....
>
> .....(f) such other institution, association or body [or class of institutions, associations or bodies] which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette;"

6. It is not disputed that the Societies in question are wholly funded by the Government.

7. Evidently, as noticed by the Appellate Authority, by virtue of its power, in terms of Section 194A, Central Government has issued notification covering "Any undertaking or body including a Society registered under the Societies Registration Act, 1860 (XXI of 1860) financed wholly by the Government."

8. Now the language of Section 194A of the Act is simple, unambiguous and evidently clear. The Central Government has issued notification, specifically exempting, *inter alia,* Societies which are wholly financed by the Government, thus making the provisions of Section 1 of Section 194A inapplicable. In view of sub-section 3(iii) (f) of the said Section, in the instant case, assessee made payments, without deducting income-tax, to such Societies which stand exempted under the notification.

9. In our considered view, once the notification stands issued, it is not the requirement of the Act for the assessee to either apply or seek exemption from the Authorities under the Act or the Central Government. Expression "reasons to be recorded in writing" are in reference to the stage preceding issuance of notification by the Central Government. Reasons have to be that of the Central Government and not the assessee. With the issuance of notification by the Central Government, which is not the subject matter of challenge herein, provisions of Section 194(A) (1) of the Act, automatically becomes inapplicable.

10. Thus, order passed by the Appellate Authority is upheld and substantial question of law is answered accordingly. As such, appeal stands disposed of as also pending application(s), if any.

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

Commissioner of Income tax (TDS), Chandigarh. ...Petitioner.

Versus

State Bank of Patiala Sectt., Shimla. ...Respondent.

ITA No.22 of 2014
Date of Decision: 31.12.2014

Income Tax Act, 1961- Section 194 A (3) (f)- 'B' and 'H' wholly financed and controlled establishment of the Government, had made certain deposits with the assessee- the assessee had not deducted the income tax at the sources at the time of disbursement- penal action was taken by ITO- assessee filed an appeal and the decision of ITO was reversed- an appeal was preferred before Income Tax Appellate Tribunal Chandigarh, which was also dismissed- Government had issued a notification under Section 194(A) covering any undertaking or body including a Society registered under the Societies Registration Act wholly financed by the Government- held, that once the notification had been issued, it is not necessary for the assessee to seek exemption from the Authorities under the Act or the Central Government or the central Government- therefore, the Appellate Authority had rightly allowed the Appeal and had set aside the order passed by ITO. (Para- 3 to 9)

For the Petitioner: Mr. Vinay Kuthiala, Sr. Advocate with Mr.Diwan Singh Negi, Advocate vice Ms.Vandana Kuthiala, Advocate.

For the Respondent: Mr. Vishal Mohan, Advocate with Mr.Aditya Sood, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral)

This appeal stands admitted on the following substantial question of law:-

> "Whether for the purpose of obtaining exemption under Section 194A(3) (f) of the Income Tax Act, the assessee was required to apply for exemption and the same could only be granted to the assessee after the Central Government issued a notification in this behalf in the official gazette?"

2. Genesis of the dispute emanates with the alleged non-compliance of statutory provisions of Section 194A (1) of the Income Tax Act, 1961 (hereinafter referred to as the Act) by the assessee/respondent herein. M/s Biotech Biobusiness and HP SITEG, wholly financed and controlled establishment of the Government, had made certain deposits with the assessee, who at the time of disbursement did not deduct the component of income tax (TDS).

3. Finding such action of the assessee to be illegal, Revenue initiated proceedings with the issuance of notice under Section 201(1) /201(1A) of the Act. Vide order dated 15.12.2012, for the financial year 2008-09, Income Tax Officer (TDS), Shimla, raised demands and took penal action.

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5. For the purposes of adjudication of the present appeal, relevant provisions of the Act, are reproduced as under:-

> "194A. (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident ay income by way of interest other than income [by way of interest on securities], shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force: .....
>
> .....(3) The provisions of sub-section (1) shall not aply—.....
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> .....(iii) to such income credited or paid to—.....
>
> .....(f) such other institution, association or body [or class of institutions, associations or bodies] which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette;"

6. It is not disputed that the Societies in question are wholly funded by the Government.

7. Evidently, as noticed by the Appellate Authority, by virtue of its power, in terms of Section 194A, Central Government has issued notification covering "Any undertaking or body including a Society registered under the Societies Registration Act, 1860 (XXI of 1860) financed wholly by the Government."

8. Now the language of Section 194A of the Act is simple, unambiguous and evidently clear. The Central Government has issued notification, specifically exempting, *inter alia,* Societies which are wholly financed by the Government, thus making the provisions of Section 1 of Section 194A inapplicable. In view of sub-section 3(iii) (f) of the said Section, in the instant case, assessee made payments, without deducting income-tax, to such Societies which stand exempted under the notification.

9. In our considered view, once the notification stands issued, it is not the requirement of the Act for the assessee to either apply or seek exemption from the Authorities under the Act or the Central Government. Expression "reasons to be recorded in writing" are in reference to the stage preceding issuance of notification by the Central Government. Reasons have to be that of the Central Government and not the assessee. With the issuance of notification by the Central Government, which is not the subject matter of challenge herein, provisions of Section 194(A) (1) of the Act, automatically becomes inapplicable.

10. Thus, order passed by the Appellate Authority is upheld and substantial question of law is answered accordingly. As such, appeal stands disposed of as also pending application(s), if any.

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

LPA No. 216 of 2014 a/w LPA Nos. 217, 218, 219, 220, 221, 222, 223 and 224 of 2014
Reserved on: 23.12.2014
Date of decision: December 31, 2014

1. LPA No. 216 of 2014

Federal Mogul Bearing India Ltd. ... Appellant.

Vs.

Prit Pal .... Respondent.

2. LPA No. 217 of 2014
Federal Mogul Bearing India Ltd. ....Appellant
Vs.
Krishan Chand ....Respondent.

3. LPA No. 218 of 2014
Federal Mogul Bearing India Ltd. ....Appellant
Vs.
Mehar Chand ....Respondent

4. LPA No. 219 of 2014
Federal Mogul Bearing India Ltd. ...Appellant
Vs.
Dilbara Singh ...Respondent

5. LPA No. 220 of 2014
Federal Mogul Bearing India Ltd. ....Appellant
Vs.
Prit Pal ...Respondent

6. LPA No. 221 of 2014
Federal Mogul Bearing India Ltd. ...Appellant
Vs.
Krishan Chand ...Respondent.

7. LPA No. 222 of 2014
Federal Mogul Bearing India Ltd. ...Appellant
Vs.
Ram Chander ...Respondent.

8. LPA No. 223 of 2014
Federal Mogul Bearing India Ltd. ...Appellant
Vs.
Mehar Chand ...Respondent.

9. LPA No. 224 of 2014
Federal Mogul Bearing India Ltd. ...Appellant
Vs
Dilbara Singh ...Respondent.

Letters Patent Appeal- Clause 10- An order was passed by the Writ Court directing the re-instatement of the Workmen- an appeal was preferred against the order contending that Writ Court had granted the main relief sought in the petition which was not permissible- held, that an appeal is competent from the decision of a Single Bench provided that such decision falls within the ambit of judgment- order must decide question in controversy in ancillary proceedings, in the petition itself or in the part of the proceedings and such adjudication must also decide and affect the rights of parties – further intermediary or interlocutory order cannot be regarded as judgment but only such order which decides or affects the rights of the parties and put to an end or terminate the proceedings can be treated as judgment- Workmen were ordered to be re-instated subject to the condition and order had not determined the rights or liabilities of the parties - hence, order cannot be termed to be a judgment. (Para-4 to 16)

Cases referred:

Shah Babulal Khimji vs. Jayaben D. Kania and another AIR 1981 SC 1786

Subal Paul vs. Malina Paul and another (2003) 10 SCC 361

Midnapore Peoples' Coop. Bank Ltd. and others vs. Chunilal Nanda and others (2006) 5 SCC 399

State of Rajasthan and others vs. M/s Swaika Properties and another (1985) 3 SCC 217

State of J & K vs. Mohd. Yaqoob Khan and others (1992) 4 SCC 167

Bank of Maharashtra vs. Race Shipping and Transport Company Pvt. Ltd. and another (1995) 3 SCC 257

P. R. Sinha and others vs. Inder Krishan Raina and others (1996) 1 SCC 681

Union of India and others vs. Modiluft Ltd. (2003) 6 SCC 65

State of U.P. and others vs. Ram Sukhi Devi (2005) 9 SCC 733

For the Appellant(s) : Mr. Rahul Mahajan, Advocate.
For the Respondent(s) : Mr. V.D. Khidtta, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The appellant(s) by medium of these appeals has challenged the order passed by the writ court on 17.11.2014, which is as follows:

> **CWP's No. 3441, 3442, 3443, 3444, 3878, 3879, 3881, 3883, 3884 of 2012**
>
> *"Services of the workmen in the above writ petitions have been terminated during the course of conciliation proceedings before Labour Officer-cum-Conciliation Officer. Thus, the employer is directed to reinstate the workmen. The workmen so reinstated/re-engaged will not involve themselves in any Union activities and will not cause any problem in the premises of the workplace. The employer will be at liberty to impose stringent conditions to avoid vitiating of industrial peace in the factory premises.*
>
> *To ensure that no trouble is caused by the re-engaged workmen, Labour Officer-cum-Conciliation Officer, Solan will visit the premises fortnightly and submit his report to this Court.*
>
> ***CWP's No. 3441 to 3444, 3878 to 3881, 3883 to 3885, 4084 and 9215 of 2012***
>
> *Parties are also directed to explore possibility of amicable settlement outside the Court in view of this order.*
>
> *List the cases for hearing in the first week of January 2015."*

2. It is contended that the aforesaid order is not sustainable in the eyes of law as it amounts to granting main relief which the respondents would otherwise be entitled to if the writ petitions were to be dismissed. The order has been challenged on various other grounds as taken in the memo of appeal.

Undisputedly, the writ petitions are pending before the learned writ Court and have been fixed for hearing in the first week of January, 2015.

3. We have heard learned counsel for the parties and perused the records.

4. Clause 10 of the Letters Patent Appeal, as applicable to Himachal Pradesh, reads thus:

> *"10. Appeals to the High Court from Judges of the Court – And we do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the Superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of Superintendence under the provisions of Section*

107 of the government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made on or after the first day of February, one thousand nine hundred and twenty-nine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or Successors in our or their Privy Council, as hereinafter provided."

5. Plain reading of Clause 10 makes it clear that an appeal is competent from the decision of a Single Bench provided such decision falls within the ambit of "judgment".

Therefore, moot question which arises for consideration is as to whether the impugned order falls within the ambit of "judgment".

6. The word "judgment" has been considered in detail and explained by the Hon'ble Supreme Court in ***Shah Babulal Khimji vs. Jayaben D. Kania and another AIR 1981 SC 1786*** in the following terms

"*106. Thus, the only point which emerges from this decision is that whenever a Trial Judge decides a controversy which affects valuable rights of one of the parties, it must be treated to be a judgment within the meaning of the Letters Patent.***,**

113. Thus, under the Code of Civil Procedure, a judgment consists of the reasons and grounds for a decree passed by a court. As a judgment constitutes the reasons for the decree it follows as a matter of course that the judgment must be a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The concept of a judgment as defined by the Code of Civil Procedure seems to be rather narrow and the limitations engrafted by sub-s. (2) of s. 2 cannot be physically imported into the definition of the word 'judgment' as used in cl. 15 of the Letters Patent because the Letters Patent has advisedly not used the term 'order' or 'decree' anywhere. The intention, therefore, of the givers of the Letters Patent was that the word 'judgment' should receive a much wider and more liberal interpretation than the word 'judgment' used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a Trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the Letters Patent. It seems to us that the word 'judgment' has undoubtedly a concept of finality in a broader and not a narrower sense. In other words, a judgment can be of three kinds :.

(1) A Final Judgment - A judgment which decides all the questions or issues in controversy so far as the trial Judge is concerned and leaves nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the Trial Judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench.

(2) A preliminary judgment-This kind of a judgment may take two forms-(a) where the trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the trial Judge would be a judgment finally deciding the cause so far as the Trial Judge is concerned and therefore appealable to the larger Bench. (b) Another shape which a preliminary judgment may take is that where the trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdiction, res Judicata, a manifest defect in the suit, absence of notice under section 80 and the like, and these objections are decided by the Trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to larger Bench.

(3) Intermediary or Interlocutory judgment-Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of order 43 Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by O. 43 R.1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. For instance, where the trial Judge in a suit under order 37 of the Code of Civil Procedure refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiff's case on his own evidence without being given a chance to rebut that evidence. As such an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the Letters Patent so as to be appealable to a larger Bench. Take the converse case in a similar suit where the trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff still possesses his full right to show that the defence is false and succeed in the suit. Thus, such an Order passed by the trial Judge would not amount to a judgment within the meaning of cl. 15 of the Letters Patent but will be purely an interlocutory order.

Similarly, suppose the trial Judge passes an Order setting aside an exparte decree against the defendant, which is not appealable under any of the clauses of O. 43 R.1 though an order rejecting an application to set aside the decree passed exparte falls within O. 43 R.l, cl. (d) and is appealable, the serious question that arises is whether or not the order first mentioned is a judgment within the meaning of Letters Patent. The

fact, however, remains that the order setting aside the ex-parte decree puts the defendant to a great advantage and works serious injustice to the plaintiff because as a consequence of the order, the plaintiff has now to contest the suit and is deprived of the fruits of the decree passed in his favour. In these circumstances, therefore, the order passed by the trial Judge setting aside the ex parte decree vitally affects the valuable rights of the plaintiff and hence amounts to an interlocutory judgment and is therefore, appealable to a larger Bench.

119. Apart from the tests laid down by Sir White, C.J., the following considerations must prevail with the court:

(1) That the Trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion exercised or routine orders passed by the trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice one party or the other cannot be treated as a judgment otherwise the appellate court (Division Bench) will be flooded with appeals from all kinds of orders passed by the Trial Judge. The courts must give sufficient allowance to the trial Judge and raise a presumption that any discretionary order which he passes must be presumed to be correct unless it is ex facie legally erroneous or causes grave and substantial injustice.

(2) That the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings.

(3) The tests laid down by Sir White, C.J. as also by Sir Couch, C.J. as modified by later decisions of the Calcutta High Court itself which have been dealt with by us elaborately should be borne in mind.".

