THE
INDIAN LAW REPORTS
HIMACHAL SERIES, 2015

EDITOR
RAKESH KAINTHLA
Director,
H.P. Judicial Academy,
Shimla.

ASSISTANT EDITOR
HANS RAJ
Joint Director,
H.P. Judicial Academy,
Shimla.

SEPTEMBER, 2015

Vol. XLV (V)

Pages: HC 1 TO 729

Mode of Citation : I L R 2015 (V) HP 1

Containing cases decided by the High Court of

Himachal Pradesh and by the Supreme Court of India

And

Acts, Rules and Notifications.

PUBLISHED UNDER THE AUTHORITY OF THE GOVERNMENT OF HIMACHAL PRADESH , BY THE CONTROLLER, PRINTING AND STATIONERY DEPARTMENT, HIMACHAL PRADESH, SHIMLA-5.

All Right Reserved

INDIAN LAW REPORTS

HIMACHAL SERIES

(September, 2015)

INDEX

Nominal table
I L R 2015 (V) HP 1

****

SUBJECT INDEX

'A'

'C'

Code of Civil Procedure, 1908- Section 100- Plaintiff claimed damages on account of demolition of the double storeyed structure raised on the land of Rajput Kalyan Sabha on the plea that Sabha had leased the land in favour of Municipal Committee, where after Municipal Committee created permanent lease in his favour and construction was raised- defendants pleaded that lease in favour of Municipal Committee was cancelled and possession of the land was handed over to Sabha and the land was being fenced when the residents of town and private bus operators attacked the members of the Sabha- further pleaded that land and Sabha Bhawan were owned and possessed by the Sabha- suit was dismissed by the trial Court- First appeal was also dismissed- held, that plaintiff had failed to lead tangible evidence to establish creation of permanent lease in his favour- no registered lease deed to prove permanent lease was placed on record- plaintiff also failed to prove that defendants had caused any damage to his property – no person can confer better right than he actually possesses, hence, question of permanent lease by Municipal Corporation in favour of plaintiff does not arise- both the Courts have correctly appreciated the evidence so led on the record and had come to a right conclusion- appeal dismissed.

Title: Pawan Kumar and another Vs. The Rajput Kalyan Sabha, H.P. and others

Page-637

Code of Civil Procedure, 1908 - Section 100 - Plaintiffs filed a suit for possession alleging therein that they are the owners of the suit land to the extent of ½ share and the defendants also had ½ share in the same - further, alleging that during settlement operation in 1890-91, revenue entries were inadvertently changed reducing the share of the plaintiffs to 1/4th and increasing the share of the defendants to the extent of 2/3rd – claimed that this mistake did not come to the notice till 1986 and during consolidation proceedings in 1985-86, possession of 2/3rd share was wrongly delivered to the defendants - trial Court decreed the suit and First Appellate Court while accepting the appeal, dismissed the suit- held, that there is nothing on record to suggest that revenue entries were inadvertently changed - long standing revenue entries since 1890-91 showing plaintiffs entitled to 1/4th share in the suit land and the same are not rebutted by the plaintiffs during trial - suit filed after 100 years is time barred as various consolidation proceedings took place in between and it cannot be believed that plaintiffs were not aware of the revenue entries- appeal rightly accepted and suit dismissed by the First Appellate Court- the findings of the First Appellate Court well reasoned and need no interference- appeal dismissed.

Title: Prithvi Chand and others Vs. Tej Singh and others Page-272

Code of Civil Procedure, 1908 - Section 114- Petitioner sought a review of the judgment passed by the Court on the ground that there was an error apparent on the face of the record – record shows that entire lis of the petitioner revolves around the answer keys about which the Court has already delivered the judgment- there is no error apparent on the face of the record- petition dismissed.

Title: Pawam Kumar Vs. State of HP and others (D.B.) Page-577

Code of Civil Procedure, 1908- Section 115- **Hindu Marriage Act, 1955-** Section 24- Court awarded maintenance pendente lite @ Rs. 7,000/- per month along with litigation expenses of Rs. 10,000/- to the wife - husband feeling aggrieved challenged the order on the ground that his income was meager and, therefore, maintenance was wrongly awarded- held, that husband is able-bodied person and the wife has a child to be looked after and maintained- child was in need of admission fees, tuition fees, school uniform etc., apart from the basic needs- it has to be remembered that when a woman leaves matrimonial home, she

is deprived of many comforts- only comfort law can impose is that the husband is bound to give monetary comfort- taking into account the facts and circumstances of the case, the maintenance amount and litigation expenses have rightly been awarded- order does not suffer from any illegality, irregularity or perversity- Revision petition dismissed.

Title: Dinesh Mohan Vs. Kavita alias Kamlesh Page- 682

Code of Civil Procedure, 1908- Section 115- Order 23 Rule 1(3)- Plaintiff sought declaration qua ownership of suit land on account of adverse possession and prayed for correction of revenue entries and injunction against the defendants not to interfere in his peaceful possession - defendants contested the suit- during the suit, the plaintiff prayed for withdrawal of the suit with permission to file a fresh suit on the ground that mutation was attested during the pendency of suit, and, suit land was reverted to the villagers and the villagers are necessary parties for disposal of the suit- application dismissed by the trial Court- held, that mutation having been effected during the pendency of the suit was hit by doctrine of lis pendens, and secondly, plaintiff could implead the villagers as party in the same suit and suit could be continued further in the same shape- further held, that no formal defect was apparent from the material and, therefore, permission to withdraw the suit with liberty to file a fresh suit was rightly declined- revision dismissed.

Title: Khem Chand son of late Shri Kanshi Ram & others Vs. State of H.P. & other Page-710

Code of Civil Procedure, 1908- Section 144- An application was filed for execution of the award passed by the Arbitrator- a notice was issued in which J.D was proceeded ex-parte and the attached property was ordered to be sold- J.D deposited an amount of Rs. 4,68,25,228/- - J.D filed an application pleading that there was an error in calculation and the D.Hs are entitled to Rs. 3,70,49,770.80/-- he prayed for the return of the excess amount – record shows that Arbitrator had awarded a specific sum to the DH- Learned Single Judge had found that D.Hs are entitled to the amount of Rs. 3,70,49,770.80/- and not for Rs. 4,68,25,228/-- Executing Court was bound to execute decree passed by the arbitrator- when specific amount was awarded, J.D is only liable to pay that amount- mere wrong calculation by the Executing Court will not confer any right upon the D.Hs – J.D had made the payment of the excess amount without his being liable - claim of the J.D cannot be said to be barred by principles of res-judicata due to calculation error made by the Court- held, that Court had rightly passed the order for the refund of the amount.

Title: Deepak Arora and another Vs. Vijay Khanna (D.B.) Page-162

Code of Civil Procedure, 1908- Section 151- A counter claim was filed by the defendant pleading that plaintiff had encroached upon his land- plaintiff filed a complaint against the defendant before Deputy Commissioner that defendant had violated Section 118 of H.P. Tenancy and Land Reforms Act - complaint was accepted and land was ordered to be vested in the State of Himachal Pradesh - this order was affirmed by Financial Commissioner (Appeals)- plaintiff contended that in view of the orders, defendant had no locus standi to seek any relief- application was filed for placing the orders on record- application was dismissed by the trial Court on the ground that writ petition is pending before the High Court assailing the order passed by Financial Commissioner- held, that since the order has not attained finality, it can not be relied upon by the plaintiff – petition dismissed.

Title: Geeta Chopra Vs. Kulwant Singh Bakshi Page-93

Code of Civil Procedure, 1908- Section 151- Plaintiff filed a suit seeking permanent prohibitory injunction claiming that his passage was blocked by the defendant by stacking stones on it- plaintiff filed an application seeking direction from the trial Court to the Revenue Agency to place on record copy of Tatima after carrying out demarcation to determine whether the passage was blocked by the defendant or not – application was rejected on the ground that it amounted to the collection of the evidence on the part of the plaintiff- held, that dispute between the parties could have been resolved only by conducting the demarcation to determine, whether defendant had encroached upon the passage or not- application allowed and trial Court directed to issue necessary direction.

Title: Hukam Chand Vs. Bhintra Devi Page-55

Code of Civil Procedure, 1908- Order 1 Rule 10 CPC- Plaintiffs challenged the revenue entries reducing their share in the suit land and the area under tenancy- defendants took the objections that the owner of the land is a necessary party- held, that since owner 'C' had died and her legal representatives were not before the Court, question regarding the tenancy and its extent cannot be adjudicated in their absence - suit is bad for non-joinder of necessary parties- appeal accepted and suit remanded to the trial Court with the directions to implead legal representatives of deceased 'C' as co-owners and thereafter to dispose of the same within three months.

Title: Sada Nand S/o Fata Vs. Bhagti Devi widow of Shamboo Ram and others Page-542

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiffs filed a suit seeking declaration that the order passed by the Settlement Collector, Kinnaur is void- defendant filed an application seeking amendment of the written statement to take a plea regarding the suit being barred by limitation and existence of alternative passage- trial Court allowed the application- however, it was not discussed as to how the amendment is clarificatory in nature - the basis of forming an opinion that no prejudice is going to be caused was not specified in the order – objections raised by the plaintiffs were not considered by the Court – therefore, order set aside and the case remanded to the trial Court with a direction to decide the application afresh.

Title: Jumla Jamindaran Village Pangi & others Vs. Jumla Jamindaran Village Telangi & others Page-631

Code of Civil Procedure, 1908- Order 10 Rule 2 read with Order 16 Rule 1- Plaintiff filed an application for examination of the parties before framing the issues on the ground that defendant had denied the execution of the agreement - held, that object of examining the parties before framing of issues is to ascertain the matter in dispute and not to take evidence in civil suit- examination of the parties under Order 10 is not a substitute for regular examination on oath- parties are examined in the Court before framing of issues only when there is some ambiguity in the pleadings of the parties- there is no ambiguity in the pleadings in the present case- application dismissed.

Title: Dharamjeet Kaur wife of Sh. Surinder Singh Vs. Jagiro D/o Sh. Labhu Ram Page-708

Code of Civil Procedure, 1908- Order 17 Rule 1- Petitioner filed an application for adjournment which was dismissed- order-sheet showed that petitioner was unable to complete evidence despite the lapse of 6 years- held, that only three adjournments can be

granted in a suit - more than three adjournments should be granted only in the exceptional cases and not in routine- petition dismissed.

Title: Veena Sood Vs. Ramesh Kumar Sood & anr Page-255

Code of Civil Procedure, 1908- Order 21- Executing Court had closed the right of J.D to file the objections on the ground that sufficient opportunities had been granted to file objections but objections were not filed- one more opportunity granted to the J.D to file objections subject to costs of Rs.1,000/-.

Title: Pamwi Tissue Ltd. Vs. Universal Sales Corporation & others Page-669

Code of Civil Procedure, 1908- Order 21 Rule 32- A compromise decree was passed for permanent prohibitory injunction- an execution petition was filed pleading that a double storeyed house was demolished and a house with lintel was constructed in violation of the decree of the Court- J.D pleaded that he was not party to the decree and was not aware of the same and he had not raised any construction - Execution Petition was allowed and the J.D was directed to undergo civil imprisonment for a period of one month and his property was ordered to be attached- Record shows that J.D was aware of the judgment and decree- he had demolished old structure - he had constructed one room and thereafter had added two rooms, bath-room and balcony without seeking permission of the Court- a decree for injunction can be executed against the legal representatives on the death of J.D- held, that trial Court had rightly held that J.D had violated the judgment and decree- revision dismissed.

Title: Gian Chand Vs. Hem Raj & ors. Page-30

Code of Civil Procedure, 1908- Order 32 Rule 15- Eviction of the tenant was ordered on the ground of arrears of rent, that building had become unfit and unsafe for human habitation and the premises was required for re-building and re-construction which cannot be carried out without vacating the same- an appeal was preferred- an application under Order 32 Rule 15 was filed- application was sent to the Rent Controller for conducting inquiry- rent controller held that revisionist may be suffering from mental illness but there is no material on record to hold that revisionist was incapacitated to protect his interest because of mental illness – there was no necessity to appoint a legal guardian- revisionist was impleaded through his son with the allegation that revisionist is suffering from mental illness- held, that Court had not declared the revisionist to be suffering from mental illness- litigant cannot declare a person to be of unsound mind suo moto without the permission of the Court- non-revisionist was also not served, he is ordered to be served by way of affixation.

Title: Parkash Chand son of Jagan Nath Vs. Ajay Sharma and another Page-635

Code of Criminal Procedure, 1973- Section 70- Trial Court issued non-bailable warrant for securing the appearance of the petitioner- petitioner had appeared before the trial Court; hence, petition has become infructuous.

Title: Sushil Kumar Vs. Lachhami Chand & another Page-428

Code of Criminal Procedure, 1973- Section 125- **Indian Evidence Act, 1872-** Section 138- husband directed to pay interim maintenance to his wife @ Rs. 3,000/- per month from the date of application- husband showed his inability to pay interim maintenance so awarded by the Court - on refusal of the respondent to pay interim maintenance, Magistrate

denied the opportunity to the husband to cross-examine the witnesses produced by his wife and listed case for respondent's evidence- held that the right to cross-examine a witness is a valuable right provided under Section 138 of Indian Evidence Act and cannot be denied to adversary party - arrears of maintenance could be recovered through the ways and means provided in Cr.P.C. itself – under no circumstances the right to cross-examine the witnesses could be closed.

Title: Jai Singh Vs. Manisha Page-505

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the applicant for the 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 the larger interest of the public and State- 43 bags of the fake cement were found in the shop of the applicant- fake cement endangers human life- custodial interrogation is necessary to locate the manufacturer- interest of public and State would be prejudiced by releasing the applicant on bail- petition dismissed.

Title: Rajesh Kumar Nanda Vs. State of Himachal Pradesh Page-676

Code of Criminal Procedure, 1973- Section 439- Petitioner was admitted on bail subject to the condition that he will not leave India- petitioner prayed that he is Director of the Company and is required to visit abroad in connection with his work- the trial pending before the Learned Judicial Magistrate was stayed by the Supreme Court of India- therefore, trial will not suffer by the absence of the petitioner- petitioner had also not abused liberty granted to him, hence, permission granted to the petitioner to visit abroad.

Title: Chandra Bhan Sharma Vs. State of H.P. Page-52

Code of Criminal Procedure, 1973- Section 482- An FIR under Sections 279, 337 and 201 of IPC and Section 187 of M.V. Act was registered against the petitioner which resulted in initiation of criminal proceedings against the petitioner in the Court of Judicial Magistrate- petitioner stated in the petition that the injured had entered into a compromise with him and FIR was lodged due to some misunderstanding – injured also appeared before the Court and stated that he got perplexed on seeing the motor-cycle and thereby lost his control and fell down on the road, hence, he had no objection for quashing the FIR - held, that taking into account the statement of the injured and the fact that offence is not against the State and the trial will be a futile exercise, it is a fit case where the FIR can be quashed –FIR and proceedings pending the court of Judicial Magistrate quashed.

Title: Vijay Kumar Vs. State of H.P. and another Page-678

Code of Criminal Procedure, 1973- Section 482- Petitioner sought quashing of FIR registered against him on the ground that no cause of action has arisen within the territorial jurisdiction of the State of H.P. - held, that the promise of recruitment was made within the jurisdiction of Shimla- merely because payment was made at Chandigarh will not divest the jurisdiction of the Court at Shimla- petition dismissed.

Title: Rajinder Guleria Vs. State of Himachal Pradesh Page-1

Constitution of India, 1950- Article 141- Precedents- Precedents by the Hon'ble Apex Court have binding effect even if they were delivered four decades ago- doctrine of binding precedent promotes certainty and consistency in judicial decisions and enables an organic development of law.

Title: Managing Director, M/s Crest Steel and Power Ltd. Vs. Tara Chand

Page-367

Constitution of India, 1950- Article 226- 'N' was engaged as a Junior Scientific Assistant- 'D' had also participated in the selection process- appointment was for a period of one year, which was extended by another year- writ Court had allowed the writ petition filed by the 'D' and had cancelled the appointment of 'N' – writ court also directed the recovery of the salary paid to 'N' from the members of Selection Committee- held, that period of contract has come to an end and the appeal has become infructuous – members of the Selection Committee were not arrayed as parties before the Writ Court and order could not have been passed against them- appeal allowed and order directing the recovery of money set aside.

Title: Namrta Sharma Vs. H.P. State Environment Protection and Pollution Control Board and others (D.B.) Page-68

Constitution of India, 1950- Article 226- A letter of intent was issued to the petitioner- an agreement was entered between the parties, however, Retail outlet dealership was terminated on the ground of concealment of facts – petitioner contended that her marriage was solemnized in the temple- some ceremonies were held thereafter and record was corrected on the basis of subsequent ceremonies- held, that petitioner had not led any evidence to show that she had married earlier- her plea that she had to marry again was also not acceptable- different dates of marriage were recorded in panchayat register - name of the husband of petitioner was also recorded different- petitioner had concealed his marriage as well as the fact that her mother was a partner in the Agency at Hamirpur, therefore, respondent had rightly cancelled the allotment made in favour of the petitioner- petition dismissed.

Title: M/s. Surya Filling Station Vs. Indian Oil Corporation and another

Page-56

Constitution of India, 1950- Article 226- Administrative Tribunal found that the orders of the Disciplinary and Appellate Authority were not reasoned- Appellate Authority had not given findings whether Disciplinary Authority had followed prescribed procedure or not- Appellate Authority had also not given due consideration to the explanation given by the delinquent- orders were quashed and the consequential benefits were ordered to be extended to the delinquent- no infirmity was pointed out in the orders passed by the Administrative Tribunal- petition dismissed.

Title: Union of India & ors. Vs. Balwant Singh Chandel (D.B.) Page-497

Constitution of India, 1950- Article 226- Appellant was selected for the post of Forest Guard- Private respondent filed various complaints against him that false certificates were filed by the appellant- Respondent also filed a petition challenging the appointment of appellant- an inquiry was conducted by SDO (Civil) who found that appellant did not belong to IRDP and Below Poverty Line category- his services were terminated- Writ Court held that appellant did not belong to IRDP category and his termination was legal- SDO(Civil) was directed to inquire, as to whether respondent belonged to IRDP category or not- Secretary, Gram Panchayat Kasol appeared before the High Court and produced the record after which

Court held that appeallant belongs to IRDP category- Respondent had participated in the inquiry and findings were recorded against him- in view of this, appeals are allowed with all the consequential benefits.

Title: Gehru Ram Vs. State of Himachal Pradesh & others Page-96

Constitution of India, 1950- Article 226- Case of the appellant was rejected on the ground that he had not completed 10 years of continuous services with the minimum 240 days in each calendar year and, therefore, he was not entitled for regularization- he filed a writ petition against this order pleading that his services were wrongly retrenched while his juniors were retained thereby violating principles of 'last come first go'- Conservator of Forest filed his personal affidavit stating that no person junior to the appellant was retained by the department and services of the appellant were never retrenched by the department- petition was dismissed by the writ Court- there was no material on record to show that services of the appellant were retrenched while his juniors were retained- the chart prepared by the petitioner was also not correct- held, that writ Court had rightly dismissed the petition.

Title: Krishan Chand Vs. State of HP & ors. (D.B.) Page-101

Constitution of India, 1950- Article 226- HRTC took a decision to fill up 680 posts of TMPAs by cancelling the earlier process- written tests and interviews were conducted- selection process was challenged- General Rules framed by the State Government regarding H.P. Subordinate Services Selection Board will not be applicable to HRTC, unless it is proved that notification was issued after the consultation with the corporation- advertisement is required to specify the rules and instructions under which the applications are being invited and on the basis of which selection is to be made- respondent/corporation is a State and cannot act arbitrarily – therefore, in absence of the guidelines, selection process has to be set aside- petition allowed.

Title: Shashi Bhushan Vs. State of Himachal Pradesh and others (D.B.)

Page-114

Constitution of India, 1950- Article 226- Petitioner contended that University had not conducted the examination of first hourly, mid-term, second hourly and practical examination despite repeated request- petitioner had submitted his assignment but he was shown absent- he was denied the access to the answer book when so demanded by him- respondent contended that petitioner had failed to submit his assignment up to the end-term examination and did not turn up for final practical examination - he was rightly shown as absent- all other students except the petitioner had checked their answer books but the petitioner had never reported to check his answer books- answer books were produced before the High Court, which showed that petitioner had appeared and his answers were marked by the University- held, that petitioner had not come to the Court with clean hands and had not disclosed the material facts- no proof was filed to show that petitioner had submitted his assignment and was wrongly shown absent- petition dismissed.

Title: Lalit Narain Mishra Vs. State of HP & others (D.B.) Page-105

Constitution of India, 1950- Article 226- Petitioner contested for the office of Ward Member along with respondent No. 2- however, respondent No. 2 was declared as elected after counting the votes- petitioner feeling aggrieved by the manner of counting ballot papers thrice by Returning Officer before declaration of result, approached the SDO (Civil)-cum-Authorized Officer- petition was dismissed- an appeal was filed which was also dismissed-

held, that Rule 41(2) of Himachal Pradesh Gram Panchayat (Election) Rules, 1978 provides that the ballot papers can be recounted only, if an aggrieved candidate applies in writing to the Returning Officer for re-counting and the Returning Officer while deciding the application, allows the recounting- further held, that since, the Returning Officer in this case has recounted the ballot papers thrice without there being a request from any of the candidates, the mandatory provisions were violated - orders passed by SDO (Civil)-cum-Authorized Officer and Deputy Commissioner in appeal do not stand the legal scrutiny, hence, both the orders set aside with the directions to SDO (Civil)-cum-Authorized Officer to recount the ballot papers within three weeks and thereafter to announce the result.
Title: Som Dutt Vs. State of H.P. and others Page-462

Constitution of India, 1950- Article 226- Petitioner filed an application seeking licence of revolver- nothing adverse was found against him by the police or local pardhan- subsequently, 'S' sent a report stating that a case was registered against the petitioner under Section 325/34 of IPC- the application of the petitioner was rejected- earlier police had no objection for issuance of the licence and it was specifically stated that petitioner had good moral character- son of the petitioner was murdered and FIR was registered regarding the same- petitioner was not prohibited by the Act or by any other law from acquiring any arms or ammunition – there was no issue of public peace or public safety involved in the case- ADM had taken the guidance from the State Government and had abdicated his power to the State- there is a property dispute between the petitioner and his brother-in-law- therefore, it can be safely said that there was threat to his life - authorities cannot refuse to issue the licence on the ground of registration of a case against the petitioner - where a person has committed heinous crime, licence can be refused to him- writ petition allowed and respondent No. 5 directed to issue the licence in favour of the petitioner.
Title: Bhavak Parasher Vs. State of H.P. & ors.(D.B.) Page-345

Constitution of India, 1950- Article 226- Petitioner had issued a legal notice on the basis of which an order was passed- he had taken the benefit of the Rule 2 of Demobilized Armed Forces Personnel Rules, 1972- he cannot make a U-turn and plead that he is a fresh appointee- appeal dismissed.
Title: Gurbax Singh Vs. State of Himachal Pradesh & others (D.B.) Page-50

Constitution of India, 1950- Article 226- Petitioner had made a prayer to quash the rules, office orders dated November 3, 2001 and November 22, 2001- Writ Court had not discussed the grounds on which the rules were held to be violative of the Service Jurisprudence and the mandate of the Constitution of India- it had also not discussed how the writ petitioners were affected and which of their rights were taken away- Writ Court had not taken into account the pleadings of the parties particularly the defence of the respondents- Court had not made any discussion and had failed to marshal out the facts and merits of the case- judgment set aside and the case remanded to Administrative Tribunal.
Title: State of H.P. and others Vs. Prem Chand and others (D.B.) Page-586

Constitution of India, 1950- Article 226- Petitioner had participated in the selection process- he cannot turn around and challenge the process itself- his writ petition was rightly dismissed.
Title: Rajeev Kumar Vs. State of H.P. and others (D.B.) Page-578

Constitution of India, 1950- Article 226- Petitioner was appointed as a Salesman on 50% commission basis- his services were terminated – surcharge proceedings were initiated

against the petitioner- he was directed to refund the amount of Rs. 31,012.60/- along with interest- representation made by the petitioner was decided by the speaking order after affording opportunity of being heard- petitioner had admitted his liability – surcharge proceedings were initiated on the basis of inquiry/audit report of the society- appeal dismissed.
Title: Nikku Ram Vs. State of H.P. & ors. Page-70

Constitution of India, 1950- Article 226- Petitioner was appointed as a lecturer in Himachal Pradesh Dental College, Sunder Nagar- pay scale was revised - petitioner filed a representation for fixing his salary as per revised pay scale which was rejected- no reply was filed by the respondent, therefore, averments made in the writ petition had remained unrebutted - writ Court had granted the relief on the ground that petitioner was entitled for the revised pay scale which cannot be faulted- appeal dismissed.
Title: Principal, Himachal Dental College & another Vs. Union of India & others (D.B.)
Page-109

Constitution of India, 1950- Article 226- Petitioner was appointed as a driver in HRTC- he left to his native place on 28.6.1994 and did not report for duty – his absence was treated as subject matter of inquiry- he was ultimately removed- he filed a representation which was rejected- it was contended that Inquiry Officer had not held that absence of the petitioner was willful and in absence of such finding, petitioner could not have been removed from the service- held, that charge against the petitioner was of willful absence but the Inquiry Officer had nowhere recorded in the findings that absence was willful – petitioner had relied upon some documents but these were not considered by the Inquiry Officer- no finding was recorded by the Inquiry Officer that defence taken by petitioner was false or after thought- petitioner cannot be removed from the service without proving willful absence- further, Inquiry Officer had not supplied the copy of inquiry report to the petitioner which is mandatory- petition allowed- petitioner ordered to be reinstated and he is held entitled to 50% back wages.
Title: Sher Mohammed Vs. Himachal Road Transport Corporation & ors (D.B.)
Page-237

Constitution of India, 1950- Article 226- Petitioner working as Panchayat Sahayak - he failed to supply information sought under the Right to Information Act- a show cause notice was issued to him as to why his contract should not be rescinded under rule 8 (5) of the H.P. Panchyati Raj (Appointment and Condition of Service of Panchyat Sahayak) Rules, 2008- reply was considered and contract was rescinded- appeal was also dismissed – both the orders challenged through a writ petition- held, that under aforesaid rule, the District Panchayat Officer was to satisfy himself that the petitioner had failed to perform his duties assigned to him and then to pass a speaking order- the order passed by the District Panchayat Officer showed that aforesaid rule has not been followed in letter and spirit by him – hence, order passed by District Panchayat Officer and Appellate Authority both quashed with liberty to proceed against the petitioner strictly in accordance with law.
Title: Vijay Kumar Vs. State of Himachal Pradesh & others Page-662

Constitution of India, 1950- Article 226- Petitioners are the retired employees of the bank- they claimed benefit in accordance with the Government Memorandum- respondent is a creation of the statute and falls within the definition of the State - as per Rule 30(3) employees of the respondent are entitled to the gratuity fixed by the Government of Himachal Pradesh- Government had issued a notification enhancing the gratuity from 3.5

lacs to 10 lacs- this notification was made applicable to those who had retired or would be retiring after 1.1.2006- Board of Directors issued a circular providing the enhanced gratuity w.e.f. 24.5.2010- held that in case of conflict between Act, the Rules, and circulars, provisions of the Act will prevail -Board of Directors could not have superseded the provisions of the rules- therefore, the decision taken by the Bank that enhanced gratuity will be given to the employees who had retired after 24.5.2010 cannot be sustained.
Title: R.B.S. Negi & ors. Vs. State of HP & others Page-537

Constitution of India, 1950- Article 226- Petitioners were appointed as Laboratory Attendants in Baba Balak Nath College Chakmoh- their services were regularized in the year 1993- they claimed that they became eligible for the post of Junior Laboratory Assistant/Junior Lecturer Assistant after the completion of five years services – they filed representation but they were not regularized – respondents claimed that no funds were provided by the State of Himachal Pradesh for running the college and the college was being run on the basis of offerings made by pilgrims/devotees- there was no post to which the petitioners could be promoted- held, that petitioners do not possess minimum qualification for the posts and they are not entitled for the salary and the emoluments payable to Junior Laboratory Assistant/Junior Lecturer Assistant- petition dismissed.
Title: Amar Nath & another Vs. State of H.P. & others Page-705

Constitution of India, 1950- Article 226- Respondent No. 2 sent a communication to respondent No. 3 regarding providing of road to sewerage treatment plant at Solan- respondent No. 3 was requested to prepare documents for acquisition of the land- petitioner is owner of the plot- a notification for acquiring the land was published in the news paper- compensation of Rs. 26,981.49 per biswa was proposed- total amount of Rs. 35,19,965/- was determined as compensation- proposed award was sent to Principal Secretary, I & PH- a communication for de-notification of khasra number mentioned in the communication was sent and the land was de-notified- held that the respondents had used the land for laying down pipes and construction of chambers- respondent also admitted that necessary cutting and dressing was undertaken on the land - no reason was specified for de-notification of the land- papers for acquiring the land and pronouncing the award were sent, therefore, the plea that possession was not taken over cannot be accepted- once the land has been acquired and no award has been pronounced, the acquisition will not lapse- petitioner cannot be deprived of his right to get compensation- once possession has been taken the Department is not at liberty to withdraw from the acquisition- Writ petition allowed and respondents No. 1 and 2 directed to grant necessary approval to draft award.
Title: Kanti Swaroop Mehta Vs. State of H.P. and others Page-429

Constitution of India, 1950- Article 226- Respondent No. 3 was selected as Gram Rojgar Sewak- petitioner challenged her appointment before Additional District Magistrate- respondent No. 3 had obtained the highest marks followed by respondent No. 4- petitioner had secured third position- petitioner contended that diploma in the computer application and the certificate of experience produced by respondent No. 3 were false and fabricated- respondent No. 3 had produced diploma showing her proficiency in computer data entry- she had five years experience and two marks were awarded for each year's experience- affidavit of the owner of the institution was filed regarding the correctness of the experience certificate- further, affidavits of the students who studied with respondent No. 3 were also filed- merely because respondent No. 3 had acted as a part time agent of Mahila Pradhan Kashetriya Bachat is not sufficient to doubt the affidavits- petition dismissed.
Title: Rajesh Kumar Vs. State of H.P. & Others Page-79

Constitution of India, 1950- Article 226- Respondent was appointed as Assistant Professor – her appointment was quashed on the ground that her selection and appointment were arbitrary- petitioner was appointed in her place- petitioner had suffered at the hands of the University- when a candidate is deprived of the appointment illegally, he is deemed to have been appointed from the date of the denial - direction issued to treat the petitioner to be appointed on regular basis.

Title: Dr. (Ms.) Monica Sharma Vs. Dr. Y.S. Parmar University of Horticulture & Forestry, Nauni and others Page-491

Constitution of India, 1950- Article 226- Respondents No. 2 to 4 issued an advertisement for the appointment of distributor of LPG- respondent No. 5 was declared as a selected candidate- petitioner contended that respondent No. 5 did not fulfill the eligibility criteria- respondent No. 5 was lessee of the land along with his brother-in-law- the case of the brother-in-law was rejected on the ground that show room and godown did not fulfill the criteria specified by respondents No. 2 to 4- respondent No. 5 and Sanjay Kumar were not free to assign, transfer, sublet, underlet, or part with possession of the property as per the lease deed – respondents No. 2 to 4 stated that all the applicants including petitioner were given a chance to remove deficiency- respondent No. 5 was considered eligible on the basis of experience and the documents submitted by him- status of respondent No. 5 and Sanjay Kumar was that of joint tenants and not tenant in common – mere execution of the affidavit will not bring out the partition without the consent of the lessor- respondent No. 5 was asked to verify her share including the dimension of the land for show room as well as godown- certificate was issued by the patwari, which was counter-signed by the Naib-Tehsildar specifying the length and width of the land offered by respondent No. 5 as 26 mtr x 35.3 sq. mtrs- however, patwari and Naib-Tehsildar appeared before the High Court and admitted that since the lease deed was jointly executed, the share of the lessee would be equal and the Revenue Authorities are not competent to determine the share, unless specified in the documents- this shows that mischief was committed by the authorities while issuing the certificates- petition allowed and the allotment made in favour of the respondent No. 5 quashed- Government directed to take departmental action against the patwari and Naib-Tehsildar.

Title: Vandana Kumari Guleria & anr Vs. Union of India & others Page-382

Constitution of India, 1950- Article 226- State inviting bids for the construction of the road – petitioners submitted their tender- technical and financial bids were opened- cases were being proceeded when the Tender Evaluation Committee recommended that entire tender process be cancelled on the ground that some of the contractors were not aware of the condition No. 26.5 contained in the tender notice- tender was cancelled on the recommendation of the committee- held, that once tender notice was published, it does not lie in the mouth of any person to say that he was not aware of the terms and conditions of the policy- Committee had not stated that cancellation was necessary in the public interest – administrative action of the State authority can be reviewed to prevent arbitrariness or favourtism- tenderer has an enforceable right which cannot be taken away without any justification- Court has power to examine the illegality and irregularity of the tender process- commencement of fresh process will delay the construction of the road and will deprive the public of the benefit of the right- petition allowed.

Title: Sandeep Bhardwaj Vs. State of H.P. and others (D.B.) Page-83

Constitution of India, 1950- Articles 14 and 226- Government of Himachal Pradesh introduced a scheme/policy of free hold for a limited period of one month w.e.f. 15th January

to 15th February, 2007 and for six months w.e.f. 15.9.2012 to 14.3.2013 to regularize the ownership of the land- introduction of the schemes for such a short period was not based upon any intelligible differentia and violated article 14 of the Constitution – only few could avail the benefit of those schemes due to shortage of time- petitioner had prayed for issuance of writ of mandamus against the respondent to process and sanction his house plan and also to cause changes in the revenue entries- held, that the schemes were in violation of Article 14- Government directed to re-introduce the schemes on similar line as were introduced earlier in 2007 and 2013 without fixing unreasonable duration of its operation and thereafter to consider the case of the petitioner within three months from the date of the order as per schemes – writ petition disposed of.

Title: Karam Chand Sood (deceased) through his LRs: Smt. Ram Kumari Sood and others Vs. State of H.P. and another Page-510

Constitution of India, 1950- Articles 226 and 227- Award passed by the Industrial Tribunal-cum-Labour Court can be challenged before the High Court in case it is shown that there are manifest errors or the order is contrary to the provisions of the law and the order has been passed without jurisdiction.

Title: The Chairman Market Committee and another Vs. Geeta Ram and another Page-485

Contempt of Courts Act, 1971- Section 2(b) - Respondents No. 1 and 2 have committed contempt of the Court's order and no reply to the notice filed- Respondents tendered unconditional apology and threw themselves at the mercy of the Court- similarly, respondent No. 3 also tendered unconditional apology and submitted in writing not to indulge in any such activity in future- unconditional apology accepted and further directions issued.

Title: Municipal Corporation Vs. Dinesh Kuthiala and others (D.B.) Page-496

'H'

H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971- Section 54- Consolidation scheme was prepared in consultation with and on the advice of land owners and the committee constituted under the Act- no objection was raised by the private respondent but a complaint was made regarding the obstruction of his path- his dispute was resolved and the path was again blocked on which a fresh complaint was made, which was sent to SDO (Civil) for further action- Director Consolidation modified the consolidation scheme- a writ petition was filed against this modification- order was upheld on the ground that no objection was raised to the report of the Consolidation Officer and the petitioners were estopped from questioning the same- Section 54 of the Act does not provide for a period of limitation but the power should be exercised in a reasonable time- in the present case, consolidation proceedings were completed in the year 1988 and revision was filed after 18 years- remedy for removing the obstruction in the path lies elsewhere and not under the Act- Further, Director Consolidation had not given any opportunity to the parties to raise objection, therefore, order set aside.

Title: Saraswati Devi & ors Vs. State of HP & ors. (D.B.) Page-641

H.P. Land Revenue Act, 1954- Section 123- An application for partition of the property was filed- Assistant Collector Second Grade framed mode of partition and the file was sent to Assistant Collector 1st Grade for further proceedings- Assistant Collector 1st Grade affirmed the mode of partition- application was filed by the co-sharers claiming that some portion of

the land touched the road and all the co-sharers have equal right in the same- Assistant Collector 1st Grade passed an order that reference sent to the Field Agency was not in accordance with the mode of partition – appeal and revision preferred against this order were dismissed - a writ petition was filed which was also dismissed- record shows that no question of title was raised at the time of preparation of mode of partition- it was not mentioned in the reference that land located adjacent to the road be also partitioned and, therefore, Assistant Collector 1st Grade had rightly modified the reference order- appeal dismissed.

Title: Simrata Devi widow of Sh. Bhupinder Dutt and another Vs. Financial Commissioner Revenue (Appeals) State of H.P. Shimla and others (D.B.) Page-276

Hindu Marriage Act, 1955- Section 13- Marriage between the parties was solemnized as per Hindu rites and customs- wife started misbehaving with her husband and her in-laws- she gave beatings to the mother of the husband and used abusive language against her father-in-law – matter was reported to the Gram Panchayat and police- wife also filed a complaint under Section 498-A read with Section 34 of I.P.C and left the home in the month of October, 2001- wife admitted that no dowry was ever demanded by her husband or his relatives – she was not given any beatings by her husband- wife had threatened the husband to commit suicide by consuming poisonous substance- husband had filed a divorce petition which was compromised- wife had filed a complaint against husband only when the husband had filed a petition for divorce – it was duly proved that wife had caused mental and physical cruelty to the husband- she had left her matrimonial home without any reasonable cause- held, that Court had rightly granted the divorce.

Title: Pushpa Devi Vs. Om Parkash Page-72

Hindu Succession Act, 1956- Section 14- Plaintiff claimed that he is co-owners in possession of the suit land – earlier 'P' was the tenant who had re-married and her tenancy rights reverted to 'S', the predecessor of the plaintiff- defendant claimed that 'P' became the absolute owner of the property under Section 14 of the Act and proprietary rights were conferred upon the legal heirs of 'P' in the year 1975- land was divided between 'S' and 'P'- limited tenancy rights would mature under Section 14- 'P' was in possession of the property and would become the owner- 'P' was consistently shown in possession of the suit property in the revenue record- suit was filed after 25 years of the attestation of the mutation and is barred by limitation.

Title: Dharam Dass alias Dharam Singh Vs. Puran Dass and others Page-286

Hindu Succession Act, 1956- Section 14- 'D' was owner of the suit property- he died prior to 1948 leaving behind three widows J, S and S- J and S re-married and third widow became limited owner of the property – she gifted the suit property on 21.4.1948 to 'P'- 'P' sold the suit property- alienation was challenged and the suit was decreed on 26.4.1954- plaintiffs being class-II heirs of 'D' claimed that they are entitled to succeed to the suit property- plaintiffs had duly proved that they were successors of 'D' – 'S' had life interest in the suit property- plaintiffs being reversioners had a legal right to challenge the alienation – improvement made after the decree will not benefit the defendants – widow had alienated the property prior to the commencement of the Hindu Succession Act and the reversioners had a right to file the suit.

Title: Kewal Ram (dead through LRs. Jeet Ram & ors.) Vs. Singh Ram & ors.

Page-261

Income Tax Act, 1961- Sections 44AE and 145(3)- Assessee filed a return declaring income from the contract as well as running trucks on hire- the gross receipts were declared at Rs.12.09 crores on which net income of Rs. 62,66,030/- was shown- income from the trucks was declared on estimate basis- Assessing Officer held that accounts were incorrect and incomplete- he rejected the books of accounts and estimated net profit at 8%- appeal was filed by the assessee which was allowed by the Income Tax Appellate Tribunal- Department preferred an appeal before the High Court- record shows that no separate accounts were maintained in respect of gross hiring receipts, diesel expenses and salaries of drivers and helpers- assessee had failed to give any explanation except that his accounts were previously accepted by the Assessing Officer which is not a valid explanation- there is no presumption in Law about the correctness of continuing Income Tax Returns- assessment of each year has to be made separately – in case a true picture of the profits and gains is made in the account books, same should not be ordinarily disturbed but when the true picture cannot be obtained, the Assessing Officer has a right to reject the books of accounts- Assessing Officer had rightly passed the order- appeal allowed and order of Income Tax Appellate Tribunal set aside while order of Assessing Officer upheld.

Title: Commissioner of Income Tax Vs. Rakesh Mahajan (D.B.) Page-359

Indian Evidence Act, 1872- Section 45- Plaintiff filed a civil suit for recovery of Rs. 7 lacs on the basis of cheque – defendant pleaded that signatures on the reverse of the cheque did not belong to him- application was filed by the plaintiff for sending signatures to the expert for comparison which was dismissed by the trial Court on the ground of delay- held, that report of the expert would have helped in determining whether the signatures on the reverse of the cheque were put by the defendant or not – this opinion is necessary for determination of the dispute pending between the parties- application allowed.

Title: Manish Dharmaik Vs. Shyam Sharma Page-66

Indian Evidence Act, 1872- Section 115- Estoppel- The award was challenged by the petitioner on the ground that workman was a contractual employee and his case was not covered under Industrial Disputes Act- held, record shows that workman had filed original application before the Administrative Tribunal prior to approaching the Industrial Tribunal-cum-Labour Court and it was held by the Administrative Tribunal that matter was covered under the Industrial Disputes Act- this order was never challenged by the petitioner and has attained finality- secondly, a demand notice was also served upon the workman by the petitioner and after failure of conciliation proceedings the matter was referred to Industrial Tribunal-cum-Labour Court- petitioner is now estopped from taking plea that case of the workman is not covered under the Industrial Dispute Act and he is a contractual employee. Petition dismissed.

Title: The Chairman Market Committee and another Vs. Geeta Ram and another Page-485

Indian Penal Code, 1860- Section 302- Accused was student of IIT Rurkee and deceased was student of IIT Delhi- they came to Shimla and stayed in a hotel- room was found locked and was opened by the police- dead body of the deceased was found in the room- accused claimed that he was in love with the deceased- deceased had committed suicide- Medical Officer found self inflicted injury on the person of the accused while the injury found on the person of the deceased could not have been self inflicted- nature of the injuries found on the person of the accused were simple and cannot lead to an inferences that he had tried to commit suicide – deceased was found to have consumed alcohol- the fact that accused had

run away from the scene of the crime falsifies his version that he had tried to commit suicide- held, that in these circumstances, prosecution version was proved beyond reasonable doubt and the accused was rightly convicted.

Title: Gaurav Verma Vs. State of Himachal Pradesh (D.B.) Page-394

Indian Penal Code, 1860- Section 302- Deceased was shot by the accused- post mortem examination showed that she had sustained injury which could have been caused by means of fire arm- bullets were recovered from the body at the time of post mortem examination- country made pistol was also recovered from the accused- testimonies of eye-witnesses corroborated each other- held, that in these circumstances, accused was rightly convicted.

Title: Sumit Kumar Sharma Vs. State of H.P. (D.B.) Page-132

Indian Penal Code, 1860- Section 302- Deceased was working in the shop owned by 'R'- he left home but did not return- he made a call to his wife and stated that he would be reaching home soon- he was found in an injured condition near the culvert and was taken to hospital- he had sustained injury by some sharp object on the back of the head and left ankle- he succumbed to the injuries prior to reaching hospital- accused were arrested and weapon of offence was recovered at their instance- prosecution had not examined any independent witness- it was stated by the prosecution that there was some financial dispute but this was not established by the testimony of the wife of the deceased- version of the prosecution that accused was last seen with the deceased was not proved on record satisfactorily- according to the report of FSL, quantity of ethyl alcohol of the blood was 209.81 mg%- thus, deceased was highly intoxicated and possibility of fall in a state of intoxication cannot be ruled out - no examination was conducted to determine the blood group- there was delay in recording the statements of witnesses- held, that in these circumstances, prosecution version was not proved- accused acquitted.

Title: Satnam Singh alias Chint Ram Vs. State of Himachal Pradesh (D.B.)
Page-579

Indian Penal Code, 1860- Section 302- Deceased was working under the accused- accused approached PW-25 – security guard noticed that hands of the accused were smeared with the blood- he also found blood drops on the ground where accused was standing- accused informed PW-5 that some incident had taken place in his room in which deceased had sustained injuries and there was a lot of blood- PW-5 informed PW-8 and PW-9 about the incident- prosecution witnesses went to the room of the accused- the accused was standing outside his door with one hand on his neck and another hand raised up- he was bleeding - the deceased was lying on the floor and blood was found all around the room- accused and deceased were taken to hospital where deceased was found dead- cause of death was ante mortem injury- it was contended on behalf of accused that deceased had attacked the accused and the accused had caused injury to the deceased to save himself – accused had sustained injury on the neck which was not shown to be self inflicted – accused had not run away and had not disturbed the crime spot- 159.82 mg% alcohol was found in the blood of the deceased- this probablizes the defence taken by the accused that he had caused injuries to the deceased in exercise of right of private defence- however, the accused had caused more harm than was necessary- accused had no right to cause fatal injury to the deceased- accused convicted for the commission of offence punishable under Section 304(Part-I) instead of Section 302 of I.P.C.

Title: Kuldeep Chand Vs. State of Himachal Pradesh (D.B.) Page-190

Indian Penal Code, 1860- Section 302 read with Section 34- Accused murdered the deceased and cut his dead body- they dumped parts of the body in a septic tank and put the remaining parts in a gunny bag, which was concealed under the stones and cow-dung-gunny bag was recovered by the villagers when the wife of the deceased observed foul smell-accused 'G' took a plea that deceased tried to rape her on which co-accused gave a blow to the deceased- held, that right of private defence commences as soon as reasonable apprehension of danger to body arises - this right does not extend to inflicting of more harm than what is necessary to be inflicted for the purposes of defence- accused 'R' has to probablize his defence and not to prove the same beyond reasonable doubt- the version of the defence that deceased tried to rape the accused 'G' on which injury was inflicted on his person was not suggested to any prosecution witnesses and this fact was never disclosed to any person- it was duly proved by the testimonies of the witnesses as well as by the statements of the accused that deceased was last seen in the company of the accused-burden was upon the accused to establish as to what had happened to the deceased-accused had tried to destroy the evidence by concealing the dead body- recovery was effected pursuant to the disclosure statements made by the accused – in these circumstances, prosecution case was proved beyond reasonable doubt and the accused were rightly convicted.

Title: Vinod Kumar & another Vs. State of H.P. (D.B.) Page-139

Indian Penal Code, 1860- Sections 302, 364, 201 - **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989-** Section 3(2)(v)(vi)- Deceased was found missing from her home and could not be found- earlier deceased had registered a rape case against the accused – father of the deceased suspected the involvement of the accused-subsequently, her dead body was found- dogs squad was called which led the police to the house of the accused- two bottles of thyodine were recovered at the instance of the accused-Medical Officer found that cause of death was strangulation with Dhatu- father of the deceased had detected dead body – an inference can be drawn that he in collusion with I.O. had tied Dhatu around the neck of the deceased- the fact that bottles of poison were recovered by the I.O shows that he had no idea regarding the cause of death- testimony of sister of the deceased that she had seen the accused in the company of the deceased was not believable as she had not narrated the incident to any person- extra judicial confession made by the accused was also not proved satisfactorily- mere motive is not sufficient to implicate the accused- held, that accused was rightly acquitted by the trial Court.

Title: State of Himachal Pradesh Vs. Kamal Swarup (D.B.) Page-472

Indian Penal Code, 1860- Sections 302, 392, 328, 201, 473, 420 read with Section 34-Accused hired a taxi on 3.12.2011 for visiting temples at Chintpurni, Jawalajji and Naina Devi Ji and thereafter for being dropped at Rampur- deceased was owner of the Bolero and Alto car- accused had checked in the guest house at Naina Devi Ji- dead body of the deceased was discovered on 13.12.2011 at 9.45 am at Kiratpur- Bolero belonging to the deceased was signaled to stop at Poanta Sahib- it was being driven by accused 'K' - accused 'G' and 'H' were sitting in the vehicle- recoveries were effected on the basis of disclosure statements made by the accused- it was duly proved that accused had hired taxi of the deceased- it was also proved that vehicle was recovered from the possession of the accused-accused had visited the guest house with the driver- time between the recovery of the dead body and death was found to be 7-10 days by Medical Officer-recoveries were also proved by the prosecution witnesses- thus, prosecution has succeeded in proving chain of circumstances against the accused- accused convicted.

Title: Kalyan Singh and others Vs. State of Himachal Pradesh (D.B.) Page-34

Indian Penal Code, 1860- Sections 302, 498-A and 506- Deceased was married to the accused- accused and the deceased had a quarrel- accused brought the stove from the kitchen and sprinkled kerosene oil on her and put her on fire- deceased asked the accused to bring her clothes and to inform the ambulance but the accused did not so- villagers called the ambulance- initially, deceased stated that she had caught fire due to bursting of stove – but subsequently, she made a dying declaration that accused had put her on fire- accused had also tried to commit suicide by putting kerosene oil on himself- prosecution witnesses consistently deposed that accused used to beat the deceased- deceased had received a severe burn injury and had succumbed to the same- she had explained that initial statement was made by her due to fear- dying declaration is sufficient to convict the accused and no further corroboration is required – the fact that accused had tried to commit suicide shows his guilty mind- husband and wife were alone in the room and it was for the accused to explain as to how the deceased had received burn injury- theory of suicide is not plausible – held, that accused was rightly convicted.
Title: Gangadhar Vs. State of Himachal Pradesh (D.B) Page-411

Indian Penal Code, 1860- Sections 353, 332 and 333- Complainant was posted as Driver on the bus owned by HRTC- he was plying bus on Kullu-Ani route - when the bus reached at Mangrot, he found the road blocked due to the cutting being carried out by labourers- complainant requested the contractor and his labourers to clear the road- accused gave beatings to the complainant due to which he sustained injuries and his clothes were also torn- he was rescued by PW-2 and the contractor- Medical Officer admitted that injury could have been caused by way of fall- record shows that 'S' was driver of the bus – there was no evidence on record to show that complainant was driving the bus- log book was not produced- name of the complainant was over written in the register- prosecution witnesses were working in HRTC and are interested witnesses- independent witnesses had not supported the prosecution version and had turned hostile- no test identification was conducted- the contractor was not examined to prove that accused was employed as labourer by him- initial version was that four labourers had given beatings to the complainant but only two persons were arrayed as accused – version of the complainant that he had recognized the accused after seven years in the Court, does not inspire confidence – the circumstances are not proved to form unbroken chain- guilt of the accused is not proved to the hilt- accused acquitted.
Title: Sunil Kumar Vs. State of H.P. Page-300

Indian Penal Code, 1860- Sections 363 and 376- **Protection of Children from Sexual Offences Act, 2012-** Section 4- Prosecutrix was student of 9th class- she did not reach home from the school on 14.5.2013- it was found on inquiry that she was seen with the accused- she was found in the room of the accused – prosecutrix stated that accused had told her that she was called by her grand-mother- she was taken to the room where she was raped- testimony of the prosecutrix was corroborated by the witnesses- report of FSL also corroborated the version of the prosecutrix – held, that accused was rightly convicted.
Title: Des Raj Vs. State of H.P. (D.B.) Page-665

Indian Penal Code, 1860- Sections 363, 366 and 376- Prosecutrix aged 14 years and student of 9th class was enticed by the accused to have sex with him, on the pretext of solemnization of marriage- statement of prosecutrix also supported by her friend - their statements inspire confidence and have remained un-impeached – conviction of the accused proper and sentence imposed is in proportion to the offence committed- no adequate and special reason for imposing of lesser sentence as action of the accused was deliberate and he

was not victim of circumstances- accused had acquired age of majority and had no business to play with the sentiments of child and abuse her to satisfy his lust.
Title: Dinesh Kumar Vs. State of Himachal Pradesh (D.B.) Page-571

Indian Penal Code, 1860- Sections 363, 376 and 506- Prosecutrix aged about 18 years had left home on the pretext of undergoing training of tailoring course- PW-3 also left home for Paonta Sahib- matter was reported to police and the missing girls were found in the premises owned by PW-2- an FIR was lodged at the instance of prosecutrix that accused had enticed her on the pretext of marriage and had raped her. Accused had also threatened the prosecutrix – record regarding the date of birth of the prosecutrix was not satisfactory – prosecutrix had voluntarily travelled with her friends to Chandigarh where accused made them to stay in a Gurudwara- prosecutrix had not made any complaint of sexual intercourse to the police initially – even she had not disclosed this fact to her friends and the parents- prosecutrix was aged more than 18 years- she was mature enough to understand the implication of her action as well as action of the accused- she had travelled with the accused and had stayed at different places- accused had not kidnapped the prosecutrix- held, that in these circumstances, version of the prosecutrix did not inspire confidence and the accused was rightly acquitted by the trial Court.
Title: State of H.P. Vs. Amrik Singh (D.B.) Page-653

Indian Penal Code, 1860- Sections 372, 376 (2)(g), 506, 120-B- **Immoral Traffic (Prevention) Act, 1956-** Sections 5 and 6- Prosecutrix was called by 'S' - she was asked to accompany to the house of 'R', daughter of 'S'- 'R' took her to the house of someone where she was raped- 'R' gave her Rs. 1,000/-- prosecutrix was taken to a hotel where she was again raped- 'R' gave her Rs. 200/- and one mobile phone- prosecutrix was taken to a rest house where she was raped by two person - 'R' again gave her Rs. 500/- 'R' also threatened the prosecutrix- prosecutrix filed a written complaint narrating these incidents- date of birth of the prosecutrix was recorded to be 10.6.1992 in the school leaving certificate- however, record of the school, where prosecutrix was initially admitted was not produced in the evidence- date of birth was also recorded in PW-9/A but this entry was made in ink pen, whereas rest of the entries were made in ball pen – the person who exhibited the documents was not examined- the age of the prosecutrix was stated to be 15-17 years by radiologist with the margin of 2-3 years and thus, prosecutrix is not proved to be a minor – prosecutrix had not mentioned the specific dates and had reported the matter to the police belatedly- no satisfactory explanation for delay was given - there were inter-se contradictions between the FIR and the statement recorded by the Magistrate- there was no evidence that accused were kept with their faces muffled after their arrest- I.O/SHO remained present during identification, which made identification doubtful- held, that in these circumstances, prosecution case was not established and the trial Court had rightly acquitted the accused.
Title: State of Himachal Pradesh Vs. Reeta Devi & others (D.B.) Page-124

Indian Penal Code, 1860- Section 376- Prosecutrix aged three years was raped by the accused after she was taken on the pretext that sweets would be provided to her- prosecutrix was found by PW-12 lying on the sand and was taken to Hospital- blood stains were found on the clothes of the prosecutrix- injuries were found on her person which suggested sexual intercourse- testimony of the prosecutrix was trustworthy- there was no reason to falsely implicate the accused in a heinous crime like rape- testimony of the prosecutrix was corroborated by the testimonies of eye-witnesses and other independent witnesses- held, that accused was rightly convicted.
Title: Ravinder Sahi Vs. State of Himachal Pradesh (D.B.) Page-16

Indian Penal Code, 1860- Section 376- Prosecutrix was cutting grass, when the accused came, caught hold of her and raped her- accused also threatened the prosecutrix not to disclose the incident to any person and promised to marry her- prosecutrix became pregnant and went to the house of the accused where she was abused- matter was reported to the police - prosecutrix was major at the time of incident- she died subsequently and, therefore, there was nothing on record to show whether she had consented or not- she had made a statement in the proceedings for claiming maintenance but had not deposed anything about the incident- held, that in these circumstances, acquittal recorded by the trial Court cannot be faulted- appeal dismissed.

Title: State of Himachal Pradesh Vs. Kamal Swarup Cr. Appeal No. 280 of 2009 (D.B.) Page-465

Indian Penal Code- Section 376(2)(f)- Prosecutrix aged about 8 years went to the house of accused to watch television where she was raped by the accused -mother of the prosecutrix on noticing dark spots on the underwear of the child made enquiries from child and came to know that the child was sexually abused by the accused- F.I.R was lodged- accused was tried, convicted and sentenced by the trial court- held that the prosecutrix has consistently deposed that the accused inserted his finger in her private parts and then urinated in her underwear-mother of the prosecutrix also stated categorically that her daughter had disclosed that the accused firstly inserted his finger in her private part and then rubbed his penis in the same- the medical officer while examining the child found tenderness in the vaginal parts of the child and presence of seminal fluid on labia minora- human semen was found on the bed sheet, underwear of the prosecutrix, underwear of the accused as also vaginal swab and vaginal smear slide- Result of DNA profiling revealed the blood and the semen found on the body and the clothes of the prosecutrix and also other clothes/articles to be that of the accused- no reasons available on the record to disbelieve the prosecution case- no reason to interfere with the well reasoned judgment passed by the trial Court- appeal dismissed.

Title: Subhash Vs. State of H.P. (D.B.) Page-714

Indian Penal Code, 1860- Sections 376 and 354- Accused was working as a Physical Education Teacher (PET) in Government School- prosecutrix was studying in class 8th in that school – accused applied for half day leave and also made the prosecutrix to apply for half day leave and thereafter took her in a car towards an isolated place in a jungle and subjected to her sexual assault- prosecutrix was threatened not to disclose the incident to any one- held, that statement of the prosecutrix is cogent, convincing and trustworthy and also supported by the medical evidence- the prosecutrix has to be treated as victim of the offence and not an accomplice in the crime – defence of the accused that he was implicated at the instance of the one 'D' due to the fact that 'D' bore grudge against him is highly improbable and cannot be believed- conviction and sentence of the accused is proper- appeal dismissed.

Title: Ram Singh Vs. State of Himachal Pradesh (D.B.) Page-694

Indian Penal Code, 1860- Sections 376 and 506- **Prevention of Children from Sexual Offences Act, 2012-** Section 6- Prosecutrix was residing with her elder sister in the house of maternal grand-father- accused was her maternal uncle- she was alone in the house when she was raped by the accused- accused threatened her not to divulge the incident to anybody- prosecutrix suffered stomach ache and was taken to Doctor who told that prosecutrix was pregnant for 26-28 weeks- age of the prosecutrix was 13 years- Medical Officer also corroborated the sexual intercourse- the testimony of the prosecutrix was

corroborated by other witnesses- according to the report, accused was biological father of the baby of the prosecutrix- held, that in these circumstances, prosecution version was duly proved.

Title: Fateh Chand Vs. State of Himachal Pradesh (D.B.) Page-212

Indian Penal Code, 1860- Sections 376, 342, 506 and 366- Prosecutrix alleged that while she was going to Government Senior Secondary School to obtain admission in +2, accused held her in the way, took her to nearby isolated field and committed rape- she tried to raise cry but her mouth was gagged and she was threatened to be killed- later on, accused took prosecutrix to his house -prosecutrix in her cross-examination admitted that two paths existed on the spot and the spot was accessible from the village- she further admitted that villagers of 2-3 villages pass through the aforesaid path- prosecutrix remained on the spot throughout the day and had not raised hue and cry- such conduct of the prosecutrix shows that she was a consenting party - absence of physical injuries on the body of the prosecutrix further leads to an inference that she was a consenting party- held that the accused was rightly acquitted- appeal dismissed.

Title: State of Himachal Pradesh Vs. Praveen Kumar Page-406

Indian Penal Code, 1860- Sections 148, 341, 447, 452, 323, 325, 436, 506 read with Section 149- **Indian Arms Act 1959**- Section 27- Accused visited the house of 'P' and pointed gun towards his parents- father of 'P' was injured- a blow with lever (Jhabbal) was given on his foot- accused 'R' inflicted a blow on the head with gun while other accused put chilli powder in his eye – accused demolished the house of 'P' and set it on fire – it was duly proved that 'P' and co-accused had purchased different parcels of land- injured had sustained four injuries- testimonies of the witnesses were corroborated by medical evidence- accused 'R' had pointed gun towards the parents of 'P'- gun was recovered from his possession- Court had also issued an injunction order which was violated by the accused- testimonies of the prosecution witnesses were corroborating each other- mere lapse of time is not sufficient to doubt the testimonies of prosecution witnesses - accused 'R' was convicted of the commission of offences punishable under Section 325 of IPC and Section 27 of Arms Act.

Title: State of Himachal Pradesh Vs. Surjan Singh son of Shri Hari Nand and others Page-589

Indian Penal Code, 1860- Sections 452, 342, 302 read with Section 34- Deceased was working as a labourer and was residing in the house of contractor- he had gone to the house of one 'R' – deceased told 'R' that accused used to pick up quarrel with him- 'R' received an intimation that deceased was killed inside the room- it was duly proved from the statements of the prosecution witnesses that accused had given beatings to the deceased with a stick- PW-2 had seen the accused going inside the room and coming out of the same- accused 'D' was carrying a stick- incident was also seen by PW-6 from the window- deceased had died due to poly-trauma of injury- held, that in these circumstances, prosecution case was duly proved and the accused was rightly convicted.

Title: Deep Kumar @ Deepu Vs. State of Himachal Pradesh (D.B.) Page-46

Indian Succession Act, 1925- Section 63- Plaintiff claimed that he is co-owner in possession of the suit land and the mutation entered on the basis of the Will was incorrect- defendants pleaded that deceased had executed a Will in their favour when deceased was in a sound disposing state of mind - record shows that deceased was aged 97 years at the time

of execution of the Will- Will was prepared earlier and was produced before Sub Registrar who refused to register the same- deceased was hard of hearing and his eye sight was weak- Will was registered at Amb- DW-2 was deed writer at Amb and the age of the deceased was mentioned as 78 years in the Will - it was not explained as to why the Will was got registered at Amb instead of at Bangana- no evidence was led to show that beneficiaries were looking after the deceased- beneficiary had actively participated in the execution of the Will- mere registration of the Will does not give rise to presumption that Will was valid- held, that in these circumstances, Will was rightly rejected by the trial Court.

Title: Bhag Singh & anr. Vs. Bachni Devi & ors. Page-332

Industrial Disputes Act, 1947- Section 25- **Constitution of India, 1950-** Article 226- Respondent No.1 was retrenched from school as he had failed to join the place where he was transferred – respondent No.1 had asked for transfer grant and one month advance salary from the petitioners so that he could join at the place of his transfer- Labour Commissioner also failed to effect conciliation- reference was made to Industrial Tribunal-cum-Labour Court, wherein Tribunal held that inquiry conducted against the respondent No.1 was exparte without granting him sufficient opportunity- the respondent No. 1 was ordered to be reinstated- petitioner feeling aggrieved by the award challenged the same by way of writ petition- held, that there is enough material available on record to show that respondent No.1 was not given ample opportunity to participate in the inquiry conducted against him and principle of audi alteram partem was vitiated- further held, that Tribunal has properly appreciated the factual situation and the evidence and the writ petition is without merits.

Title: The General Secretary DAV College and another Vs. Bindu Lal and another Page-452

Industrial Disputes Act, 1947- Section 25(g)- Workman/respondent alleged that he was retrenched by the petitioner despite the fact that he had completed 240 days in a calendar year and person junior to him was retained- reference made to the Tribunal was answered holding that services of respondent were wrongly and illegally terminated without complying with the relevant provisions – tribunal ordered reinstatement of services of the workman with seniority- the award challenged by the petitioner under Articles 226 and 227 of the Constitution of India- held, that material on record clearly established that workman has completed 240 days in a calendar year and workman junior to respondent was still working- the award passed by the Tribunal was based upon proper appreciation of the material- petition liable to the dismissed.

Title: The Chairman Market Committee and another Vs. Geeta Ram and another Page-485

Industrial Disputes Act, 1947- Section 25F- 'S' was working on daily wages in the office of Executive Engineer IPH Division Dalhousie- services of 363 workmen were terminated due to shortage of funds and work in the Division - he filed a petition before the Labour Court who directed the Executive Engineer to re-engage the service of 'S' and to consider his case for regularization- services of two workmen were re-engaged- it was not proved that any offer was made to 'S' for re-employment- held that the petitioner was deprived of his right of being engaged prior to the engagement of his juniors- petition dismissed.

Title: State of Himachal Pradesh and another Vs. Surinder Singh Page-379

Industrial Disputes Act, 1947- Section 25F- Petitioner was working on daily wages in the office of Executive Engineer IPH Division Dalhousie- services of 363 workmen were

terminated due to shortage of funds and work in the Division - he filed a petition before the Labour Court who directed the Executive Engineer to re-engage the service of petitioner and to consider his case for regularization- services of two workmen were re-engaged- it was not proved that any offer was made to petitioner for re-employment- held that the petitioner was deprived of his right of being engaged prior to the engagement of his juniors- petition dismissed.