7. The matter was subsequently considered by the Hon'ble Supreme Court in a number of decisions and we may with advantage refer to the observations made by the Hon'ble Supreme Court in ***Subal Paul vs. Malina Paul and another (2003) 10 SCC 361*** :

"32**.** *While determining the question as regards clause 15 of the Letters Patent, the court is required to see as to whether the order sought to be appealed against is a judgment within the meaning thereof or not. Once it is held that irrespective of the nature of the order, meaning thereby whether interlocutory or final, a judgment has been rendered, clause 15 of the Letters Patent would be attracted.*

33. The Supreme Court in Shah Babulal Khimji 's case (supra) deprecated a very narrow interpretation on the word 'judgment' within the meaning of clause 15.

34. This Court said: (SCC pp. 45-46, para 82)

"A court is not justified in interpreting a legal term which amounts to a complete distortion of the word 'judgment' so as to deny appeals even against unjust orders to litigants having genuine grievances so as to make them scapegoats in the garb of protecting vexatious appeals. In such cases, a just balance must be struck so as to advance the object of the statute and give the desired relief to the litigants, if possible."

35. In Shah Babulal Khimji 's case (supra), the Apex Court in no uncertain terms referred to the judgment under the Special Act which confers

additional jurisdiction to the High Court even in internal appeals from an order passed by the Trial Judge to a larger Bench. Letters Patent has the force of law. It is no longer res Integra. Clause 15 of the Letters Patent confers a right of appeal on a litigant against any judgment passed under any Act unless the same is expressly excluded. Clause 15 may be subject to an Act but when it is not so subject to the special provision the power and jurisdiction of the High Court under Clause 15 to entertain any appeal from a judgment would be effective.

38. The decision of this Court in Shah Babulal Khimji 's case (supra) has been considered in some details by a Special Bench of the Calcutta High Court in M/s. Tanusree Art Printers and Anr. v. Rabindra Nath Pal, [2000] 2 CHN 213 and 2000 (2) CHN 843. It was pointed out: (CHN p.233, para 67)

> *"If the right of appeal is a creature of a statute, the same would be governed by the said statute. Whether an appeal under Clause 15 of the Letters patent will be maintainable or not when the matter is governed by a Special Statue will also have to be judged from the scheme thereof, (e.g. despite absence of bar, a Letters Patent appeal will not be maintainable from a judgement of the learned Single Judge rendered under the Representation of People Act.)"*

39. It was pointed out that in Shah Babulal Khimji's case (supra) this Court posed three questions namely: (CHN p.227, para 42)

> *"(1) Whether in view of clause 15 of the Letters Patent an appeal under section 104 of the Code of Civil Procedure would lie? (2) Whether clause 15 of the Letters Patent supersedes Order 43 Rule 1 of the code of Civil Procedure? (3) Even section 104 of the CPC has no application, whether an order refusing to grant injunction or appoint a receiver would be a judgment within the meaning of Clause 15 of the Letters Patent?"*

40. The Apex Court answered each of them from a different angle: (CHN p.227, para 43)

> *(a) Section 104 of the Code of Civil Procedure read with Order 43 Rule 1 expressly authorizes a forum of appeal against orders falling under various clauses of Order 43 Rule 1 to a Larger Bench of a High Court without at all disturbing interference with or overriding the Letters Patent jurisdiction.*
>
> *(b) Having regard to the provisions of Section 117 and Order 49 Rule 3 of the Code of Civil Procedure which excludes various other provisions from the jurisdiction of the High Court, it does not exclude Order 43 Rule 1 of the CPC.*
>
> *(c) There is no inconsistency between section 104 read with Order 43 Rule I and the appeals under Letters Patent, as Letters Patent in any way does not exclude or override the application under section 104 read with Order 43 Rule 1 which shows that these provisions would not apply in internal appeals within the High Court "*

47. In Prataprai N, Kothari v. John Braganza, [1999] 4 SCC 403, even in a suit for possession only not based on title, a letters patent appeal was held to be maintainable.

48. The decision of this Court in Sharda Devi v. State of Bihar, [2002] 3 SCC 705 is also to the same effect, wherein in para 9 it was held: (SCC p. 709)

> *"9. A Letters patent is the charter under which the High Court is established. The powers given to a High Court under the Letters Patent are akin to the constitutional powers of a High Court. Thus*

when a Letters Patent grants to the High Court a power of appeal, against a judgment of a Single Judge, the right to entertain the appeal would not get excluded unless the statutory enactment concerned excludes an appeal under the Letters Patent."

49. Section 54 of the Land Acquisition Act, 1894 provides for an appeal before the High Court and thereafter to the Supreme Court and despite the same it was held that a letters patent appeal under clause 15 would be maintainable."

8. In ***Midnapore Peoples' Coop. Bank Ltd. and others vs. Chunilal Nanda and others (2006) 5 SCC 399*** the Hon'ble Supreme Court held that the term "judgment" occurring in clause 15 of the Letters Patent will take into its fold not only the judgments as defined in Section 2(9) CPC and orders enumerated in Order 43 Rule 1 CPC, but also other orders which, though may not finally and conclusively determine the rights of parties with regard to all or any matters in controversy, may have finality in regard to some collateral matter, which would affect the vital and valuable rights and obligations of the parties. It is apt to reproduce paras 15 and 16 of the report, which reads thus:

"15. Interim orders/interlocutory orders passed during the pendency of a case, fall under one or the other of the following categories:

(i) Orders which finally decide a question or issue in controversy in the main case.

(ii) Orders which finally decide an issue which materially and directly affects the final decision in the main case.

(iii) Orders which finally decide a collateral issue or question which is not the subject mater of the main case.

(iv) Routine orders which are passed to facilitate the progress of the case till its culmination in the final judgment.

(v) Orders which may cause some inconvenience or some prejudice to a party, but which do not finally determine the rights and obligations of the parties.

16. The term "judgment" occurring in clause 15 of the Letters Patent will take into its fold not only the judgments as defined in Section 2 (9) CPC and orders enumerated in Order 43 Rule 1 CPC, but also other orders which, though may not finally and conclusively determine the rights of parties with regard to all or any matters in controversy, may have finality in regard to some collateral matter, which will affect the vital and valuable rights and obligations of the parties. Interlocutory orders which fall under categories (i) to (iii) above, are, therefore "judgments" for the purpose of filing appeals under the Letters Patent. On the other hand, orders falling under categories (iv) and (v) are not "judgments" for the purpose of filing appeals provided under the Letters Patent."

9. On the basis of the aforesaid exposition of law, it can safely be concluded that in order to fall within the meaning of "judgment" under Clause 10 of the Letters Patent Appeal, the order must contain the traits and trappings of finality either by deciding questions in controversy in ancillary proceeding or in the petition itself or in a part of the proceedings and such an adjudication must also decide and affect the rights of parties. It has also to be borne in mind that every intermediary or interlocutory order cannot be regarded as "judgment" but only such orders which decide or affect the rights of the parties and put to an end or terminate the proceedings can be treated as "judgment". The effect, rather than the form, of the adjudication has to be looked into, and if so done, the order appealed against is nothing but a step towards a final adjudication.

What must be looked into is general nature and effect of the order and the same has to be judged by the test as to whether adjudication of rights, proceedings are terminated if it is not so, such an order would not be a judgment within the meaning of Clause 10.

10. Coming to the facts of this case, it would be seen that in the writ petition preferred by the appellant(s) the award passed by the Industrial Tribunal-cum-Labour Court, Shimla (for short 'Tribunal') under Section 33 (2) of the Industrial Disputes Act, read with Rule 64 (2) of the H. P. Industrial Disputes Rules, 1974 has been assailed. The appellant(s) had approached the Tribunal for approval of their action in respect of dismissing the services of the respondents. This application came to be dismissed by the learned Tribunal and the respondents were ordered to be reinstated in service alongwith back wages @ 25%.

11. A perusal of the impugned order reveals that the respondents-workmen have been ordered to be reinstated with the condition that they will not involve themselves in any Union activities and would also not cause any problem in the premises of the workplace. At the same time, the appellant(s) has been granted liberty to impose stringent conditions on the workmen so that the respondents do not vitiate industrial peace in the factory premises. Not only this, the Labour Officer-cum-Conciliation Officer, Solan has been directed to oversee this arrangement and has been directed to visit the premises fortnightly and submit his report.

12. The appellant(s) has taken exception to this order by claiming that the order though on the face of it appears to be interlocutory but in fact it grants the main relief which the respondents would otherwise be entitled to if the writ petitions were ordered to be dismissed and, therefore, the order would fall within the ambit of "judgment" and, therefore, the appeal is competent.

13. In support of his submission, the appellant(s) has relied upon the judgment of the Hon'ble Supreme Court in ***State of Rajasthan and others*** vs. ***M/s Swaika Properties and another (1985) 3 SCC 217***, ***State of J & K*** vs. ***Mohd. Yaqoob Khan and others (1992) 4 SCC 167, Bank of Maharashtra*** vs. ***Race Shipping and Transport Company Pvt. Ltd. and another (1995) 3 SCC 257, P. R. Sinha and others*** vs. ***Inder Krishan Raina and others (1996) 1 SCC 681, Union of India and others*** vs. ***Modiluft Ltd. (2003) 6 SCC 65*** and ***State of U.P. and others*** vs. ***Ram Sukhi Devi (2005) 9 SCC 733.***

14. We have gone through these judgments. The sum and substance of these judgments is that the Hon'ble Supreme Court has time and again deprecated the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason than that of a prima facie case having been made out, without considering the balance of convenience, the public interest and a host of other considerations.

15. There is no quarrel with the aforesaid proposition of law, but at the same time, we fail to understand as to how the ratio of the same is applicable to the facts of the present case. Admittedly, it is the appellant, who happens to be the writ petitioner on whose asking the impugned order has been passed. The settled position of law is that the Courts are not to grant interim orders which practically give principal relief sought in the petition but the converse is not true. Meaning thereby that the appellant cannot be heard to complain that since the interim order on its asking has been passed, the same virtually amounts to dismissal of the petition itself. Further, the appellant cannot, as a matter of right, claim interim relief in its favour much less dictate the mode and manner in which interim relief is to be granted. Even otherwise, interim orders passed by the learned writ Court would not govern the

consideration for final relief and if found necessary, effect of interim order can always be reversed by way of restitution.

16. That apart, the impugned order does not determine the rights or liabilities of the parties affecting the merits of the controversy and, therefore, cannot be termed to be a "Judgment".

17. Having perused the impugned order, we have no hesitation to hold that the impugned order is a just, fair and equitable order calling for no interference. The learned writ Court had discretion to pass the impugned order and it cannot be said that such discretion has been exercised arbitrarily, capriciously, perversely or has been passed by ignoring the well settled principles of law.

18. Above all, the learned writ Court after taking into consideration the urgency of the matter has directed these cases to be listed for hearing in the first week of January, 2015. In such circumstances, we fail to understand that even if assuming that the impugned order is a judgment against which the present appeal is maintainable, even then, what prejudice and in what manner the rights of the appellant(s) have been effected so as to afford it a cause of action to file the present appeals. Having said so, we have no hesitation to conclude that these appeals are nothing but an abuse of process of the Court wherein the appellant(s) has sought to drag the hapless and helpless workmen into unwanted, unwarranted and otherwise avoidable litigation.

Accordingly, all these appeals are dismissed. Though this was a fit case for imposing cost, we refrain from doing so since we have not issued notice to the opposite party and the counsel for the respondents has put in appearance of his own. The pending applications, if any, are also disposed of. The Registry is directed to place a copy of this judgment on the files of connected matters.

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

CWP No. 9266 A/W CWP No.8368 of 2014.
Date of decision: 31.12.2014.

CWP No.9266/2014.	
Harish Kumar and another	*.....Petitioners*
Versus	
State of H.P and others	*...Respondents*
CWP No.8368/2014.	
Sudha and others	*.....Petitioners*
Versus	
State of H.P and others	*...Respondents*

Constitution of India, 1950- Article 226- Seniority was fixed on the basis of the date of joining and not on the basis of merit obtained in the selection process- petitioner claimed that the seniority list be issued on the basis of the merit obtained by the candidates in the selection process- held, that seniority list is to be drawn as per the merit obtained in the selection process and date of joining cannot determine the seniority- respondents directed to issue a fresh seniority list as per merit. (Para-7 to 12)

Cases referred:
Chairman, Puri Gramya Bank and another vs. Ananda Chandra Das and others (1994) 6 SCC 301

Bimlesh Tanwar vs. State of Haryana and others AIR 2003 SC 2000.
Suresh Chandra Jha versus State of Bihar and others (2007) 1 SCC 405

For the petitioner(s): Ms. Jyotsna Rewal Dua, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. Anup Rattan, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2-State.

Mr. Ashwani Kaundal, Advocate, for respondents No. 3 to 5 in CWP No.9266/2014.

Mr. Ajay Chauhan and Mr. Anupinder Singh Rohal, Advocates, for respondents No. 3 to 8 and 10 to 12 in CWP No.8368/2014.

Mr. Manish Kumar Gupta, Advocate, for respondent No. 9 in CWP No.8368/2014.

Mr. V.D. Khidtta, Advocate, for respondent No. 13 in CWP No. 8368/2014.

Mr. Naveen K. Bhardwaj, Advocate, in CMP No.21123/2014.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Similar questions of facts and law are involved in both these writ petitions thus; we deem it proper to determine both these writ petitions by this common judgment.

2. It is apt to reproduce reliefs as sought for in both the writ petitions, as under:-

CWP No.9266/2014.

"(i) Quashing annexure P-5 (colly) dated 21.10.2014 to the extent it promotes respondents No. 3-5, who are juniors to the petitioners as JBT teachers to the post of Trained Graduate Teachers (TGT) without promoting the petitioners as TGTs.

(ii) For directing the respondents to promote the petitioners as Trained Graduate Teachers (TGTs) w.e.f. 21.10.2014 i.e., the date their juniors (respondents 3-5) were promoted as TGTs alongwith all consequential benefits of seniority and financial benefits.

(iii) For directing the respondents not to treat the date of joining of the JBT teachers as the basis for consideration for making their promotion to TGT amongst petitioners and private respondents (i.e. those appointed vide same appointment order) in the facts and circumstances of the case and in view of submissions made in the writ petition. Respondents may kindly be directed to treat the order of merit, in which the candidates are placed in the appointment order at annexure P1, as the basis of seniority for making promotions to the post of TGT."

CWP No.8368/2014.

"(i) Quashing annexure P-3 (colly) dated 21.10.2014 to the extent it promotes respondents No. 3-12, who are juniors to the petitioners as JBT teachers to the post of Trained Graduate Teachers (TGT) without promoting the petitioners as TGTs.

(ii) For directing the respondents to promote the petitioners as Trained Graduate Teachers (TGTs) w.e.f. 21.10.2014 i.e., the date their juniors (respondents 3-12) were promoted as TGTs alongwith all consequential benefits of seniority and financial benefits.