Title: State of Himachal Pradesh and another Vs. Chaman Singh Page-403

Industrial Disputes Act, 1947- Section 36- Petitioner had appointed a legal practitioner before the Industrial Tribunal- respondents objected to the appointment of the Advocate by filing an application- petitioner filed an application seeking representation through an Advocate- Tribunal allowed the application filed by the respondents and dismissed the application filed by the petitioner- held, that workman has an absolute right to be represented by the member of the executive or office bearer of registered trade union- similarly, employer has an absolute right to be represented by an officer of association of which the employer is a member- workman can also be represented by an office bearer or member of the executive of the trade union, even if he was a legal practitioner prior to becoming an office bearer or member of the executive- similarly, a company can be represented by an officer, even if such officer was a legal practitioner prior to his appointment - an advocate can only be appointed with the consent of the other party and with the permission of the Tribunal- since, in the present case no such permission was granted by the Tribunal nor consent was taken from the opposite party- therefore, application was rightly dismissed.

Title: Managing Director, M/s Crest Steel and Power Ltd. Vs. Tara Chand Page-367

'L'

Land Acquisition Act, 1894- Section 45- A notice was issued to the petitioner informing him that sum of Rs. 3,65,598/- had been awarded in his favour- it was reported by Patwari that notice was received by 'C' and not by the petitioner- petitioner sought the reference but the reference was declined - it was not the case of the respondent that petitioner could not be found despite the exercise of due diligence and, therefore, service had to be effected on the 'C'- respondent had erred in law by not making the reference to the District Judge when the petitioner was not served in accordance with law- reference can be made within 6 weeks of the pronouncement of the award in case of service or within 6 months from the date of the knowledge- petitioner had immediately approached the Collector on coming to know about the award- his petition cannot be said to be beyond limitation- Writ petition allowed.

Title: Mohinder Chand Vs. State of H.P. and another Page- 107

Land Acquisition Act, 1894- Section 45- A notice was issued to the petitioner informing him that sum of Rs. 3,65,598/- had been awarded in her favour- it was reported by Patwari that notice was received by 'C' and not by the petitioner- petitioner sought the reference but the reference was declined - it was not the case of the respondent that petitioner could not be found despite the exercise of due diligence and, therefore, service had to be effected on the 'C'- respondent had erred in law by not making the reference to the District Judge when the petitioner was not served in accordance with law- reference can be made within 6 weeks of the pronouncement of the award in case of service or within 6 months from the date of the knowledge- petitioner had immediately approached the Collector on coming to know about the award- her petition cannot be said to be beyond limitation- Writ petition allowed.

Title: Rekha Vs. State of H.P. and another Page-112

Limitation Act, 1963- Article 54- Mutation showing incorrect revenue entries and incorrect name of the father of the plaintiff was attested in the year 1949- suit filed after 1990 claiming that cause of action accrued on 22.10.1990 when A.C. 2nd Grade dismissed the application for correction of record and advised the party to approach the Civil Court- First Appellate Court held the suit to be barred by limitation- held, the approach of First Appellate Court is erroneous as cause of action does not arise on account of wrong revenue entries but from the date when plaintiff in fact feels aggrieved – in this case, cause of action accrued to the plaintiff on 22.10.1990 when his prayer for correction was rejected by A.C. 2nd Grade and he was directed to approach the Civil Court.
Title: Taj Ali Vs. Charag Deen & others Page-551

'M'

Motor Vehicles Act, 1988- Section 149 - Owner/insurer had questioned the amount awarded on the ground that he had wrongly been saddled with the liability- claimant pleaded that he was travelling in the truck carrying apple boxes- owner on the other hand pleaded specifically in the reply that claimant was not travelling in the offending vehicle with the apple boxes – held, that claimant was proved to be a gratuitous passenger and the owner of the offending vehicle- owner had committed the breach of terms of the policy and was rightly fastened with the liability.
Title: Narain Chauhan Vs. Ramesh Kumar & another Page-514

Motor Vehicles Act, 1988- Section 149 and 134(c) - Insurer contended that insured had not complied with the provisions of Section 134(c) of the Act- held, that Section 134(c) is not part of chapter X to XII dealing with the grant of compensation, it deals with the control of traffic- non-compliance of Section 134(c) cannot be made a ground for denying relief.
Title: National Insurance Company Ltd. Vs. Changa Ram and others Page-216

Motor Vehicles Act, 1988- Section 149- Insurance Company contended that the driver had not attained age of 18 years, when the driving licence was issued to him and the driving licence issued to him was not valid- held that accident had taken place on 3.8.2006 on which date driver was aged 20 years- licence was renewed from time to time- therefore, plea of the Insurance Company that driver did not possess a valid driving licence cannot be accepted.
Title: United India Insurance Company Ltd. Vs. Sham Lal and others Page-253

Motor Vehicles Act, 1988- Section 149- Insurer challenged the award on the plea that claimants had not proved rashness and negligent driving of the driver of the offending vehicle- claimants had led sufficient evidence to prove rash and negligent driving of the driver- insurer did not lead any evidence to this effect- driver could have challenged these findings but no appeal was filed by him- insurer was rightly held liable- appeal dismissed.
Title: National Insurance Company Ltd. Vs. Ashwani Kumar & others
Page-515

Motor Vehicles Act, 1988- Section 149- Insurer contended that deceased were travelling in the vehicle as a gratuitous passengers- claimants had specifically stated that deceased were travelling in the vehicle with their goods- owner of the vehicle also admitted this fact- therefore, plea taken by the insurer that deceased were travelling in the vehicle as gratuitous passengers cannot be accepted.
Title: Oriental Insurance Co. Ltd. Vs. Ranjana & others Page-229

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid and effective driving licence to drive the vehicle – licence was valid for driving Light Motor Vehicle (non-transport) but had no endorsement to drive transport vehicle- held that the gross weight of the vehicle was 1165 kilograms, as per R.C and the vehicle falls within the definition of Light Motor Vehicle - no endorsement of PSV is required in such cases- the plea of the Insurance Company that driver did not have a valid driving licence to drive the vehicle cannot be accepted.

Title: The New India Assurance Company Vs. Bimla Devi and others

Page-218

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving licence- Insurer did not examine the Officer who had issued the driving licence- therefore, the plea that driver did not have a valid driving licence was not established.

Title: Cholamandlam MS General Insurance Co. Ltd. Vs. Jamna Devi and others

Page-207

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving licence- held, that driver had a valid driving licence to drive 'Light Motor Vehicle'- offending vehicle fell within the definition of 'Light Motor Vehicle'- therefore, driver was competent to drive the vehicle and the plea of the Insurer cannot be accepted.

Title: Dinesh Kumar Vs. Trishla Devi and another Page-210

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver of the offending vehicle was having a learner's licence at the time of accident and thus, he was not competent to drive the same- held, that a person possessing a learner's licence is competent to drive the motor vehicles of any specified class or description for which he has been given the licence- Tribunal has rightly held that licence in question was valid and effective- appeal dismissed.

Title: Oriental Insurance Company Ltd. Vs. Mansha Ram and others Page-524

Motor Vehicles Act, 1988- Section 149- Insurer contended that insurance policy was not subsisting on the date of the accident – insurance policy provided that it was valid w.e.f. 3.11.2003 till the midnight of 2.11.2004- it was further provided that policy was effective w.e.f. 3.12.2003 instead of 3.11.2003 and this rectification was made on the request of the claimant- therefore, insurance policy would expire on 2.12.2004- vehicle was purchased on 15.11.2003 and, therefore, rectification was justified – Insurance policy was valid up to 2.12.2004- accident had taken place on 4.11.2004- held, that vehicle was under a subsisting policy.

Title: The New India Assurance Company Limited Vs. Nirmala Devi & others

Page-517

Motor Vehicles Act, 1988- Section 149- Insurer contended that owner had committed willful breach as the driver of the offending vehicle was not having valid and effective driving licence- held, that no evidence was led by the insurer to prove this plea- hence, appeal dismissed.

Title: United India Insurance Company Ltd. Vs. Puran Chand & others

Page-564

Motor Vehicles Act, 1988- Section 149- Insurer had challenged the award on the ground that offending vehicle was not insured at the time of accident- no material placed by the appellant to show this fact- held, that the appeal is without merits and dismissed.
Title: Laxmi Bhardwaj Vs. Lalit Kumar and others Page-513

Motor Vehicles Act, 1988- Section 149- Tribunal passed an award and directed the insurer to satisfy the award and to recover the amount from the owner- owner challenged these findings- held, that insurer has not pleaded and proved willful default on the part of the owner- Driving Licence of the driver was also effective- Tribunal, had fallen in error in granting right of recovery- award modified.
Title: Kamal Bhardwaj Vs. Paramjit and others Page-509

Motor Vehicles Act, 1988- Section 166- A car being driven by the son of the deceased was hit by an HRTC bus resulting into the death of the deceased- petition was dismissed on the ground that son of the deceased was driving the vehicle in a rash and negligent manner and that risk of owner was not covered in terms of insurance policy- insurance policy covered the risk of four persons namely driver, owner and two other persons – Insurance policy, therefore, specifically covered the risk of the owner- risk was covered to the extent of Rs. 2 lacs – therefore, amount of Rs. 2 lacs awarded with interest @ 6% per annum.
Title: Sita Rani and others Vs. The Managing Director, HRTC, and others
Page-247

Motor Vehicles Act, 1988- Section 166- Claimant had suffered permanent disability of 35%- she had spent Rs. 40,000/- on her treatment and is entitled to Rs. 40,000/- - she had spent Rs. 23,500/- as taxi charges and is entitled to the same as transportation charges- she remained in hospital w.e.f. 29.8.2002 till 25.9.2002 and is entitled to Rs. 10,000/- under the head 'special diet', Rs. 10,000/- under the head 'attendant charges'- she is entitled to Rs. 50,000/- under the head 'pain and suffering' and Rs. 50,000/- on account of future pain and suffering- injury has shattered her physical frame and has affected her matrimonial home - amount of Rs. 50,000/- awarded under the head 'loss of amenities of life'- her monthly income was Rs. 4,000/- and she was unable to work after the accident- therefore, loss of income can be treated as Rs. 2,500/- per month- she is 26 years of age and applying multiplier of '16', she is entitled to Rs. 2,500 x 16 x 12=Rs.4,80,000/- - thus, claimant is entitled to Rs. 7,13,500/-.
Title: Oriental Insurance Company Vs. Padma Devi and others Page-526

Motor Vehicles Act, 1988- Section 166- claimants had pleaded that deceased was earning Rs. 5,000/- per month from agriculture and horticulture - affidavit by one of the claimants filed to this effect- held, that in view of the fact that deceased was owner of the agricultural land, he would have been earning at least Rs. 2,000/- p.m. from it- age of the deceased was 29 years at the time of accident and multiplier of 16 will be applicable - claimants held entitled to Rs. 3500/- x 12 = Rs. 42,000 x 16= Rs. 6,72,000/- under the head of loss of dependency after deducting 1/3rd of monthly income for his personal expenses.
Title: Rita Devi & others Vs. Dinesh Kumar & others Page-540

Motor Vehicles Act, 1988- Section 166- Deceased was a bachelor at the time of his death- his income was assessed as Rs.5,000/- per month- 1/2 share was to be deducted towards

personal expenses- multiplier of '16' was applicable- thus, claimants are entitled to Rs.4,80,000/- (Rs.2500 x 12 x 16) as compensation.

Title: National Insurance co. Ltd. Vs. Gulaboo Devi and others Page-217

Motor Vehicles Act, 1988- Section 166- Deceased was driving a motorcycle which met with an accident – deceased was aged 20 years and 11 months on the date of accident- it was averred in the petition that deceased was employed as Accountant-cum-Store Assistant and was pursuing his studies in B.Com from Sikkim Manipal University, Gangtok- his record of appointment was proved by authorized representative of the last employer- his gross salary was Rs.9,500/- - he was sole bread earner of the family and the entire family was dependent upon him- 50% of the amount was to be added towards future prospectus- thus, monthly income of the deceased would be Rs.14,250/- (Rs.9,500/-+ 4,750/-) or Rs.1,71,000/- per year- deceased was bachelor and, therefore, 50% amount was to be deducted towards personal expenses - annual income of the deceased would be Rs. 85,500/- - multiplier of '18' would be applicable and the claimants are entitled to compensation of Rs. 15,39,000/- (Rs.85,500 x 18 = Rs.15,39,000/-) for loss of dependency- amount of Rs. 30,000/- awarded towards funeral expenses and amount of Rs. 25,000/- awarded towards loss of estate and the claimants held entitled to Rs. 15,94,000/-.

Title: Shriram General Insurance Company Vs. Amarjeet Singh and others

Page-648

Motor Vehicles Act, 1988- Section 166- Deceased was earning Rs. 15,000/- per month- Tribunal had rightly assessed monthly income of the deceased as Rs. 10,000/- and after deducting 1/3rd amount towards personal expenses had assessed the loss of dependency to the claimants as Rs. 6,700/- - Tribunal had applied multiplier of '17', whereas multiplier of '15' was applicable – thus, claimants are entitled to Rs. 6,700/- x 12 x 15 = Rs. 12,06,000/- + Rs. 10,000/- under the head 'loss of love and affection'+ Rs. 10,000/- under the head 'funeral expenses' + Rs. 10,000/- under the head 'loss of estate' + Rs. 10,000/- under the head loss of consortium= Rs. 12,46,000/- with interest - litigation costs of Rs. 20,000/- also to be borne by the petitioner.

Title: National Insurance Company Ltd. Vs. Priya and others (D.B.) Page-613

Motor Vehicles Act, 1988- Section 166- Documents disclosed that deceased remained on leave for a long period immediately after the accident- Medical Officer stated that death could have been caused by the injury sustained in the accident- held that the plea that death was not caused by the accident cannot be accepted - appeal dismissed.

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

Page-250

Motor Vehicles Act, 1988- Section 166- PW-5 stated that vehicle had rolled down 300 feet and was totally damaged- Insurance policy disclosed that insured value of the vehicle was Rs. 4 lacs- no specific evidence was led to prove the extent of damage- hence, amount of Rs. 3 lacs awarded in lump sum without any interest.

Title: Oriental Insurance Company Vs. Sukhpal and others Page-231

Motor Vehicles Act, 1988- Section 166- Respondents contended that vehicle belongs to Self Help Group- they are neither owners nor possessors of the same- respondents have executed a Power of Attorney admitting that they are members of the Group, that they are

running the offending vehicle and are in possession of the same- they have power to ply the vehicle and to appoint driver and conductor and to deposit taxes- held, that in view of these circumstances, the plea of the respondents that they are not owners cannot be accepted.
Title: Sunita and others Vs. Self Help Group village Panesh and others
Page-549

Motor Vehicles Act, 1988- Section 169- Insurer moved an application under Order 11 Rule 14 C.P.C which was rejected by the Tribunal- held, that the technicalities or procedural wrangles and tangles have no role to play before MACT- all the provisions of Civil Procedure Code are not applicable and only some provisions have been made applicable- Order 11 Rule 14 is not applicable before MACT and the application was rightly dismissed.
Title: Cholamandlam MS General Insurance Co. Ltd. Vs. Jamna Devi and others
Page-207

Motor Vehicles Act, 1988- Section 173- Award challenged by the Insurer on the ground that claimants had not proved rashness and negligence of the driver of the offending vehicle- FIR lodged against the driver and challan presented against him- oral evidence also led to prove rashness and negligence of the driver- held, that lodging of FIR is sufficient proof to hold the rashness and negligence of the driver- insurer did not lead any evidence to contrary- finding qua rashness and negligence of the driver of the offending vehicle is the result of the proper appreciation of evidence - appeal dismissed.
Title: United India Insurance Co. Ltd.Vs. Meena Devi and others Page-560

Motor Vehicles Act, 1988- Section 173- Award passed by the Tribunal challenged by the insurer on twin grounds i.e. owner has committed willful breach and the amount awarded is not in accordance with the second Schedule of Motor Vehicles Act read with the judgment passed by Apex Court titled **Sarla Verma and others**- held, that first plea has been covered in the judgment delivered in bunch of appeals and had attained finality- issue once decided finally cannot be re-opened- Tribunal had fallen in error while applying multiplier of '16', whereas multiplier of '14' was applicable- secondly, age of the deceased was 16 years and he was bachelor- therefore, ½ of the income was to be deducted towards personal expenses - award modified accordingly.
Title: Oriental Insurance co. Ltd. Vs. Mahtaba and others Page-520

Motor Vehicles Act, 1988- Section 173- HRTC and the claimant had challenged the award on the ground of adequacy and the driver of private bus had challenged the award on the ground that he was not negligent and was wrongly saddled with the liability – drivers of both the buses admitted in the pleadings that deceased was crushed in between two buses- this admission proved their rashness and negligence- salary of deceased was Rs.18,000/- per month- 1/3rd amount was rightly deducted towards personal expenses- awarded amount has rightly been calculated by the Tribunal- appeal without merits and dismissed.
Title: Himachal Raod Transport Corporation Vs. Banti Devi & others
Page-503

Motor Vehicles Act, 1988- Section 173- Insurer challenged the award on the plea that ownership of the offending vehicle was transferred by the owner and alleged purchaser was not party to petition- hence, owner had committed willful breach, secondly, claimants had not proved that offending vehicle was being driven rashly and negligently- held, that since intimation of the alleged sale of offending vehicle was not given to Insurance Company,

therefore, liability of the insurer does not cease in case of third party- further, held, that claimants have led sufficient evidence to prove that offending vehicle was being driven rashly and negligently by proving FIR - challan was also filed against the erring driver - no evidence to counter this evidence led by the Insurance Company- owner and driver did not step into witness box to dislodge the evidence led by the claimants- grounds taken in appeal sans merit and findings of the Tribunal upheld- appeal dismissed.
Title: United India Insurance Co. Ltd. Vs. Vidya and others Page-565

Motor Vehicles Act, 1988- Section 173- Insurer had challenged the award on the plea that amount awarded was excessive and that sitting capacity of the offending vehicle was '9+1' at the relevant time- held, that since only two claim petitions were before the Court – therefore, plea regarding sitting capacity is not tenable- deceased were bachelor in both the cases at the time of their death- Tribunal fell in error while deducting 1/3rd amount towards personal expenses, whereas, deduction should have been ½- Tribunal had also fallen in error by applying multiplier of '17', whereas, multiplier should have been '15' as the age of the deceased were respectively 21 years and 23 years- award accordingly modified.
Title: The Oriental Insurance Co. Ltd. Vs. Thano Devi & others Page-534

Motor Vehicles Act, 1988- Section 173- Insurer had challenged the award on the ground that claimant has not proved the negligence of the driver, and that amount awarded was excessive- record shows that FIR was lodged against the driver of the offending vehicle- claimant has also specifically pleaded and proved the rashness and negligence on the part of the driver of the offending vehicle- no evidence was led by the insurer/appellant to the contrary- insurer had also failed to prove that driver of the offending vehicle was not having a valid and effective driving licence at the relevant time or there was collusion between the claimant and owner- held, that the award passed by the Tribunal is based upon proper appreciation of evidence- appeal dismissed.
Title: United India Insurance Company Vs. Palvi & another Page-562

Motor Vehicles Act, 1988- Section 173- Tribunal held that vehicle involved in the accident was being driven by one 'D' and not by driver alleged in the claim petition- tribunal saddled the insurer with the liability with a right of recovery- findings challenged by the owner of the offending vehicle- held, that while determining the claim petition, prima facie proof is required and the Tribunal fell in error while expecting the owner to prove the case beyond reasonable doubt- owner had led sufficient evidence that vehicle was being driven by the driver pleaded in the claim petition and not by one 'D'- findings of the Tribunal holding otherwise set aside – award modified and insurer saddled with the entire liability without right of recovery.
Title: Tulsi Ram Vs. Veena Devi and others Page-557

'N'

N.D.P.S. Act, 1985- Section 20- A car was checked which was containing 26 kg 150 grams of charas- accused were travelling in the vehicle- independent witnesses had not supported the prosecution version- personal search of the accused were conducted in the police station- however, no option was given to the accused to be searched before Magistrate or Gazetted Officer - independent witnesses were drivers by profession- no local residents were associated- held, that in these circumstances, prosecution version was not proved- accused acquitted.
Title: Parkash Chand & ors. Vs. State of H.P. (D.B.) Page-669

N.D.P.S. Act, 1985- Section 20- Accused was apprehended with 1.9 k.gs of charas from secluded place- police made efforts to associate independent witnesses by stopping the vehicles but none stopped- the nearest inhabited place was at a distance of 15-20 minutes- accused tried to run away from the spot and, therefore, he could not have been left alone- testimonies of police officials corroborated each other- there were no contradictions in their testimonies- police did not have any reason to implicate the accused falsely- link evidence was complete- held, that in these circumstances, accused was rightly convicted, however, sentence was modified.

Title: Usman Shamshudeen Shekh Vs. State of Himachal Pradesh (D.B.)

Page-20

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 700 grams of charas concealed in a wooden box of his house- independent witnesses had not supported the prosecution version - elected representatives of the area were also not associated- independent witnesses were not even the local residents of the area- no reason was assigned as to why the local residents were not associated- there were contradictions in the testimonies of the police officials- testimonies of the police officials were also vague- held, that in these circumstances, accused was rightly acquitted by the trial Court.

Title: State of Himachal Pradesh Vs. Jai Ram (D.B.) Page-619

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2.5 kgs. Of charas – witnesses admitted that constable was sent for calling independent witnesses from the Village located at a distance of ¾-1 km.- however, no independent witness was associated- police was on the duty of traffic checking but no vehicle was stopped to associate independent person- there was no entry of the deposit of the contraband in the malkhana when it was received from FSL, Junga- no entry was made in the Malkhana register regarding taking out of the case property for production in the Court and re-deposit of the case property after its production in the Court, which casts doubt that case property produced in the Court is the same which was recovered from the accused- held, that in these circumstances, prosecution case was not proved beyond reasonable doubt - accused acquitted.

Title: Raj Kumar alias Tilku Vs. State of H.P. (D.B.) Page-232

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 4 kg. 600 gms cannabis – there were houses and shops near the place where the accused was apprehended – no independent witness was associated- no action was taken against the person who had refused to be a witness- accused was asked whether he would like to searched before Magistrate, Gazetted Officer or Police Officials present at the spot- this was violative of Section 50 of N.D.P.S. Act as the option to be searched before Magistrate and Gazetted officer has to be given- held, that in these circumstances, case of prosecution was not proved beyond reasonable doubt- accused acquitted.

Title: Changa Ram Vs. State of H.P. (D.B.) Page-607

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.250 kg. of charas- testimony of police official cannot be doubted on the ground that he is interested in the success of his case- accused got afraid on seeing the police and was apprehended on the basis of suspicion – there was no evidence that the place from where accused was apprehended was motorable road - the place was in the middle of the jungle and no person could have been associated during search and seizure – testimonies of the police officials

were corroborating each other- there was no reason with the police to falsely implicate the accused- defence evidence was not satisfactory- held, that in these circumstances, accused was rightly convicted.

Title: State of H.P. Vs. Suraj Mal (D.B.) Page-625

N.D.P.S. Act, 1985- Section 20- Accused was found with a bag containing 1.1 kgs of charas when he was travelling in the bus- PW-11 admitted that he was aware that accused was occupying seat No. 27 which shows that police had prior intimation- however, police had not complied with the Section 42(2) of N.D.P.S Act, which is a mandatory requirement - accused was not apprised of his right under Section 50 of the N.D.P.S. Act- there were contradictions in the testimonies of the prosecution witnesses- accused acquitted.

Title: Bashir Mian Vs. State of Himachal Pradesh (D.B.) Page-155

N.D.P.S. Act, 1985- Section 20- One bed sheet was found in the dicky which was containing two plastic packets wrapped with the tape- charas weighing 10.02 kg was found inside the packets- it had come in evidence of PW-1 that there was a heavy tourist season and the National Highway remained busy- PW-2 admitted that Badanu was located at a distance of 150 meters from the place of incident- no police official was sent to call any witness from the Badanu – no vehicle was stopped by the I.O to associate independent witness- there were houses and shops on both the side of the road but no witness was associated – accused was not given any option to be searched before the Magistrate or Gazetted Officer- personal search of the accused was also conducted – therefore, it was necessary to comply with the provisions of Section 50 of N.D.P.S. Act- held, that in these circumstances, prosecution version was not proved beyond reasonable doubt- accused acquitted.

Title: Rajinder Vs. State of H.P. (D.B.) Page-615

Negotiable Instruments Act, 1881- Section 138- Accused was authorized signatory of M/s Century Vision Organic Farm Pvt. Ltd.- he had issued a cheque for a sum of Rs.78,000/- which was dishonoured on presentation- the complainant had not arrayed the Company as an accused – held, that impleading of the Company was mandatory- accused can only be held vicariously liable for the offence committed by the Company - in absence of the Company, accused cannot be held liable.

Title: Vijay Kumar Vs. Rakesh Kumar Page-281

'P'

Public Premises (Eviction of Unauthorized Occupants) Act, 1971- Section 4- Petitioner was directed to vacate the public premises and to pay damages of Rs.3,01,500/- within one month, failing which 9% interest was to be charged up to three months and 12% after four months- petitioner contended that he was general power of attorney of 'R' and 'R' was in possession of the same – record shows that 'R' was never appointed as Manager and he had no occasion to give general power of attorney in favour of the petitioner – petitioner was collecting rent from the tenants and, therefore, he was in unauthorized possession of the same - petition dismissed.

Title: Anil Kumar Sood Vs. Union of India and another Page-306

'R'

Registration Act, 1908- Section-17- Family arrangement arrived at between the parties does not require registration.

Title: Narain Chand & ors. Vs. Bhago and ors. Page- 687

'S'

Specific Relief Act, 1963- Section 20- Plaintiff claimed that he had entered into a contract with defendant No. 1- it is the duty of the Court to construe correspondence to determine, whether there was any meeting of mind between the parties, which would create a binding contract between them- however, Court is not empowered to create a contract for the parties- burden of proving that there was a valid binding contract between the parties is on the plaintiff- even if, contract was not signed by the parties and it can be inferred from the agreement- plaintiff never talked with the defendant No. 1, although he was an intending purchaser and was hearing the conversation on the parallel line when the alleged deal was struck- there was no meeting of mind between the plaintiff and defendant No. 1- there was no privity of contract between the plaintiff and defendant No. 1- defendant No. 1 had returned the earnest money to PW-2 and not PW-1 which shows that there was no concluded contract between the parties- telephonic transcript and conversation were not legally proved- suit dismissed.

Title: Arjan Singh Vs. Dr. S.R. Bawa and others Page-312

Specific Relief Act, 1963- Section 20- Plaintiff filed a suit for enforcement of agreement against the defendant by way of specific performance, mandatory injunction for directing the defendant to execute the sale deed and permanent injunction for restraining him, his agents and servants from causing interference in the subject matter of agreement- Plaintiff also sought damages- defendant did not contest the suit and remained exparte- plaintiff examined herself and both marginal witnesses to the agreement to sell to speak about the due execution of the agreement- she further proved her willingness and readiness to perform her part of the agreement and inaction on the part of the defendant - held, that plaintiff was entitled to the decree for specific performance of contract, mandatory injunction and permanent injunction as she had succeeded in proving the agreement and her willingness and readiness to perform her part- further held, that since the defendant has not chosen to contest the suit and appear in the witness box to deny the case of the plaintiff, therefore, an adverse inference is to be drawn against him in view of the settled law- suit for specific performance of agreement and injunction decreed, whereas, relief for damages declined in view of terms and conditions of the agreement.

Title: Aarti D/o Sh.Raghubir Singh Vs. Lalit Kumar Sharma Page-701

Specific Relief Act, 1963- Section 34- Plaintiff filed a suit for declaration and permanent prohibitory injunction claiming that he had appointed his son as General Power of Attorney to look after the construction work- the defendants got the sale deed executed in favour of defendant No. 1 in connivance with each other, scribe and marginal witnesses - sale deed was not binding upon the plaintiff- defendant No. 1 contended that plaintiff had sold the suit land to her and had concealed the fact that suit property was mortgaged with the bank- construction was raised by the defendant No. 1 after the purchase- record shows that defendant No. 1 had admitted before JMIC, Manali that she had purchased the house- sale deed was executed in year 2006- General Power of Attorney specifically authorized the defendant No. 2 to execute the sale deed- Sale deed was duly registered- the contents were read over and explained to the executor who admitted the same to be correct- General Power

of Attorney had executed an agreement to sell on 10.7.2006 and had executed the sale deed on 26/27.7.2006- defendant No. 1 is in possession of property and is paying taxes to Nagar Panchayat- she had rented out four sets to the tenants- held, that plea of the plaintiff that defendant No. 2 was not authorized to execute the sale deed and Power of Attorney was executed for enabling the defendant No. 2 to look after the construction work cannot be accepted in view of express provisions in the general power of attorney- defendant No. 1 is a bona fide purchaser for consideration- appeal dismissed.

Title: Thakur Dass Vs. Uma Devi & ors. Page-42

Specific Relief Act, 1963- Section 34- Plaintiff sought declaration that he is son of 'A' and is wrongly shown as son of 'C' in the revenue record, whereas one 'B' is son of 'C'- Consequential relief of correction of revenue record was also sought – suit decreed by trial Court holding the plaintiff to be son of 'A' and not 'C' - first appellate Court reversed the findings on the plea of limitation and in view of the fact that longstanding revenue entries were not rebutted by the plaintiff- held, that it is an admitted case of the defendants in the written statement that plaintiff is son of 'A' – secondly, plaintiff has produced on record the service record of one 'B' showing him to be son of 'C'- this evidence has gone unchallenged- and establishes that 'B' is son of 'C-thus, the plaintiff is proved to be the son of 'A'- further held, that first appellate Court wrongly concluded that the plaintiff's case not proved and plaintiff not proved to be a son of 'A' but son of 'C- plaintiff entitled for declaration as prayed for.

Title: Taj Ali Vs. Charag Deen & others Page-551

Specific Relief Act, 1963- Section 34- Plaintiffs claimed to be owner in possession of the suit and that name of 'G' was wrongly recorded to be in possession- defendants pleaded adverse possession- copy of mutation recording the name of 'G' was not produced on record- there is nothing on record to show that notice was issued to the plaintiffs at the time of attestation- 'G' had died in the year 1966 but the entries continued till 1993-94, which shows that entries were made in routine- mere attestation of mutation will not have effect of the commencement of adverse possession- held, that in these circumstances, adverse possession was not proved- appeal dismissed.

Title: Hardev Singh & another Vs. Hira Singh (dead) through LRs. Smt. Damodari Devi & ors. Page-455

Specific Relief Act, 1963- Section 38- Plaintiff claimed that he is owner in possession of the suit land and the defendant is interfering with the same without any right to do so- plaintiff had failed to identify the land purchased by him by filing any Tatima- it was not possible to demarcate the land in absence of the Tatima- plaintiff had not assisted the Local Commissioner by filing a Tatima- it was not permissible for the plaintiff to fill up the lacuna by leading the evidence- held, that suit of the plaintiff was rightly dismissed in these circumstances by the trial Court.

Title: Salig Ram Vs. Devi Ram Page-459

Specific Relief Act, 1963- Section 38- Plaintiff claimed to be the owner in possession of the suit land and sought injunction to restrain the defendant from dispossessing her from the suit land- defendant claimed that plaintiff had got herself recorded to be in possession of the suit land – defendant also raised a plea of adverse possession- record shows that separate parcel of land was allotted to the defendant and a plea of adverse possession was not proved- defendant had failed to prove that entries recorded in the revenue record are

incorrect- there was no boundary dispute and Local Commissioner could not have been appointed- held, that in these circumstances, suit was rightly decreed by the trial Court.

Title: Rama Nand Vs. Mulmi Devi Page-449

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit seeking permanent prohibitory injunction for restraining the defendants from constructing overhanging verandah, which will hamper the light and air to the first and ground floors of the building which are in possession of the plaintiff- defendants pleaded that they had not raised any construction and verandah was already constructed by them in the year 1979 after obtaining permission from Municipal Corporation, Shimla- plaintiff had admitted that he had raised construction of the first floor of the verandah- another verandah was in existence on the top floor – it was not understandable as to how construction of the verandah on the second floor was going to affect the right of the plaintiff regarding light and air- plaintiff had raised unauthorized construction and is not entitled for the discretionary relief of injunction.

Title: Vijay Kumar Sood Vs. Krishna Devi Sud & or. Page-137

Specific Relief Act, 1963- Section 38- Plaintiff filed a suit claiming that she is owner in possession of the suit property – Defendant No. 1 had also admitted the plaintiff to be in possession of the suit property in Khangi Panchayat- defendant No. 1 pleaded that a house was given to the plaintiff with a right of residence- no vacant plot or cattle shed was ever given to the plaintiff – defendant No. 1 did not appear in the witness box and an adverse inference was rightly drawn against him- he had specifically admitted in the agreement that possession of the suit property was given to the plaintiff- held, that suit was rightly decreed by the Appellate Court.

Title: Narain Chand & ors. Vs. Bhago and ors. Page-687

'W'

Words and Phrases- Joint tenants and tenants in common- Joint tenants have unity of title, unity of commencement of title, unity of interest, have equal shares in the joint estate, unity of possession and right of survivorship; while tenants in common have unity of possession and no unity of title.

Title: Vandana Kumari Guleria & anr Vs. Union of India & others Page-382

Workmen Compensation Act, 1923- Section 22- Deceased was employed as a driver – vehicle met with an accident in which deceased received multiple injuries and died at the spot- respondent No. 4 had admitted that deceased was working as driver with him- relationship of employer and employee was duly established- Commissioner had ordered the deposit of 50% of amount by way of penalty- held, that the penalty has to be deposited by the employer and not by the employee.

Title: Bajaj Allianz General Insurance Company Ltd. Vs. Pinki Devi and others Page-14

Workmen Compensation Act, 1923- Section 23- Deceased died in an accident during the course of his employment with respondent No. 1- he was engaged by respondent No. 2 for the construction of the building at a salary of Rs. 5,000/- p.m.- respondent No. 1 contended that deceased was not his employee- respondent No. 2 also denied the relationship of employer and employee- petition was dismissed by the Workmen Compensation Commissioner - record shows that an agreement was entered into between the respondents

No. 1 and 2- respondent No. 1 was the contractor and had undertaken the construction work of the house of respondent No. 2- deceased was a plumber, employed by respondent No. 1 - deceased had gone to the house of respondent No. 2 to affix the water tank – while carrying out the repairs, he came in contact with live electric wire and died- Workmen Compensation Commissioner had wrongly relied upon the statement made by PW-1 in a criminal case and statement made by the deceased under Section 161 of Cr.P.C- statement made under Section 161 of Cr.P.C has no evidentiary value and the statement made by the complainant in a criminal cases could not have been relied upon in a civil case- it was duly proved before Workmen Compensation Commissioner that an agreement was executed between the respondents proving the relationship of employer and employee - appeal allowed and the compensation in the sum of Rs. 6,03,224.88/- awarded.

Title: Bhagya Laxmi and ors. Vs. Kalyan Singh & anr. Page-5

Workmen Compensation Act, 1923- Section 4- Deceased and the others were engaged for maintenance and up-keep of the college building and furniture- deceased was electrocuted during the employment- no tangible evidence was led to prove that deceased was employed by the contractor- he was employed as a workman by the appellant and, therefore, there was relationship of employer and employee between the appellant and the deceased- petition dismissed.

Title: International Institute of Telecom Technology Vs. Jai Pal and others

Page-100

TABLE OF CASES CITED

'A'

A. Nawab John and others vs. V.N. Subramaniyam, (2012)7 SCC 738
A. Srinath and others Vs. A.P. State Road Transport Corporation & others, (2002) 9 SCC 750
A.P. and another Vs. Syed Akbar, A.I.R. 2005 Supreme Court 492
Abdul Kader versus Chinnaswamy Padayachi, AIR 1980 Madras 116
Aher Raja Khima v. State of Saurashtra, AIR 1956
Ajit Kumar Maulik vrs. Mukunda Lal Maulik and ors., AIR 1988 Calcutta 196
Ajit Singh vs. State, AIR 1999 SC page 3471
Amar Singh and others vrs. Sewa Ram and ors. AIR 1960 Punjab 530
Amar Singh versus Gulab Chand, AIR 1960 Rajasthan 280
Amarnath Ashram Trust Society Vs. Governor of U.P. and others, (1998) 1 SCC 591
Amit Kapoor vrs. Ramesh Chander and another, (2012) 9 SCC 460
Amit Kumar Shaw and another vs. Farida Khatoon and another, AIR 2005 SC 2209
Amrik Chand Saluja vrs. State of M.P. and ors, 1991 Cri. L.J. 1314
Aneeta Hada versus Godfather Travels and Tours Private Limited, (2012)5 SCC 661
Anjali Ashok Sadhwani versus Ashok Kishinchand Sadhwani AIR 2009 SC 1374
Anthony D'Souza & others vs. State of Karnataka, (2003) 1 SCC 259
Anuj Sirkek versus Neelma Devi and Ors., I L R 2014 (VI) HP 1242
Appabhai and another vs. State of Gujarat AIR 1988 SC 696
Arti Rani alias Pinki Devi and another versus Dharmendra Kumar Gupta (2008) 9 SCC 353
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ashok Kumar and another versus Smt. Kamla Devi and others, I L R 2014 (IX) HP 1192
Ashoka Marketing Ltd. and another vs. Punjab National Banka and ors., AIR 1991 SC 855
Asia Foundation & Construction Ltd. versus Trafalgar House Construction (I) Ltd. and others, (1997) 1 Supreme Court Cases 738
Associate Builders versus Delhi Development Authority, (2015) 3 SCC 49
Awdh Bihari Yadav and others vs. State of Bihar and others, AIR 1996 SC 122

'B'

B. Ganesh Prasad vrs. Board of Revenue (LR), Thiruvananthapuram and another, 2005 Cri.L.J. 3178
Badrinath vs. Government of Tamil Nadu, 2008 (8) SCC Page 395
Bai Vajia (dead) by LRs vs. Thakorbhai Chelabhai and others AIR 1979 SC 993
Balak Ram versus State of Himachal Pradesh and others, I L R 2014 (VI) HP 338
Baldev Singh & others vs. Manohar Singh & another, (2006) 6 SCC 498
Baldev Singh vrs. State of Punjab, (1990) 4 SCC 692
Balwant Narayan Bhagde vs. M.D. Bhagwat and others, AIR 1975 SC 1767
Balwant Singh & another vs. Daulat Singh (Dead) by LRs & others, (1997) 7 SCC 137
Balwinder Singh v. State of Punjab, 1995 Supp (4) SCC 259
Bangalore Development Authority vs M/s. Vijaya Leasing Ltd. & Anr., 2013 AIR SCW 3463
Barkat Ali and another versus Badrinarain (dead) by LRs, (2008) 4 SCC 615
Beckodan Abdul Rahiman v. State of Kerala (2002) 4 SCC 229
Bhagwan Das and others vs. State of Uttar Pradesh and others, (2010) 3 SCC 545
Bhagwandas Goverdhandas Kedia vs. M/s Girdharlal Parshottamdas and Co., and others, AIR 1966 SC 543,
Bhagyawati vs. General Public and others, 1994-2 PLR 649

Bharti Singh vrs. State of Bihar and ors., AIR 1982 Patna 111,
Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, (1983) 3 SCC 217
Bhee Ram vs. State of Haryana, AIR 1980 SC 957
Bherulal vrs. Ramkunwarbai and others, AIR 1994 M.P. 5
Bibi Zubaida Khatoon vs. Nabi Hassan Saheb and another, AIR 2004 SC 173
Bipinchandra Jaisinghbai Shah versus Prabhavati, AIR 1957 SC 176
Bishnu Charan Das versus Dhani Biswal and another, AIR 1977 Orissa 68
Bishwanath v. Badami Kaur AIR 1980 SC 1329
Board of Trustees of Port of Kandla vs. Hargovind Jasraj & another, (2013) 3 SCC 182
Bolo vs. Koklan, (1929-30) 57 IA 325: AIR 1930 PC 270
Bondar Singh and others vrs. Nihal Singh and others, AIR 2003 SC 1905
Brathi alias Sukhdev Singh v. State of Punjab, (1991) 1 SCC 519
Browne Vs Dunn (1893) 6 R 67

'C'

C. Mohammad Yunus vs. Syed Unnissa, AIR 1961 SC 808
C. Muniappan and others vs. State of Tamil Nadu, (2010)9 SCC 567
C. Sam Joseph Raj vrs. District Revenue Officer and Addl. Distt. Magistrate, Nagercoil and another 1998 Cri.L.J. 3152
C.P. Subhash vrs. Inspector of Police, Chennai and others, (2013) 11 SCC 559
Cement Corporation of India Vs. Presiding Officer, Labour Court Shimla, 1999 (1) Shiml. L.C. 91
Central Bank of India vs. S. Satyam and others, (1996) 5 SCC 419
Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791
Chander Bhan vs. Hari Ram and others, 1996(1) S.L.J. 696
Chander Parkash Bodh Raj versus Smt. Shila Rani Chander Prakash AIR 1968 Delhi 174
Chandra Gupta vs. Secretary Govt. of India Ministry of Environment & Forests, 1995 (1) SCC page 23
Chandrika Jha vrs. State of Bihar and ors., AIR 1984 SC 322
Chhel Singh versus MGB Gramin Bank, Pali and others, (2014) 13 SCC 166
Collector Land Acquisition Anantnag and another Vs. Mst. Katji and ors., AIR 1987 SC 1353
Commissioner of Income Tax versus British Paints India Ltd. (1991) 188 ITR 44
Commissioner of Income Tax versus M/s. Mcmillan and Co., AIR 1958 SC 207
Commissioner of Police, Bombay vrs. Gordhandas Bhanji, AIR (39) 1952 SC 16
Crest Hotel Ltd. Vs. Assistant Superintendent of Stamps, AIR 1994 Bombay 228

'D'

Dalbir Singh vs. State of Haryana and others, AIR 2000 SC 1677
Dalbir Singh Vs. State of Punjab AIR 1987 S.C. 1328
Darbara Singh and another vs. Gurdial Singh and another, 1994(1) S.L.J. 433
Darshan Singh versus State of Punjab and another, (2010) 2 SCC 333
Dattu Ramrao Sakhare v. State of Maharashtra (1997 (5) SCC 341
Daya Singh & another vs. Gurdev Singh (Dead) by LRs & others, (2010) 2 SCC 194
Daya Singh (dead) through Lrs. vrs. Dhan Kaur, AIR 1974 SC 665
Dehal Singh v. State of Himachal Pradesh, (2010) 3 SCC (Cri) 1139
Deo Narain vrs. The State of U.P., (1973) 1 SCC 347

Dharam Chand V. State of HP & anr 2010(2) Him.L.R.1084
Dharam Deo Yadav vs. State of Uttar Pradesh, (2014) 5 SCC 509
Dharampal Singh v. State of Punjab, (2010) 9 SCC 608
Dhondiram Dalichand versus Commissioner of Income Tax, Poona (1971) 81 ITR 609
Dhurandhar Prasad Singh vs. Jai Prakash University and others, AIR 2001 SC 2552
Dilip and another vrs. State of M.P., (2007) 1 SCC 450
Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622
Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646
Durga Das vs. Collector & others, (1996) 5 SCC 618

'F'

Food Corporation of India versus M/s Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71

'G'

Ganeshlal vs. State of Maharashtra, (1992) 3 SCC 106
Gangu Pundlik Waghmare vs. Pundlik Maroti Waghmare and another AIR 1979 Bombay 264
Gian Chand vs. State of Haryana, (2013) 14 SCC 420
Girija Prasad (dead) by LRs v. State of M.P., (2007) 3 SC (Cri) 475
Girja Prasad v. State of M.P., (2007) 7 SCC 625
Golla Yelugu Govindu vs. State of AndhraPradesh (2008) 16 SCC 769
Gopal Swaroop vrs. Krishna Murari Mangal and others, (2010) 14 SCC 266
Govind Yadav v. New India Insurance Company Limited, (2011) 10 SCC 683
Govindaraju alias Govinda v. State by Srirampuram Police Station & anr, (2012) 4 SCC 722
Gummalapura Taggina Matada Kotturuswami v. Setra Veeravva and ors AIR 1959 SC 577
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
Gurdial Kaur and others vrs. Kartar Kaur and others, (1998) 4 SCC 384

'H'

Hans Raj and another vrs. State, 2006 Cri. L.J. 2540,
Harishchandra Ladaku Thange v. State of Maharashtra, (2007) 11 SCC 436
Harivadan Babubhai Patel vs. State of Gujarat, (2013) 7 SCC 45
Harjinder Singh Vs. Punjab State Warehousing Corporation (2010) 3 SCC 192
Hazari Lal vrs. The State (Delhi Admn.), AIR 1980 SC 873
Heinz India Private Limited and antoher vs. State of Uttar Pradesh & ors, (2012) 5 SCC 443
Hem Chand versus State of H.P. & others, 2014 (3) Him L.R. 1962
Hemaji Waghaji Jat vrs. Bhikhabhai Khengarbhai Harijan and others, (2009) 16 SCC 517
Himachal Pradesh State Electricity Board V. Charan Dass 2012 (1) Him. L.R.(DB) 320
Himachal Pradesh State Electricity Board vs. Mahesh Dahiya, ILR 2015 XLV (II) H.P. 739 D.B.

'I'

I.S. Sikandar (dead) by LRs vs. K. Subramani and others (2013) 15 SCC 27
Indian Airlines Corporation vs. Capt. K.C. Shukla, 1993 (1) SCC page 17
Indian Council for Enviro-legal Action versus Union of India and others, (2011) 8 SCC 161
Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 23.10.2014, In Re, (2014) 4 SCC 786
Ishar Singh vs District and Sessions Judge and another, AIR 1999 SC 1425
Iswar Bhai C.Patel Vs. Harihar Behera, SLJ 1999 724

'J'

J. Samuel & others vs. Gattu Mahesh & others, (2012) 2 SCC 300
Jagdish Mandal vs. State of Orissa and others, (2007) 14 SCC 517
Jagdish Singh v. Madhuri Devi (2008)10 SCC 497
Jagendra Nath Singh versus Hira Sahu and others, AIR 1948 Allahabad 252
Jai Dev and another vrs. State of Punjab, AIR 1963 SC 612
Jai Prakash and others vrs. State of Haryana, 1999 Cri. L.J. 837
Janki vs. IndusInd Bank (2005) 2 SCC 217
Jasmer Singh versus State of Haryana and another, 2015 AIR SCW 869
Jasmer Singh Vs. State of Haryana and others, 2015 (4) SCC 458
Jayalakshmi Coelho versus Oswald Joseph Coelho, AIR 2001 Supreme Court 1084
Jayaram Mudaliar vs. Ayyaswami and others, AIR 1973 SC 569
Joint Collector Ranga Reddy District & anr Vs. D.Narsing Rao and others (2015) 3 SCC 695
Jose vs. State of Kerala (Full Bench), AIR 1973 SC 944

'K'

K.S.Abdulla vrs. District Collector and ors., AIR 1972 Kerala 202
K.V.S. Ram Vs. Bangalore Metropolitan Transport Corporation JT 2015 (1) SC 252
Kalpanaraj & others v. Tamil Nadu State Transport Corporation, (2015) 2 SCC 764
Kamal Kumar Agarwal vs. Commissioner of Commercial Taxes, West Bengal and others, JT 2010(3) SC 390
Kanti Associates Private Limited & anr. vs. Masood Ahmed Khan & ors., (2010) 9 SCC 496
Kapil Corepacks Private Limited. vs. Harbans Lal, 2010 (8) SCC page 452
Kartarey and others vrs. State of U.P., AIR 1976 SC 76
Kathiyammakutty Umma vs. Thalakkadah Kattil Karappan and others, AIR 1989 Kerala 133
Kavita Trehan and another versus Balsara Hygiene Produces Ltd., AIR 1995 SCC 441
Kavita versus Deepak and others, 2012 AIR SCW 4771
Kendriya Vidyalaya Sangathan and another versus S.C. Sharma, 2005 AIR SCW 377
Khanda Singh and another vrs. Natha Singh and ors., (1994-2) PLR 742,
Khem Dutt and another vs. Palkia and another, AIR 1983 H.P. page 28
Khemchand Shankar Choudhary and another vs. Vishnu Hari Patil & ors., AIR 1983 SC 124
Khushal Rao vrs. State of Bombay, AIR 1958 SC 22
Komalam Vardarajan vs. The Union of India and another, AIR 1997 Bombay 57
Krishan Yadav and another Vs. State of Haryana and others (1994) 4 SCC 165
Krishna Swami vs. Union of India, (1992) 4 SCC 605 (Five Judges)
Krishnan alias Ramasamy & others, vs. State of Tamil Nadu, AIR 2014 SC 2548
Krushnakant B.Parmar versus Union of India and another, (2012) 3 SCC 178
Kulwant Singh & Ors. versus Oriental Insurance Company Ltd., JT 2014 (12) SC 110
Kulwinder Kaur alias Kulwinder Gurcharan Singh versus Kandi Friends Education Trust and others (2008) 3 SCC 659
Kuriya and another vs. State of Rajasthan (2012)10 SCC 433

'L'

L. Janakirama Iyer and others versus P.M. Nilakanta Iyer and others, AIR 1962 SCC 633
Lachhman vrs. Thunia, AIR 1972 HP 69
Lal Chand versus Oriental Insurance Co. Ltd., 2006 AIR SCW 4832

Lal Mandi v. State of W.B., (1995) 3 SCC 603
Lala Ram vs. Financial Commissioner Haryana & others, AIR 1992 P&H 62
Laxman Singh vrs. Poonam Singh and others, 2003 Cri. L.J. 4478
Laxman Singh vs. Poonam Singh and others (2004) 10 SCC 94
Luxminarayannan Shetty vs. Shantha and another, 2002-III-LLJ 523

'M'

M.P. State Coop. Bank Ltd., Bhopal Vs. Nanuram Yadav and others (2007) 8 SCC 264
M.P.S.R.T.C. Bairagarh Bhopal Vs. Ramchandra and others, AIR 1977 M.P. 243) (FB)
M/s Reetu Marbles versus Prabhakant Shukla 2009 AIR SCW 7614
M/s Siemens Aktiengeselischaft & S. Ltd. vs. DMRC Ltd. & Ors., JT 2014 (3) SC 290
M/s. Siemens Aktiengeselischaft & S. Ltd. versus DMRC Ltd. & Ors., 2014 AIR SCW 1249
Maa Binda Express Carrier and another versus North-East Frontier Railway and others, (2014) 3 Supreme Court Cases 760
Madan Gopal Makkad v. Naval Dubey and another, (1992) 3 SCC 204
Madan Lal and another vs. State of H.P., 2003 (7) SCC 465
Madhu Versus State of Kerala, (2012) 2 SCC 399
Mahijibhai Mohanbhai Barot versus Patel Manibhai Gokalbhai and others, AIR 1965 Supreme Court 1477
Mahila Bajrangi (dead) through LRs & others vs. Badribai w/o Jagannath & another, (2003) 2 SCC 464
Man Kaur vs. Hartar Singh Sangha, (2010) 10 SCC 512
Manali Singhal and another vrs. Ravi Singhal and others, AIR 1999 Delhi 156
Mangal Singh and others v. Smt. Rattno (dead) by her legal representatives and another AIR 1967 SC 1786
Mani Ram v. The State of Punjab and others, AIR 1975 P&H 135
Manisha Tyagi vs. Deepak Kumar 2010(1) Divorce & Matrimonial Cases 451
Mashyak Grihnirman Sahkari Sanstha Maryadit vs. Usman Habib Dhuka & others, (2013) 9 SCC 485
Mayawanti vs. Kaushalya Devi (1990) 3 SCC 1
Meghmala and others vs. G. Narasimha Reddy and others, 2010 (8) SCC 383
Michigan Rubber (India) Limited, (2012) 8 SCC 216
Mohammad Shafi Versus Emperor, AIR 1934 Lahore 620
Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94
Mohan Singh and others vs. International Airport Authority of India and others, (1997) 9 SCC 132
Mohd. Iqbal v. State of Jharkhand, (2013) 14 SCC 481
Mohinder Singh Gill vs. Chief Election Commissioner, (1978) 1 SCC 405
Mool Raj Upadhyaya Vs. State of HP and others, 1994 Supp (2) SCC 316
Mst. Anjanbai and ors. vrs. Ramprasad, AIR 1994 MP 91
Mukesh v. State of Chhattisgarh, (2014) 10 SC 327
Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43
Mumbai International Airport Pvt. Ltd. vs. Regency Convention Centre and Hotels Pvt. Ltd. and others, AIR 2010 SC 3109
Municipal Committee, Jullundur City vrs. Shri Romesh Saggi and others, AIR 1970 Punjab and Haryana 137

Munna Lal Jain and another v. Vipin Kumar Sharma and others, (2015) 6 SCC 347
Munna v. State of Madhya Pradesh, (2014) 10 SCC 254

'N'

N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354
Nagubai Ammal and others vs. B. Shama Rao and others, AIR 1956 SC 593
Nand Lal & another vs. Meena Devi & others, Latest HLJ 2014 (HP) Suppl.414
Narender Kumar v. State (NCT of Delhi), (2012) 7 SCC 171
Naresh Kumari (dead) by LRs and another vrs. Shakshi Lal (dead) by LRs and anr. (1999) 2 SCC 656
Narinder Singh & Ors. v. State of Punjab & Anr. JT 2014 (4) SC 573
National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
National Insurance Company Ltd. vs Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906
Neel Kumar vs. State of Haryana, (2012) 5 SCC 766
New India Assurance Co. Ltd. vs. Kamla Devi and others, I L R 2015 (III) HP 820
New India Assurance Co. Ltd. Vs. Nusli Neville Wadia and another, AIR 2008 SC 876
Nika Ram vs. State of H.P., (1972) 2 SCC 80
Nishan Singh versus Bhupendra Kaur 1985 (2) HLR 321
North Eastern Railway Administration, Gorakhpur vs. Bhagwan Das (Dead) by LRs. (2008) 8 SCC 511
Nripendra Narayan Roy vrs. The State of Bihar and ors., 1975 Cri. L.J. 572

'O'

O.M. Baby (Dead) by Legal Representative v. State of Keral, (2012) 11 SCC 362
Onkarmal and another vrs. Banwarilal and others, AIR 1962 Rajasthan 127
Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81
Oriental Insurance Company Ltd vs Smt. Amra Devi and others ILR 2015 XLV (II) H.P. 874
Oriental Insurance Company Ltd. vs Sh. Krishan Dev and others, I L R 2015 (III) HP 621

'P'

P.K. Shaikh v. State of West Bengal and others, AIR 1976 Calcutta 149
P.V. Radhakrishna vrs. State of Karnataka, AIR 2003 SC 2859
Padala Veera Reddy v. State of Andhra Pradesh and others, 1989 Supp (2) SCC 706
Paniben vrs. State of Gujarat, AIR 1992 SC 1817,
Paradip Port Trust, Paradip Vs. Their Workmen, AIR 1977 SC 36
Paras Ram V. Himachal Pradesh State Electricity Board Limited 2013 (1) Him L.R.465
Parkash vrs. State of Karnataka, (2014) 12 SCC 133
Parminder alias Ladka Pola v. State of Delhi, (2014) 2 SCC 592
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217
Phundi vrs. State of M.P., 1993 Cri. L.J. 1881
Prabhakar Babusso Chodankar and another vrs. Smt. Maria Victoria Periera, 1977 Goa, Daman & Diu 15
Prandas v. The State, AIR 1954 SC 36
Prithu alias Prithi Chand and another vs. State of Himachal Pradesh, (2009)11 SCC 588
Pudhu Raja and another Vs State Represented by Inspector of Police, (2012) 11 SCC 196

Puran Chand v. State of Himachal Pradesh, (2014) 5 SCC 689

'Q'

Qabool Singh vrs. Board of Revenue and others, AIR 1973 Allahabad 158
Queen vs. Commissioners for Special Purposes of Income Tax (t), [1888] 21 QBD 313

'R'

R. Prabha Devi vs. Govt of India, AIR 1988 SC 902
R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Rabindra Nath Mukherjee and another vrs. Panchanan Banerjee (dead) by LRs and others, (1995) 4 SCC 459
Radha Rani Bhargava vrs. Hanuman Prasad Bhargava & ors., AIR 1966 SC 216
Radhakrishna Nagesh v. State of Andhra Pradesh, (2013) 11 SCC 688
Radhey Krishan Singh and ors. vrs. Shiva Shankar Singh & ors., AIR 1973 SC 2405
Radhey Shyam Gupta versus Punjab National Bank & Anr., 2008 AIR SCW 8284
Radhu v. State of Madhya Pradesh, (2007) 12 SCC 57
Raghuvir Vs. G.M. Haryana Roadways Hissar, 2014 (10) SCC 301
Rai Singh vs. State of Haryana, AIR 1971 SC 2505
Raj Kumar v. State of Madhya Pradesh, (2014) 5 SCC 353
Raj Prakash Varshney vrs. Addl. District Magistrate, New Delhi and ors,. AIR 1978 Delhi 17
Raja Ram Singh vrs. Arjun Singh and another, AIR 2002 Delhi 338,
Raja Sahib of Poonch versus Kirpa Ram, AIR 1954 Jammu & Kashmir 23
Rajani Kishor Pardeshi versus Kishor Babulal Pardeshi (2005) 12 SCC 237
Rajasthan Housing Board and others Vs. Shri Kishan and others, (1993) 2 SCC 84
Rajendar Singh and others vs. Santa Singh and others, AIR 1973 SC 2537
Rajesh and others v. Rajbir Singh and others, (2013) 9 SCC 54
Rajesh Patel Versus State of Jharkhand, (2013) 3 SCC 791
Rajiv Thapar and others vrs. Madan Lal Kapoor, (2013) 3 SCC 330
Rajkishore Mohanty and another versus Kangali Moharana and others, AIR 1972 Orissa 119
Ram Singh vs. Col. Ram Singh 1985 Supp SCC 611
Ram Swaroop and others vrs. State of Rajasthan, AIR 2004 SC 2943
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Ramesh Chand & anr Vs. Director of Consolidation & ors 2008 (2) SLC 176
Rameshwar v. The State of Rajasthan, AIR 1952 SC 54
Rammi alias Rameshwar vs. State of Madhya Pradesh AIR 1999 SC 3544
Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172
Ranjitham versus Basavaraj and others, (2012) 1 SCC 414
Rashmi Metaliks Limited and another vs. Kolkata Metropolitan Development Authority and others, (2013) 10 Supreme Court Cases 95.
Ravindra Shantram Savant v. State of Maharashtra, (2002) 5 SCC 604
Ravirala Laxmaiah vs. State of Andhra Pradesh, (2013) 9 SCC 283
Reshma Kumari and others v. Madan Mohan and another, (2013) 9 SCC 65
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120
Rickmers Verwaltung GMBH vs. Indian Oil Corporation Ltd. (1999) 1 SCC 1
Rizan and another vrs. State of Chhattisgarh, (2003) 2 SCC 661
Rohtash Kumar vs. State of Haryana, (2013) 14 SCC 434

Roop Singh Negi versus Punjab National Bank and others, (2009) 2 SCC 570

'S'

S.B. Bhattacharjee vs. S.D. Majumdar, 2007 (10) SCC 513
S.L. Soni vs. State of M.P, AIR 1996 SC page 665
S.Sanyal Vs. Gian Chand AIR 1968 SC 438
Sadhu Ram vs. Delhi Transport Corporation (1983) 4 SCC 156
Salvation Army Vs. Sunil J. Ingle 2005 (107) FLR 932
Sama Alana Abdulla v. State of Gujarat, (1996) 1 SCC 427
Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511
Samarendra Das Vs. M/s Win Medicare Pvt. Ltd. 2014 LLR 345
Samarendra Nath Sinha and another versus Krishna Kumar Nag, AIR 1967 SCC 1440
Sanjay Dhar versus J & K Public Service Commission and another, (2000) 8 SCC 182
Sanjay Verma v. Haryana Roadways, (2014) 3 SCC 210
Sarla Verma (Smt) and others v. Delhi Transport Corporation & another, (2009) 6 SCC 121
Satendra Prasad Jain and others vs. State of U.P. and others, AIR 1993 SC 2517
Savitri Devi vs. District Judge, Gorakhpur and others, AIR 1999 SC 976
Sayarabano alias Sultana Begum vrs. State of Maharashtra, (2007) 12 SCC 562
Scaria alias Thankan vrs. State of Kerala, AIR 1995 SC 2342
Shahejadkhan Mahebubkhan Pathan v. State of Gujarat, (2013) 1 SCC 570
Shakuntala vrs. Smt. Kamla, 1998(1) Sim. L.C. 162.
Shamima Farooqui versus Shahid Khan (2015) 5 SCC 705
Shanti Kumar Panda vrs. Shakuntala Devi, (2004) 1 SCC 438
Shanti Lal v. State of H.P., 2007 (11) SCC 243
Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116
Shayam Rao v. Land Acquisition Officer (Spl.) cum-Dy.Collector Singoor Project of Sanga Reddy and others, AIR 1991 AP 219
Sheoratan Kurmi and after his death Akhji Devi and others versus Kalicharan Ram and others, AIR 1968 Patna 270
Sher Singh and another vrs. State of Punjab, (2008) 4 SCC 265
Shiam Singh & others vs. Chaman Lal & others, 2011 (2) Shim. LC 1
Shish Ram and others vs. State of H.P. and others, (1996) 10 SCC 166
Shivaji Sahabrao Bobade & another vs. State of Maharashtra, (1973) 2 SCC 793
Shivshankar Gurgar versus Dilip, 2014 AIR SCW 1099
Shyam Narain v. State (NCT of Delhi), (2013) 7 SCC 77
Shyam Sunder and others vrs. Siya Ram and another, AIR 1973 Allahabad 382
Shyamal Saha and another vrs. State of West Bengal, (2014) 12 SCC 321
Sikandar Singh and others versus State of Bihar, (2010) 7 SCC 477
Siriya @ Shri Lal vs. State of Madhya Pradesh, (2008) 8 SCC 72
Sohan Lal vrs. Nihali Devi, 1988 S.L.J. 485
Sohrab and another vs. The State of Madhya Pradesh AIR 1972 SC 2020
Soma Choudhury versus Gourab Choudhaury (2004) 13 SCC 462
South Eastern Coalfields Ltd. versus State of M.P. and others, (2003) 8 SCC 648
Srihari (Dead) through LR Smt. Ch. Niveditha Reddy versus Syed Maqdoom Shah and others, 2014 AIR SCW 6068
State Bank of India vs. Mohd. Mynuddin, AIR 1987 Apex Court page 1889
State of Bihar v. Basawan Singh, AIR 1958 SC 500

State of Chhattisgarh v. Lekhram, (2006) 5 SCC 736
State of Delhi vrs. Ram Avtar alias Rama, (2011) 12 SCC 207
State of Gujarat & Ors. versus Essar Oil Limited and Anr., 2012 AIR SCW 1008
State of Gujarat vs. V.A.Chauhan, AIR 1983 SC 359
State of H.P. v. Asha Ram, (2005) 13 SCC 766
State of H.P. v. Mehboon Khan, Latest HLJ 2014 (HP) (FB) 900
State of H.P. vs. Lekh Raj and another (2000)1 SCC 247
State of H.P. vs. Om Prakash and others, HLJ 2003(1) H.P. page 541
State of H.P. vs. Surinder Kumar, 1996 (1) SCC page 650
State of Haryana v. Basti Ram, (2013) 4 SCC 200
State of Himachal Pradesh vs. Suresh Kumar (2009) 16 SCC 697
State of HP & anr V Kapil Dev 2011 (3) Him L.R.(DB) 1145
State of Jharkhand vs. Bhadey Munda and another, 2014 (10) SCC 398
State of Karnataka vrs. Shariff, AIR 2003 SC 1074,
State of M.P. v. Bablu Natt, (2009) 2 SCC 272
State of M.P. v. Dharkole alias Govind Singh and others, (2004) 13 SCC 308
State of M.P. vs. Surendra Singh, AIR 2015 SC 398
State of Madhya Pradesh v. Munna Choubey & another, (2005) 2 SCC 710
State of Maharashtra and another v. Umashankar Rajabhau and others, (1996) 1 SCC 299
State of Maharashtra versus Chandraprakash Kewalchand Jain, (1990) 1 SCC 550
State of Maharashtra vrs. Krishnamurti Laxmipati Naidu, AIR 1981 SC 617,
State of Maharashtra vs. Suresh, (2000) 1 SCC 471
State of Punjab and another vrs. Suraj Parkash Kapur etc., AIR 1963 SC 507,
State of Punjab v. Partap Singh, 2004 Drugs Cases (Narcotics) 104
State of Punjab versus Darshan Singh, AIR 2003 Supreme Court 4179
State of Punjab versus Gurmit Singh and others, (1996) 2 SCC 384
State of Punjab versus Jagir Singh (1974) 3 SCC 277
State of Punjab vs. Kuldeep Singh, 2002 (5) SCC 756
State of Rajasthan v. Parmanand, (2014) 5 SCC 345
State of Rajasthan Versus Babu Meena, (2013) 4 SCC 206
State of Rajasthan versus N. K. THE ACCUSED (2000) 5 SCC 30
State of Rajasthan vs. Om Parkash AIR 2007 SC 2257
State of U.P. through Secy. Home Dept. Lucknow and ors. Vrs. Jaswant Singh Sarna, AIR 1968 Allahabad 383
State of U.P. v. Ashok Kumar Srivastava, (1992) 2 SCC 286
State of U.P. v. Chhotey Lal, (2011) 2 SCC 550
State of U.P. vs. M.K. Anthony, AIR 1985 SC 48
State of Uttar Pradesh vs. Santosh Kumar and others (2009)9 SCC 626
Sukhdev Singh v. State of Haryana (2013) 2 SCC 212
Suman Verma vs. Union of India & others, (2004) 12 SCC 58
Sumita Singh versus Kumar Sanjay and another (2001) 10 SCC 41
Sundeep Kumar Bafna Vs. State of Maharashtra and another AIR 2014 SC 1745
Sunil Kumar v. State of H.P., HLJ 2010 HP 207
Sunita Gupta vs. Union of India and others 2015 (1) SLJ 83
Suraj Narain Lal Versus Emperor, AIR 1933 Allahabad 213
Suresh and others vrs. State of Madhya Pradesh, (2013) 1 SCC 550
Suresh Vishwanath Jadhav vrs. State of Maharashtra, 2006 Cri. L.J. 4277