(iii) For directing the respondents not to treat the date of joining of the JBT teachers as the basis for consideration for making their promotion to TGT amongst petitioners and private respondents (i.e. those appointed vide same appointment order) in the facts and circumstances of the case and in view of submissions made in the writ petition. Respondents may kindly be directed to treat the order of merit, in which the candidates are placed in the appointment order at annexure P1, as the basis of seniority for making promotions to the post of TGT."

3. In both the writ petitions, petitioners have called in question the action drawn by the respondents, whereby seniority came to be fixed on the basis of the date of joining and not as per the merit obtained in the selection process and prayed that the Tentative Seniority list issued by the Department vide office order No. EDN-SLN-Elem.(E-III) Sty—1/2014-15925-32 and office order No.EDN-H (2) 7/2014-Pro-JBT-NM dated 21.10.2014, so far it promoted the private respondents, be quashed and respondents be directed to issue fresh seniority list, strictly in terms of the merits obtained by the candidates in the selection process and thereafter promotions be made to the next cadre, as per the Rules, occupying the field.

4. Replies have not been filed in both the writ petitions.

5. The learned counsel for the private respondents stated at the Bar that they have no objections in case prayer in both the writ petitions is granted with the command to the respondents-State to frame seniority list, as per the merit list obtained in the selection process and entire exercise for grant of promotion, be made, in terms of merit list read with the Rules, occupying the field, within a time frame. Their statements are taken on record.

6. The learned Advocate General has vehemently argued that so many persons will be affected by this judgment and order, who are not before this Court and prayed that the seniority list qua those persons, who are ranking below in the merit list be quashed.

7. It is beaten law of the land that the seniority list is to be drawn as per the merit obtained in the selection process and date of joining cannot determine the seniority.

8. The apex Court in case *The Direct Recruit Class-II Engineering Officers' Association and others vs. State of Maharashtra and others* reported in *AIR 1990 SC 1607,* held that once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. It is apt to reproduce para 44-A of the said judgment herein:

> *"44.To sum up, we hold that:*
>
> *(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority."*

9. The apex Court in ***Chairman, Puri Gramya Bank and another vs. Ananda Chandra Das and others*** reported in *(1994) 6 SCC 301,* held that seniority among direct recruits has to be determined on the basis of ranking secured in the selection, subject to reservation and roster rules, and not on the basis of the dates of joining duty. It is apt to reproduce relevant portion of para 2 of the judgment herein:

> *"2…….. The respondent and others were selected by direct recruitment as managers of Rural Bank. His rank was No. 9 in the merit list. He was directed to be given seniority on the basis of the date of his reporting to duty. It is reported that the first respondent is dead. The only question in this case is that what shall be the ranking among the direct recruits? Is it the date on which they joined duty or according to the ranking given by the Selection Board? On comparative evaluation of the respective merits of the candidates for direct recruitment, the Board had prepared the merit list on the basis of the ranking secured at the time of the selection. It is settled law that if more than one are selected, the seniority is as per ranking of the direct recruits subject to the adjustment of the candidates selected on applying the rule of reservation and the roster. By mere fortuitous chance of reporting to duty earlier would not alter the ranking given by the Selection Board and the arranged one as per roster. The High court is, therefore, wholly wrong in its conclusion that the seniority shall be determined on the basis of the joining reports given by the candidates selected for appointment by direct recruitment and length of service on its basis. The view, therefore, is wrong. However, we need not interfere with the order, since the first respondent has died."*

10. The same principles of law have been laid down by the apex Court in case titled ***Bimlesh Tanwar vs. State of Haryana and others*** reported in ***AIR 2003 SC 2000***. It is profitable to reproduce para 49 of the said judgment herein:

> *"49.In this case also, although there does not exist any statutory rule but the practice of determining inter se seniority on the basis of the merit list has been evolved on interpretation of the Rules. A select list is prepared keeping in view the respective merit of the candidates. Not only appointments are required to be made on the basis of such merit list, seniority is also to be determined on that basis as it is expected that the candidates should be joining their respective posts almost at the same time. Yet again in Chairman, Puri Gramya Bank & Anr. vs. Ananda Chandra Das & Ors. [1994(6) SCC 301] this court held:*
>
> > *"It is settled law that if more than one are selected, the seniority is as per ranking of the direct recruits*

subject to the adjustment of the candidates selected on applying the rule of reservation and the roster. By mere fortuitous chance of reporting to duty earlier would not alter the ranking given by the Selection Board and the arranged one as per roster. The High Court is, therefore, wholly wrong in its conclusion that the seniority shall be determined on the basis of the joining reports given by the candidates selected for appointment by direct recruitment and length of service on its basis."

11. The above principles of law have been followed by the apex Court in case titled ***Suresh Chandra Jha*** *versus* ***State of Bihar and others reported in (2007) 1 SCC 405.***

12. Accordingly, the writ petitions are allowed. The Tentative Seniority List issued vide office order No.EDN-SLN-Elem.(E.III) Sty—1/ 2014-15925-32 and office order No. EDN-H (2) 7/2014-Pro-JBT-NM dated 21.10.2014, in both the writ petitions, so far it relate to private respondents and the persons who are ranking below in the merit list, is quashed and respondents are directed to issue fresh seniority list, strictly as per the merit obtained, in terms of the selection process and make the promotions, strictly, as per the Rules, occupying the field.

13. It goes without saying that promotions of the persons, who are ranking above in the merit, to the writ petitioners, be kept in tact and the cases of only those persons, who are ranking below in the merit list, be considered, afresh while making exercise for promotions alongwith the writ petitioners and other persons eligible for consideration. The entire exercise be done within two months from today.

14. Having said so, both the writ petitions are disposed of, as indicated hereinabove, alongwith pending applications, if any.

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

Raj Kumar ..... Petitioner
Vs.
State of H.P. & ors. ..... Respondents.

CWP No. 8590 of 2014.
Judgement reserved on: 23.12.2014.
Date of decision: 31.12.2014.

Constitution of India, 1950- Article 226- Petitioner was transferred on the basis of U.O. Note received from the office of Chief Minister- respondents claimed that they had received numerous complaints against the petitioner from public representatives of nearest Panchayat, which compelled the authorities to effect the transfer- petitioner has remained in and around his home district- held, that transfer is an incident of service and can be effected on the basis of administrative exigency and taking into consideration the public interest- government servant has no vested right to remain posted at one place or the other and courts should not interfere with the orders of transfer- however, if the exercise of power is based on extraneous considerations or for achieving an alien purpose or an oblique motive, it would amount to colourable exercise of power- transfer has been made on the basis of UO Note, no proposal for transfer had originated from the administrative department- hence, order is not sustainable. (Para-4 to 21)

Cases referred:

Amir Chand vs. State of Himachal Pradesh 2013 (2) Him. L.R. (DB) 648

Ram Krishan vs. District Education Officer, ILR (Himachal Series) (1979) 8 HIM, 481

A.K.Vasudeva vs. State of H.P. and others ILR (Himachal Series) (1981) 10 HIM 359

Sant Ram Pant vs. State of H.P. and others 2009 (3) Shim. L.C. 206

Sanjay Kumar vs. State of H.P. & others Latest HLJ 2013 (HP) 1051

Somesh Tiwari vs. Union of India and others (2009) 2 SCC 592

For the petitioner : Mr. Sanjeev Bhushan, Advocate.

For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma and Mr. M.A. Khan, Additional Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

It is for the second time that the petitioner has been compelled to approach this court seeking quashment of his transfer, which has been effected on the basis of U.O. Note No. Secy./C.M-7004/2012-VIP-B-143360 dated 17.6.2014 received from the office of Hon'ble Chief Minister.

2. Initially the petitioner vide order dated 7.2.2014 was ordered to be transferred from Horticulture Extension Centre, Sundla, Development Block Salooni, District Chamba to Plant Protection Centre, Ratnari Development Block, Jubbal & Kotkhai, District Shimla against the vacancy. This order had been effected on the basis of D.O. No. Secy/CM-07004/ 2012-VIP-B-114510 dated 10.01.2014. The petitioner approached this court by filing CWP No. 1261 of 2014 and the said transfer was cancelled on the basis of the decision of this court in **Amir Chand** vs. **State of Himachal Pradesh 2013 (2) Him. L.R. (DB) 648,** to which decision we shall advert to later.

3. Thereafter vide order dated 3rd August 2014 the petitioner was again transferred to the said station. This transfer has been assailed on the ground that the same is illegal, arbitrary and against the settled norms and the petitioner has been transferred to a distance of nearly 500 kilometers without taking into consideration that his children are studying in 9th and 6th class, respectively. These generalized grounds appear to have been taken because the office order dated 3.8.2014 on the face of it appears to be innocuous.

4. But then the cat is out of the bag when the respondents filed the reply wherein it has been averred that respondents had received numerous complaints against the petitioner from public representatives of nearby Panchayat(s), which compelled the authorities to effect the transfer. It is the further case of the respondents that right from the date of his appointment on 7.10.1988, the petitioner has remained in and around his home district i.e. Chamba. So far so good. The respondents then have placed on record letter dated 15th July 2014, a perusal whereof reveals that petitioner has again been transferred on the basis of U.O. note, as would be clear from the contents of letter, which is reproduced here in below:-

"**Sir,**

On the above cited subject, the U.O. note No. Secy./C.M-7004/2012-VIP-B-143360, dated 17.6.2014 received from the office of Hon'ble Chief Minister H.P. vide which Sh. Raj Kumar, Horticulture Extension Officer has been transferred from

Horticulture Extension Centre Sundla Distt. Chamba to Plant Protection Centre Ratnari in the Dev. Block Jubbal & Kotkhai area and be made effective. In this regard it is requested that Sh. Raj Kumar HEO had already been transferred vide this Directorate office order of even number dated 7.2.2014 in compliance to the U.O. dated 10.1.2014 (copy enclosed). Sh. Raj Kumar, HEO has challenged the transfer order in the Hon'ble High Court of H.P. on 5.3.2014 and as per the order passed by the Hon'ble Court of H.P. this Directorate has cancelled the office order of even number dated 7.2.2014 therefore, keeping in view decision of Hon'ble Court of H.P. it is not possible to issue the transfer order on the basis of received U.O. Note dated 17.6.2014 and if the transfer is necessary this can be made on administrative ground, the service Bio-data of the official is as under:-

Name of the official/Designation	Sh. Raj Kumar, Horticulture Extension Officer.
Date of Birth/ Retirement	15.5.1964/ 31.5.2022
Date of Appointment	7.10.1988
Home District	Chamba
Place of present posting with date	Horticulture Extension Centre Sundla w.e.f. 23.6.2008.
Previous three place of posting	1. Salooni 2/1997 to 11/2001 2. Sundla 11/2001 to 3/2005 3. Zeera 3/2005 to 8/2007
Place where from transfer proposed to.	Horticulture Extension Centre Sundla Dev. Block Salooni Distt. Chamba to Plant protection Centre Jubbal Kotkhai Distt. Shimla against vacancy.
Stay from court, if	The above official was transferred vide this Directorate office order of even No. dt. 7.2.2014, but the official has filed a CWP 1261/2014 before the Hon'ble High Court of H.P. and as per decision passed on 5.3.2014 by Hon'ble Court the transfer order passed on 7.2.2014 had been cancelled accordingly.
Distance of transfer	550 K.M.
Tribal served or not.	Yes
Proposal of Head of department	If, the compliance is necessary on the approval received from the office of the Hon'ble Chief Minister of H.P. then the administrative approval may be accorded to transfer the official, because the behaviour of the said official is not good with the local public as is evident from the representations received from the four Gram Panchayat's (copy enclosed)."

5. It is trite that transfer is an incidence of service and as long as the authority acts keeping in view the administrative exigency and taking into

consideration the public interest as the paramount consideration, it has unfettered powers to effect transfer subject of course to certain disciplines. Once it is admitted that the petitioner is State government employee and holds a transferable post then he is liable to be transferred from one place to the other within the District in case it is a District cadre post and throughout the State in case he holds a State cadre post. A government servant holding a transferable post has no vested right to remain posted at one place or the other and courts should not ordinarily interfere with the orders of transfer instead affected party should approach the higher authorities in the department. Who should be transferred where and in what manner is for the appropriate authority to decide. The courts and tribunals are not expected to interdict the working the working of the administrative system by transferring the officers to "proper place". It is for the administration to take appropriate decision.

6. Even the administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/ servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments. Even if the order of transfer is made in transgression of administrative guidelines, the same cannot be interfered with as it does not confer any legally enforceable rights unless the same is shown to have been vitiated by malafides or made in violation of any statutory provision. The government is the best judge to decide how to distribute and utilize the services of its employees.

7. However, this power must be exercised honestly, bona fide and reasonably. It should be exercised in public interest. If the exercise of power is based on extraneous considerations without any factual background foundation or for achieving an alien purpose or an oblique motive it would amount to mala fide and colourable exercise of power. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of service but for other purpose, such as on the basis of complaints. It is the basic principle of rule of law and good administration, that even administrative action should be just and fair. An order of transfer is to satisfy the test of Articles 14 and 16 of the Constitution otherwise the same will be treated as arbitrary.

8. Judicial review of the order of transfer is permissible when the order is made on irrelevant consideration. Even when the order of transfer which otherwise appears to be innocuous on its face is passed on extraneous consideration then the court is competent to go into the matter to find out the real foundation of transfer. The court is competent to ascertain whether the order of transfer is passed bonafide or as a measure of punishment.

9. The transfer in the present case evidently has not been effected in administrative exigencies or in public interest but has been made on the basis of U.O. Note. It is the specific case of the respondents themselves that petitioner was transferred on the basis of complaints received from the public representatives. Therefore, the question that falls for our consideration is as to whether such transfer can withstand judicial scrutiny and is permissible in law.

10. This precise question came up for consideration before this court more than three and half decades back in **Ram Krishan** vs. **District Education Officer, ILR (Himachal Series) (1979) 8 HIM, 481,** wherein this court held as follows: -

> "8. We hereby record our strong disapproval of such type of interference from outsiders in day today administration of the State. If such interference is to be allowed, it would only mean that the government servants should run after those who are taking part

in public life and in politics for getting better terms of service and a better place for their postings, and should do everything to please them and not to please the department by their ability, honesty and integrity. It need not be emphasized that such interference of outsiders in day--to-day administration of the State is highly detrimental to the public interest as it would result in nepotism and corruption wherein only those who can wield influence and purse, can succeed. Therefore, we want by this judgment to bring it to the notice of all concerned that sooner this type of interference is discouraged and stopped, the better for the administration and the people of this State."