Surjit Singh and others vs. Harbans Singh and others, AIR 1996 SC 135
Swapan Patra vs. State of W.B. (1999) 9 SCC 242
Syed Abdul Qadir and others versus State of Bihar and others (2009) 3 SCC 475

'T'

T.K. Varghese Vs. Nichimen Corporation 2001 (90) FLR 91
Tahir v. State (Delhi), (1996) 3 SCC 338
Tata Cellular versus Union of India, (1994) 6 Supreme Court Cases 651
Tejas Constructions and Infrastructure Private Limited vs. Municipal Council, Sendhwa and another, (2012) 6 SCC 464
The Munney Khan vrs. State of Madhya Pradesh, 1970 (2) SCC 480,
The Sales Tax Officer, Banaras and others versus Kanhaiya Lal Makund Lal Saraf, AIR 1959 Supreme Court 135
The State of Punjab and another vrs. Hari Kishan Sharma AIR 1966 SC 1081,
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Thomson Press (India) Ltd. vs. Nanak Builders and Investors P. Ltd. and others AIR 2013 SC 2389
Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760
Tilak Raj vs. The Chandigarh Administration and others, AIR 1976 P&H 238
Tribhuvanshankar vrs. Amrutlal, (2014) 2 SCC 788,
Trimukh Maroti Kirkan vs. State of Maharashtra, (2006) 10 SCC 681

'U'

U.P.S.R.T.C. Ltd. Versus Sarada Prasad Misra & Anr., 2006 AIR SCW 3216
Union of India and others versus R.P. Singh, 2014 AIR SCW 3475
Union of India and others vs. Arun Kumar Roy, AIR 1986 SC 737
Union of India vs. Madras Telephones Scheduled Castes and Scheduled Tribes Social Welfare Association (1997) 10 SCC 226
Union Public Service Commission vs. Sukanta Kar, 2007 (9) SCC page 555
Usha Balashaheb Swami & others vs. Kiran Appaso Swami & others, (2007) 5 SCC 602

'V'

V. Subramani and another vrs. State of T.N., (2005) 10 SCC 358
Vareed vs. P.C. George, AIR 1971 Kerala 31
Vattakam Purath Parambil Ananda Bhai and another vrs. Kanaka Bhai and others, AIR 1995 Kerala 208
Vidhya Dhar vs. Manikrao, (1999) 3 SCC 573
Vidhyadhar Vs. Mankikrao, AIR 1999 S.C. 1441
Vidur Impex and Traders Pvt. Ltd and others vs. Tosh Apartments Pvt. Ltd and others, AIR 2012 SC 2925
Vijay Pal Singh v. Deputy Director of Consolidation and others AIR 1996 SC 146
Vijayee Singh and others Versus State of U.P., (1990) 3 SCC 190
Villianpur Iyarkkai Padukappu Maiyam vs. Union of India and others, (2009) 7 SCC 561
Vinod Kumar Versus State of Kerala, (2014) 5 SCC 678
Vipul Lakhanpal versus Smt. Pooja Sharma, I L R 2015 (III) HP 896
Virupakshappa Malleshappa and ors. vrs. Smt. Akkamahadevi and others, AIR 2002 Karnataka 83
Vishwanath Versus The State of Uttar Pradesh, AIR 1960 SC 67

Voltas Limited vs. Rolta India Limited, (2014) 4 SCC 516

'W'

Wassan Singh vrs. State of Punjab, (1996) 1 SCC 458

'Y'

Yashodabai Ganesh Naik Gaunekar vs. Gopi Mukund Naik, AIR 2003 Bombay 77
Yogendra Morarji vrs. The State of Gujarat, AIR 1980 SC 660
Yoginder Paul Chowdhry vrs. Durga Dass Punj and another, 1972 A.C.J. 483

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

Rajinder Guleria ……Petitioner.

Versus

State of Himachal Pradesh …….Respondent.

Cr.MMO No. 233 of 2015.
Decided on: 3.8.2015.

Code of Criminal Procedure, 1973- Section 482- Petitioner sought quashing of FIR registered against him on the ground that no cause of action has arisen within the territorial jurisdiction of the State of H.P. - held, that the promise of recruitment was made within the jurisdiction of Shimla- merely because payment was made at Chandigarh will not divest the jurisdiction of the Court at Shimla- petition dismissed. (Para-3 to 6)

Cases referred:

Amit Kapoor vrs. Ramesh Chander and another, (2012) 9 SCC 460
Rajiv Thapar and others vrs. Madan Lal Kapoor, (2013) 3 SCC 330
C.P. Subhash vrs. Inspector of Police, Chennai and others, (2013) 11 SCC 559

For the petitioner: Mr. H.C.Sharma, Advocate.
For the respondent: Mr. Parmod Thakur, Addl. AG with Mr. Neeraj K. Sharma, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner, by medium of this petition, has sought quashing of the proceedings pending in criminal case No. 114-2 of 13/08, titled as State of H.P. vrs. Rajinder Guleria, pending before the learned Chief Judicial Magistrate, Shimla.

2. "Key facts" necessary for the adjudication of this petition are that earlier FIR was registered against the petitioner at Chirgaon on 11.10.2008. He was sent to police remand on 18.10.2008. He was released on bail on 24.10.2008. The FIR was also registered against the petitioner bearing No. 235 of 2008 dated 2.11.2008 at Police Station Dhalli, under Sections 419, 420, 467, 468, 471 and 109 IPC. The challan has been put up and charges have been framed against the petitioner on 20.5.2015.

3. Mr. H.C.Sharma, Advocate, has vehemently argued that no cause of action has arisen within the territorial jurisdiction of the State of H.P. and only Courts at Chandigarh had the jurisdiction. The cause of action has arisen in Himachal Pradesh since the promise to recruitment was made at Bhathan Kuffer, Shimla. According to the averments made in the FIR, the complainant has made payment of Rs. 1,00,000/- to the petitioner in Skylark Hotel, SCO 50 Sector-20, Chandigarh. Merely that the payment has been made at Chandigarh, it will not divest the trial Court to try the case, on the basis of FIR No. 235 of 2008 dated 2.11.2008.

4. Their lordships of the Hon'ble Supreme Court in the case of ***Amit Kapoor vrs. Ramesh Chander and another,*** reported in ***(2012) 9 SCC 460,*** have culled out the following principles to be considered for proper exercise of jurisdiction, particularly with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 Cr.P.C., as under:

> "1) Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to

be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

2) The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

3) Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance with the requirements of the offence.

4) The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

5) Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

6) Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

7) The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

8) The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

9) Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained. It may be purely a civil wrong or purely a criminal offence or a civil wrong as also a criminal offence constituting both on the same set of facts. But if the records disclose commission of a criminal offence and the ingredients of the offence are satisfied, then such criminal proceedings cannot be quashed merely because a civil wrong has also been committed. The power cannot be invoked to stifle or scuttle a legitimate prosecution. The factual foundation and ingredients of an offence being satisfied, the court will not either dismiss a complaint or quash such proceedings in exercise of its inherent or original jurisdiction.

10) Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the

charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

11) Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

12) It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

13) In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

14) Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

15) Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

16) Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist.

17) These are all the principles which individually and preferably cumulatively (one or more) are to be taken into consideration."

5. Their lordships of the Hon'ble Supreme Court in the case of ***Rajiv Thapar and others vrs. Madan Lal Kapoor,*** reported in ***(2013) 3 SCC 330,*** have laid down the following steps required to be followed by the High Court while exercising power of quashment under Section 482 Cr.P.C.:

"(i) Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

(ii) Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

(iii) Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

(iv) Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."

6. Their lordships of the Hon'ble Supreme Court in the case of ***C.P. Subhash vrs. Inspector of Police, Chennai and others,*** reported in ***(2013) 11 SCC 559,*** have again reiterated that where complaint, prima facie makes out commission of offence, High Court in ordinary course should not invoke its powers to quash such proceedings, except in rare and compelling circumstances. It has been held as follows:

"7. The legal position regarding the exercise of powers under Section 482 Cr.P.C. or under Article 226 of the Constitution of India by the High Court in relation to pending criminal proceedings including FIRs under investigation is fairly well settled by a long line of decisions of this Court. Suffice it to say that in cases where the complaint lodged by the complainant whether before a Court or before the jurisdictional police station makes out the commission of an offence, the High Court would not in the ordinary course invoke its powers to quash such proceedings except in rare and compelling circumstances enumerated in the decision of this Court in State of Haryana and Ors. v Ch. Bhajan Lal and Others.

11. Coming to the case at hand it cannot be said that the allegations made in the complaint do not constitute any offence or that the same do not prima facie allege the complicity of the persons accused of committing the same. The complaint filed by the appellant sets out the relevant facts and alleges that the documents have been forged and fabricated only to be used as genuine to make a fraudulent and illegal claim over the land owned by complainant. The following passage from the complaint is relevant in this regard:

"…..Thus evidently these two sale deeds being produced by GWL i.e. 1551/1922 dated: 10th March 1922 and 1575/1922 dated 27th June 1922 are forged and fabricated and after making the false documents they were used as genuine to make fraudulent and illegal claim over our lands and go grab them. The representatives of GWL Properties with dishonest motive of grabbing our lands having indulged in committing forgery and fabrication of documents and with the aid of the forged documents are constantly attempting to criminally trespass into our lawful possessed lands and have been threatening and intimidating the staffs of our company in an illegal manner endangering life and damaging the land. The representatives of GWL properties also have been making false statements to the Government Revenue Authorities by producing these forged and fabricated documents with dishonest intention to enter their name in the Government Records. The present Director-in-charge and responsible for the affairs of the GWL Properties Limited is Mrs. V.M.

Chhabria and all the above mentioned acts and commission of offences have been committed with the knowledge of the Directors of GWL Properties Ltd., and connivance for which they are liable. Mr. A.V.L. Ramprasad Varma representing M/s GWL Properties Limited has registered a civil suit in the District Court, Chengalpet using the forged documents. Mr. Satish, Manager (Legal), Mr. Shanmuga Sundram, Senior Manager, (Administration), have assisted in fabricating the forged documents and used the same to get patta from Tahsildar, Tambaram, thus cheating the Govt. Officials. Hence we request you to register the complaint and to investigate and take action in accordance with law as against the said company M/s GWL Property Limited represented by Mr. Satish, Manager (Legal) Mr. Shanmudga Sundaram, Senior Manager (Administration), A.V.L. Ramprasad Varma, Directors, and their accomplice who have connived and indulged in fabricating and forging documents for the purpose of illegally grabbing our lands and for all other offences committed by them."

7. Consequently, there is no merit in this petition, the same is dismissed.

****

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

Smt. Bhagya Laxmi and ors. .....Appellants.

Versus

Kalyan Singh & anr. .....Respondents.

FAO No. 221 of 2007.
Reserved on: 11.8.2015.
Decided on: 12.8.2015.

Workmen Compensation Act, 1923- Section 23- Deceased died in an accident during the course of his employment with respondent No. 1- he was engaged by respondent No. 2 for the construction of the building at a salary of Rs. 5,000/- p.m.- respondent No. 1 contended that deceased was not his employee- respondent No. 2 also denied the relationship of employer and employee- petition was dismissed by the Workmen Compensation Commissioner - record shows that an agreement was entered into between the respondents No. 1 and 2- respondent No. 1 was the contractor and had undertaken the construction work of the house of respondent No. 2- deceased was a plumber, employed by respondent No. 1 - deceased had gone to the house of respondent No. 2 to affix the water tank – while carrying out the repairs, he came in contact with live electric wire and died- Workmen Compensation Commissioner had wrongly relied upon the statement made by PW-1 in a criminal case and statement made by the deceased under Section 161 of Cr.P.C- statement made under Section 161 of Cr.P.C has no evidentiary value and the statement made by the complainant in a criminal cases could not have been relied upon in a civil case- it was duly proved before Workmen Compensation Commissioner that an agreement was executed between the respondents proving the relationship of employer and employee - appeal allowed and the compensation in the sum of Rs. 6,03,224.88/- awarded. (Para-15 to 26)

Cases referred:
Onkarmal and another vrs. Banwarilal and others, AIR 1962 Rajasthan 127
Municipal Committee, Jullundur City vrs. Shri Romesh Saggi and others, AIR 1970 Punjab and Haryana 137
Yoginder Paul Chowdhry vrs. Durga Dass Punj and another, 1972 A.C.J. 483
Prabhakar Babusso Chodankar and another vrs. Smt. Maria Victoria Periera, 1977 Goa, Daman & Diu 15
Hazari Lal vrs. The State (Delhi Admn.), AIR 1980 SC 873
Baldev Singh vrs. State of Punjab, (1990) 4 SCC 692
Shanti Kumar Panda vrs. Shakuntala Devi, (2004) 1 SCC 438
Ram Swaroop and others vrs. State of Rajasthan, AIR 2004 SC 2943

For the appellants: Mr. V.S.Chauhan, Advocate.
For the respondents: Mr. Sunil Chauhan, Advocate, for respondent No. 1.
Mr. Ajay Kumar Sr. Advocate, with Mr. Dheeraj K. Vashistha, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the award dated 28.3.2007, rendered by the learned Commissioner, Workmen's Compensation, Shimla (Rural), Distt. Shimla, H.P. in case No.9/2000.

2. Key facts, necessary for the adjudication of this appeal are that the appellants/claimants have filed a petition under Section 22 of the Workmen's Compensation Act 1923 (hereinafter referred to as the Act) for grant of compensation, being dependent of late Sh. D.D. Panday. Late D.D. Panday died in the accident during the course of employment with respondent No. 1 on 24.5.2000. The respondent No. 1 was engaged by respondent No. 2 for construction of building. The deceased was getting salary of Rs.5,000/- per month. His age at the time of accident was 34 years. He was admitted in IGMC, Shimla on 24.5.2000. He died on 17.6.2000. The FIR was registered. The post mortem was also conducted at IGMC, Shimla. The appellants claimed compensation to the tune of Rs.11,00,000/-.

3. The petition was contested by respondent No.1. He has denied the employer-employee relationship. According to him, he has undertaken the construction work of ground and first floor of the house of respondent No. 2 at New Shimla. Late Sh. D.D. Panday was not employed by him. He was not paying Rs.5,000/- per month to the deceased. The petition was also contested by respondent No. 2. Respondent No. 2 has taken a specific stand that the service of late Sh. D.D. Panday were never availed by her. She had given reference to agreement dated 9.10.1999.

4. The learned Commissioner framed the issues and dismissed the petition on 28.3.2007. Hence, this appeal at the instance of the appellants/claimants.

5. The appeal was admitted on 12.9.2007 on the following substantial questions of law:

> "1. If the witness is not confronted with his earlier statement, whether the said statement can be relied upon or taken into consideration for appreciation of evidence?

2. Whether the work was being executed by the deceased at the time of accident was in continuity of earlier work, if so, whether the claimants are entitled for the amount of compensation?

3. Whether the commissioner was right in holding that the deceased was not a workman under the provisions of Workmen's Compensation Act, 1923?"

6. Mr. V.S.Chauhan, Advocate for the appellants, on the basis of the substantial questions of law framed, has vehemently argued that there was employer and employee relationship between the deceased and respondent No. 1. Respondent No. 1 had engaged the services of deceased on monthly sum of Rs. 5000/-. The deceased died due to electrocution. On the other hand, Mr. Sunil Chauhan, Advocate for respondent No. 1 and Mr. Ajay Kumar, Sr. Advocate, for respondent No. 2 have supported the award dated 28.3.2007.

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

8. PW-1 Bhagya Laxmi testified that her husband was working as Plumber. He was working in the building of respondent No. 2. He was employed by respondent No. 1. The accident has taken place on 24.5.2000. He was electrocuted. He was 34 years of age at the time of death. She has to support three children. The entire family including her in-laws were dependant on late Sh. D.D. Panday. Her husband was admitted in IGMC, Shimla. He died on 17.6.2000. She proved death certificate Mark-A. In her cross-examination, she deposed that her husband was working as Plumber. PW-2 HC Ramesh Chand has proved copy of FIR Ext. PW-2/A. PW-3 Dr. Piyush Kapila has conducted the post mortem examination. According to him, it was a case of electrocution due to high tension wire. He was working as plumber on 24.5.2000. He was admitted in the IGMC, Shimla up to 17.6.2000. The deceased died due to septicemia shock as a result of electrical injuries sustained by accidental electrocution by High Tension Wires. PW-1 Bhagya Laxmi was further cross-examined qua the certified copy Ext. PX.

9. Respondent No. 1 has appeared as RW-1. According to him, he has undertaken the work of construction of house of respondent No. 2 at New Shimla. He has undertaken the work of ground floor and first floor. He has completed the work in the month of February, 2000. Thereafter, he handed over the same to respondent No. 2. He has never worked beyond first floor. He came to know about the death of late Sh. D.D. Panday in the month of May, 2000. He went to see him at IGMC, Shimla. He could speak at that time. He told him that he was working on the 3rd floor of respondent No. 2. He had gone to repair water tank. He told him that he was called by respondent No. 2. In his cross-examination by the learned Advocate appearing on behalf of respondent No. 2, he has admitted that on two floors he had undertaken the contract of electricity and water.

10. RW-2 Krishna Devi has produced the requisitioned record.

11. RW-3 HC Baldev Singh deposed that FIR No. 89 of 2000 was registered on 24.5.2000 under Section 336 IPC. He proved the statement Ext. RW-3/A. He was the I.O. he has recorded the statement of late Sh. D.D. Panday. According to the statement of the deceased, he was working as Plumber. He was working at the instance of respondent No. 2. Late Sh. D.D.Panday, had gone all alone to the house of respondent No. 2. When he climbed on the roof of the building, he came in contact with 33 KV line. He fell down and

was taken to IGMC, Shimla. According to him, the death was not caused due to the negligence of respondent No. 1. He proved the statement of the deceased vide Ext. RW-3/A.

12. RW-4 Suman Kohli deposed that she has entered into agreement with respondent No. 1 vide agreement Ext. RW-4/A. She was not responsible to compensate the claimant. It was the responsibility of respondent No.1. She in her cross-examination has admitted that she has never got any work executed from any person beyond agreement Ext. RW-4/A. She has taken over the complete possession of the house in December, 2001. She also admitted that when late Sh. D.D. Panday died, respondent No. 1 Kalyan Singh was the contractor.

13. RW-5 Zhunna alias Kaushal deposed that he was working as Plumber with late D.D. Panday. He has worked with him in the house of Suman Kohli. They have affixed water tank in the house of respondent No.2. They were sent to affix the same at the instance of contractor in the year 2000. Suman Kohli had informed that water tank was leaking.

14. RW-6 Satish Kumar Khera has deposed that the construction work was undertaken by respondent No. 1 as per agreement Ext. RW-4/A. He has signed the agreement.

15. What emerges from the evidence discussed hereinabove is that agreement was entered into between respondent No. 1 & 2 vide Ext. RW-4/A. The respondent No. 1 was the contractor. He has undertaken the construction work of house of respondent No. 2 vide agreement. The deceased was employed as Plumber by respondent No. 1. He had gone to the house of respondent No. 2 to affix the water tank. While he was repairing, he came in contact with the live electric wire. The deceased died and post mortem examination was conducted. According to PW-3 Dr. Piyush Kapila, he died due to electric shock. The appellants have proved copy of FIR Ext. PW-2/A and post mortem report. The learned Workmen's Commissioner has come to a wrong conclusion that there was no relationship of employer and employee between respondent No. 1 and late Sh. D.D. Panday. There is ample evidence on record to establish this fact. The learned Workmen's Commissioner has wrongly placed reliance upon the statement of late Sh. D.D.Panday, recorded under Section 161 Cr.P.C. vide Ext. RW-3/A and the statement made by PW-1 Bhagya Laxmi dated 17.6.2004 in criminal case before the learned ACJM, Shimla. It is settled law that the statement under Section 161 Cr.P.C. has no evidentiary value. The statement of PW-1 Bhagya Laxmi recorded before the learned ACJM, Shimla could not be relied upon in a civil case.

16. In the case of ***Onkarmal and another vrs. Banwarilal and others,*** reported in ***AIR 1962 Rajasthan 127,*** the learned Single Judge has held that the judgment of acquittal in a criminal Court is irrelevant in a civil suit based on the same cause of action, just as a judgment of conviction cannot, in a subsequent civil suit, be treated as evidence of facts on which the conviction is based. It has been held as follows:

> "24. I now turn to the plaintiff's cross-objection. The learned District Judge has held that beyond the return of the money which the plaintiffs paid to the defendants, namely, Rs. 700/-, the former were not entitled to get any damages, special or general. The main reason which seems to have prevailed with the learned District Judge was that the defendants had been acquitted in the criminal case of the charge of wrongful confinement among other charges for which they had been prosecuted. As the learned Judge has put it, the accused had been acquitted by a criminal court and, therefore, it must be held that they had not kept the plaintiff Banarsilal under illegal

confinement and were innocent in this respect. To me, it clearly appears that, in taking this view, the learned District Judge fell into a grave error of law.

From what I have stated in the foregoing part of my judgment, I have no hesitation in saying that, left to himself, the learned Judge would have been well disposed to hold, on the material which he was prepared to accept as true, that the plaintiff Banarsilal had been detained under illegal custody by the Sub-Inspector Jagannathsingh at the instance of the defendants. In fact, this is the entire foundation of his judgment in so far as he decreed the return of the sum of Rs. 711/-by the defendants to the plaintiffs. And yet, when he came to deal with the question of damages awardable to the plaintiffs in the same connection over and above the return of the money, which had been actually paid by them to the defendants, he thought that he was bound by the finding of the criminal court. There is, however, abundant authority for the proposition that a judgment of acquittal in a criminal court is irrelevant in a civil suit based on the same cause of action, just as a judgment of conviction cannot, in a sub-sequent civil suit, be treated as evidence of facts on which the conviction is based. The correct position in law, therefore, is that the Civil Court must independently of the decision of the criminal court investigate facts and come to its own finding. Thus it was held in Venkatapathi v. Balappa, AIR 1933 Mad 429 that in a suit for damages for malicious prosecution, under Section 43 of the Evidence Act, the judgment of the criminal court can only be used to establish the fact that an acquittal has taken place as a fact in issue in the civil suit, but the civil court cannot take into consideration the grounds upon which that acquittal was based and it would be for the civil court itself to undertake an entirely independent inquiry before satisfying itself of the absence of reasonable and probable cause. Again, it was held in Ramadhar v. Janki, AIR 1958 Pat 49 that a judgment of a criminal court is admissible to prove only who the parties to the dispute were and what order was passed; but the facts stated therein or statements of the evidence of the witnesses examined in the case or the findings given by the court are not admissible at all and the civil court is bound to find the facts for itself. That this view is unchallengeably correct would appear from the judgment of their Lordships of the Supreme Court in Anil Behari v. Latika Bala Dassi, (S) AIR 1955 SC 566. I have, therefore, no hesitation in holding that the learned Judge was completely wrong when he thought that on the score mentioned above the plaintiffs were not entitled to recover any damages from the defendants for the unlawful detention of the plaintiff Banarsilal at the police outpost Jasrapur from the 31st May, 1952, to the morning of the 2nd June, 1952."

17. In the case of ***Municipal Committee, Jullundur City vrs. Shri Romesh Saggi and others,*** reported in ***AIR 1970 Punjab and Haryana 137,*** the Division Bench has held that the judgment of a Criminal Court in a prosecution arising out of a motor accident, determining the guilt or innocence of the driver of the motor vehicle concerned, is neither conclusive nor binding on the Motor Accidents Claims Tribunals. It has been held as follows:

"35. For the reasons recorded in OUT separate judgments, we answer the question referred to us in the following manner, and direct that this appeal

will now go back to the learned Single Judge for disposal on merits in accordance with law:--

> "The Judgment of a Criminal Court in a prosecution arising out of a motor accident, determining the guilt or innocence of the driver of the motor vehicle concerned, is neither conclusive nor binding on the Motor Accidents Claims Tribunals, dealing with a claim petition under Section 110-C of the Motor Vehicles Act, and its findings as to the guilt or otherwise of the driver are wholly irrelevant for the purpose of the trial on merits of the claim petition before the Motor Accidents Claims Tribunal. Such judgment can however, be relevant only for the purpose and to the extent specified in Section 43 of the Evidence Act"

18. In the case of ***Yoginder Paul Chowdhry vrs. Durga Dass Punj and another,*** reported in ***1972 A.C.J. 483,*** the learned Single Judge has held that the judgment of the Criminal Court was not binding on the Civil Court. It has been held as follows:

> "[5] The learned Tribunal was, no doubt, right in his view that the burden of proving that the accident occurred due to the rashness or negligence of the first respondent lay upon the appellant and that if he failed to discharge this onus satisfactorily, the weakness of the respondent's evidence would not matter. But the learned Tribunal did not take into consideration two factors which supported the appellant's case, namely, (1) the admission made by the first respondent in the criminal Court that the accident was due to his rashness and negligence, and (2) the circumstances under which the accident occurred. The first respondent was challenged by the police in connection with this accident and when a charge was framed against him to the effect that the accident occurred due to his rashness and negligence, he pleaded guilty to the the charge and was convicted and sentenced to pay a fine of Rs. 600.00. The learned counsel for the appellants contends that the conviction of the first respondent by the Criminal Court was conclusive evidence of the rashness and negligence of the first respondent and that the judgment of the criminal Court was binding upon the Tribunal. In support of this contention, he has placed reliance upon the judgment of the Punjab and Haryana High Court in the case of Sadhu Singh v. The Punjab Roadways and another1, in which Mr. Justice D. K. Mahajan held that the Motor Accidents Claims Tribunal constituted under the Motor Vehicles Act, 1939 was a statutory Tribunal and was bound by the judgment of the criminal Court. In so holding, the learned judge has relied upon a decision of Madras High Court in Jerome D'silva v. The Regional Transport Authority3 and a judgment of the Mysore High Court in the case of P. Channappa v. Mysore Revenue Appellate Tribunal3 With respect, these two decisions do not really support the view taken by Mr. Justice Mahajan. In both these cases, the statutory Tribunal on which the judgment of the criminal Court was held to be binding was the Road Transport Authority. In these cases, the driver of the motor vehicle was prosecuted in a criminal Court and was acquitted. But the Road Transport Authority were seeking to cancel his licence on the same charge on which he was prosecuted and acquitted. It was on these facts that it was held in these cases that it was not open to the statutory Tribunal to make a fresh enquiry into the same charge which had already been enquired

into by the criminal Court. On the other hand, there is a direct decision of Madras High Court under the Motor Vehicles Act which lays down the scope of the power of the Motor Accidents Claims Tribunal. This is the case Krishnan Asari and another v. Adaikalam and others. After referring to the case law on the subject, the High Court held that any decision of a criminal case could not be relied on as one binding in a civil action and that equally the findings in a civil proceeding were not binding on a subsequent prosecution founded upon the same or similar allegations. There is a decision of the Mysore High Court on the point in Seethamma and others v. Benedict D'sa and others in which also it was held that the mere fact that the driver of the bus who was prosecuted for rash and negligent driving had been acquitted would not be a proof of the fact that he was not guilty of negligence. The acquittal order has to be construed in the circumstances of each case. The purpose for which such order of acquittal could be used was only to prove that there was an order of acquittal and nothing more. With respect, therefore, I cannot agree with the view expressed by Mr. Justice Mahajan in the case referred to by the learned counsel for the appellant and I cannot on the strength of the judgment of the criminal court alone hold that the respondent was guilty of rashness or negligence."

19. In the case of ***Prabhakar Babusso Chodankar and another vrs. Smt. Maria Victoria Periera***, reported in ***1977 Goa, Daman & Diu 15,*** the learned Single Judge has held that judgment of the Criminal Court is not binding on the Motor Accident Tribunal and it is not inhibited from coming to its own conclusion as to the veracity of the witnesses. It has been held as follows:

"8. Learned counsel for the appellants argued that witness Fonseca had been disbelieved by the Criminal Court and that was a good reason to disbelieve him in these proceedings as well. The argument has no substance. Section 43 of the Evidence Act lays down that judgments other than those mentioned in Sections 40 to 42 are irrelevant unless the existence of such a judgment is a fact in issue. It is nobody's case that the judgment of the Criminal Court came under the ambit of Sections 40 to 42 of the Evidence Act. Therefore the fact that the Criminal Court did not rely on the statement of Fonseca did not in any inhibit the Tribunal from coming to its own decision about the veracity or otherwise of Fonseca's statement."

20. In the case of ***Hazari Lal vrs. The State (Delhi Admn.),*** reported in ***AIR 1980 SC 873,*** their lordships of the Hon'ble Supreme Court have held that statements made by witnesses in the course of investigation cannot be used as substantive evidence.

"7. The learned counsel was right in his submission about the free use made by the Courts below of statements of witnesses recorded during the course of investigation. Section 162 of the Code of Criminal Procedure imposes a bar on the use of any statement made by any person to a Police Officer in the course of investigation at any enquiry or trial in respect of any offence under investigation at the time when such statement was made, except for the purpose of contradicting the witness in the manner provided by s.145 of the Indian Evidence Act. Where any part of such statement is so used any part thereof may also be used in the re- examination of the witness for the limited purpose of explaining any matter referred to in his cross-examination. The only other exceptions to this embargo on the use of

> statements made in the course of an investigation, relates to the statements falling within the provisions of s. 32(1) of the Indian Evidence Act or permitted to be proved under s. 27 of the Indian Evidence Act S.145 of the Evidence Act provides that a witness may be cross-examined as to previous statements made by him in writing and reduced into writing and relevant to matters in question, without such writing being shown to him or being proved but, that if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The Courts below were clearly wrong in using as substantive evidence statements made by witnesses in the course of investigation. Shri H. S. Marwah, learned counsel for the Delhi Administration amazed us by advancing the argument that the earlier statements with which witnesses were confronted for the purpose of contradiction could be taken into consideration by the Court in view of the definition of "proved" in section 3 of the Evidence Act which is, "a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man, ought, in the circumstances of the particular case to act upon the supposition that it exists." We need say no more on the submission of Shri Marwah except that the definition of proved does not enable a Court to take into consideration matters, including statements, whose use is statutorily barred."