11. In **A.K.Vasudeva** vs. **State of H.P. and others ILR (Himachal Series) (1981) 10 HIM 359,** this court while dealing with a case in which the transfer of a teacher had been made at the behest of a Member of the Legislative Assembly has held as follows:-

21. The practice of effecting transfers of teachers at the behest of every M.L.A. and other influential persons seems to be rampant in the department of Education in the State. The record is full of it. Indeed when the transfer proposals are prepared there is a column No. 8 which is to show "recommended / proposed by". I find that a transfer as been made even at the instance of the esident Youth Congress (I) Subathu of a teacher Alaxender from Kanda to Subathu. It appears that no transfer is made except at the instance of somebody. Why was Shri Chaman Lal reluctant to admit his role, and why did he depose that he had nothing to do with the posting and transfer of any teacher? I had expected him to come out openly and frankly. He is not only a member of the Legislative Assembly but at the moment owns a responsible position as Chairman of a public corporation."

12 Thereafter referring to the judgement in **Ram Krishan's** case (supra), this court went on to hold as follows:

"28. It is unfortunate indeed that despite the aforementioned pronouncement by this Court the malady of the politicians interfering in the administration of the Education Department is as rampant as before, if not worse. Apparently no one is bothered about any discipline in this department and the teachers and others are perhaps encouraged by this method to be beholden to the political persons instead of relying on the honesty and the integrity of the Director of Education and other officers for administering the department and ordering transfers."

13. In CWP No. 1105 of 2006, titled **Sushila Sharma** vs. **State of H.P and others,** this court has held as follows:-

"We, however, direct that a copy of this judgment be sent to the Chief Secretary to the Govt. of H.P., who shall ensure that a proper transfer policy is formulated to ensure that the transfers are made only on administrative grounds and not on any others grounds. In the policy to be framed, it shall be ensured that all the employees are treated fairly and equally and every employee during his tenure of

service serves in tribal/ hard areas and also in remote /rural areas. When transfers are made, the administrative department shall ensure that the employees who have already served in tribal/ hard areas as well as remote/ rural areas are not again sent to these areas and there is a continuous process of change whereby all the employees have a chance to serve in tribal/hard areas as well as remote/ rural areas. In the policy so framed, It should also be ensured that the transfer orders are not cancelled without making reference to the administrative department to putforth its views. In the policy, measures shall be provided to ensure that employees (obviously influential) who have managed to remain posted in the urban areas/cities are posted to rural/remote areas and hard/tribal areas in the transfer season when the transfers are made. The transfer policy should also ensure that people, who are posted in remote/rural areas, join their place of postings and do not manage to get their transfers cancelled on frivolous grounds as has happened in the present case. The policy be framed and filed in Court within two months from today." Consequent to these directions, a policy was framed, but has been observed more in breach."

14. In CWP No. 3530 of 2011 titled **Babita Thakur** vs. **State of H.P. and others,** a learned single Judge of this court held as follows:-

"9. It is true that it is for the employer to see where the Government servant is to be posted. However, it is equally true that there is no arbitrariness in the action. The transfer cannot be used as an instrument to accommodate/ adjust the persons without there being any administrative exigency. The underline principle for transfer is public interest or administrative exigency. In the instant case, neither there was any public interest nor any administrative exigency necessitating the transfer of the petitioner from government Primary School,Chadyara (Sadar) to G overnment Primary School, Khanyari (Chachoit1)."

15. In CWP No. 2844 of 2010 titled **Pratap Singh Chauhan** vs. **State of H.P. & others decided on 18.6.2011,** a learned single Judge of this court after considering various judgements of Hon'ble Supreme Court held as follows:-

"10. We are governed by the Constitution of India. As per the constitutional scheme there are three pillars of democracy; the Legislature; the Judiciary and the Executive. Each has to work in its own sphere. This is a system of checks and balances where each can check the other, but it must be clearly understood that none of the three organs can encroach upon the - jurisdiction of the other. The jurisdiction vested in this Court under Article 226 of the Constitution of India is indeed very wide. Wider the jurisdiction, more care should be taken to exercise it with greater discretion, so that questions are not raised about the functioning of the Judiciary. The Apex Court has in no uncertain terms laid down a note of caution that Courts should not interfere in transfer matters except on very strong grounds.

11. Having held so, this Court is also not oblivious to the factual position which exists on the spot and the situation is that day in and day out this Court is flooded with writ petitions in which employees challenge the order of their transfer on various grounds. On more than one occasion this Court has found that there are notes sent by public representatives such as Members of the Legislative Assembly recommending the transfers. No doubt, public representatives have a right to make recommendations, but these can only be recommendations and cannot be taken to be the final word."

16. In **Sant Ram Pant** vs. **State of H.P. and others 2009 (3) Shim. L.C. 206,** a Division Bench of this court held as follows:-

" 8. When transfers are made, an employee may be aggrieved by his transfer. An employee has a right to make a representation against such transfer. It is also the right of the employer, including the State, to look into the grievances of the employees and if the grievance made by the employee is found to be genuine, the State is well within its right to redress the grievance of the employee and cancel the order of transfer. However, the grounds for passing an order of cancellation within two weeks of the original order must be borne out from some material on the record. In the present case, despite two opportunities being given the State has not produced any representation made by the respondent No. 3 or any other communication addressed to the office of the Hon'ble Chief Minister on behalf of the respondent No. 3 which would justify the issuance of the note dated 1.1.2009."

17. A treatise on this subject is a judgement of Division Bench of this court in **Amir Chand's** case (supra), wherein this court after taking into consideration the entire law as settled by the Hon'ble Supreme Court as also various High Courts including this court issued the following directions:-

"1. The State must amend its transfer policy and categorize all the stations in the State under different categories. At present, there are only two categories, i.e. tribal/ hard areas and other areas. We have increasingly found that people who are sent to the hard/ tribal areas find it very difficult to come back because whenever a person is posted there, he first manages to get orders staying his transfer by approaching the political bosses and sometimes even from the Courts. Why should the poor people of such areas suffer on this count. We are, therefore, of the view that the Government should categorize all the stations in the State in at least four or five categories, i.e. A, B, C, D and E also, if the State so requires. The most easy stations, i.e. urban areas like Shimla, Dharamshala, Mandi etc. may fall in category A and the lowest category will be of the must difficult stations in the remote corners of the State such as Pangi, Dodra Kawar, Kaza etc. At the same time, the home town or area adjoining to home town of the employee, regardless of its category, otherwise can be treated as category A or at least in a category higher than its actual category in which the employee would normally fall. For example, if an employee belongs to Ghumarwin, which is categorized in category B, then if the employee is serving in and around Ghumarwin, he will be deemed to be in Category A.

2. After the stations have been categorized, a database must be maintained of all the employees in different departments as to in which

category of station(s) a particular employee has served throughout his career. An effort should be made to ensure that every employee serves in every category of stations. Supposing the State decides to have four categories, i.e. A, B, C, D, then an employee should be posted from category A to any of the other three categories, but should not be again transferred to category A station. If after category A he is transferred to category D station, then his next posting must be in category B or C. In case such a policy is followed, there will be no scope for adjusting the favourites and all employees will be treated equally and there will be no heart burning between the employees.

3. We make it clear that in certain hard cases, keeping in view the problems of a particular employee, an exception can be made but whenever such exception is made, a reasoned order must be passed why policy is not being followed.

4. Coming to the issue of political patronage. On the basis of the judgements cited hereinabove, there can be no manner of doubt that the elected representative do have a right to complain about the working of an official, but once such a complaint is made, then it must be sent to the head of the administrative department, who should verify the complaint and if the complaint is found to be true, then alone can the employee be transferred.

5. We are, however, of the view that the elected representative cannot have a right to claim that a particular employee should be posted at a particular station. This choice has to be made by the administrative head, i.e. the Executive and not by the legislators. Where an employee is to be posted must be decided by the administration. It is for the officers to show their independence by ensuring that they do not order transfers merely on the asking of an MLA or Minister. They can always send back a proposal showing why the same cannot be accepted.

6. We, therefore, direct that whenever any transfer is ordered not by the departments, but on the recommendations of a Minster or MLA, then before ordering the transfer, views of the administrative department must be ascertained. Only after ascertaining the views of the administrative department, the transfer may be ordered if approved by the administrative department.

7. No transfer should be ordered at the behest of party workers or others who have no connection either with the legislature or the executive. These persons have no right to recommend that an employee should be posted at a particular place. In case they want to complain about the functioning of the employees then the complaint must be made to the Minister In charge and/ or the Head of the Department. Only after the complaint is verified should action be taken. We, however, reiterate that no transfer should be made at the behest of party workers."

(underlining supplied by us)

18. Here it is pertinent to observe that the aforesaid decision of this court has been affirmed by the Hon'ble Supreme Court as noted in para-22 of the judgement in **Sanjay Kumar** vs. **State of H.P. & others Latest HLJ 2013 (HP) 1051.**

19. Yet again the matter regarding transfer on the basis of D.O. Notes was the subject matter of consideration in **Sanjay Kumar's** case (supra) wherein after a lucid analysis and taking note of various judgements of Hon'ble Supreme Court and this court, it was held as follows:-

"30. The transfer at the instance of a person, who has no role to play in the Government, will not only be extraneous consideration, but also against public policy. It shakes the confidence of the people and creates an impression in the mind of a common man that the centre of power is somewhere else and not the Government. In order to curb this tendency

and inspire confidence in general public and more particularly in the employees, it is necessary that no one should get an impression that employee can be transferred for asking at the instance of a person, who has no concern with the Government. This, if goes unchecked, is bound to affect the morale of the employees and their independent working and will not be in the interest of general public. There is, however, one caveat. That, any person has a right to make a complaint against an employee regarding his conduct to his superior or Chief Minster and even request for his transfer. It is, however, only for the competent authority to consider the request and to take appropriate action in accordance with law. Further, it is unfathomable that such large number of transfers could be made at the instance of a person who is not in the Government, nor a people's representative as such. Issuing transfer orders at the instance of an outsider, who incidentally happens to be a Party worker, cannot be a co-incidence, but a concerted effort of the duty holders, who were otherwise responsible to preserve rule of law. Such action not only shakes the conscience of the Court, but also, inevitably, impinges upon the validity of such orders as the same are the product of colourable exercise of power."

20. Notably, the State government challenged the aforesaid decision before the Hon'ble Supreme Court which was dismissed vide order dated 27.9.2013 in the following terms:

> "Heard learned counsel for the petitioner. We do not see any cogent reason to interfere with the impugned judgement and order in these petitions. The special leave petitions are dismissed. However. We clarify that the State is entitled to make the transfer as per the transfer policy adopted by the State for the particular time and particular department."

21. Tested on the touchstone of aforesaid exposition of law, it can safely be concluded that the transfer of the petitioner cannot withstand judicial scrutiny as the basis and foundation of the transfer happens to be the various complaints made by the public representatives against the petitioner. The transfer has been made on the basis of the U.O. note issued by the office of Hon'ble Chief Minister and whereas, no proposal for transfer has been originated from the concerned administrative department. The impugned transfer order, therefore, is not sustainable being arbitrary and vitiated because the same has been issued under dictation.

22. The learned Advocate General would, however, contend that irrespective of the U.O. Note, the petitioner cannot have any grievance with regard to his transfer since there were numerous complaints against him and therefore, the employer has acted well within its rights to transfer such an employee.

23. We are afraid that this submission cannot be countenanced because it only leads to one inference that order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on irrelevant ground i.e. on the allegations made against the petitioner in the complaints. It is one thing to say that employer is entitled to pass an order of transfer in administrative exigency but it is another thing to say that order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set-aside being wholly illegal. (Ref: **Somesh Tiwari** vs. **Union of India and others (2009) 2 SCC 592).**

24. There is yet another reason why the aforesaid submission of the respondents cannot be accepted. In terms of the judgement passed by this court in **Amir Chand's** case (supra), the complaints as alleged to have been received against the petitioner by the respondents from various representatives were required to be sent to the head of the administrative department, who in turn was required to verify the same and if after associating the petitioner, the complaints were found to be true then alone could the petitioner have been

ordered to be transferred. Admittedly, this exercise has not been undertaken by the administrative department i.e. the respondents herein. Therefore also the order of transfer cannot be sustained having been passed capriciously and arbitrarily.

25. If the petitioner has been indulging in any conduct not befitting his office and contrary to public interest, the respondents- authority should have conducted an inquiry and imposed appropriate penalty as would be permissible under the rules. But then the transfer at the behest of the members of the public without any inquiry is not only against the interest of the concerned government servant but is also against public interest. It tends to destroy the morale of government servant and the same is otherwise illegal. Such a transfer can not get the seal of approval from this court.

26. Lastly, the learned Advocate General has strenuously contended that petitioner right from the date of his entry in service has remained posted in and around Chamba, which is his home district and for this purpose he has placed on record the details of up to date posting of the petitioner, which are as under:-

1.	7.10.1988 (date of appointment) to 11/1992 at Horticulture Extension Centre Kowas, Dev. Block Pangi District Chamba.
2.	11/1992 to 1/1997 HEC Chaklu District Chamba
3.	2/1997 to 11/2001 HEC Salooni District Chamba
4.	11/2001 to 03/2005 HEC Sundla District Chamba.
5.	03/2005 to 8/2007 HEC Jeera District Chamba
6.	8/2007 to 6/2008 Dev. Block Noorpur District Kangra.
7.	6/2008 to till date HEC Sundla District Chamba.

27. Such submission that too at the instance of the State cannot be maintained because it is settled law that an employee has no choice in the matters of posting and transfer, which powers are within the exclusive domain of the employer. Even if the petitioner has remained in and around his home district Chamba, it was only because the respondents desired so by posting him at such places. The petitioner of his own could not have joined at a station of his choice.

28. This case reflects a dismal state of affairs where despite repeated directions passed by this court from time to time over the last three and half decades, the respondents have shown scant regard to such directions and have not cared to follow the mandate of law in matters of transfer. This court has repeatedly held that any person has a right to make a complaint against an employee regarding his conduct to his superiors including the Hon'ble Chief Minister and even request for his transfer. It is, however, only for the competent authority i.e. administrative department to consider the request and take appropriate action in accordance with law. But when the administrative authorities do not perform their duties and resultantly fair play is denied by the administrative authorities, people turn up to the courts complaining of such blatant case of administrative excess compelling the courts to intervene in such matter. Once the State government has framed a transfer policy, then it is its duty to implement the same because the very purpose of framing a policy is to strike a balance between the rights of the employees and the State in matters relating to transfer so that the same is not misused.

29. For the reasons stated above, the writ petition is allowed. Accordingly, the impugned order of transfer dated 3.8.2014 is quashed and set-aside. However, the respondents are at liberty to transfer the petitioner in accordance with law. All pending application(s) , if any, also stands disposed of.

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

Ram Lal son of Sh Buaditta ....Applicant.
Vs.
State of Himachal Pradesh. ....Non-applicant.