21. Their lordships of the Hon'ble Supreme Court in the case of ***Baldev Singh vrs. State of Punjab,*** reported in ***(1990) 4 SCC 692,*** have held that statement recorded under Section 161 Cr.P.C. shall not be used for any purpose except to contradict a witness in the manner prescribed in the proviso to Section 162(1). It has been held as follows:

> "5. It is seen from the judgment of the High Court that though PW-10 in his chief examination has supported the prosecution version in all its material particulars has given a complete go- by and struck a death kneel to the prosecution in his cross- examination stating that due to darkness he could not identify the culprits. The High Court was inclined to place reliance on his evidence on the ground that this witness in his statement before the police; evidentially referring to the statement recorded under Section 161 of the CrPC during the investigation as well in the first information report Exh. P.O., has narrated all the relevant facts and had not whispered in those statements that he could not identify the appellant due to darkness. This reasoning of the High Court in our view is erroneous. Needless to stress that the statement recorded under Section 161 of the CrPC shall not be used for any purpose except to contradict a witness in the manner prescribed in the proviso toSection 162(1) and that the first information report is not a substantial piece of evidence. The High Court has misled itself into relying upon these two statements and thereby has fallen into a serious error. It is pertinent to note in this connection that PW-7, an Advocate who is a disinterested witness has testified to the fact that both PWs 9 and 10 met him after the incident, but they did not tell the name of the appellant."

22. Their lordships of the Hon'ble Supreme Court in the case of ***Shanti Kumar Panda vrs. Shakuntala Devi,*** reported in ***(2004) 1 SCC 438,*** have held that decision by a Criminal Court does not bind the Civil Court while a decision by the Civil Court binds the Criminal Court. It has been held as follows:

" 15. It is well-settled that a decision by a Criminal Court does not bind the Civil Court while a decision by the Civil Court binds the Criminal Court (See Sarkar on Evidence, Fifteenth Edition, page 845). A decision given under Section 145 of the Code has relevance and is admissible in evidence to show :- (i) that there was a dispute relating to a particular property; (ii) that the dispute was between the particular parties; (iii) that such dispute led to the passing of a preliminary order under Section 145(1) or an attachment under Section 146(1), on the given date, and (iv) that the Magistrate found one of the parties to be in possession or fictional possession of the disputed property on the date of the preliminary order. The reasoning recorded by the Magistrate or other findings arrived at by him have no relevance and are not admissible in evidence before the competent court and the competent court is not bound by the findings arrived at by the Magistrate even on the question of possession through, as between the parties, the order of the Magistrate would be evidence of possession. The finding recorded by the Magistrate does not bind the Court. The competent court has jurisdiction and would be justified in arriving at a finding inconsistent with the one arrived at by the Executive Magistrate even on the question of possession. Sections 145 and 146 only provide for the order of the Executive Magistrate made under any of the two provisions being superseded by and giving way to the order or decree of a competent court. The effect of the Magistrate's order is that burden is thrown on the unsuccessful party to prove its possession or entitlement to possession before the competent court."

23. Their lordships of the Hon'ble Supreme Court in the case of ***Ram Swaroop and others vrs. State of Rajasthan,*** reported in ***AIR 2004 SC 2943,*** have held that attaching undue importance by Court to statements made in course of investigation and recorded under S. 161 Cr.P.C. is not proper. It has been held as follows:

"23. We have also noticed that the High Court has attached undue importance to the statements made in the course of investigation and recorded under Section 161 of the Code of Criminal Procedure. It is well settled that a statement recorded under Section 161 of the Code of Criminal Procedure cannot be treated as evidence in the criminal trial but may be used for the limited purpose of impeaching the credibility of a witness. We find that in paragraph 6 of the judgment, the High Court while dealing with the evidence of PW-7 has clearly treated the statement of PW-7, recorded in the course of investigation, as substantive evidence in this case. The High Court observed :-

> "He is consistent in his statement U/s. 161 Cr. P.C. that while he along with Kishore (PW-10) were sitting in front of the house of Kishore, which is just near the Shiv Temple, Ramswaroop and his sons Ram Kalyan and Hiralal armed with lathies came and gave beating to Bhanwar Lal and specifically head injury is attributed to Ramswaroop. In the statement in court, he only attributed injuries to Hiralal and Ram Kalyan. Even he is consistent on the fact that while Madan Lal and his mother came and tried to save Bhanwar Lal from these persons, they were caught hold by Dakhan and Ram Kanya and Dakhan and Ram Kanya have given beating to Mdan Lal and his mother."

> 24. In our view the High Court ought to have considered his deposition rather than his statement recorded under Section 161 of the Code of Criminal Procedure. The inconsistency between the two versions is obvious from the fact that the prosecution had to declare the witness hostile. The approach of the High Court, therefore, is clearly erroneous."

24. In the instance case, the evidence which has been led by the parties before the learned Workmen's Commissioner was to be looked into instead of giving undue importance to statement recorded under Section 161 Cr.P.C of late D.D. Pandaty and his wife vide Ext. PX, especially when it has come in the evidence of RW-4 Suman Kohli that she has got the work executed as per agreement Ext. RW-4/A. The respondent No. 1 has also failed to deposit the compensation amount with the Commissioner, Workmen's Compensation and thus he is liable to pay penalty @ 20%. The substantial questions of law are answered accordingly.

25. The deceased was 34 years of age. It has come in the evidence that the claimants were dependent upon the deceased. The deceased was earning Rs.5000/- per month. The accident has taken place on 24.5.2000. The salary of the deceased was to be taken as Rs. 2000/- per month. The petitioners, being the legal heirs of the deceased, are entitled to compensation amount and penalty as under:

(1) Age 34 years, salary Rs. (2000 – 1000) = Rs. 1000 per month, for the purpose of compensation i.e Rs. 1000 x 199.40 = 1,99,400.

(2) Simple interest @ 12% per annum from 24.5.2000, till date, comes out to Rs. 3,63,944.88.

(3) Penalty @ 20% comes out to Rs.39,880.

(4) Total amount comes out to Rs. **6,03,224.88.**

26. Accordingly, the appeal is allowed. The claimants are entitled to compensation of Rs. **6,03,224.88,** as computed hereinabove. The amount shall be paid by respondent No. 1 to the claimants within a period of six weeks from today.

****

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

Bajaj Allianz General Insurance Company Ltd. ...Appellant

Versus

Pinki Devi and others. ...Respondents.

FAO (ECA) No. : 81 of 2015
Decided on: 31.8.2015

Workmen Compensation Act, 1923- Section 22- Deceased was employed as a driver – vehicle met with an accident in which deceased received multiple injuries and died at the spot- respondent No. 4 had admitted that deceased was working as driver with him- relationship of employer and employee was duly established- Commissioner had ordered the deposit of 50% of amount by way of penalty- held, that the penalty has to be deposited by the employer and not by the employee. (Para-9 and 10)

For the Appellant : Mr. Jagdish Thakur, Advocate.
For the Respondents : Mr. R.K. Sharma, Sr. Advocate with Mr. Amit Kumar Dhumal, Advocate for respondent Nos. 1 to 3.
Mr. Sat Prakash, Advocate for respondent No.4.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the award dated 28.5.2014 rendered by the Commissioner under Employee's Compensation Act, 1923, Chamba in case No. 533/13.

2. "Key facts" necessary for the adjudication of this appeal are that respondent Nos. 1 to 3 instituted a petition for the grant of compensation under section 22 of the Workmen Compensation Act against the appellant as well as respondent No.4 with the averments that Sampuran Singh was a workman. He was employed by respondent No.4 as a Driver on tipper No. HP-73-0999. The vehicle met with an accident on 21.4.2010, as a result of which, deceased received multiple injuries on his person. He died on the spot. Matter was reported to the police vide FIR No.106/2010 dated 22.4.2010. Deceased was 37 years of age. He was earning Rs.5,000/- per month.

3. Petition was contested by appellant as well as respondent No.4. According to respondent No.4, vehicle was registered with the Insurance Company with effect from 15.11.2009 to 14.11.2010. It is also admitted that that late Sampuran Singh was employed by respondent No.4. Factum of accident has also been admitted. According to the reply filed by the appellant, deceased was not holding valid and effective driving licence.

4. Claimants filed rejoineder. Issues were framed by the Commissioner on 3.12.2012. Award was made in favour of the claimants on 28.5.2014.

5. Mr. Jagdish Thakur, learned counsel for the appellant, on the basis of the substantial questions of law framed, has vehemently argued that conditional order of payment of penalty by his client is contrary to the provisions of Workmen Compensation Act, 1923.

6. Mr. R.K. Sharma, learned Senior Advocate and Mr. Sat Prakash have supported the award dated 28.5.2014.

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

8. Accident has taken place on 21.4.2010. Deceased was employed as Driver by respondent No.4 on tipper. AW-1 Pinki has led her evidence by way of affidavit Ex.AW-1/A. She has proved legal heirs certificate mark 'X'. She has reiterated the averments contained in the petition. AW-2 Varun Sharma has proved postmortem report Ex.AW-2/A. AW-3 MHC Raj Kumar has proved FIR Ex.AW-3/A. RC is Ex.R-1/A, Driving Licence is Ex.R-1/B and Insurance is Ex.R-1/C.

9. Respondent No.4 has admitted that the deceased was working as a Driver and employed by him. He died in accident on 21.4.2010. Appellant has not led any tangible and convincing evidence that deceased was not possessing valid and effective driving licence. Age of the deceased, as per post-mortem report was 40 years. FIR is Ex. AW-1/A. Claimants have led tangible evidence to establish that deceased died during the course of employment with respondent No.4. There was relationship of employee and employer

between deceased and respondent No.4. The vehicle was insured with appellant with effect from 15.11.2009 to 14.11.2010. The accident has taken place on 21.4.2010.

10. Learned Commissioner has correctly assessed the income of deceased and applied proper factor of 181.37. However, she has passed the conditional order whereby she has ordered that the award amount be deposited within 30 days from the date of passing of this award, failing which appellant and respondent No.4 were made liable to deposit 50% of the amount by way of penalty. The penalty amount has to be paid by the employer and not by the insurance company. Moreover, the notice is also required to be issued to the employer before the imposition of penalty.

11. Accordingly, in view of the analysis and observation made hereinabove, the appeal is partly allowed. The award made by the Commissioner is upheld whereby a sum of Rs. 4,10,582/- has been awarded in favour of the claimants, however, conditional order to deposit 50% of the amount by way of penalty by the appellant and respondent No.4 is set aside. Pending application(s), if any, also stands disposed of. No costs.

****

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

Ravinder Sahi .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 158 of 2014
Reserved on: August 19, 2015.
Decided on: August 20, 2015.

Indian Penal Code, 1860- Section 376- Prosecutrix aged three years was raped by the accused after she was taken on the pretext that sweets would be provided to her- prosecutrix was found by PW-12 lying on the sand and was taken to Hospital- blood stains were found on the clothes of the prosecutrix- injuries were found on her person which suggested sexual intercourse- testimony of the prosecutrix was trustworthy- there was no reason to falsely implicate the accused in a heinous crime like rape- testimony of the prosecutrix was corroborated by the testimonies of eye-witnesses and other independent witnesses- held, that accused was rightly convicted. (Para-6 to 29)

For the appellant: Mr. Virender Singh Rathour, Advocate.
For the respondent: Mr. M.A.Khan, Addl. AG with Mr. P.M. Negi, Dy. AG and Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment and order dated 23.10.2013 & 24.10.2013, respectively, rendered by the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, Distt. Shimla, H.P. in Sessions Trial No. 35-K/7 of 2012, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 376 IPC, has been convicted and

sentenced to undergo imprisonment for life and to pay fine of Rs. 10,000/- and in default of payment of fine, the accused was further ordered to undergo simple imprisonment for a period of six months.

2. The case of the prosecution, in a nut shell, is that on 18.7.2012 at 9:55 PM, on receipt of the telephonic information from Medical Officer, Regional Hospital, Reckong Peo, Distt. Kinnaur, H.P. to the effect that a Nepali girl had been brought to their hospital being a rape victim, the police party, headed by HC Ramesh Kumar PS Reckong Peo was dispatched to do the needful. HC Ramesh Kumar visited the hospital and recorded the statement of the mother of the prosecutrix under Section 154 Cr.P.C. He moved an application for medical examination of the prosecutrix from Dr. Kalpna Sharma. He obtained the MLC. Since the offence was committed within the jurisdiction of P.S. Pooh, the statement of the mother of the prosecutrix and the parcels were sent to PS Pooh for further action. Thereafter, formal FIR was lodged in PS Pooh. The IO went to the spot and on completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 19 witnesses. The accused was also examined under Section 313 Cr.P.C. He has denied the prosecution case and pleaded innocence. The learned trial Court convicted the accused, as noticed hereinabove.

4. Mr. Varinder Singh Rathore, Advocate, for the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, learned Addl. Advocate General, for the State has supported the judgment/order of the learned trial Court dated 23/24.10.2013.

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

6. Dr. Kalpana Sharma, PW-1 deposed that on 18.7.2012, the police filed an application Ext PW-1/A for conducting medical examination of the prosecutrix. The age of the prosecutrix was 3 ½ years. On external examination, blood stains with soil particles were seen on front side of frock with multiple white hair and some faecal matter on back side of the frock. Blood and soil stains were also seen on inner shirt. Dupatta around the child was also stained with blood and sand particles. She noticed blood stains on lower part of abdomen. She also noticed three vertical and one transverse scratch marks over sacral region of size 7 to 8 cm. Small contusion was also present 2 x 3 cm over lower back. Multiple scratch marks were also noticed on the lateral side of right thigh. Sand particles with blood stains were also present over medial side of thigh. On local examination, blood stains were noticed on labia majora. On separation of labia, blood was seen oozing from vaginal orifice. There was perinea tear 3 cm extending from vaginal orifice towards perinea region. Swelling/edema was present around vaginal orifice. Sand particles, faecal matter was present around the annal region. The probable duration of injuries was less than six hours. According to PW-1, the evidence was suggestive of sexual intercourse with the patient. She proved MLC Ext. PW-1/B.

7. Dr. Vidyasagar, PW-2 has examined the accused. He issued MLC Ext. PW-2/B. According to him, there was nothing suggestive of the fact that the accused was not capable of performing sexual act.

8. Sh. Rakesh Kumar, PW-3 deposed that on 18.7.2012, at about 5/6 PM, when he was present at GREF Store at Spillow, one Nepali was seen coming from the side of Sutlej towards upper side. He was perplexed and wearing yellow coloured T-shirt, black

pant and Chappals. He was walking briskly and went towards Akpa side. Later on, he came to know that child of Gopal had been raped by some Nepali person and afterwards the police had arrested the accused. He identified the accused in the Court.

9. Mohinder Pal, PW-4 deposed that he was on duty with I.O. Head Constable Ramesh Kumar and M.O. RH Reckong Peo had given information that one child aged about 3 years had come to the hospital for treatment. On this information, he alongwith the IO Ramesh Kumar and HC Harish Sain reached Reckong Peo Hospital where the prosecutrix was under treatment. The IO recorded the statement of mother of the prosecutrix under Section 154 Cr.P.C. vide Ext. PW-4/A.

10. Const. Nitin Kumar, PW-5 deposed that the case property was handed over to him by MHC Pardeep Kumar.

11. HC Pardeep Kumar, PW-6 deposed that on 19.7.2012, Const. Mohinder Pal, PS Reckong Peo deposited with him the case property of this case. The entries regarding the same were made by him at Sr. No. 110/2012 dated 19.7.2012. On 20.7.2012, other case property pertaining to this case was got deposited with him by Const. Nitin Kumar.

12. HC Sunil Kumar, PW-7 deposed that he sent the case property of this case through Const. Yadvinder Singh to be deposited at FSL Junga, vide RC No. 55/2012.

13. Const. Yadvinder Singh PW-8 deposed that he took the case property pertaining to this case to the FSL, Junga.

14. Smt. Rupa PW-10, is a material witness. She is the mother of the prosecutrix. According to her, on 18.7.2012, her husband had gone to Skibba in order to bring birds. After 12 noon, her husband had come back accompanied with accused. She provided meals in the shop. After taking food, her husband started taking rest by lying inside the shop and the accused also started resting outside the shop. At that time, she was running the shop. Her daughter, the prosecutrix was also present behind the shop. Accused made her daughter to accompany him by alluring that she would be provided sweets by him. At about 5:00 PM, she was told by Radhika on telephone that her daughter had been admitted in the hospital. Thereafter, she went to the hospital and came to know that accused had committed rape on her. From Spillow hospital, they took the daughter to Reckong Peo for treatment. Her daughter told her in the hospital at Reckong Peo that her Nepali Uncle had taken her towards the river side where he opened her Pyjama and laid upon her and from her private organ, blood started oozing out. Her statement was recorded vide Ext. PW-4/A.

15. Sh. Gopal Singh, PW-11 deposed that his wife works in GREF as labourer. His daughter had gone to *Anganbari*. She was 3 years of age at the time of incident. At about 12:30 PM, he accompanied with accused and returned to Spillow. They dressed 5/6 chickens for sale and thereafter went to the shop. In the shop, his wife brought the food. After taking food, he slept in the shop. The accused was also lying outside the shop. At that time, his wife was conducting business in the shop. At about 5:30 PM, some Nepali lady rang his wife and informed that his daughter was in the Spillow hospital. Firstly, his wife went to the hospital and thereafter he also went to the hospital. Since his daughter was bleeding profusely from her private organ, she was brought to Reckong Peo for treatment. In Reckong Peo, his daughter told that she had been taken by Nepali Uncle towards river side on the pretext that she would be provided with sweets. Thereafter, he opened her Pyjama and laid on her and she started bleeding.

16. The prosecutrix (name withheld), deposed that from the shop, she was taken by Nepali Uncle. She recognized him. He took her to river. He did Balatkar with her. She started crying as she felt pain in her "*gupt ang'*.

17. Ms. Kesang, PW-12 deposed that on 18.7.2012, she went to Sutlej river for urination. She saw prosecutrix lying on the sand. She was bleeding from private part. She was unconscious. When, she shook her, she cried. She along with one *Biharan* lady took her to hospital for treatment. She handed over the prosecutrix to nurse in the hospital. Later on, she came to know that she was the daughter of one Nepali chicken-seller.

18. Sh. Dev Singh, PW-14, deposed that the accused has given demarcation of chow-shed. In the cow-shed one gunny bag was recovered which was stained with blood. The gunny bag was taken into possession vide seizure memo Ext. PW-14/A. The pyjama was also taken into possession vide memo Ext. PW-14/B.

19. Sh. Bir Singh, PW-15, deposed that on 18.7.2012, he had come from Kanam to his quarter. He went to Spillow bazaar to buy newspaper. While returning, he found a three year old girl weeping. When he approached her, he noticed blood oozing out from her private organ. He went towards the colony of GREF in search of the parents of that girl. He brought two-three Nepalese.

20. HC Ramesh Kumar, PW-16 deposed that he was on duty and a telephonic call was received at about 9:55 PM from RH, Reckong Peo that one Nepali girl aged about 3 or 3 ½ years had been admitted in the hospital being a rape victim. He alongwith HC Harish Kumar, Const. Mohinder Pal went to the hospital where the prosecutrix was admitted. The statement of the mother of the prosecutrix was recorded under Section 154 Cr.P.C. The MLC of the prosecutrix was obtained. The samples were sent to PS Pooh through Const. Mohinder Pal.

21. Dr. Dinesh Sharma, PW-17 deposed that physical violence and sexual abuse had been performed with the minor child.

22. Sh. Amir Lama, PW-18 deposed that the accused led the police party to the cowshed where he got recovered the piece of gunny bag, upon which blood stains were present. The pyjama was also got recovered on the way by the accused.

23. ASI Jeet Ram, PW-19 prepared the spot map Ext. PW-19/A. The photographs were also clicked. The statements of the witnesses were also recorded. Gunny bag and Pyjama were got recovered by the accused. The case property was sent for FSL, Junga for chemical examination. The final opinion of the doctor is Ext. PW-17/B. He also obtained the MLC of the prosecutrix.

24. What emerges from the statements of the witnesses is that the prosecutrix, aged about 3 ½ years, was taken by the accused towards the river side. He committed rape on her. The girl was admitted in the hospital. The MLC was got conducted and case property was sent to FSL, Junga for chemical examination.

25. PW-1 Dr. Kalpna Sharma, stated that blood stains were noticed on labia majora. On separation of labia, blood was seen oozing from vaginal orifice. There was perineal tear 3 cm extending from vaginal orifice towards perineal region. She also noticed swelling/odema around the vaginal orifice. According to the MLC Ext. PW-1/B, it was a case of sexual intercourse with the patient. PW-17 Dr. Dinesh Sharma, Gynecologist, has

also opined that physical violence and sexual abuse has been performed with the patient. He has given his expert opinion vide Ext. PW-17/B.

26. The statement of the prosecutrix was also recorded. She categorically deposed that the accused took her to river side. He did balatkar with her. She started crying and her mouth was gagged. She felt pain in her private part. Her statement has been fully corroborated by her mother, PW-10 Smt. Rupa and her father PW-11 Gopal Singh. According to them, the accused took prosecutrix towards the river side by alluring her to give sweets.

27. The accused was capable of performing sexual act as per the statement of PW-2 Dr. Vidyasagar. The accused was also seen coming from river side by PW-3 Rakesh Kumar. The prosecutrix was seen lying on the sand by PW-12 Kesang. The gunny bag and pyjama was got recovered by the accused in the presence of PW-14 Dev Singh. PW-15 Bir Singh also found the three year old girl weeping. He noticed that blood was oozing out from her private organ.

28. According to Ext. PX-1, FSL report, human blood was detected on exhibit 1a (T-shirt, of the prosecutrix), exhibit 1c (dupatta of the prosecutrix), exhibit 3a (vaginal swab of the prosecutrix), exhibit 3b (endo cervical swab of the prosecutrix) and exhibit 3c (annal swab of the prosecutrix). Human blood was also detected on exhibit 3d (swab taken from medial aspect of thigh of the prosecutrix). Human blood and semen was detected on exhibit 1b (frock of the prosecutrix) and exhibit 7d (underwear of the accused). The DNA report Ext. PX-2 also established that the accused has committed rape upon the prosecutrix.

29. Mr. Varinder Singh Rathore, Advocate appearing for the accused has also argued that it was a case of false implication. This plea merits rejection. There was no occasion for the poor labourers to falsely implicate the accused. The accused was working as servant with the family of the prosecutrix. He allured and took the prosecutrix to river side and committed rape on her. No respectable family would ever try to falsely implicate the accused and that too in heinous crime like rape, moreover when the honour and prestige of the family is involved. Thus, the prosecution has proved the case against the accused beyond reasonable doubt. There is no occasion for us to interfere with the well reasoned judgment passed by the learned trial Court.

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

****

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

Usman Shamshudeen Shekh ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Criminal Appeal No.88 of 2013
Reserved on : 29.7.2015
Date of Decision: August 21, 2015

N.D.P.S. Act, 1985- Section 20- Accused was apprehended with 1.9 k.gs of charas from secluded place- police made efforts to associate independent witnesses by stopping the vehicles but none stopped- the nearest inhabited place was at a distance of 15-20 minutes- accused tried to run away from the spot and, therefore, he could not have been left alone- testimonies of police officials corroborated each other- there were no contradictions in their testimonies- police did not have any reason to implicate the accused falsely- link evidence was complete- held, that in these circumstances, accused was rightly convicted, however, sentence was modified. (Para-7 to 45)

Cases referred:

State of Bihar v. Basawan Singh, AIR 1958 SC 500
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 Kh ima v. State of Saurashtra, AIR 1956
Tahir v. State (Delhi), (1996) 3 SCC 338
Sama Alana Abdulla v. State of Gujarat, (1996) 1 SCC 427
Ravindra Shantram Savant v. State of Maharashtra, (2002) 5 SCC 604
Girija Prasad (dead) by LRs v. State of M.P., (2007) 3 SC (Cri) 475
Dharampal Singh v. State of Punjab, (2010) 9 SCC 608
Madan Lal and another vs. State of H.P., 2003 (7) SCC 465
Dehal Singh v. State of Himachal Pradesh, (2010) 3 SCC (Cri) 1139
Shivaji Sahabrao Bobade & another vs. State of Maharashtra, (1973) 2 SCC 793
State of Punjab v. Partap Singh, 2004 Drugs Cases (Narcotics) 104
Shahejadkhan Mahebubkhan Pathan v. State of Gujarat, (2013) 1 SCC 570
Shanti Lal v. State of H.P., 2007 (11) SCC 243

For the Appellant : Mr. Anoop Chitkara, Advocate.
For the Respondent : Mr. V.S. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Usman Shamshudeen Shekh, hereinafter referred to as the accused, has assailed the judgment dated 17.11.2012, passed by the learned Special Judge, Shimla, in Sessions Trial No.18-S/7 of 2012, titled as *State of Himachal Pradesh v. Usman Shamshudeen Shekh*, whereby he stands convicted of the offence punishable under the provisions of Section 20-61-85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) and sentenced to undergo rigorous imprisonment for a period of twelve years and pay fine of Rs.15,00,000/-, and in default thereof to further undergo rigorous imprisonment for a period of one year.

2. It is the case of prosecution that on 2.4.2012, police party, comprising of HC Balbir Singh (PW-1), ASI Rajesh Kumar (PW-2) and SI Rupinder Kumar (PW-9) of Police Station, State CID Bharari, was on duty at Tara Devi and Shogi, in connection with detection of crime and collection of evidence. At about 6.30 p.m., at an isolated place, approximately 1 km ahead of Tara Devi, they noticed one person sitting on the parapet

alongside the road. When police made enquiries, he became perplexed and tried to flee away. At that he was apprehended. On enquiry, he disclosed his name as Usman Shamshudeen Shekh, resident of Mumbai, also having his residence in District Kullu, Himachal Pradesh. On suspicion, he was sought to be searched. Vide memo (Ex.PW-1/B), he was informed of his statutory rights, on which he consented to be searched by the police party present on the spot. In the presence of ASI Rajesh Kumar (PW-2) and HC Balbir Singh (PW-1), SI Rupinder Kumar searched the accused and found packets wrapped with cello tape around his body. These packets contained Charas like substance, which upon weighment was found to be 1.9 kgs. The contraband substance was packed in a cloth and sealed with nine seals of seal impression 'P'. Facsimile of the seal was also separately taken on a piece of cloth (Ex. PW-1/D). NCB form (Ex. PW-3/D) was filled up in triplicate. HC Balbir Singh carried Rukka (Ex. PW-9/A), on the basis of which FIR No.8, dated 2.4.2012 (Ex.PW-1/F), for offence under the provisions of Section 20 of the Act, was registered at Police Station, CID Bharari. Accused was arrested. With the completion of formalities on the spot and on return of the police the contraband substance was produced before ASI Veena (PW-4), the officiating SHO, who resealed the same with three seals of seal impression 'K', sample of which was also separately drawn on a piece of cloth (Ex.PW-4/A). Thereafter, the case property was deposited in the Malkhana by MHC Bhagirath (PW-3), who, after making entries in the record, sent the same, through Constable Joginder Singh (PW-6), for chemical analysis to the Forensic Science Laboratory, Junga. Report of the expert (Ex.PX) was obtained and taken on record by the police. Also, Special Report (Ex. PW-5/A) sent to the superior Officer was received by HC Pardeep Kumar (PW-5). With the completion of investigation, which, prima facie, revealed complicity of the accused in the alleged crime, challan was presented by SI Krishan Chand (PW-7) in the Court for trial.

3. Accused was charged for having committed offence(s), punishable under the provisions of Section 20-61-85 of the Act, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as nine witnesses and the 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.

5. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused of the charged offence and sentenced him as aforesaid. Hence, the present appeal by the accused.

6. We have heard Mr. Anoop Chitkara, Advocate, on behalf of the accused, as also Mr. V.S. Chauhan, learned Additional Advocate General, 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.

7. Assailing the judgment, Mr. Anoop Chitkara, learned counsel for the appellant, has made the following submissions:

(a) While convicting the accused, Court below erred in relying upon the uninspiring testimonies of the police officials.

(b) In the absence of association of independent witnesses, serious doubt is cast upon the factum of recovery of the contraband substance from the conscious possession of the accused.

(c) In the alternative and in any event, sentence of imprisonment and fine so imposed is on the higher side.

8. Learned Additional Advocate General has supported the judgment of conviction and sentence, for the reasons so assigned therein.

9. Undoubtedly, no independent witness has been associated by the police, in carrying out the search and seizure operations. The issue as to whether in every case, and under the all circumstances, police must associate independent witnesses, while carrying out search and seizure operations, is no longer res integra.

10. From the testimonies of HC Balbir Singh (PW-1), ASI Rajesh Kumar (PW-2) and SI Rupinder Kumar (PW-9), the police officials, who carried out search and seizure operations on the spot, we find that the place where the accused was apprehended and searched, was not only secluded, but also the police party, who were in plain clothes, made serious attempt of associating independent witnesses. They signaled the vehicles, which were passing by, but none stopped. The spot is covered by forest from all sides and none else was available there. This has come in the uncontroverted testimony of the police officials. Consequently, the reason for non-association of independent witnesses stands sufficiently explained by the prosecution. Also, police party did not have any vehicle. They were on foot and Tara Devi, the nearest inhabited place, was at a walking distance of 15-20 minutes. The witnesses have also deposed that the accused, who disclosed himself to be a resident of Mumbai, tried to flee away from the spot. Hence none could have been spared to call a witness from Tara Devi. In this backdrop, non-association of independent witnesses, reason whereof stands sufficiently explained, cannot be a factor rendering the prosecution case to be fatal. Thus, the prosecution case solely rests upon the testimonies of the police officials.

11. 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.

12. 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.

13. In *State of Bihar v. Basawan Singh,* AIR 1958 SC 500, a Constitutional Bench of the Hon'ble Supreme Court of India, observed as under:

> "If the witnesses are not accomplices, what then is their position? In Shiv Bahadur Singh's case (*Shiv Bahadur Singh v. State of Vindhya Pradesh,* 1954 SCR 1098) it was observed, with regard to Nagindas and Pannalal, that

> they were partisan witnesses who were out to entrap the appellant in that case, and it was further observed: "A perusal of the evidence .....leaves in the mind the impression that they were not witnesses whose evidence could be taken at its face value." We have taken the observations quoted above from a full report of the decision, as the authorised report does not contain the discussion with regard to evidence. It is thus clear that the decision did not lay down any universal or inflexible rule of rejection even with regard to the evidence of witnesses who may be called partisan or interested witnesses. It is plain and obvious that no such rule can be laid down; for the value of the testimony of a witness depend on diverse factors, such, as the character of the witness, to what extent and in what manner he is interested, how he has fared in cross-examination etc. There is no doubt that the testimony of partisan or interested witnesses must be scrutinised with care and there may be cases, as in Shiv Bahadur Singh's case (*Shiv Bahadur Singh v. State of Vindhya Pradesh,* 1954 SCR 1098), where the Court will as a matter of prudence look for independent corroboration. It is wrong, however to deduce from that decision any universal or inflexible rule that the evidence of the witnesses of the raiding party must be discarded, unless independent corroboration is available." (Emphasis supplied)

14. 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. [*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 Kh ima v. State of Saurashtra,* AIR 1956].

15. 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."

16. In *Sama Alana Abdulla v. State of Gujarat, (1996) 1 SCC 427,* the Court held that the evidence of police witnesses cannot be rejected on the ground that they are police witnesses and were members of the raiding party. Also, the Court held that evidence of

police officer cannot be discarded merely because he is police official, in absence of hostility to the accused.

17. It was further held by the Hon'ble Supreme Court of India in *Ravindra Shantram Savant v. State of Maharashtra,* (2002) 5 SCC 604, that Court need not seek corroboration of evidence of the police officer who conducted search. But then, given facts have to be kept in mind.

18. In *Girija Prasad (dead) by LRs v. State of M.P.,* (2007) 3 SC (Cri) 475, the Hon'ble Supreme Court of India, held that the presumption that people act honestly apply to police officer also.

19. In view of the aforesaid statement of law, we shall now examine the testimonies of police officials present on the spot.