Cr.MP(M) No.1397 of 2014.
Order reserved on:17.12.2014.
Date of Order: December 31,2014.

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 354A, 306, 506 read with Section 34 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused during the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- allegations against the applicant are heinous and grave in nature- applicant had abetted the deceased to commit suicide – investigation is at initial stage, and allowing application will affect the investigation adversely- bail application dismissed. (Para- 7 and 8)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration, AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

For the applicant: Mr.Anuj Gupta, Advocate.
For the respondent: Mr. M.L.Chauhan, Addl. Advocate General with Mr.J.S. Rana Asstt. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana Judge.

Present application filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail qua FIR No. 188 of 2014 dated 17.10.2014 registered under Sections 354A, 306, 506 read with Section 34 of the Indian Penal Code at Police Station Indora District Kangra HP.

2. It is pleaded that applicant is innocent and he has been falsely implicated in the present case. It is pleaded that only allegation against the applicant is that applicant asked deceased Sunita Devi to stay away from his son. It is pleaded that applicant has also filed a complaint against deceased to the Pardhan Gram Panchayat Mohtali which was further sent to Police Station Damtal. It is pleaded that no recovery is to be effected from the applicant. It is pleaded that applicant will join investigation of the case. It is pleaded that applicant will not tamper with prosecution evidence. It is pleaded that applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case. It is pleaded that applicant is the only bread earner in his family. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report in connection with FIR No. 188 of 2014 dated 17.10.2014 registered under Sections 354A, 306, 506 read with Section 34 IPC at Police Station Indora District Kangra HP filed. There is recital in police report that on dated 17.10.2014 at about 9.30 AM deceased Sunita Devi informed police officials by way telephone that she would burnt herself because she was aggrieved from the act and conduct of co-accused Deepak and his

father co-accused Ram Lal. There is recital in police report that police officials went to the house of deceased Sunita and Sunita Devi was found burnt. There is recital in police report that deceased Sunita Devi was brought for her medical treatment to CHC Indora and statement of deceased Sunita Devi was recorded under Section 154 Cr.PC. There is recital in police report that deceased Sunita Devi was married with Ram Kumar in the year 2006. There is recital in police report that husband of deceased Sunita Devi is working at Soudi Arabia and deceased used to reside along with two children in her matrimonial house. There is recital in police report that co-accused Deepak son of Ram Lal who is driver by profession used to tell deceased Sunita Devi when Sunita Devi was alone at her matrimonial house to accept relations with co-accused Deepak otherwise he would defame deceased Sunita Devi in the society. There is recital in police report that deceased had also narrated entire facts to her elder sister-in-law but to save reputation of family in the society no further action was taken. There is recital in police report that co-accused Deepak had threatened the deceased that he would defame the deceased in society in such a manner that deceased would not be in a position to live in the society. There is recital in police report that co-accused Deepak also used to threat deceased Sunita Devi to kill her. Case under Sections 354A, 306, 506 read with Section 34 IPC was registered and investigation was conducted by SI Ashok Kumar. MLC of deceased Sunita Devi obtained and site plan was also prepared. There is recital in police report that articles lying on the spot were sent for chemical examination and statements of the prosecution witnesses were recorded under Section 161 Cr.PC. There is recital in police report that deceased died on dated 31.10.2014 in the hospital. There is recital in police report that post mortem of deceased Sunita Devi was conducted. There is recital in police report that diary of deceased Sunita Devi took into possession. There is recital in police report that deceased Sunita Devi had committed suicide due to mental harassment of co-accused Ram Lal and his son Deepak. There is recital in police report that diary of deceased Sunita Devi has been sent to RFSL Dharamshala for expert opinion. There is recital in police report that there is resentment in the locality. Prayer for rejection of anticipatory bail application sought.

4. Following points arise for determination in the present bail application:

(1) Whether anticipatory bail application filed under Section 438 of the Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of bail application.

(2) Final Order.

5. Court heard learned Advocate appearing on behalf of applicant and learned Additional Advocate General appearing on behalf of State and also perused entire record carefully.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case and on this ground present anticipatory bail application be allowed is rejected being devoid of any force for the reason hereinafter mentioned. Fact whether applicant is innocent or not cannot be decided at this stage. Same fact will be decided when the case shall be decided on merits by learned trial Court after giving due opportunity of hearing to both the parties.

7. Another submission of learned Advocate appearing on behalf of the applicant that any condition imposed by the Court will be binding upon the applicant and applicant had also made a complaint against deceased Sunita Devi to Pardhan Gram Panchayat Mohtali and applicant is the only bread earner in his family and no recovery is to be effected from the applicant and on this ground anticipatory bail application be allowed is rejected being devoid of any

force for the reason hereinafter mentioned. 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) 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.*** In the present case allegations against the applicant are very heinous and grave in nature. Applicant had abetted the deceased to commit suicide when she was under prime age of her life. The fact whether there is direct nexus between abetment and suicide cannot be decided at this stage. Same fact will be decided when the case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties. Court is of the opinion that if anticipatory bail is granted to the applicant at this stage then investigation of the case will be adversely effected. Court is also of the opinion that if anticipatory bail application is allowed at this stage then interest of the State and general public will also be adversely effected.

8. Submission of learned Additional Advocate General appearing on behalf of the State that if the applicant is released on bail at this stage then applicant will induce and threat the prosecution witness is accepted for the reason hereinafter mentioned. There is apprehension in the mind of the Court that if the applicant is released on anticipatory bail at this stage then applicant will induce and threat the prosecution witness. In view of the fact that investigation is in initial stage of case and in view of the fact that allegations against the applicant are very serious and grave in nature it is not expedient in the ends of justice to release the applicant on anticipatory bail at the initial stage of the investigation. Court is of the opinion that custodial investigation of the applicant is essential in the present case for proper investigation. Hence Point No.1 is answered in negative.

Final Order

9. In view of my findings upon point No.1 present anticipatory bail application filed under Section 438 of the Code of Criminal Procedure 1973 by the applicant is rejected. Observation made hereinabove is strictly for the purpose of deciding the present bail application and it shall not effect merits of case in any manner. All pending application(s) if any are also disposed of.

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

Suman Sharma .....Petitioner

Versus

Union of India and others ....Respondents

CWP No. 3736/2009.
Judgment reserved on 16.12.2014.
Pronounced on: 31 .12.2014

Constitution of India, 1950- Article 226- Petitioner was appointed as TGT (Mathematics) for a period of two years- period of probation was extendable by another year at the discretion of the competent authority- period of probation was extended up to 2.4.2007 and thereafter it was extended for one year up to 31.3.2008- a show cause notice was served upon the petitioner- petitioner filed a reply to the notice but her services were terminated vide order dated 4.7.2008- it

was contended that petitioner was allowed to continue after probation and, therefore, she is deemed to be confirmed – petitioner further contended that her probation period could be extended by only one year and further extension of probation after one year was not permissible- held, that the services of a person can be confirmed by an order in writing- mere continuation beyond the probation period will not amount to deemed confirmation- petition dismissed.

(Para-11 to 26)

Cases referred:

Madhya Pradeshs Thru. Registrar and others v. Satya Narayan Jhavar reported in AIR 2001 SC 3234

The Commissioner of Police, Hubli and another v. R.S. More reported in AIR 2003 SC 983

Kendriya Vidyalaya Sangathan vs. Arunkumar Madhavrao Sinddhaye and another reported in (2007) 1 SCC 283

Kazia Mohammed Muzzammil vs. State of Karnataka and another reported in (2010) 8 SCC 155

Rajesh Kohli v. High Court of J & K & Anr., reported in 2010 AIR SCW 6877

Mohd. Salman v. Committee of Management & Ors., reported in 2012 AIR SCW 2527

Head Master, Lawrence School Lovedale vs. Jayanthi Raghu and another reported in (2012) 4 SCC 793

State Bank of India and Ors v. Palak Modi and Anr., reported in 2013 AIR SCW 76

For the petitioner:	Mr. Dilip Sharma, Sr. Advocate with Mr. Manish Sharma, Advocate.
For the respondents:	Mr.Ashok Sharma, Assistant Solicitor General of India.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Petitioner, by the medium of this writ petition has questioned the judgment and order made by the Central Administrative Tribunal, Chandigarh Bench (Circuit at Shimla) (hereinafter referred to as "the Administrative Tribunal", for short, in O.A. No. 475/HP/2008 dated 10.8.2009, whereby the O.A. filed by the petitioner came to be dismissed, hereinafter referred to as "the impugned judgment", for short, on the grounds taken in the writ petition.

2. A brief narration of the conspectus of facts are that the petitioner came to be appointed as TGT (Mathematics), vide appointment letter dated 5.3.2004, on probation, for a period of two years, as per the stipulations contained in the appointment order, which was extendable by another year, at the discretion of the competent authority. The petitioner, consequent upon his appointment, submitted his joining, on 2.4.2004. Thereafter the petitioner was transferred to Jawahar Navodaya Vidyalaya Kunihar, District Solan in the month of May, 2004. The competent authority, after noticing the work, conduct and performance of the petitioner, extended the period of probation upto 2.4.2007 vide order dated 24.5.2006. Thereafter, again, after noticing the work and conduct of the petitioner, the probation period of the petitioner was extended for a period of one year upto 31.3.2008, vide communication dated 28.12.2007.

3. It is worthwhile to mention here that before extension was granted to the petitioner on 24.5.2006 upto 2.4.2007, he was served with a show-cause notice dated 13.9.2004 and was asked to submit written explanation within ten days from the receipt of the notice. The petitioner had filed the reply to the said show-cause notice. After considering the reply and

other attending circumstances, the services of the petitioner came to be terminated by the respondents, vide termination order dated 4.7.2008, in terms of the Central Civil Services (Temporary Services) Rules, 1965, occupying the field at the relevant point of time.

4. The petitioner questioned the said termination order by the medium of O.A before the Administrative Tribunal, as stated supra.

5. The respondents filed reply to the Original Application before the Tribunal and the petitioner also filed rejoinder to the same. After examining the pleadings of the parties, documents and the law applicable, the Administrative Tribunal dismissed the O.A. vide order dated 10.8.2009 which is subject matter of the writ petition in hand.

6. Admittedly, the petitioner has not completed his first probation period of two years, in terms of the appointment order satisfactorily. It is apt to reproduce para 2 of the said appointment order herein:

> *"2.You will be on probation for a period of two years from the date of appointment extendable by another year at the discretion of the competent authority. Failure to complete the period of probation to the satisfaction of the competent authority or found unsuitable for the post during the probation period, will render you liable to discharge from service at any time without notice and without assigning any reason thereto."*

7. The period of probation of the petitioner was extended to one year upto 2.4.2007, vide order dated 24.5.2006. It is profitable to reproduce relevant portion of the said order herein.

> *"Consequent upon the recommendations of the Departmental Promotion Committee, the probation period of Ms. Suman Sharma, TGT (Maths), JNV Kunihar, Distt. Solan (HP) is hereby extended for one year i.e. upto 2.4.2007 as her performance has not been found satisfactory. During this period the teacher is advised to improve her work and conduct. This is also a final chance being given to her for improving her work and conduct."*

8. The said probation period was again extended vide order dated 28.12.2007, till 31.3.2008 and reasons were recorded for such extension, the relevant portion of the said order reads as under:

> *"Consequent upon the recommendations of the Departmental Promotion Committee, the probation period of Sh. Suman Sharma, TGT (Maths), JNV Kunihar, Distt. Solan (HOP) now at JNV Sarol, Distt. Chamba (HP) is hereby extended upto 31.3.2008 as his performance has not been found satisfactory. During this period the teacher is advised to improve his work and conduct. This is also a final chance being given to him for improving his work and conduct."*

9. The learned counsel for the petitioner vehemently argued that the services of the petitioner came to be terminated on 4.7.2008 and on that date, the period of probation of the petitioner was over, in view of the fact that his probation was only extended upto 31.3.2008 and he was allowed to continue after probation. It is a deemed confirmation and the services of the petitioner could not have been discharged, without full-dress regular enquiry.

10. The argument advanced by the learned counsel for the petitioner appears to be attractive but is devoid of any force, for the reasons recorded hereinafter.

11. The questions to be determined in this writ petition are whether it is a case of deemed confirmation or the order of confirmation was required in writing and whether the petitioner was still on probation.

12. The petitioner has specifically averred in para 13 (l) of the petition that the 2nd order of extension of period of probation (Annexure A-3 with P2) is wrong as he continued after completion of probation period and it is deemed confirmation. It is apt to reproduce para 9 (l) of the petition herein:

> *"9(l)Because the petitioner was appointed vide appointment letter dated 05.03.2004, therefore, the probation period of the petitioner for the first two years ended on 04.03.2006. The probation period of the petitioner was extendable for further one year and that period also ended on 03.03.2007. The office order (Annexure A-3 with P-2) dated 28.12.2007 extending the period of the application for probation till 31.03.2008 was, therefore, unauthorized and without competence. There was no power vested with the authority to extend the probation period beyond 04.03.2007. The petitioner continued serving the respondents beyond the extendable period of probation. There was no communication with the respondents even after 31.03.2008. The communication dated 28.12.2007 has been issued after the probation period was already completed by the petitioner on 04.03.2007 after a lapse of 9 months. Assuming that the probation period of the petitioner is to commence from the date of joining the service by the petitioner, then also the probation period of the petitioner (even extended period also) has come to an end on 01.04.2007. In this view of the matter the petitioner was deemed to have been confirmed with effect from 02.04.2007 and the services of the petitioner are not liable to be terminated thereafter. The probation period of the petitioner has come to an end on 02.04.2007, therefore, termination of the petitioner is invalid. It is well settled law that termination after the expiry of maximum period up to which probation could be extended is invalid, illegal and unconstitutional inasmuch as the employee is deemed to have been confirmed after the expiry of the probation period. It is brought into the kind notice of this Hon'ble Court that maximum probation period in case of the category of petitioner is two years which is further extendable for one year only. There is no power vested with the authorities in the rules to extend the probation period for another year. Therefore, after the expiry of the period of probation of the petitioner, the petitioner is deemed to have been confirmed and there is no authority vested with the respondents to keep the petitioner under probation after the expiry of the period of probation. In case the respondents have failed to pass any further order confirming the petitioner, the petitioner cannot be penalized for this. The petitioner has been deemed to have been confirmed as the petitioner has been allowed to continue in service beyond the period of probation. In this view of the matter the petitioner was confirmed employee for all intents and purposes and as such could not be terminated under the provisions of the CCS (Temporary Service) Rules, 1965, which are not applicable in the present case."*

13. The respondents have specifically replied the same in preliminary submissions. It is apt to reproduce preliminary submissions and relevant portion of reply on merits, as under:

> *"1.That by way of OA No.475/HP/2008 titled Suman Sharma vs. UOI, respondent/applicant approached the ld. Tribunal below stating therein that his services cannot be terminated under rules 5(1) of CCS (Temporary Service) Rules, 1965 because after completion of three years probation period as per terms and condition of appointment he is deemed to have been confirmed and his services cannot be terminated without following due process as per law. It is humbly submitted that applicant/respondent cannot be automatically deemed to have been confirmed unless some specific orders are passed by the competent authority for the confirmation of the employee. In catena of cases Hon'ble Apex Court as well as various High Courts have held that so long as specific order of confirmation is not passed after expiry of period of probation, a probationer shall continue and remain in service as probationer only.*
>
> *2.That in the present case respondent/applicant joined services with the respondent on 2.4.2004 on probation. During his probation period he was not found to be good teacher and instead of teaching the classes assigned to him he indulged in uncalled for activities. It is humbly submitted that whenever authorities asked him to improve, he leveled/filed false allegations/complaints against the Principal of School. It is ample clear from the records available with the school authorities that number of advisory notes were issued to respondent/applicant by the School Administration advising him to improve his working. Even when his probation period was extended for another one year Memorandum were issued to him. Record available with the school authorities would go to show that during year 2006 his work was also inspected by inspecting team and one of the member of the inspecting team namely Shri P.K. Puri, Principal Jawahar Navodyalaya, Nahan adversely commented against the working of respondent/applicant. Thereafter even after his transfer to Jawahar Navodya Vidyalya, Sarol, Distt. Chamba, working of respondent/applicant did not improve and Principal of the concerned School found the work of the applicant below average. Besides this, petitioner/applicant remained on 84 days leave during probation period besides availing the summer vacation and other Gazetted Holidays.*
>
> *3.That by way of O.A. filed before ld. Tribunal below, respondent/applicant alleged that he is being harassed by the respondents but not even a single instance has been quoted to substantiate his allegations which regard to harassment. To the contrary, there is ample evidence on record that school authorities have afforded him reasonable opportunities to improve his working. But instead of improving, petitioner/applicant started filing false complaints against the Principal JNV, Kunihar as well as answering respondent No.4. It is evident from the record that whenever the Principal of the concerned school tried to point out the deficiencies in the working of petitioner/applicant he has filed baseless complaints*

against the authorities concerned. In view of the fact that respondent/applicant was on probation and during probation he has not worked upto the satisfaction of the employer i.e.School Authorities, services of the petitioner/applicant has been rightly terminated by the respondents. Hence, the present petition deserves to be dismissed.

4.That the order passed under Rule 5(1) of CCS (TS) Rules, 1965 is appealable and appeal can be filed to next higher authority within a period of three months. But in the present case respondent/applicant without availing the remedy of appeal approached the ld. Tribunal below by way of O.A., hence petition deserves to be dismissed.

5.That the impugned order dated 10.8.2009 passed by the ld. Tribunal below in OA No.475/HP/2008 is based on correct appreciation of law and facts and same deserves to be upheld by this Hon'ble Court."

"……. ……. It is further submitted that petitioner/applicant was afforded number of opportunities by the replying respondent to improve his working but the petitioner/applicant instead of making any improvement in his work and conduct indulged in making false and frivolous complaints against the authorities. There is ample evidence on record to show that on number of accassions petitioner/applicant has remained absent from the duty without due permission from the quarter concerned. Replying respondents have already placed on record number of documents by way of filing written statement before the ld. CAT showing the misconduct of the petitioner/applicant and the same are not being reproduced for the sake of brevity. Very perusal of the documents on record would go to show that petitioner/applicant never performed his duties with sincerity, rather he took his duties very casually and failed to do justice to the number of students to whom he was supposed to teach. Replying respondent humbly submits that in case such teachers are allowed to continue to work is prestigious institutions like of Jawahar Navodya Vidyalayas, run by Ministry of HRD, Govt. of India, great injustice would be caused to the number of students studying in such schools. Hence, present petition filed by petitioner/applicant deserves to be quashed and set aside."

14. The Administrative Tribunal has discussed in detail at pages 7 and 8 of the judgment that in terms of Rule 5, mere expiry of initial period of probation is not a deemed confirmation because express order of confirmation was to be made in view of the said rule. It is profitable to reproduce relevant paras at pages 7 and 8 of the said judgment herein.

"(viii) A direct recruit who holds a lien on a post under the Central Government or any State Government or in the NVS may, while on probation, be reverted to such post at any time on grounds of any of the circumstances specified in sub-rule(iii) above.

Thus, as per Rule 5 aforesaid, a probationer can be discharged from service if his work and conduct is not found satisfactory. Even under Rule 5 of the CCS (TS)

Rules, services of a templorary employee can be dispensed with by giving him one month's notice or salary in lieu thereof on account of unsatisfactory work.

The applicant was on probation of two years. His probation was extended not once but twice. The probation has to be completed successfully and followed by an order in this regard. Satisfactory performance of work is another condition precedent. There cannot be automatic confirmation on expiry of prescribed period of probation as has been held by the Apex Court in the case of Shri Jai Kishan vs. Commissioner of Police & another (supra), wherein Dharm Singh's case (supra) was also considered. This was also the view taken by the Apex Court in Municipal Corporation, Raipur vs. Ashok Kumar Misra- AIR 1991 SC 1402 & Registrar, High Court of Gujarat and another vs. C.G. Sharma, AIR 2005 SC 344. The following observations made by the Apex Court in the aforesaid case are relevant to be noticed here:

"Exercise of the power to extend the probation is hedged with the existence of the rule in that regard followed by positive act of either confirmation of the probation or discharge from service or expiry of the period of probation. If the rules do not empower the period, or where the rules are absent about confirmation or passing of the prescribed test for confirmation or probation and inaction for a very long time may lead to an indication of the satisfactory completion of probation. However, rule 8 expressly postulates that the period of probation is subject to extension by order in writing for another period of one year. Passing the prescribed examinations and successful completion of probation and passing of an express order or confirmation are made condition precedent for conformation of probation under R.8 Mere expiry of the initial period of probation therefore does not automatically have the effect of deemed confirmation. An express order in that regard only confers status of an approved probationer. Before confirmation, the appointing authority is empowered to terminate the services of the petitioner by issuing one month's calendar notice in writing and on expiry thereof the service stands terminated without any further notice. As such the order terminating the services of a probationer was passed within three months from the date of expiry of original two years period of probation and within one year's period, the question of conducting an inquiry under the Classification, Control and Appeal (Rules) after giving an opportunity and that too for specific charges would not arise."

15. The Administrative Tribunal has also discussed what was the reasons for granting extension of probation period to the petitioner, which has been reproduced hereinabove and also that the authorities have rightly terminated the services of the petitioner.

16. The apex Court has also dealt with this issue in various judgments and held that order of confirmation should be made in writing and after expiry of probation period, it cannot be said that it is deemed confirmation.

17. In case titled *High Court of Madhya Pradeshs Thru. Registrar and others v. Satya Narayan Jhavar* reported in *AIR 2001 SC 3234,* it has been held as under:

> *"35. In the case of Dayaram Dayal (supra), a two Judge Bench of this Court was considering a case covered by Rule 24 of the Rules, in which the incumbent was appointed as Civil Judge Class II in M.P. Subordinate Judicial Service on 22nd Oct. 1985 and after completing six months training, he was put on probation for two years which period was completed on 22nd May, 1988. On 2nd March, 1990, he was placed under suspension pending some charges and in the year 1991 after inquiry, punishment of stoppage of two annual increments with cumulative effect was awarded. There were certain adverse remarks in ACRs between the years 1987-88 and 1992-93. On 3rd May, 1992, the Full Court having not found him fit for confirmation, deferred the matter to give one more opportunity. In the year 1993 again, the High Court did not find him fit for confirmation as such his services were terminated by paying one month's salary in lieu of notice as required under Rule 24. When the said order was challenged in a writ application, the same was dismissed and order of dismissal was affirmed in appeal. Thereafter, when the matter was challenged before this Court, the appeal was allowed, judgments of the High Court were set aside and order of termination was quashed holding that the incumbent would be deemed to have been confirmed on the expiry of four years maximum period of probation prescribed under the Rules following Constitution Bench decision of this Court in the case of Dharam Singh (supra) where Rules did not require an incumbent to pass any test or fulfil any other condition before confirmation, as noticed by the Constitution Bench itself in that case which goes to show that if the Rules would have required a person to pass any test or fulfil any other condition before confirmation. It was not possible to draw an inference that merely because an employee was allowed to continue on the post up on completion of the maximum period of probation, he was confirmed by implication. There the Court proceeded on the facts of that case, which do not show any assessment of work and conduct of the probationer being made and he being not found fit for confirmation by the competent authority during the period of probation. In the absence of any opinion formed after considering the performance of probationer, it was presumed in that case that there being nothing adverse against the officer, there was no compelling reason not to confirm him on the post inasmuch as there was no plea on behalf of the State that his work and conduct was not satisfactory. The Rules did not require any condition of assessment of work at the end of extended period of probation or passing of departmental examination. In the said case, order of termination was issued more than two years after the expiry of maximum period of probation which was completed on 1st Oct. 1960 and the order of termination was issued in 1963 without any assessment of his performance."*
>
> *36. In the case on hand, correctness of the interpretation given by this Court to Rule 24 of the Rules in the case of Dayaram Dayal (supra) is the bone of contention. In the*

aforesaid case, no doubt, this Court has held that a maximum period of probation having been provided under sub-rule (1) of Rule 24, if a probationer's service is not terminated and he is allowed to continue thereafter. It will be a case of deemed confirmation and the sheet anchor of the aforesaid conclusion is the Constitution Bench decision of this Court in the case of Dharam Singh (supra). But, in our considered opinion in the case of Dayaram Dayal (supra) Rule 24 of the Rules has not been interpreted in its proper perspective. A plain reading of different sub-rules of Rule 24 would indicate that every candidate appointed to the cadre will go for initial training for six months whereafter he would be appointed on probation for a period of 2 years and the said period of probation would be extended for a further period not exceeding 2 years. Thus, under sub-rule (1) of Rule 24 a maximum period of 4 years' probation has been provided. The aforesaid sub-rule also stipulates that at the end of the probation period the appointee could be confirmed subject to his fitness for confirmation and to have passed the departmental examination, as may be prescribed. In the very sub-rule, therefore, while a maximum period of probation has been indicated, yet the question of confirmation of such a probationer is dependent upon his fitness for such confirmation and his passing of the departmental examination by the higher standard, as prescribed. It necessarily stipulates that question of confirmation can be considered at the end of the period of probation, and on such consideration, if the probationer is found suitable by the Appointing Authority and he is found to have passed the prescribed departmental examination then the Appointing Authority may issue an order of confirmation. It is too well settled that an order of confirmation is a positive act on the part of the employer which the employer is required to pass in accordance with the Rules governing the question of confirmation subject to a finding that the probationer is in fact fit for confirmation. This being the position under sub- rule (1) of Rule 24, it is difficult for us to accept the proposition, broadly laid down in the case of Dayaram Dayal (supra) and to hold that since a maximum period of probation has been provided thereunder, at the end of that period the probationer must be held to be deemed to be confirmed on the basis of the judgment of this Court in the case of Dharam Singh (supra).

37-38.... ....

39. Apart from sub-rule (I) of Rule 24 of the Rules, the effect of sub-rule (3) may also be considered. Under sub-rule (3), if a probationer has been found unsuitable for the service during the period of probation or he has failed to pass the prescribed departmental examination then the Governor at any time thereafter may dispense with his service. The power for dispensing with services has been conferred upon the Governor to be exercised at any time after the period of probation if the probationer is found unsuitable or if he has failed to pass the prescribed departmental examination. If the interpretation given by this Court in the case of Dayaram Dayal (supra) to sub-rule (1) of Rule 24 is held to be correct then this power of the Governor under sub-rule

(3) would become otiose inasmuch as a probationer would acquire a deemed confirmation on the expiry of the maximum period of probation provided in sub-rule (1). Sub-rule (3) of Rule 24, therefore, is another inbuilt provision in the Rules which can be held to be a special provision to negative the inference of deemed confirmation on the expiry of the maximum period of probation indicated in sub-rule(1), as has been observed by this Court in the case of Dayaram Dayal (supra) also and which is in conformity with the decisions of this Court in the case of Shamsher Singh (supra), Sukhbans Singh (supra), G.S. Ramaswamy (supra) and AkbarAli Khan (supra). Rule 24 on a plain grammatical meaning being given to the words used therein does not provide for a deemed confirmation on expiry of the maximum period of probation, and on the other hand it contemplates a positive order of confirmation to be passed by the Appropriate Authority, if the Authority concerned is satisfied about the fitness of the probationer for confirmation, and if the probationer has passed the departmental examination, as prescribed. Mere continuance of the probationer after considering his case of confirmation during the period of probation and finding him unsuitable for confirmation by the decision of the Full Court, by no stretch of imagination can be construed to be a confirmation by implication, as was held by this Court in the case of Dharam Singh (supra) and that can never be the intention of the Rule Making Authority. If the Full Court would not have considered the suitability of the probationer for confirmation while the probation period was continuing, the matter might have stood on a different footing."

18. In *The Commissioner of Police, Hubli and another v. R.S. More* reported in *AIR 2003 SC 983,* the apex Court in para 8 held as under:-

"8. In our view, the case at hand falls under category 3. As noticed sub-rule (2) of Rule 5 requires that a probationer shall not be considered to have satisfactorily completed the probation unless a specific order to that effect is passed. No specific order having been passed by any authority, certifying the satisfactorily completion of probation period of the respondent, has been brought to our notice. Mr. Hegde, learned counsel, submitted that no order as contemplated under sub-rule (2) of Rule 5 has been passed by the competent authority. Admittedly, the order discharging the respondent, in exercise of powers under Rule 6, has been passed after the extended period of probation was over. In our view, however, that itself would not entitle the respondent to have claimed deemed confirmation in absence of the specific order to that effect. In service jurisprudence confirmation of service on a particular post is preceded by satisfactory performance of the incumbent unless service rules otherwise prescribe. In the instant case, sub-rule (2) of Rule 5 of the Rules provides that unless there is a specific order that the probationer has satisfactorily completed the period of probation, he shall not be entitled to be deemed to have satisfactorily completed the probation by reason of his being continued in service beyond the extended period of probation. The High Court has failed to consider this important aspect of the matter,

resulting in miscarriage of justice. In our view, the High Court fell into error resulting in miscarriage of justice."

19. The apex Court in *Kendriya Vidyalaya Sangathan vs. Arunkumar Madhavrao Sinddhaye and anothe*r reported in *(2007) 1 SCC 283*, in paras 11 and 17 held as under:

"11. The question which arises for consideration is, whether the order of termination of services of the respondent had been passed by way of punishment or it had been passed in accordance with the conditions mentioned in the appointment order by which the respondent had been appointed on a temporary post of Physical Education Teacher. If it is found that the termination of services was by way of punishment, another question may arise whether a formal departmental enquiry was held prior to the passing of termination order and whether the respondent was given adequate opportunity to defend himself in the said enquiry. It will be seen that the complaint made by Capt. B.K. Balasubramanyam about forcing his son Master V.K. Srinivasalu to do six rounds (4 Kms.) around the school when he was having chest pain and was unwell and further forcing him to do PT and other exercises in spite of advice of the doctor and also giving him beating was forwarded by the Principal to the Regional Office of Kendriya Vidyalaya Sangathan, Bombay. The Assistant Commissioner of the Kendriya Vidyalaya Sangathan asked the Principal to submit a report along with original statements of the students, who had been subjected to beating by the respondent. The Principal was not an eye witness to the incident relating to Master V.K. Srinivasalu and also of the corporal punishment which was awarded by the respondent to the other students. Therefore, in order to ascertain the complete facts it was necessary to make enquiry from the students concerned. If in the course of this enquiry the respondent was allowed to participate and some queries were made from the students, it would not mean that the enquiry so conducted assumed the shape of a formal departmental enquiry. No articles of charges were served upon the respondent nor were the students asked to depose on oath. The High Court has misread the evidence on record in observing that articles of charges were served upon the respondent. The limited purpose of the enquiry was to ascertain the relevant facts so that a correct report could be sent to the Kendriya Vidyalaya Sangathan. The enquiry held can under no circumstances be held to be a formal departmental enquiry where the non-observance of the prescribed rules of procedure or a violation of principle of natural justice could have the result of vitiating the whole enquiry. There cannot be even a slightest doubt that the Assistant Commissioner, Kendriya Vidyalaya Sangathan, Bombay Region, terminated the services of the respondent in accordance with the terms and conditions mentioned in his appointment order which expressly conferred power upon the appointing authority to terminate the respondent's services by one month's notice without assigning any reasons. The services of the respondent were, therefore, not terminated by way of punishment.

12-16..... ....

17. As shown above, the nature of enquiry conducted against the respondent was merely a preliminary or fact finding enquiry and no formal full scale departmental enquiry had been conducted against the respondent. In fact, the enquiry officer had himself recommended that disciplinary action be taken against the respondent. However, the authorities chose not to hold a disciplinary enquiry against the respondent and did not serve him with any article of charges or take any further steps in that regard. Instead they chose to exercise power under the terms and conditions of the appointment order. The termination order is wholly innocuous and does not cast any stigma upon the respondent nor it visits him with any evil consequences. The High Court seems to have proceeded on a wholly wrong basis and has treated the enquiry which was only a preliminary or fact finding enquiry into a regular disciplinary enquiry, which was not the case here. In these circumstances the judgment of the High Court is wholly erroneous in law and has to be set aside."

20. Same principles of law have been laid down by the apex Court in *Kazia Mohammed Muzzammil vs. State of Karnataka and another* reported in *(2010) 8 SCC 155*. It is apt to reproduce paras 19,20,33 and 35 of the said judgment herein:

"19. Having discussed in some elaboration the conduct of the appellant as well as his antecedents, now we proceed to examine the merits of the legal controversy raised in the present case on behalf of the appellant in relation to `deemed confirmation'. The `deemed confirmation' is an aspect which is known to the service jurisprudence now for a considerable time. Both the views have been taken by the Court. Firstly, there can be `deemed confirmation' after an employee has completed the maximum probation period provided under the Rules where after, his entitlement and conditions of service are placed at parity with the confirmed employee. Secondly, that there would be no `deemed confirmation' and at best after completion of maximum probation period provided under the Rules governing the employee, the employee becomes eligible for being confirmed in his post. His period of probation remains in force till written document of successful completion of probation is issued by the Competent Authority.

20. Having examined the various judgments cited at the bar, including that of all larger Benches, it is not possible for this Bench to state which of the view is the correct enunciation of law or otherwise. We are of the considered opinion, as to what view has to be taken, would depend upon the facts of a given case and the relevant Rules in force. It will be cumulative effect of these two basics that would determine the application of the principle of law to the facts of that case. Thus, it will be necessary for us to refer to this legal contention in some elucidation.

21-32.... ....

33. We have already noticed that two views are prevalent. Primarily, the Court has taken the diametrical opposite view. One which accepts the application of the deemed confirmation after the expiry of the prescribed period of

probation, while the other taking the view that it will not be appropriate to apply the concept of deemed confirmation to the officers on probation as that is not the intent of law. In our opinion, the rules and regulations governing a particular service are bound to have greater impact on determining such question and that is the precise reason that we have discussed Rules 3 to 6 of the 1977 Rules in the earlier part of the judgment of this Court in Dharam Singh (AIR01213, Paras 8-9).

34. ....

35. We may refer to the following paragraphs of the judgment of this Court:

"8. The initial period of probation of the respondents ended on October 1, 1958. By allowing the respondents to continue in their posts thereafter without any express order of confirmation, the competent authority must be taken to have extended the period of probation up to October 1, 1960 by implication. But under the proviso to Rule 6(3), the probationary period could not extend beyond October 1, 1960. In view of the proviso to Rule 6(3), it is not possible to presume that the competent authority extended the probationary period after October 1, 1960, or that thereafter the respondents continued to hold their posts as probationers.

9. Immediately upon completion of the extended period of probation on October 1, 1960, the appointing authority could dispense with the services of the respondents if their work or conduct during the period of probation was in the opinion of the authority unsatisfactory. Instead of dispensing with their services on completion of the extended period of probation, the authority continued them in their posts until sometime in 1963, and allowed them to draw annual increments of salary including the increment which fell due on October 1, 1962. The rules did not require them to pass any test or to fulfil any other condition before confirmation. There was no compelling reason for dispensing with their services and re-employing them as temporary employees on October 1, 1960, and the High Court rightly refused to draw the inference that they were so discharged from services and re-employed. In these circumstances, the High Court rightly held that the respondents must be deemed to have been confirmed in their posts. Though the appointing authority did not pass formal orders of confirmation in writing, it should be presumed to have passed orders of confirmation by so allowing them to continue in their posts after October 1, 1960. After such confirmation, the authority had no power to dispense with their services under Rule 6(3) on the ground that their work or conduct during the period of probation was unsatisfactory. It follows that on the dates of the impugned orders, the respondents had the right to hold their posts. The impugned orders deprived them of this right and amounted to removal from service by way of punishment. The removal from service could not be made without following the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 and without conforming to the constitutional requirements of

Article 311 of the Constitution. As the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 was not followed and as the constitutional protection of Article 311 was violated, the impugned orders were rightly set aside by the High Court."

21. The apex Court in *Rajesh Kohli v. High Court of J & K & Anr.*, reported in *2010 AIR SCW 6877* held as under:

"23. In the present case, the order of termination is a fall out of his unsatisfactory service adjudged on the basis of his overall performance and the manner in which he conducted himself. Such satisfaction even if recorded that his service is unsatisfactory would not make the order stigmatic or punitive as sought to be submitted by the petitioner. On the basis of the aforesaid resolution, the matter was referred to the State Government for issuing necessary orders.

24. ....

25. The aforesaid submission of the petitioner is devoid of any merit in view of the fact that since the petitioner was continuing in service, therefore, the case for granting increment was required to be considered which was so granted. The mere granting of yearly increments would not in any manner indicate that after completion of the probation period the full court of the High Court was not competent to scrutinize his records and on the basis thereof take a decision as to whether or not his service should be confirmed or dispensed with or whether his probation period should be extended. The High Court has solemn duty to consider and appreciate the service of a judicial officer before confirming him in service. The district judiciary is the bedrock of our judicial system and is positioned at the primary level of entry to the doors of justice. In providing the opportunity of access to justice to the people of the country, the Judicial Officers who are entrusted with the task of adjudication must officiate in a manner that is becoming of their position and responsibility towards society."

22. In *Mohd. Salman v. Committee of Management & Ors.*, reported in *2012 AIR SCW 2527*, the apex Court held as under:

"16. In the case of Kedar Nath Bahl Vs. The State of Punjab and Others reported in 1974 (3) SCC 21, this Court clearly laid down the proposition of law that where a person is appointed as a probationer in any post and a period of probation is specified, it does not follow that at the end of the said specified period of probation he obtains confirmation automatically even if no order is passed on that behalf. It was also held in that decision that unless the terms of appointment clearly indicate that confirmation would automatically follow at the end of the specified period or that there is a specific service rule to that effect, the expiration of the probationary period does not necessarily lead to confirmation. This Court went on to hold that at the end of the period of probation an order confirming the officer is required to be passed and if no such order is passed and if he is not reverted to his

substantive post, the result merely is that he continues in his post as a probationer.

17. In our considered opinion, the ratio of the aforesaid decision is also clearly applicable to the facts of the present case. In the present case, in the appointment letter issued to the appellant, it was specifically mentioned that his service would be regularised only when his performance during the probation period is found to be good/satisfactory.

18. In view of the aforesaid stipulation, so long an order is not passed holding that the service of the appellant is good and satisfactory, it could not have been held that his service could be regularised automatically by a deeming provision."

23. In case titled *Head Master, Lawrence School Lovedale vs. Jayanthi Raghu and another* reported in *(2012) 4 SCC 793*, the apex Court in paras 31 and 37 held as under:

"31. Having so observed, we are only required to analyse what the words "if confirmed" in their contextual use would convey. The Division Bench of the High Court has associated the said words with the entitlement of the age of superannuation. In our considered opinion, the interpretation placed by the High Court is unacceptable. The words have to be understood in the context they are used. Rule 4.9 has to be read as a whole to understand the purport and what the Rule conveys and means.

32. In Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others, [(1987) 1 SCC 424], it has been held as follows:-

> *"33.Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, - context is what gives the colour. Neither can be ignored. Both are important. The interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."*

33. Keeping the said principle in view, we are required to appreciate what precisely the words "if confirmed"

contextually convey. Regard being had to the tenor of the Rules, the words "if confirmed", read in proper context, confer a status on the appointee which consequently entitles him to continue on the post till the age of 55 years, unless he is otherwise removed from service as per the Rules.

34. It is worth noting that the use of the word "if" has its own significance. In this regard, we may usefully refer to the decision in S.N. Sharma v. Bipen Kumar Tiwari and others, [(1970) 1 SCC 653]. In the said case, a three-Judge Bench was interpreting the words "if he thinks fit" as provided under Section 159 of the Code of Criminal Procedure, 1898. It related to the exercise of power by the Magistrate.

35. In that context, the Bench observed thus: -

> *"5. ……..The use of this expression makes it clear that Section 159 is primarily meant to give to the Magistrate the power of directing an investigation in cases where the police decide not to investigate the case under the proviso to Section 157(1), and it is in those cases that, if he thinks fit, he can choose the second alternative. If the expression "if he thinks fit" had not been used, it might have been argued that this section was intended to give in wide terms the power to the Magistrate to adopt any of the two courses of either directing an investigation, or of proceeding himself or deputing any Magistrate subordinate to him to proceed to hold a preliminary enquiry as the circumstances of the case may require.*
>
> *6.Without the use of the expression "if he thinks fit", the second alternative could have been held to be independent of the first; but the use of this expression, in our opinion, makes it plain that the power conferred by the second clause of this section is only an alternative to the power given by the first clause and can, therefore, be exercised only in those cases in which the first clause is applicable."*

36. In State of Tamil Nadu v. Kodaikanal Motor Union (P) Ltd., [(1986) 3 SCC 91], the Court, while interpreting the words "if the offence had not been committed" as used in Section 10-A(1) of the Central Sales Tax Act, 1956, expressed the view as follows: -

> *"19. …….In our opinion the use of the expression `if' simpliciter, was meant to indicate a condition, the condition being that at the time of assessing the penalty, that situation should be visualised wherein there was no scope of committing any offence. Such a situation could arise only if the tax liability fell under sub-section (2) of Section 8 of the Act."*

> *37. Bearing in mind the aforesaid conceptual meaning, when the language employed under Rule 4.9 is scrutinised, it can safely be concluded that the entitlement to continue till the age of superannuation, i.e., 55 years, is not absolute. The power and right to remove is not obliterated. The status of confirmation has to be earned and conferred."*

24. In a recent judgment titled *State Bank of India and Ors v. Palak Modi and Anr.,* reported in *2013 AIR SCW 76*, the apex Court in paras 20 and 27 held as under:

> *"20.The ratio of the above noted judgments is that a probationer has no right to hold the post and his service can be terminated at any time during or at the end of the period of probation on account of general suitability for the post held by him. If the competent authority holds an inquiry for judging the suitability of the probationer or for his further continuance in service or for confirmation and such inquiry is the basis for taking decision to terminate his service, then the action of the competent authority cannot be castigated as punitive. However, if the allegation of misconduct constitutes the foundation of the action taken, the ultimate decision taken by the competent authority can be nullified on the ground of violation of the rules of natural justice.*
>
> *21-26. ....*
>
> *27. The use of unfair means in the evaluation test/confirmation test held by the Bank certainly constitutes a misconduct. The Bank itself had treated such an act to be a misconduct (paragraph 10 of advertisement dated 1.7.2008). It is not in dispute that the services of the private respondents were not terminated on the ground that there was any deficiency or shortcoming in their work or performance during probation or that they had failed to satisfactorily complete the training or had failed to secure the qualifying marks in the test held on 27.2.2011. As a matter of fact, the note prepared by the Deputy General Manager, which was approved by the General Manager makes it crystal clear that the decision to dispense with the services of the private respondents was taken solely on the ground that they were guilty of using unfair means in the test held on 27.2.2011. To put it differently, the foundation of the action taken by the General Manager was the accusation that while appearing in the objective test, the private respondents had resorted to copying. IBPS had relied upon the analysis made by the computer and sent report to the Bank that 18 candidates were suspected to have used unfair means. The concerned authority then sent for the chart of seating arrangement and treated the same as a piece of evidence for coming to the conclusion that the private respondents had indeed used unfair means in the examination. This exercise was not preceded by an inquiry involving the private respondents and no opportunity was given to them to defend themselves against the charge of use of unfair means. In other words, they were condemned unheard which, in our considered view, was legally impermissible."*

25. The same principles of law have been laid down by the apex Court in *University of Rajasthan and another vs. Prem Lata Agarwal* alongwith

connected matters reported in *(2013) 3 SCC 705*. It is apt to reproduce para 43 of the said judgment herein.