20. SI Rupinder Kumar categorically states that at 6.30 p.m., when the police party comprising of Krishan Chand (PW-7), Rajesh Kumar (PW-2) and Balbir Singh (PW-1) reached at a secluded place, ahead of Tara Devi, they found the accused sitting on a parapet. On query, he replied that he was waiting for a bus. However, there was no bus stoppage at that place. When queried further, he became perplexed and tried to flee away. Thus police party nabbed him. He disclosed his name as Usman Shamshudeen Shekh, resident of Mumbai, also residing in District Kullu. Since accused could not satisfactorily explain his presence on the spot, on suspicion, he was searched. Prior thereto, effort was made to associate independent witnesses, as vehicles, which were passing by, were signalled to stop. Since none stopped and no independent witness who could be associated was available on the spot, after associating Rajesh Kumar and Balbir Singh accused was searched. Accused who was informed of his statutory rights, consented to be searched on the spot by SI Rupinder Kumar, vide Memo (Ex.PW-1/B). First, the accused searched him and only thereafter he searched the accused. He found a packet wrapped with a brown coloured cello tape around the body of the accused. On opening, yellow coloured thermocol type bag containing black coloured substance, in the shape of cakes, were recovered. On smelling, it appeared to be Charas. Similar packets were found to have been wrapped around the lower legs by the accused. Upon weighment, the entire contraband substance was found to be 1.9 kgs, which was packed in a cloth and sealed with nine seals of seal impression 'P'. Impression of the seal was separately taken on a piece of cloth (Ex.PW-1/D). He filled up NCB form (Ex.PW-3/D) in triplicate and embossed impression seal 'P' thereupon. Contraband substance was taken into possession vide recovery memo (Ex.PW-1/E), which was also signed by the witnesses. Ruka (Ex.PW-9/A), so prepared by him, was sent through HC Balbir Singh, on the basis of which FIR (Ex.PW-1/F) was registered at Police Station, State CID, Bharari (Shimla). He arrested the accused and after completion of the proceedings on the spot returned to the Police Station. In the absence of any facility of lock-up at Police Station, State CID, Bharari, accused was sent to Police Station Dhalli. Information of arrest, as desired by the accused, was furnished to his friend, on mobile. Special Report (Ex.PW-5/A) so sent to the Dy.S.P. (Crimes) was received in his office by HC Pardeep Kumar (PW-5).

21. It be observed that sealed parcels (three in number) were opened in the Court. Contraband substance, the cello tape and the packets (Ex.P-1 to P-6) recovered from the accused stand exhibited and proved on record. The witness has withstood the test of cross-examination and there is nothing in his testimony, which would render his otherwise inspiring version to be shaky or unbelievable or the witnesses unreliable and not worthy of credence.

22. We find the version of this witness to have been corroborated by HC Balbir Singh (PW-1) and ASI Rajesh Kumar (PW-2). Perusal of their testimonies only establishes that their deposition is clear, cogent and consistent with that of SI Rupinder Kumar. The witnesses have explained that it did not take much time to carry out search and seizure operations. Entire proceedings were completed within one hour. None was available who could have been associated as independent witness and the police party left the spot after approximately 2½ hours.

23. There are no contradictions in the version of these witnesses. In fact it is clear, consistent and cogent. Thus, in our considered view, prosecution has been able to establish, beyond reasonable doubt, the factum of recovery of Charas from the conscious possession of the accused. With the establishment of such fact, it was incumbent upon the accused to have discharged the statutory burden, which he failed to do so. Neither did he lead any evidence in defence nor did he put it in the form of suggestion to the witnesses.

24. There was no reason for the police to have falsely implicated the accused. It is not the case of the accused that police harboured any animosity resulting into false implication. He claims to be a resident of District Kullu, a far of place. His presence on the spot remained unexplained by him.

25. In the present case also, there is no enmity between the Investigating Officer and the accused. Had there been any intention of the Investigating Officer to plant the contraband substance on the accused, then he might have planted small quantity of Charas.

26. It is true that the accused is only to probablize his defence and not prove his case beyond reasonable doubt. But then, in the instant case, there is nothing on record to such effect.

27. In *Dharampal Singh v. State of Punjab,* (2010) 9 SCC 608, the Hon'ble Supreme Court of India, held that the initial burden of proof of possession lies on prosecution and once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence.

28. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused. It needs no emphasis that the expression possession is not capable of precise and completely logical definition of universal application in context of all the statutes. Possession is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18/20 of the Act once possession is established, the accused who claims that it was not a conscious possession has to establish it because it is within his special knowledge. Section 54 of the Act raises presumption from possession of illicit articles.

29. Act creates legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the accused has not been able to account for satisfactorily the possession of Charas.

Once possession is established, the Court can presume that the accused had culpable mental state and had committed the offence.

30. In somewhat similar facts, the Hon'ble Supreme Court of India, had the occasion to consider this question in *Madan Lal and another vs. State of H.P.*, 2003 (7) SCC 465, wherein it has been held that once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. (See also: *Dehal Singh v. State of Himachal Pradesh,* (2010) 3 SCC (Cri) 1139).

31. In the present case, not only possession but conscious possession has been established. It has not been shown by the accused that the possession was not conscious in the logical legal backdrop of Sections 35 and 54 of the Act.

32. It is a settled position of law that the prosecution has to prove its case beyond reasonable doubt and what is "beyond reasonable doubt", it has been explained by the Hon'ble Supreme Court of India in *Shivaji Sahabrao Bobade & another vs. State of Maharashtra,* (1973) 2 SCC 793 has held that:-

> "6. Even at this stage we may remind ourselves of a necessary social perspectives in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary contest of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles of golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then breaks down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned author [*Glanville Williams in 'Proof of Guilt'*] has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that " a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent ... ..." In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents. We have adopted these cautions in analysing the

> evidence and appraising the soundness of the contrary conclusions reached by the Courts below. Certainly, in the last analysis reasonable doubts must operate to the advantage of the appellant. In India the law has been laid down on these times long ago." [Emphasis supplied]

33. We find the prosecution to have also corroborated its case by way of link evidence. ASI Veena categorically states that upon receipt of the Rukka, FIR was registered and the contraband substance resealed by her, by putting three seals of seal impression 'K'. Facsimile of the seal was also proved on record. She filled up the relevant columns of the NCB form and entrusted the case property to MHC Bhagirath.

34. MHC Bhagirath has categorically deposed that so long as the property remained with him it was not tampered with. He made entries in the Malkhana Register (Ex.PW-3/A) and vide Road Certificate (Ex.PW-3/B) sent the parcel, through Constable Joginder Singh (PW-3), for analysis.

35. Joginder Singh also states that so long as the case property remained with him it was not tampered with and he deposited the same at the Forensic Science Laboratory, Junga, on 3.4.2012.

36. Report of the Forensic Science Laboratory (Ex.PX), so taken on record by the SI Krishan Chand (PW-7), who also presented the Challan in the Court, clearly establishes the contraband substance so recovered from the accused, which was analyzed in the Laboratory, to be Charas. The NCB form, Road Certificate and the Malkhana Register clearly establish the contraband substance produced in the Court be the one which was recovered from the conscious possession of the accused. Facsimile of the seal were produced in the Court.

37. Reliance on a decision rendered by Hon'ble the Supreme Court of India, in *State of Punjab v. Partap Singh,* 2004 Drugs Cases (Narcotics) 104, is misconceived, for the apex Court was dealing with a case where the Courts below concurrently held the prosecution to have violated Section 50 of the Act and non-association of independent witnesses, despite availability in the vicinity, was an additional fact, which weighed with the Bench in not interfering with the view taken by the Courts.

38. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused stands proved beyond reasonable doubt to the hilt. The chain of events stand conclusively established and lead only to one conclusion, i.e. guilt of the accused. Circumstances when cumulatively considered fully establish completion of chain of events, indicating the guilt of the accused and no other hypothesis other than the same. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

39. Thus, the prosecution has been able to establish the charge against the accused, beyond reasonable doubt. Findings returned by the Court below cannot be said to be perverse, illegal, erroneous or based on incorrect or incomplete appreciation of evidence, oral or documentary, so proved on record by the prosecution.

40. 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.

41. For all the aforesaid reasons, we find no reason to interfere with the findings returned by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties.

42. However we are in agreement with learned counsel for the accused that the sentence so imposed by the Court below is harsh and on the higher side. Contraband substance, so recovered was of commercial quantity weighing 1.9 kgs. The accused cannot be said to be a man of means. It is his first offence. We notice that both before the trial Court as also this Court, he stands represented by a Legal Aid Counsel, who undoubtedly have put in their best efforts.

43. The Hon'ble Supreme Court of India in *Shahejadkhan Mahebubkhan Pathan v. State of Gujarat,* (2013) 1 SCC 570, has held as under:

> "12. It is clear and reiterated that the term of imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a person incurs on account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine by paying such an amount. In such circumstance, we are of the view that it is the duty of the Court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused person as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of fine. The provisions of Sections 63 to 70 of IPC make it clear that an amount of fine should not be harsh or excessive. We also reiterate that where a substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases."

Similar view was taken by the apex Court in *Shanti Lal v. State of H.P.,* 2007 (11) SCC 243.

44. It has not come on record that accused is a kingpin, regularly indulging in the trade of manufacture, supply or sale of narcotic substance.

45. While taking note of overall attending circumstances, we reduce the sentence of rigorous imprisonment, so imposed by the trial Court, from 12 years to ten years, being the minimum sentence so prescribed under the Act for an offence of this nature and also reduce the amount of fine from Rs.15,00,000/- (fifteen lacs), so imposed by the trial Court, to Rs.1,00,000/- (one lac). We direct that in the event of default in the payment of fine, the accused shall further undergo rigorous imprisonment for a period of one year.

Hence, only with modification in the sentence part of judgment of the trial Court, the appeal stands partly allowed and disposed of accordingly, so also pending application(s), if any.

****

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

Gian Chand .....Petitioner.
Versus
Hem Raj & ors. .....Respondents.

Civil Revision No. 91 of 2006.
Reserved on: 24.8.2015.
Decided on: 26.8.2015.

Code of Civil Procedure, 1908- Order 21 Rule 32- A compromise decree was passed for permanent prohibitory injunction- an execution petition was filed pleading that a double storeyed house was demolished and a house with lintel was constructed in violation of the decree of the Court- J.D pleaded that he was not party to the decree and was not aware of the same and he had not raised any construction - Execution Petition was allowed and the J.D was directed to undergo civil imprisonment for a period of one month and his property was ordered to be attached- Record shows that J.D was aware of the judgment and decree- he had demolished old structure - he had constructed one room and thereafter had added two rooms, bath-room and balcony without seeking permission of the Court- a decree for injunction can be executed against the legal representatives on the death of J.D- held, that trial Court had rightly held that J.D had violated the judgment and decree- revision dismissed. (Para-11 to 14)

Cases referred:
Kathiyammakutty Umma vs. Thalakkadah Kattil Karappan and others, AIR 1989 Kerala 133
Yashodabai Ganesh Naik Gaunekar vs. Gopi Mukund Naik, AIR 2003 Bombay 77

For the petitioner: Mr. Nitin Thakur, Advocate vice counsel.
For the respondents: Mr. R.K.Sharma, Sr. Advocate, with Ms. Vidushi Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This revision petition is instituted against the order rendered by the learned Civil Judge (Sr. Divn.), Hamirpur, H.P., in C.M.A No. 26 of 2002, dated 8.6.2006.

2. "Key facts" necessary for the adjudication of this revision petition are that the father of the petitioner Sh. Malhi Ram has instituted a Civil Suit bearing No. 196/1 of 1987 on 11.9.1987 against the respondents. A compromise decree was passed on 22.4.1988. The operative portion of the judgment reads as under:

> "In view of the compromise arrived at today and the statements of the parties recorded, I pass a decree per terms of the compromise for permanent prohibitory injunction restraining both the parties from raising any construction, cutting any tree or changing the nature of the land compromised in Khasra Nos. 6, 59, 61, 70, 71, 85, 96, 97, 99, 106, 101, 102, 103, 104, 115, 166, 169, 173, 179, 182, 184, 186, 188, 187, 189, 190, 192, 194, 196, 197, 200, 201, 209, 210, 212, 216, 217, 222, 224, 225, 229, 232, 233, 235, measuring 128 kanals 14 marlas situated in Tika Dulana Gujran, Tappa Kuthera, Tehsil and Distt. Hamirpur, H.P, till the partition between the parties is finally sanctioned. It is further ordered and decreed that the defendants shall complete the roofing of 1/3rd of the uncovered portion of their house on an area of 15' x 15'. The parties are left to bear their own costs."

3. Thereafter, a decree was also drawn. The respondents instituted petition under Order 21 Rule 32 CPC before the Executing Court. According to them, the petitioner has demolished a double storyed tinposh room in the month of November-October, 2001 and constructed new house on Kh. No. 99 with lintel in violation of the decree of the Court. The suit land was not partitioned. The reply was filed by the petitioner. According to the reply filed, he was not party to the litigation and was not aware of the same. He has not raised any fresh construction. The old house which had outlived its life was demolished and new house was constructed on the old foundation.

4. The issues were framed by the Executing Court on 4.8.2003. The Executing Court allowed the petition and ordered the petitioner to be sentenced to undergo civil imprisonment for a period of one month and in addition to this, his property was ordered to be attached. It is, in these circumstances, the present petition has been filed against the order dated 8.6.2006.

5. Mr. Nitin Thakur, Advocate, for the petitioner has vehemently argued that his client was not aware of the judgment and decree rendered in Civil Suit No. 196/1 of 1987. He was not a party in Civil Suit No. 196/1 of 1987. He has not willfully disobeyed the judgment and decree dated 22.4.1988. On the other hand, Mr. R.K.Sharma, Sr. Advocate, for the respondents has supported the order dated 8.6.2006.

6. I have heard the learned Advocates and gone through the pleadings and record very carefully.

7. The compromise decree was passed on 22.4.1988. The operative portion of the judgment has already been reproduced, hereinabove. A decree for permanent prohibitory injunction was passed restraining both the parties from raising any construction, cutting any trees or changing the nature of the land till the partition between the parties was finally sanctioned. Late Sh. Malhi Ram, the original plaintiff in Civil Suit No. 196/1 of 1987 was the father of the petitioner Sh. Gian Chand.

8. PW-1 Hem Raj testified that the petitioner has raised the construction in the month of October, 2001 by demolishing portion of the verandah. Thereafter, he made the *pucca* structure. It was situate on Kh. No. 99. He has also raised the two rooms, bath-room and balcony in the month of November, 2001. In his cross-examination, he admitted that the partition proceedings were still going on.

9. PW-2 Kamlesh Chand deposed that a new room was added after demolishing the old room in the month of October-November, 2001. Thereafter, lintel was also put over

the same. Two rooms were also added, including bath-room. The spot where bath-room was raised was courtyard. The copies of the judgment and decree Ext. P-1 and P-3 were produced before the Court.

10. The petitioner has appeared as RW-1. He testified that his old house was in a dilapidated condition. He has given the contract for raising construction to Kamlu. He raised the construction on the old foundation and constructed the rooms. In his cross-examination, he admitted that the partition proceedings were still pending. He has admitted that the old house was demolished in the month of October-November, 2001 and he re-constructed the same. He has not sought permission from the Court.

11. The petitioner was bound by the judgment and decree dated 22.4.1988, whereby both the parties were restrained from raising any construction till the partition proceedings were completed. It has come on record that the petitioner, despite judgment and decree dated 22.4.1988, has demolished the old structure and initially constructed one room and thereafter added two rooms, bath-room and balcony. The structure made by him is a "*pucca*" structure. He has admitted in his cross-examination that he has not sought the permission of the Court while raising the construction.

12. Mr. Nitin Thakur, Advocate, for the petitioner has argued that the Court has only restrained the parties from raising construction but there was no injunction for re-construction on the old one. This submission is fallacious. The Court has specifically directed the parties not to raise any construction, in any form, till the partition proceedings were completed. The language of the judgment and decree dated 22.4.1988 was plain and there was no ambiguity in the same. The construction raised after demolition of the old structure would also fall within the ambit of construction, as per the language of the judgment and decree dated 22.4.1988. The petitioner has willfully disobeyed the judgment and decree dated 22.4.1988. In his cross-examination, the petitioner has admitted that the partition proceedings were still going on. Thus, he was fully aware of the judgment and decree dated 22.4.1988. He had the opportunity to obey the judgment and decree dated 22.4.1988. He has shown scant regard for the judgment and decree by raising construction.

13. The learned Single Judge in the case of ***Kathiyammakutty Umma*** vs. ***Thalakkadah Kattil Karappan and others***, AIR 1989 Kerala 133, has held that decree for injunction obtained against sole judgment debtor restraining from obstructing the plaintiff in erecting a fence on the boundary of his property can be executed against the legal representatives on the death of original judgment debtor. The learned Single Judge has held as under:

> "[4] Section 50 of the Code of Civil Procedure (for short 'the Code') enables the holder of a decree to execute the same against legal representatives of the deceased judgment-debtor. In Such execution, the decree holder is subject to a restriction in Sub-section (2) that the execution shall only be to the extent of the property of the deceased which has come to the hands of the legal representative. The limitation imposed by Sub-section (2) applies generally in cases of money decrees. In the case of a decree of injunction, the modes of execution are prescribed in Order 21, Rule 32 of the Code. Sub-rule (1) enables the decree holder to enforce the decree by detention of the judgment-debtor in the civil prison or by attachment of his properties or by both. Sub-rule (5) is an additional mode to be followed in execution of the decree for injunction. There is no inhibition in Rule 32 that the modes of execution prescribed therein cannot be exercised against the legal representatives of

the judgment-debtor. In other words, what is permitted in Section 50 of the Code is not denied or even curtailed in Order 21, Rule 32. Section 146 of the Code enables taking of proceedings or making of applications against any one who claims under the person against whom such proceedings or applications could have been taken or made. The right conferred in Section 146 is not in any way restricted by Order 21, Rule 32. Hence it is not open to the legal representative of the judgment-debtor in a decree for injunction to contend that he is not liable under the decree. There is no dispute in this case that the judgment-debtors had right over the property which lies near the property in respect of which the decree for injunction was granted. The suit was filed in view of the boundary dispute over the respective properties. The boundary claimed by the plaintiff was upheld in the suit and hence the decree was passed by the trial court. In such a case, law does not impose any inhibition on the decree holder in executing the decree for injunction, after the death of the original judgment debtor against the legal representatives claiming under the said judgment-debtor.

[5] The decision in Jamsetji Manekji Kotval's case ((1908) ILR 32 Bom 181) has not been followed by the Bombay High Court in later decisions. AIR 1931 Bombay volume contains three decisions on this subject which are helpful in deciding the point of dispute in this revision. In Amritlal' v. Kantilal, AIR 1931 Bom 230 a Division Bench held that though a decree for injunction cannot be enforced against the surviving members of a joint family or against a purchaser from a judgment-debtor, such a decree can nevertheless be executed where the sons of the judgment-debtor were brought on record as his legal representatives by virtue of Section 50 of the Code. In Manilal v. Kikabhai, AIR 1931 Bom 482 a single Judge of the Bombay High Court following the aforesaid decision had held that, where a decree for injunction had been obtained against the father, the son not being joined as a party, and if the father died during the pendency of execution proceedings, the decree could be enforced under Section 50 of the Code against the son as his legal representative. In Ganesh v. Narayan, AIR 1931 Bom 484 another Division Bench of the same High Court followed the decision in Amritlal's case (cited supra)."

14. In the case of ***Yashodabai Ganesh Naik Gaunekar*** vs. ***Gopi Mukund Naik***, AIR 2003 Bombay 77, the learned Single Judge of Bombay High Court has even directed to proceed against the sons of judgment debtor in properly constituted execution proceedings. The learned Single Judge has held as under:

"[12] With regard to the execution and/or implementation of the decree of permanent injunction is concerned, it appears that the civil imprisonment had no effect on the judgment-debtor. He was detained in civil prison for fifteen days. He suffered the said detention, but did not amend his attitude and ventured to commit successive breaches of the decree of injunction. The effective order against him could be by attachment of his property and in the event of persistent breach and the sale thereof. If no property is available for attachment, and if the judgment-debtor persists in committing deliberate and willful breach of the permanent injunction, he may again be detained in civil prison, depending upon the gravity of the breach committed by him. Nobody can be allowed to take law in his own hands. Rule of law must prevail. The Executing Court is not helpless to take action against the sons

in properly constituted proceeding if the Executing Court finds that the sons of the judgment-debtor are abetting the breach of the decree for permanent injunction. If courts fail to get their orders implemented, the people will lose faith in the judiciary. The Executing Court is directed to deal with the situation with stern hands and prevent breach of the decree of permanent injunction."

15. Accordingly, in view of the observations and discussion made hereinabove, there is no merit in this petition and the same is dismissed.

****

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

Kalyan Singh and others ...Appellants
Versus
State of Himachal Pradesh ...Respondent

Cr. Appeal No. 8/2013
Reserved on: 26.8.2015
Decided on: 27.8.2015

Indian Penal Code, 1860- Sections 302, 392, 328, 201, 473, 420 read with Section 34- Accused hired a taxi on 3.12.2011 for visiting temples at Chintpurni, Jawalajji and Naina Devi Ji and thereafter for being dropped at Rampur- deceased was owner of the Bolero and Alto car- accused had checked in the guest house at Naina Devi Ji- dead body of the deceased was discovered on 13.12.2011 at 9.45 am at Kiratpur- Bolero belonging to the deceased was signaled to stop at Poanta Sahib- it was being driven by accused 'K' - accused 'G' and 'H' were sitting in the vehicle- recoveries were effected on the basis of disclosure statements made by the accused- it was duly proved that accused had hired taxi of the deceased- it was also proved that vehicle was recovered from the possession of the accused- accused had visited the guest house with the driver- time between the recovery of the dead body and death was found to be 7-10 days by Medical Officer-recoveries were also proved by the prosecution witnesses- thus, prosecution has succeeded in proving chain of circumstances against the accused- accused convicted. (Para-32 to 42)

For the Appellants: Mr. Karan Singh Kanwar, Advocate, for appellant No. 1.
Mr. Raju Ram Rahi, Advocate, for appellant No. 2.
Mr. Anoop Chitkara, Advocate, for appellant No.3.
For the Respondent: Mr. M.A. Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This appeal is instituted against Judgment dated 3.11.2012, rendered by learned Sessions Judge, Chamba, Division Chamba, Himachal Pradesh in Sessions Trial No. 26/2012, whereby appellants-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offences punishable under Section 302, 392, 328, 201, 473, 420/34 IPC, have been convicted and sentenced to imprisonment for life for

offence under Section 302 read with section 34 IPC alongwith a fine of Rs.25,000/- each. In default of payment of fine, to further undergo simple imprisonment for two years. All the accused were also sentenced to undergo seven years rigorous imprisonment for offence under Section 392 read with section 34 IPC and a fine of Rs.15,000 each. In default of payment of fine, to further undergo simple imprisonment one year each. They are further sentenced to undergo rigorous imprisonment for seven years under Section 328 read with section 34 IPC and a fine of Rs.10,000/-. In default of payment of fine, to further undergo simple imprisonment for one year. They are also sentenced to undergo rigorous imprisonment for three years for offence under Section 473 read with section 34 IPC. All the sentences are to run concurrently.

2. Case of the prosecution, in a nutshell, is that three accused in furtherance of their common intention arrived at the Taxi Stand, Chamba, on 3.12.2011 at about 8-9 am. They were trying to hire a taxi. They wanted to visit temples at Chintpurni, Jawalajji and Naina Devi Ji and thereafter they were to be dropped at Rampur. They hired the taxi. Deceased Deepak Kumar was owner of Bolero bearing registration No. HP01C-0771 and one Alto Car bearing No. HP01C-0242. The deal was struck for Rs.17,000/-. Accused had checked in the guest house in the name and style of Krishna Guest House at Naina Devi Ji at around 5/6 pm. They occupied room No. 100 in the guest house. Body of the deceased was discovered on 13.12.2011 at abut 9.45 am near Namogarh Siphon Bunga Sahib, Kiratpur. Inquest report was prepared on 15.12.2011. Post-mortem was conducted. On 15.12.2011, a Bolero bearing registration No. HR-36AD-6879 was signalled to stop at a Naka at Badripur, Paonta Sahib by Kailash Chand Walia. Vehicle was being driven at relevant time by accused Kalyan Singh. Accused Jagat Ram was sitting by the side of the driver and co-accused Hari Singh was sitting on the back seat. Kailash Chand PW-24 removed the number plate and found that it was bearing temporary number HP33(T)9303. Recoveries were effected on the basis of disclosure statements made by the accused. Call details record was also procured by the Investigating Officer. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 24 witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. According to them, they were falsely implicated. They were convicted and sentenced as noticed herein above. Hence, this appeal.

4. Mr. Karan Singh Kanwar, Mr.Raju Ram Rahi and Mr. Anoop Chitkara, Advocates have argued that the prosecution has failed to prove its case against accused.

5. Mr. M.A. Khan, Additional Advocate General has supported the judgment of conviction.

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

7. Prosecution has relied upon the following circumstances:

i) **The vehicle bearing registration No. HP01C-0771 belonging to the deceased Deepak having been hired by the accused (s) from the Taxi Stand at Chamba on 3.12.2011;**

ii) **That the aforesaid vehicle having been recovered from the possession of the accused.**

iii) The accused(s) and the deceased having been last seen in Shri Naina Devi Ji together on the evening of 3.12.2011.

iv) The calls details of the mobiles of the accused(s) showing their presence in Chamba on the fateful day.

v) The calls details of the mobile phones of the accused(s) and the deceased showing their presence at Shri Naina Devi Ji on the evening of 3.12.2011;

vi) The vehicle having been parked at ISBT Parking Dehradoon on 4.12.2011;

vii) The alleged disclosure statement made by accused Kalyan Singh resulting in the recovery of piece of quilt and the same having been found to contain the contents of lorazepam which had also been recovered from the accused Kalyan Singh when he was apprehended alongwith the vehicle at Badripur.

viii) The entries made in the register of M/S Krishna Guest House at Shri Naina Devi Ji and the specimen signatures of accused Hari Singh were found to have been written by one and the same person;

ix) Test identification parade got conducted by the prosecution wherein the identifier Kehar Singh (PW4) had identified the accused (s).

x) The vehicle having crossed the Toll Plaza at around 23.40 hours on 3.12.2011 at Toll Plaza Behrampur Ropar; and;

xi) The contents of the lorazepam having been detected in the viscera of the deceased.

8. PW-1 Sudershan Kumar deposed that he has retired from police. His son was named Deepak. He was aged 27 years. He was plying taxies. One vehicle was bearing No. HP01C-0771 (Bolero) and Alto Car bearing No. HP01C-0242. Bolero was purchased about 2-3 months prior to the occurrence. His son used to drive Bolero. On 3.12.2011, his son left the house at around 8 am. At about 7 pm, his telephone was received by his daughter on landline No. 223749. He told his sister that he was going on a trip for 3-4 days. He had to take passengers to various temples. Thereafter, they were to be dropped at Rampur Bushahar. He has made call from Chintpurni from mobile No. 94187-10069. He got FIR Ext. PW-1/A registered at Police Station Sadar.

9. PW-2 Afzal Mohammad deposed that he reached taxi stand at 8 am. At 9.15 am, three passengers came to taxi stand. They wanted to hire a cab. They wanted to go to temples at Chintpurni, Jawalaji and Shri Naina Devi Ji. He asked them to hire a small vehicle. However, they refused saying that four other persons were to join them from Kangra. Deceased having a Bolero talked to three people. They settled for Rs.17,000/- as fare. He recognized accused in the Court. In his cross-examination by learned Advocate appearing for the accused, he deposed that two persons were 24-25 years of age. They were talking in Hindi.

10. PW-3 Surinder Kumar also corroborated the statement of PW-2 Afzal Mohammad.

11. PW-4 Kehar Singh deposed that on 3.12.2011 at about 8.45-9 am, three people came to taxi stand. They wanted to hire a Mahindra Xylo, however, its driver was not at the spot. He told that a new Bolero was available. Accused disclosed that they wanted to

go to four temples including Chintpurni, Jawalaji, Chamunda and Naina Devi Ji. Thereafter, the accused called deceased. Thereafter, three accused talked to him. Fare was settled at Rs.17,000/-.

12. PW-5 Yashpal deposed that at about 1.45 pm, he met vehicle No. HP01C-0771 at a place known as Khajjian, Nurpur. It was being driven by deceased Deepak Kumar. He told him that he was going to Kangra. There were three passengers in the vehicle. Accused Jagat Ram was on the front seat with driver. Other accused were in the vehicle. He has gone with Param Rishi to Paonta Sahib to search for deceased and his vehicle. On 15.12.2011, he was standing at Badripur with witness Param Rishi. A vehicle was coming from Nahan side. It was bearing No. HR-36AD-6879. It was signalled to stop. Vehicle was being driven by accused Kalyan Singh. Two other persons were sitting in the vehicle. They disclosed their names as Jagat Ram and Hari Singh. He recognized them in the Court. Vehicle was searched. On removing the number plate, temporary number HP33(T)-9303 was found. Vehicle belonged to Deepak Kumar. On search of the vehicle, one knife was found concealed inside a green coloured cloth, one iron rod was also recovered alongwith a rope. He identified the knife, Ext. P1, iron rod Ext. P2 and cotton rope Ext. P3. Personal search of accused was carried out. Recoveries were effected pursuant to search of accused Kalyan Singh vide Ext. PW-5/C, those of accused Jagat Ram were recovered vide Ext. PW-5/D, in respect of Hari Singh vide Ext. PW-5/E. Some powder was found in possession of Kalyan Singh in two paper pouches, 30 tablets were recovered from his possession. Haryana number plate which was removed from vehicle was also taken into possession.

13. PW-6 Ram Parkash deposed that he was running a canteen in Naina Devi Ji. On 3.12.2011, he received an order for sending four plates in Krishna Guest House, Naina Devi Ji. On 22.12.2011, police had taken into possession the register of Krishna Guest House. Police had also taken into possession photocopy of register Mark A vide memo Ext. PW-6/A. His waiter Mast Ram identified photo of deceased Ext. PW-6/B. His waiter also identified the accused.

14. PW-7 Balwinder Kumar deposed that on 3.12.2011 at about 5-6 pm, three accused came to his hotel. They occupied room No. 100. Entry was made at page 152. Signature was put by accused Jagat Ram. They stayed in his guest house. Accused were accompanied by a driver. He identified his photograph. Register Ext. PX was taken into possession vide Ext. PW-6/A. He has signed the memo alongwith Ram Parkash. On 23.12.2011, accused were brought by the police to Sri Naina Devi Ji. He recognized the accused. On 23.12.2011, accused led police party to a place known as Chhidawala Choe. It was at a distance of 10 kms from Naina Devi Ji towards Anandpur Sahib. They got recovered piece of cloth. Mast Ram identified the same piece from the quilt which was given to the accused in the Hotel. It was taken into possession vide Ext. PW-7/B.

15. PW-8 Mast Ram deposed that the accused had come at around 6.30 pm and left at 8.30 pm. They stayed in room No. 100. Driver was also in the vehicle. Accused Kalyan Singh has taken quilt from him.

16. PW-9 Constable Amit Kumar deposed that he accompanied ASI Joginder Singh to Kiratpur Sahib. The place known as Bunga Sahib where body was found. On 20.12.2011, MHC Pawan Kumar handed over one cloth parcel stated to be containing viscera of deceased. He deposited articles at RFSL Dharamshala.

17. PW-10 Captain Bachan Ram issued transaction slip relating to movement of vehicle on 3.12.2011. According to transaction slip, vehicle No. HP01C-0771 had crossed toll plaza at 23.40 hours on 3.12.2011 through lane No. 5.

18. According to PW-11 Vijender Singh deposed that police had sought verification of vehicle No. HR-36AD-6879. He deposed that no such series has been started at Rewari nor any number was issued to any person by Registering and Licensing Authority, Rewari.

19. PW-12 Kavinder Singh deposed that Mahindra Bolero bearing No. HP33(T)-9303 was issued permanent number by RTO Chamba being HP01C-0771. He issued documents relating to vehicle vide Ext. PW-12/A to Ext. PW-12/C.

20. PW-13 Preetinder Singh deposed that he was member of the Board constituted for conducting autopsy of Deepak Kumar. Body was brought by ASI Joginder Singh. Body was brought on 16.12.2011 at about 7.30 pm. He proved post-mortem report Ext. PW-13/B. According to the Board, cause of death was Asphyxia due to ante mortem drowning, which was sufficient to cause death in ordinary course of nature. Time between death and post mortem was 7-10 days and time between injury and death was not mentioned as same could not be stated by post mortem examination. Final opinion is Ext. PW-13/C. In his cross-examination, he has admitted that body was in advance stage of decomposition. According to him, facial features were identifiable. Body had only started decomposing from internal organs.

21. PW-14 Vijay Parkash has proved Ext. PW-14/A. According to him, location of mobile number 94187-10069 was at Naina Devi Sector and same was incorporated by him in his report Ext. PW-14/A.