> *"43. The High Court, as has been stated earlier, has pressed into service Regulation 23 and relying on the same, it has held that the services of the respondents shall be deemed to have been confirmed as in the instant cases the University has never opined that their services were not satisfactory. The language of Regulation 23 is couched in a different manner. It fundamentally deals with the computation of the period of service of an employee. That apart, Regulation 23(b) uses the words "if he is confirmed". It is a conditional one and it relates to officiating services. Both the concepts have their own significance in service jurisprudence. The respondents were not in the officiating service and by no stretch of imagination, could they have been treated to be confirmed because the words "if he is confirmed" required an affirmative act to be done by the University. The High Court, as we find, has applied the doctrine of deemed confirmation to the case at hand which is impermissible. In this context, we may, with profit, refer to the decision in Head Master, Lawrence School, Lovedale v. Jayanthi Raghu and another[(2012) 4 SCC 793] wherein it has been ruled thus: -*
>
> > *"A confirmation, as is demonstrable from the language employed in the Rule, does not occur with efflux of time. As it is hedged by a condition, an affirmative or positive act is the requisite by the employer. In our considered opinion, an order of confirmation is required to be passed."*
> >
> > *Thus analyzed, the conclusion of the High Court which also rests on the interpretation of the regulations does not commend acceptation."*

26. Applying the ratio and keeping in view the facts and circumstances of the case on hand, read with the discussion made by the Administrative Tribunal, we are of the considered view that the confirmation order in writing was must and mere continuance, after expiry of probation period, cannot be said to be deemed confirmation.

27. The petitioner has not made out a case for interference by this Court, not to speak of issuance of a writ of certiorari.

28. Having said so, we find that the order of termination is legal one, needs no interference. The impugned judgment is well reasoned, speaking and legal one, is upheld. Consequently, the writ petition merits dismissal and is accordingly, dismissed.

29. With the aforesaid observations, the writ petition is disposed of along with pending applications, if any.

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

Than Singh son of Sh. Sobha Ram ....Petitioner.

Versus

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

CWP No. 910 of 2011.
Order reserved on: 26.11.2014.
Date of Order: December 31, 2014

Constitution of India, 1950- Article 226- Petitioner was appointed as Gram Panchayat Vikas Adhikari – his name was sponsored by the Department for undergoing five years degree course in B.Sc Agriculture - he was allowed study leave and he completed B.Sc Agriculture by scoring 70.1% marks- petitioner claimed that he is qualified to be appointed as Agricultural Development Officer by way of promotion under 5% quota- it was proved on record that no post was lying vacant- held that, petitioner cannot claim promotion. (Para-4 to 6)

Cases referred:

Chandra Gupta Vs. Secretary Government of India AIR 1995 SCC 23

State of Jharkhand Vs. Bhadey Munda and another 2014 (10) SCC 398

State Bank of India Vs. Kashinath Kher, AIR 1996 8 SCC 762

Indian Airlines Corporation Vs. K.C.Shukla 1993 1 SCC 17

S.L.Soni Vs. State of M.P. AIR 1996 SC 665

U.P.Jal Nigam Vs. Narinder Kumar Agarwal 1996 (8) SCC 43

D.C.Aggarwal (dead) through L.Rs Vs. State Bank of India and another, 2006 (5) SCC 153

State of HP Vs. Surinder Kumar, 1996 (1) SCC 650

S.B. Bhattacharjee Vs. S.D.Majumdar and others 2007 (10) SCC 513

Indian Airlines Corporation Vs. Capt. K.C.Shukla and others 1993 (1) SCC 17

For the petitioner: Mr. Adarsh K.Vashista, Advocate.
For Respondents. Mr. Puneet Rajta, Dy. Advocate General
with Mr.J.S.Rana, Asstt. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana Judge.

Present Civil Writ Petition filed under Article 226 of the Constitution of India. Brief facts of the case as pleaded are that petitioner was appointed as Gram Punchayat Vikas Adhikari (GPVA) on dated 14.10.1998. It is pleaded that in the year 2003 the name of the petitioner was sponsored by respondent department for undergoing five years degree course in B.Sc Agriculture and petitioner was allowed study leave and he completed B.Sc degree by scoring 70.1% marks. It is pleaded that in the year 2008 the Recruitment and Promotion Rules for the post of Agriculture Development Officer (Class-I Gazetted) provides two modes of recruitment to the post of Agriculture Development Officer. (1) 50% by way of direct recruitment (2) 50% by way of promotion. It is pleaded that in the recruitment by way of promotion 5% quota is reserved for the category of GPVA. It is pleaded that petitioner is qualified and eligible to be promoted for the post of Agriculture Development Officer (ADO) as per Recruitment and Promotion Rules. It is pleaded that on dated 7.3.2009 respondent department initiated the process for promotion to the post of Agriculture Development Officer Class-I Gazetted and the name of the petitioner was also mentioned in the panel at serial No.11. It is pleaded that respondents promoted as many as eleven similarly situated persons to the post of Agriculture Development Officer but the name of petitioner did not recommend for promotion for the post of Agriculture Development Officer. It is pleaded that in the year 2010 one Kaula Ram Agriculture Development Officer who belonged to the quota of the petitioner retired on 31.5.2010 and one Sh Arjun Singh Agriculture Development Officer who belonged from the same quota also retired in July, 2010. It is pleaded that two posts belonging to the category of petitioner have fallen vacant. It is further pleaded that despite the vacancy of two posts the petitioner was not promoted to the next higher post of Agriculture Development Officer in accordance with Recruitment and Promotion Rules. It is pleaded that on dated 29.8.2010 petitioner filed Civil Writ petition No.5130 of

2010 before Hon'ble High Court of HP which was decided on 23.8.2010. It is pleaded that on dated 28.12.2010 respondent No.2 has rejected the case of the petitioner in illegal manner. It is pleaded that Annexure P10 dated 28.12.2010 be quashed. It is pleaded that petitioner be promoted to the post of Agriculture Development Officer (Class-I Gazetted) with all consequential benefits. Prayer for acceptance of writ petition sought.

2. Per contra reply filed on behalf of respondents pleaded therein that petitioner was appointed as GPVA on dated 14.10.1998. It is pleaded that as per Recruitment and Promotion Rules for promotion to the post of Agriculture Development Officer 5% quota has been provided to the category of GPVA who possess B.Sc (Agri.) with seven years regular service. It is pleaded that twenty posts fall in the share of GPVA as per provision of Recruitment and Promotion Rules. It is pleaded that all posts have been filled up by way of promotion. It is pleaded that at present no post is lying vacant in the share of GPVA. It is pleaded that the claim of the petitioner is not maintainable. Prayer for dismissal of writ petition sought.

3. Court heard learned Advocate appearing on behalf of the petitioner and learned Deputy Advocate General appearing on behalf of the respondents and also perused entire records carefully.

4. Following points arise for determination in the present writ petition:

(1) Whether petitioner is entitled for promotion to the post of Agriculture Development Officer from the quota of GPVA as alleged?

(2) Final order.

Finding upon Point No.1.

5. Submission of learned Advocate appearing on behalf of the petitioner that petitioner is legally entitled for promotion to the post of Agriculture Development Officer from the quota of GPVA is rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that petitioner filed CWP No. 5130 of 2010 before Hon'ble High Court of HP which was disposed of on dated 27.10.2010. Hon'ble High Court of HP directed the Secretary (Agriculture) Government of Himachal Pradesh to take a decision in the matter in view of the reply regarding the entitlement of the petitioner for promotion within a period of one month from the date of production of the copy of order. It is also proved on record that thereafter Secretary (Agriculture) to the Government of Himachal Pradesh in compliance to the direction of Hon'ble High Court of HP issued in CWP No.5130 of 2010 passed the order that no post of Agriculture Development Officer is vacant on dated 28.12.2010 from the share of GPVA and held that 20 GPVAs already stood promoted to the post of ADO from quota of GPVA who are working on regular basis and representation dated 22.11.2010 preferred by petitioner was rejected. It is proved on record that there are two modes for appointment for the post of Agriculture Development Officer (1) Direct recruitment (2) By way of promotion. It is proved on record that 50% quota is reserved for promotion from feeder cadre and 50% quota is reserved for direct recruitment for the post of Agriculture Development Officer. It is proved on record that 5% quota is reserved for GPVA category for promotion to the post of Agriculture Development Officer and 45% quota is reserved for Assistant Agriculture Development Officer. It is also proved on record that thereafter present CWP No. 910 of 2011-A was filed before Hon'ble High Court of HP and on dated 18.11.2011 Hon'ble High Court of HP directed respondent-State to verify the fact whether 19 candidates are occupying the posts of Agriculture Development Officer from 5% quota of GPVA. Hon'ble High Court of HP further directed that in case only 19 persons are occupying the posts of ADO under 5% quota of GPVA then the case of the petitioner would also be considered for promotion with all consequential benefits within a period of four weeks w.e.f.

18.11.2011. In compliance to the interim direction of Hon'ble High Court of HP passed in CWP No. 910 of 2011, Additional Chief Secretary (Agriculture) to the Government of HP passed order on dated 19.1.2012 that no post of Agriculture Development Officer in the quota of GPVA is lying vacant and held that one Sh Kartar Singh GPVA also stood promoted to the post of Agriculture Development Officer on dated 6.8.2010 on the recommendations of HPPSC. List of ADO promoted from 5% quota of GPVA submitted by respondents is quoted in toto:

Sr.No.	Name of ADO promoted from GPVAs.	Present place of posting.	Remarks.
1.	S/Sh Kewal Krishan	Seed Grading Centre, Pekhubela, Distt Una	
2.	Ram Pal	S.C.Section Dhaliara, Distt Kangra.	
3.	Surender Kumar	Placed as SDSCO, Una w.e.f.23.5.2011	
4.	Manoj Gautam	Dev Block, Nagar Distt.Kullu	
5.	Naresh Dutt	Nankhari Cir.Dev.Block, Rampur Distt.Shimla	
6.	Som Raj Negi	S.C.Section, Nichar, Distt Kinnaur.	
7.	Devi Chand Kashyap	S.C.Section Kuthar Distt. Solan	
8.	Yoginder Pal	Dev.Block, Bhedu Mahadev Distt. Kangra	
9.	Hakam Chand	Tiara Circle Dev. Block, Kangra Distt. Kangra	
10.	Shyam Lal	Chuhru Cir.Dev.Block, Amb, Distt Una	
11.	Hem Raj	S.C.Section, Jhandutta, Distt. Bilaspur.	
12.	Abhay Kumar	Dev. Block Hamirpur, Distt Hamirpur	
13.	Sita Ram	S.C.Section, Kandaghat, Distt. Solan	
14.	Nitin Kumar Sharma	S.C.Section, Bharmour, Distt. Chamba	
15.	Virender Singh	SDSCO, Shimla	
16.	Smt. Pushpa Devi	Sr. Analytical Chemist Howthorn Villa, Shimla-4	
17.	Durga Dutt	Darlaghat Circle, Dev. Block Kunihar Distt. Solan	
18.	Bhupender Singh	Dev. Block, Kaza Distt Lahaul & Spiti	
19.	Dev Raj	Jalog Cir. Dev. Block, Basantpur, Distt. Shimla	
20.	Kartar Singh	S.C.Section, Indora, Distt. Kangra	

6. It is well settled law that appointment upon public post is by way of two modes (1) Promotional mode (2) Direct recruitment mode and concept of rota and quota is applied when promotion is between feeder cadre and direct

recruitment. In the present case it is proved on record that 5% quota from the posts of GPVA is fixed for promotional post of Agriculture Development Officer. It is proved on record that 20 posts come to the share of GPVA. As per document placed on record there is no vacant post as of today in the quota of GPVA for promotional post of Agriculture Development Officer and as of today entire quota of GPVA in the promotional post of Agriculture Development Officer stood filled up. Details of twenty officials occupying 5% quota of GPVA are cited supra. It is well settled law that promotion in the public post is always given as per approval of recommendation of Department Promotion Committee constituted by appointing authority. It is well settled law that Department Promotion Committee is under legal obligation to recommend the name of officials for promotion keeping in view the ACRs of the officials and keeping in view the integrity of the officials suitable for public post. In the present case petitioner did not place on record any documentary evidence in order to prove that his case was recommended for appointment to the post of Agriculture Development Officer by Department Promotion Committee in preference to twenty candidates cited supra. Falling names of the officials in the zone of consideration for promotion and recommendation of the officials by Department Promotion Committee for appointment in promotional post are two entirely different concepts in the promotion process in the public post. Generally minimum three candidates falls in zone of consideration for one promotional post. It was held in case reported in AIR 1995 SCC 23 titled Chandra Gupta Vs. Secretary Government of India that no employee has a right or vested right of promotion. It was held in case reported in 2014 (10) SCC 398 titled State of Jharkhand Vs. Bhadey Munda and another that an employee has no fundamental right of promotion. It was held that employee has only a right to be considered for promotion. It was held in case reported in AIR 1996 8 SCC 762 titled State Bank of India Vs. Kashinath Kher that object of writing the confidential report is two folds (1) To give an opportunity to the officer to remove deficiencies and to inculcate discipline. (2) It seeks to serve improvement of quality and excellence and efficiency of public service. It was held in case reported in 1993 1 SCC 17 titled Indian Airlines Corporation Vs. K.C.Shukla that Court could not substitute its opinion and devise its own method for evaluation of fitness of candidate for a particular post. Also see AIR 1996 SC 665 titled S.L.Soni Vs. State of M.P. It was held in case reported in 1996 (8) SCC 43 titled U.P.Jal Nigam Vs. Narinder Kumar Agarwal that merit and integrity are the sole consideration for selecting the officials in a public post for promotion. Also see 2006 (5) SCC 153 titled D.C.Aggarwal (dead) through L.Rs Vs. State Bank of India and another. Also see 1996 (1) SCC 650 titled State of HP Vs. Surinder Kumar. Also See 2007 (10) SCC 513 titled S.B. Bhattacharjee Vs. S.D.Majumdar and others**.** Also see 1993 (1) SCC 17 titled Indian Airlines Corporation Vs. Capt. K.C.Shukla and others. In view of the fact that no vacancy is available in the quota of GPVA for promotional post of Agriculture Development Officer as of today and in view of the fact that petitioner did not implead Agriculture Development Officers as co-respondents to whom undue favour has been given by the respondents from the reserve quota of GPVA in the promotional post of Agriculture Development Officer to meet requirement of concept of audi alteram partem no relief could be granted in favour of the petitioner as sought. Hence point No.1 is answered in negative.

Final Order.

7. In view of my finding upon point No.1 civil writ petition filed by petitioner under Article 226 of the Constitution of India is dismissed with no order as to costs. Writ petition is disposed of. All pending application(s) if any are also disposed of.

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