22. PW-15 Davidner Verma deposed that police had sought details of mobile bearing No. 98177-47999, 88943-34555 with effect from 16.11.2011 till 16.12.2011. These were supplied vide Ext. PW-15/A. Details of mobile phone number 88943-34555 were supplied vide Ext. PW-15/B. He also issued call detail report Ext. PW-15/C of mobile No. 98153-92941. He had also proved Ext. PW-15/E. He also proved Ext. PW-15/F and Ext. PW-15/G as well.

23. PW-16 ASI Rajesh Thakur deposed that on 23.12.2011, accused Jagat Ram disclosed to the IO that mobile phones of the deceased had been stolen by them and thrown on national highway. His statement was recorded vide Ext. PW-16/B.

24. PW-17 Krishan Kumar is a formal witness.

25. PW-18 Pawan Kumar is also a formal witness.

26. PW-19 ASI Joginder Singh deposed that he clicked photographs of body with official camera. He proved photographs Ext. PW-19/B-1 to Ext. PW-19/B-3. On 16.12.2011, he moved an application for autopsy of body of deceased at Rajindera Medical College, Patiala and procured post-mortem report.

27. PW-20 Gian Singh is a formal witness.

28. PW-21 Vivek Sharma deposed that on 8.12.2011, an application was moved in his Court seeking specimen signatures of Hari Singh accused. Accused had been identified by Salim Mohammad. Specimen signatures were taken in the Court in his presence on Ext. PW-21/A-1 to Ext. PW-21/A-13. Application was allowed by him vide

Order Ext. PW-21/A-14. Consent of Hari Singh in written was obtained vide Ext. PW-21/A-15. Test identification parade was also held by him in District Jail, Chamba. On 18.12.2011 he conducted test identification in District Jail. He has taken consent of three accused. He recorded statement of identifier Kehar Singh vide Ext. PW-21/E.

29. PW-22 Sanjay Sharma, deposed that on 24.12.2011, police party came to him and took into possession extracts of register relating to vehicle bearing No. HR-36AD-6879. The vehicle had entered parking lot on 10.12.2011. Vehicle left parking lot on 12.12.2011. Vehicle bearing No. HP33(T)9303 also left on 5.12.2011. He proved extract Ext. PW-22/A, Ext. PW-22/B, Ext. PW-22/C, Ext. PW-22/D.

30. PW-23 Inder Singh deposed that on 13.12.2011, at 9.45 am, a telephonic message was received at police Station by Narinder Singh Mate BBMB Power House Kotla that one naked body was seen floating at Namogarh siphon near Bunga Sahib. He alongwith HC Sohan Singh left for Bunga Sahib and got the body of the deceased photographed. Body was got extracted from the canal and sent to dead house at CH Anandpur Sahib. He denied the suggestion that body was not identifiable when it was recovered.

31. PW-24 Inspector Kailash Chand was the Investigating Officer. He recorded statements of witnesses. He applied for the call details of the deceased to SP Chamba. He received information on 14.12.2011 that body of deceased was found at Kiratpur Sahib. He proceeded to Kiratpur. On 15.12.2011, he received information about movement of vehicle. He set up a Naka 100 metres from Badripur towards Nahan. One Yashpal and Param Rishi were also present. Vehicle was being driven by accused Kalyan Singh. Accused Jagat Ram was sitting by the side of driver. Accused Hari Singh was on the backseat. Vehicle was carrying registration plate No. HR-36AD-6879. He searched the vehicle. One iron rod, jungle knife and rope were recovered and taken into possession. Personal search of Kalyan Singh was carried out and two packets having some orange powder substance and three strips of Lorezapam-B atevin 2 mg were also recovered. Accused disclosed to him during investigation that they threw deceased in canal near Lamlehadi at village Miyanpur. Accused were identified by Mast Ram on 23.12.2011. Accused Jagat Ram also made disclosure statement that they threw mobile phones somewhere on national highway short of Ambala. However, nothing was recovered from the spot. On 25.12.2011, Kalyan Singh made a disclosure statement that he could get piece of cloth recovered from Naina Devi Ji. Piece of quilt was recovered vide memo Ext. PW-7/B.

(Circumstance i)

The vehicle bearing registration No. HP01C-0771 belonging to the deceased Deepak having been hired by the accused (s) from the Taxi Stand at Chamba on 3.12.2011;

32. Prosecution has duly proved that vehicle bearing registration No. HP01C-0771 was hired by the accused from deceased Deepak on the basis of statements of PW-2 Afzal Mohammad, PW-3 Surinder Kumar, PW-4 Kehar Singh and PW-5 Yashpal. PW-2 Afzal Mohammad has categorically deposed that three persons had come to the spot at 9/9.15 am on 3.12.2011. They hired taxi from Deepak. Similarly, PW-3 Surinder Kumar also deposed that taxi was hired for a sum of Rs.17,000/-, which was owned by Deepak. PW-4 Kehar Singh was driver of Alto car bearing No. HP01C-0242. He also corroborated statements of Sudershan Kuma PW-1, Afzal Mohammad PW-2, Surinder Kumar PW-3 regarding the manner in which accused hired the taxi on 3.12.2011 from deceased for a

sum of Rs.17,000/-. PW-5 Yashpal has met the deceased near Khajjian, Nurpur on 3.12.2011.

(Circumstance ii)

That the aforesaid vehicle having been recovered from the possession of the accused.

33. Vehicle was got recovered at Badripur Chowk. PW-5 Yashpal has categorically deposed that he alongwith Param Rishi was present with the police at Badripur Chowk. Vehicle bearing registration No. HR36AD-6879 coming from Nahan side was signalled to stop. It was intercepted. It was being driven by Kalyan Singh. Other accused were also sitting in the vehicle. Number of vehicle was found to be fake. However, after removing number plate of Haryana, number HP33(T)9303 was found below the number plate. Vehicle was searched. A Knife, rod and rope were recovered. Kalyan Singh was also searched. 30 tablets of lorazepam were recovered. Registration of the vehicle was duly proved by PW-12 Kavinder Kumar from RTO Office Chamba. It has come in the statement of PW-11 that no vehicle bearing registration No. HR36AD-6879 was registered by Registering and Licensing Authority Rewari.

(Circumstance iii)

The accused(s) and the deceased having been last seen in Shri Naina Devi Ji together on the evening of 3.12.2011.

34. PW-7 Balwinder Kumar deposed that he runs a guest house at Naina Devi in the name and style of Krishna Guest House. On 3.12.2011 at about 5-6 pm, accused came to his hotel and occupied room No. 100. Entry was made at page 152. He identified the accused. Accused were accompanied by Driver. Police has taken into possession register of the hotel, PX vide Ext. PW-6/A. Accused were also identified by Mast Ram PW-8. Mast Ram has served them food. He also identified photograph of deceased Ext. PW-6/B.

(Circumstance iv)

The calls details of the mobiles of the accused(s) showing their presence in Chamba on the fateful day.

(Circumstance v)

The calls details of the mobile phones of the accused(s) and the deceased showing their presence at Shri Naina Devi Ji on the evening of 3.12.2011;

35. PW-14 Vijay Parkash has proved call details of mobile of deceased Deepak. Phone was in use from 27.11.2011 to 3.12.2011 till 19.52 hours. Last location of the mobile number 94187-10069 was in Naina Devi Ji Sector B. Prosecution has examined Davinder Verma, Nodal Officer, Bharti Airtel, Kasumpti. He has supplied call details of mobile No. 98177-47999 and 88943-34555. The Police has also sought call details of mobile No. 98153-92941. Calls were generated from the tower No. 60921 in District Chamba. Phone No. 98177-47999 was in operation from 7 to 9 pm at Naina Devi. 16 calls were received by that mobile as per Ext. PW-15/A. Call from mobile No. 98177-47999 to 88943-34555 was made at Badripur at 7.56 am on 4.12.2011. Accused Hari Singh was in possession of mobile No. 98050-15225, Kalyan Singh was in possession of phone No. 98056-69669.

(Circumstance vi)

The vehicle having been parked at ISBT Parking Dehradoon on 4.12.2011;

36. Prosecution has also proved circumstance vi) that vehicle was parked at Dehradoon on 4.12.2011 on the basis of statement of PW-22 Sanjay Sharma.

(Circumstance vii)

The alleged disclosure statement made by accused Kalyan Singh resulting in the recovery of piece of quilt and the same having been found to contain the contents of lorazepam which had also been recovered from the accused Kalyan Singh when he was apprehended alongwith the vehicle at Badripur.

37. Now as far as circumstance No. vii) is concerned, piece of cloth was recovered on the basis of disclosure statement made by accused Kalyan Singh. On 25.12.2011, PW-7 Balwinder Kumar and PW-8 Mast Ram deposed that accused Kalyan Singh led police party to place where he got piece of quilt recovered, lying on the spot.

(Circumstance viii)

The entries made in the register of M/S Krishna Guest House at Shri Naina Devi Ji and the specimen signatures of accused Hari Singh were found to have been written by one and the same person;

38. Prosecution has also proved circumstance viii) whereby accused have stayed in Krishna Guest House Naina Devi Ji. Prosecution has proved register of Krishna Guest House (Ext. PX). It was proved by Balwant Kumar PW-7 that accused Jagat Ram has put his signatures. Prosecution has obtained specimen signatures of Hari Singh before Shri Vivek Sharma, PW-21. Specimen handwriting, questioned signatures and register Ext. PX were sent to RFSL Dharamshala for comparison. According to report, specimen signatures S1 to S30 were written by one and the same person as well as entry was made in the Register by the same person.

(Circumstance ix)

Test identification parade got conducted by the prosecution wherein the identifier Kehar Singh (PW4) had identified the accused (s).

39. Accused were identified on the basis of test identification parade held by Shri Vivek Sharma, Civil Judge (Junior Division)-cum-JMIC Dalhausie. He obtained consent of three accused vide Ext. PW-21/B, Ext. PW-21/C and Ext. PW-21/D. He prepared report vide Ext. PW-21/F. Accused were identified by Kehar Singh PW-4.

(Circumstance x)

The vehicle having crossed the Toll Plaza at around 23.40 hours on 3.12.2011 at Toll Plaza Behrampur Ropar;

40. Prosecution has also proved circumstance x) on the basis of statement of Captain Bachan Ram. He has proved report Ext. PW-10/B.

(Circumstance xi)

The contents of the lorazepam having been detected in the viscera of the deceased.

41. Prosecution has also proved recovery of lorazepam from Kalyan Singh and the same is proved by report of RFSL, Ext. PA.

42. PW-2 Afzal Mohammad, PW-3 Surinder Kumar, PW-4 Kehar Singh, PW-5 Yashpal have proved hiring of the vehicle from Deepak at Chamba by the accused persons. Their presence at Naina Devi temple has been proved by prosecution on the basis of statements of owner of guest house, PW-7 Balwinder Kumar and PW-8 Mast Ram and that vehicle had crossed at Behrampur toll Plaza which was duly proved by PW-10 Captain Bachan Ram. Vehicle was duly registered by Registering and Licensing Authority Chamba.

Call details have been proved by PW-14 Vijay Parkash and PW-15 Davinder Verma. Prosecution has proved on the basis of call detail report the conversation from Chamba to Naina Devi and thereafter at Badripur Chowk. Post-mortem was conducted by PW-13 Dr. Preetinder Singh. He has categorically deposed that body was identifiable. He has also deposed that body had started decomposing from internal organs only. Time between death and post-mortem was about 7-10 days, time between injury and death was not mentioned as the same could not be reported in post mortem examination. Accused were identified on the basis of test identification parade conducted by PW-21 Vivek Sharma. Accused were identified by one Shri Kehar Singh PW-4. Test identification was held strictly as per law. Accused had also been identified by PW-2 Afzal Mohammad, PW-3 Surinder Kumar, PW-4 Kehar Singh, PW-5 Yashpal, PW-7 Balwinder Kumar as well as PW-8 Mast Ram. Accused have hired vehicle from Chamba and had come to Naina Devi. Thereafter they murdered the deceased and threw the body in the canal. Photographs of the body were taken. PW-19 ASI Joginder Singh. Body was got recovered from the canal by PW-13 Inder Singh. He has categorically denied in his cross-examination that body was not identifiable when it was recovered. Thus, there is no merit in the contention of advocates appearing on behalf of the appellants that the body was not identifiable. Prosecution has thus proved all the circumstances discussed herein above against the accused. Chain is complete. All the circumstances point towards the guilt of the accused. There is no occasion for us to interfere with the well reasoned judgment of trial Court.

43. In view of the discussion and analysis made hereinabove, there is no merit in the appeal and the same is dismissed. Pending applications, if any, are also disposed of.

****

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

Thakur Dass .....Appellant.

Versus

Uma Devi & ors. .....Respondents.

RSA No. 305 of 2014.
Reserved on: 25.8.2015.
Decided on: 27.8.2015.

Specific Relief Act, 1963- Section 34- Plaintiff filed a suit for declaration and permanent prohibitory injunction claiming that he had appointed his son as General Power of Attorney to look after the construction work- the defendants got the sale deed executed in favour of defendant No. 1 in connivance with each other, scribe and marginal witnesses - sale deed was not binding upon the plaintiff- defendant No. 1 contended that plaintiff had sold the suit land to her and had concealed the fact that suit property was mortgaged with the bank- construction was raised by the defendant No. 1 after the purchase- record shows that defendant No. 1 had admitted before JMIC, Manali that she had purchased the house- sale deed was executed in year 2006- General Power of Attorney specifically authorized the defendant No. 2 to execute the sale deed- Sale deed was duly registered- the contents were read over and explained to the executor who admitted the same to be correct- General Power of Attorney had executed an agreement to sell on 10.7.2006 and had executed the sale deed on 26/27.7.2006- defendant No. 1 is in possession of property and is paying taxes to Nagar Panchayat- she had rented out four sets to the tenants- held, that plea of the plaintiff that defendant No. 2 was not authorized to execute the sale deed and Power of Attorney was

executed for enabling the defendant No. 2 to look after the construction work cannot be accepted in view of express provisions in the general power of attorney- defendant No. 1 is a bona fide purchaser for consideration- appeal dismissed. (Para-12 to 14)

For the appellant(s): Mr. J.L.Bhardwaj, Advocate.
For the respondents: Mr. Sunil Mohan Goel, Advocate, for respondent No.1.
Mr. Debinder Ghosh, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Additional District Judge, Kullu, H.P. dated 5.6.2014, passed in Civil Appeal No. 6 of 2014 (2013).

2. Key facts, necessary for the adjudication of this regular second appeal are that the appellant-plaintiff (hereinafter referred to as the plaintiff), has instituted a suit for declaration and injunction against the respondents-defendants (hereinafter referred to as the defendants), stating therein that he is owner-in-possession of land measuring 162-47 hectares, being 160/1320 shares out of total land measuring 1340-39 hectares comprised of Kh. No. 999, 1232, 1233, 1234, 1235 and 1238 Khata and Khatoni No. 141/222, situated at Muhal Bhajogi Tehsil Manali, Distt. Kullu, H.P. (hereinafter referred to as the suit property. He raised a loan of rupees eight lacs in order to raise construction in the year 2004 from defendant No. 3 i.e. Bank of India. He also mortgaged the suit property in favour of defendant No. 3 in order to secure the loan. The plaintiff appointed his son, defendant No. 2 as General Power of Attorney to look after the construction work and to deal with the labour, mason, carpenter etc. The General Power of Attorney was executed on 11.4.2005. It is alleged that the plaintiff raised double storyed RCC building on the suit land. It was completed in the month of October, 2005. However, during the subsistence of the General Power of Attorney, defendant No. 1 in connivance with defendants No. 2 & 3, including the scribe and marginal witnesses got managed the sale deed No. 330 dated 27.7.2006 of the suit land in her favour and got entered mutation No. 59. According to the plaintiff, the sale deed is wrong, illegal and void and not binding upon the plaintiff and liable to be declared as such.

3. The suit was contested by the defendants by filing separate written statements. According to defendant No. 1, the suit property was recorded in the name of plaintiff prior to the sale. The plaintiff sold the suit property to defendant No. 1 vide registered sale deed No. 330 dated 27.7.2006 through his son, defendant No. 2, the General Power of Attorney for a consideration of Rs. 3,12,500/-. The plaintiff never disclosed that the suit property was mortgaged with defendant No. 3. There was no entry in the revenue record in this behalf. There was only dilapidated structure on the suit land, which was completely reconstructed and renovated by the defendant after purchasing the suit property. She was residing in the same with her family. Defendant No. 2 was proceeded ex-parte on 25.5.2007. Defendant No. 3, has admitted that the plaintiff has raised loan of Rs. 8 lacs for the construction and mortgaged the suit land with the defendant No. 3.

4. The replication was filed by the plaintiff. The learned trial Court framed the issues on 7.11.2011. The suit was dismissed vide judgment dated 18.3.2013. The plaintiff, feeling aggrieved, preferred an appeal against the judgment and decree dated 18.3.2013.

The learned Additional District Judge, Kullu, dismissed the appeal on 5.6.2014. Hence, this regular second appeal.

5. Mr. J.L.Bhardwaj, Advocate, for the appellant, on the basis of the substantial questions of law framed, has vehemently argued that both the courts below have misread the documentary as well as the oral evidence placed on record. According to him, sale deed Ext. DW-1/B was the outcome of fraud. He also argued that defendant No. 1 was not given authority to sell the suit property. The findings recorded by the learned Courts below that defendant No. 1 is the bonafide purchaser are wrong. The defendant No. 2 was not authorized to sell the suit land, including the house. On the other hand, Mr. Sunil Mohal Goel and Debinder Ghosh, Advocates for the respective respondents have supported the judgments and decrees passed by the Courts below.

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

7. PW-1 Ajeet Sharma, Architect, has proved site plan Ext. PW-1/A. It was prepared by him after visiting the spot. He categorically stated that he did not know if the said house is owned by defendant No. 1 Uma, by further stating that the site plan was prepared by him at the instance of the plaintiff.

8. Sh. Thakur Dass PW-2 plaintiff has tendered his evidence vide Ext. PW-2/A. It is stated in Ext. PW-2/A that his son has illegally sold the suit property in favour of defendant No. 1, without having any authority to alienate the same and also stated that defendant No. 2 was never authorized to sell the suit property rather he was authorized to construct the house over the portion of the suit land. He came to know about the illegal sale deed in favour of defendant No. 1 and he obtained the documents and asked defendant No. 1 not to interfere over the suit property. He has admitted in his cross-examination that he gave General Power of Attorney to his son qua suit property on 11.4.2005. He also admitted that no entry qua the mortgage of the suit land was got incorporated by him in the revenue record. He also admitted that the sale deed was executed on 27.7.2006 vide sale deed No. 330. He had not disclosed to Uma Devi about the mortgage of the suit land but self stated that his son had disclosed about the same. He has rented out four sets to different tenants, namely, Shiv Shankar, Ravi Kumar, Bablu and Raj Kumar out of the suit house but denied that defendant No. 1 has been making payment of electricity bills, water bills and house tax etc. He also admitted that he has not paid even a single penny of the mortgage amount.

9. Defendant No. 1 has examined herself as DW-1 by tendering her affidavit Ext. DW-1/A. She is in possession of the suit property. The land was sold to her by defendant No. 2. She has proved copies of receipts issued by Nagar Panchayat, qua the payment of taxes, copy of Jamabandi, copy of FIR, copy of judgment vide Ext. DW-1/B to Ext. DW-1/K. She denied the suggestion that the house was completed by plaintiff in the month of October, 2005.

10. Ms. Pinki Sharma DW-2 has also tendered her evidence by filing affidavit Ext. DW-2/A. She was residing as tenant in the suit house owned by defendant No. 1 since April, 2007. She was paying rent at the rate of Rs. 1200/- per month to defendant No. 1.

11. Sh. Shiv Shankar, DW-3 has tendered his evidence vide Ext. DW-3/A. The house was rented out to him by defendant No. 1 for rent at the rate of Rs. 2000/-.

12. Ext. P-1 is the copy of Khatauni Bandobast Jadeed. Mark A is the copy of sale deed executed on 26.7.2006 and registered on 27.7.2006. Ext. PW-1/A is the site plan

indicating the house existing over the portion of the suit land. Ext. PX is the copy of statement of Smt. Uma Devi recorded in the Court of learned JMIC, Manali, in a criminal case. She has admitted in her statement that she purchased the house for sale consideration of Rs. 20,00,000/-. She also stated that the sale deed was executed in the year 2006. Ext. DW-1/H-1 to Ext. DW-1/H-4 are the receipts issued by Nagar Panchayat Manali qua the payment of house tax by defendant No. 1. Ext. DW-1/J is the copy of notice issued by Secretary Nagar Panchayat Manali to the plaintiff qua the house in dispute. Ext. DW-1/K is the certificate issued by Secretary Nagar Panchayat Manali. Ext. DW-1/B is the copy of general power of attorney which indicates that the plaintiff had also authorized defendant No. 2, his son to alienate the suit property. Ext. DW-1/D is the agreement to sell executed by plaintiff through his son defendant No. 1. Ext. DW-1/D is the copy of Khatauni Bandobast 2004-05 qua the suit property.

13. The General Power of Attorney i.e. Ext. DW-1/B was executed by plaintiff in favour of defendant No. 2. Defendant No. 2 is the son of plaintiff. Ext. DW-1/B is registered document. It was registered by Sub Registrar, Manali. The contents of the same were read over and explained to the executant, who after admitting the contents of the same has signed the same. The relevant para 8 of Ext. DW-1/B reads as under:

> "To enter into any sale deed, agreement of sale, transfer, or conveyance, mortgage, lease, release, or rent, exchange, or any other documents of any of the above party of the land above or total land on my behalf and to sign all the documents and to present the same Sub Registrar on my behalf and for me and to admit the execution of the sale documents on my behalf and for me and also to raise necessary papers for the same and to sign all documents and papers for me and on my behalf.
>
> All other acts, deeds and things pertaining to the abovesaid land of any part thereof shall be done by my above general power of attorney shall be acceptable to me in all manner with regard to the sale, conveyance, lease, release, rent exchange, mortgage, or any other disposition of the land or any part thereof."

14. It is evident from the recital of para 8 that the plaintiff authorized his son defendant No. 2 to execute the sale deed or transfer the suit land, in any manner, whatsoever. The plaintiff has signed the general power of attorney Ext. DW-1/B. It is evident from the record that the general power of attorney of plaintiff, firstly executed agreement to sell Ext. DW-1/D on 10.7.2006 and thereafter sale deed was executed on 26/27.7.2006 by defendant No. 2.

15. The defendant No. 1 has duly proved that she was in possession of the suit property and she has placed reliance on receipts of Nagar Panchayat, Manali. She was paying taxes to the Nagar Panchayat, Manali, though the case of the plaintiff was that he has rented out four sets out of the suit house to his tenants Shiv Shankar, Ravi Kumar, Bablu and Raj Kumar, but he has failed to examine any of them. Defendant No. 1 has examined DW-2 Pinki Sharma and DW-3 Shiv Shankar. They have corroborated the statement of DW-1 Smt. Uma Devi that they were engaged as tenants by DW-1 Uma Devi and were paying rent to defendant No. 1 Uma Devi. The receipts issued by the Nagar Panchayat, Manali Ext. DW-1/H-1 to Ext. DW-1/H-4 also indicate that the house tax etc. was being paid by defendant No. 1. The Courts below have rightly come to the conclusion that defendant No. 1 was bonafide purchaser. Since the plaintiff himself has admitted that she was not informed about the mortgage by him qua the suit property. Even in Ext. P-1, copy of Khatauni Bandobast Jadeed, there is no entry qua the suit land mortgaged by the

plaintiff in favour of defendant No. 3. The mutation has also been attested vide mutation No. 59. There is no merit in the contention of Mr. J.L.Bhardwaj, Advocate that the general power of attorney was executed in favour of defendant No. 2 only to supervise the construction work. He was specifically authorized, as noticed hereinabove, to enter into any agreement, sale deed, mortgage or lease etc. as per para 8 of Ext. DW-1/B. The sale deed on the basis of general power of attorney Ext. DW-1/B is valid. The defendant No. 1 has purchased the suit property. She is bonafide purchaser of the suit property. The learned Courts below have correctly appreciated the oral as well as documentary evidence placed on record. The sale has taken place during the subsistence of the General Power of Attorney Ext. DW-1/B. The substantial questions of law are answered accordingly.

16. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any. The judgments and decrees passed by both the Courts below are affirmed.

****

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

Deep Kumar @ Deepu ...Appellant
Versus
State of Himachal Pradesh ...Respondent

Cr. Appeal No. 152/2014
Reserved on: 27.8.2015
Decided on: 28.8.2015

Indian Penal Code, 1860- Sections 452, 342, 302 read with Section 34- Deceased was working as a labourer and was residing in the house of contractor- he had gone to the house of one 'R' – deceased told 'R' that accused used to pick up quarrel with him- 'R' received an intimation that deceased was killed inside the room- it was duly proved from the statements of the prosecution witnesses that accused had given beatings to the deceased with a stick- PW-2 had seen the accused going inside the room and coming out of the same- accused 'D' was carrying a stick- incident was also seen by PW-6 from the window- deceased had died due to poly-trauma of injury- held, that in these circumstances, prosecution case was duly proved and the accused was rightly convicted. (Para-18)

For the Appellant: Mr. Vinay Thakur, Advocate.
For the Respondent: Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This appeal is instituted against Judgment dated 2.4.2014 rendered by learned Additional Sessions Judge-III, Kangra at Dharamshala in Session Case No. 53-D/VII/12 (Session Trial No. 1/14), whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Sections 452, 342, 302 read with Section 34 IPC, has been convicted and sentenced to undergo

rigorous imprisonment for five years and to pay fine of Rs.2,000/- for the commission of offence under Section 452 IPC and in default of payment of fine, to further undergo simple imprisonment for 6 months; to undergo rigorous imprisonment for one year for offence under Section 342 IPC; to undergo rigorous imprisonment for life and fine of Rs.5,000/- for offence under Section 302 IPC, in default of payment of fine, to further undergo simple imprisonment for one year.

2. Case of the prosecution, in a nutshell, is that in the year 2012 deceased Om Parkash was working as a labourer with contractor Neeraj Sharma and was residing in the house of said Neeraj Sharma at village Lunta. On 15.2.2012 he had gone to the house of one Rattan Chand. Deceased Om Parkash had told Rattan Chand that the present accused used to pick up quarrel with him. On 23.2.2012, Rattan Chand received information that Om Parkash was killed inside his room. The matter was reported to the police. His statement was recorded by police under Section 154 CrPC. FIR was registered. Police investigated the matter. During Investigation it was found that in the evening of 21.2.2012, at about 3-4 pm, accused Deep Kumar @ Deepu and Bhota had gone inside the room of Om Prakash and confined him inside the room. They had given beatings to the deceased. Deceased had suffered injuries on his head and other parts of body due to blows given by the accused with Danda, who was also seen with the Danda by the witnesses. One Jaspal had witnessed the occurrence alongwith other labourers. Investigation was complete and the challan was put up in the Court, after completing all the codal formalities.

3. Prosecution has examined as many as 22 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He denied the case of prosecution. Trial Court convicted and sentenced the accused as noticed herein above. Hence, this appeal.

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

5. Mr. Ramesh Thakur, Assistant Advocate General, has supported the judgment of conviction.

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

7. PW-1 Rattan Chand testified that Om Parkash alias Phimu was his relative (Sala). Om Parkash had come to his house and stayed there for a week. He told him that accused Deep Kumar and Bhota used to pick quarrel with him on trivial issues. He had gone to village Lunta where he was working with Neeraj Sharma. On 22 or 23, he received a telephonic communication from Laxmi Devi that Om Parkash has died. He alongwith his wife and sons Bhindu Pal and Surinder Kumar reached Lunta at 8.30 am and found dead body of Om Parkash. He came to know that Om Parkash was killed by accused Deep Kumar and Bhota. Quarrel had taken place regarding mobile phone. Police recorded statement of Rattan Chand under Section 154 CrPC vide Ext. PW-1/A. Police took into possession gunny bag which was blood stained. One blood stained blanket was lying on the cot. Blood stains were taken in a paper which was put in match box. Blood stained gunny bag was and blanket were sealed with seal 'M', six each. Seizure memo Ext. PW-1/B was prepared.

8. PW-2 Janam Singh deposed that he alongwith other labourers used to reside in the house of Neeraj Sharma at village Lunta. Om Parkash was employed with contractor Neeraj Sharma. On 21.2.2012 Deep Kumar and Bhota went inside the room of deceased at about 3.00 pm. He identified the accused in the Court. Om Parkash was inside his room at

that time. He heard the noise from outside and he went to the room of Om Parkash, which was bolted from inside. He saw Deep Kumar and Bhota coming out of the room. Accused threatened not to tell the incident to anybody. He went inside the room. Om Parkash had suffered injuries on his head and blood was oozing out of the wound. Sohan Lal, Chaman Lal and Beli Ram also witnessed the occurrence. Chaman Lal had made telephone call to nephew of deceased Om Parkash regarding the incident but he did not come till evening. They told about the incident on the same day to Shastri Ji and Neeraj Sharma On 22.2.2012 contractor Neeraj Sharma asked for well being of Om Parkash and he was told that Om Parkash was serious. On 22.2.2012, he came to know that Om Parkash had died. Contractor Neeraj Sharma was telephonically informed and Beli Ram informed the police through telephone. Police came to the spot on 23.2.2012. Police recovered one Thali, Katori, pair of shoes, one glass, two pieces of brick etc. Accused had made disclosure statement Ext. PW-2/C. After 4-5 days, on the basis of statement, recovery of Danda was made from the bushes at the instance of the accused. Ext. PW-2/D was prepared to this effect. In his cross-examination, he admitted that deceased was not taken to hospital from 21.2.2012 till his death.

9. PW-3 Ramesh Kumar deposed that Neeraj Sharma had employed Chaman Lal, Hari Pal and 5-7 other persons of District Chamba. They used to reside in the house of Contractor Neeraj Sharma at village Lunta. Om Parkash alias Phimu was employed by Neeraj Sharma as Chowkidar. Chaman Lal disclosed that two persons entered the room of Om Parkash and gave beatings to him due to which he sustained injuries. He informed Neeraj Sharma about the incident.

10. PW-4 Mamta Devi deposed that Om Parkash was lying dead on the cot in his room. Police recorded statement of Rattan Chand. Police took photographs. She also saw injuries on the body of deceased. It was apparent that he was beaten up. On the same day, police has taken into possession gunny bag which was blood stained.

11. PW-5 Chaman Singh deposed that Om Parkash alias Phimu was residing in the same house in separate room. He was employed as a Chowkidar. On 21.2.2012 at around 3.00 pm, they came from work. Deep Kumar and Bhota came there and were abusing and asked for Phimu. He told Phimu was sleeping inside his room. They went inside the room and closed the door. He identified the accused Deep Kumar in the Court. Deep Kumar was carrying danda and Bhota was not having anything with him. He heard cries of Phimu from his room. He sent other persons to the room of Phimu but it was bolted from inside. Jaspal told him that Phimu was being beaten inside the room. Accused came out the room and told them that they had not seen anything at the spot. They threatened them not to disclose the occurrence to any person. The condition of Phimu was serious. Blood was oozing out from nose, eyes and face of Phimu. He went to the house of Shastri and narrated the whole incident to him. After about 5-6 days, in his presence, accused made a disclosure statement before the police that he had kept Danda in the bushes and he could get recovered the same. Statement was recorded vide Ext. PW-2/C. Danda was recovered from Deep Kumar, which was kept in the bushes at village Lunta. Recovery memo was prepared to this extent. He denied the suggestion, in his cross-examination, that the deceased has received injuries on his person due to fall. He died due to negligence of contractor for not providing timely medical aid to him.

12. PW-6 Jaspal Singh deposed that on 21.2.2012 at about 3.00 pm, he was in his room. In the room of Phimu quarrel started between deceased and accused persons. Accused Deep Kumar gave blow of Danda to Phimu and Bhota gave fist blows. He saw occurrence from his window of the room of Phimu. Thereafter Deep Kumar and Bhota went

away from the spot. They threatened not to narrate the incident to anybody. Phimu suffered injuries on his face. Chaman told occurrence to Neeraj Sharma Contractor. Neeraj Sharma sent two persons for taking Phimu to hospital but he did not go to the hospital. Condition of Phimu was not well on 22.2.2012 and, on 23.2.2012 in the morning they found Phimu dead in his room. In his cross-examination, he has deposed that he has not disclosed about alleged incident to contractor and Pradhan as well as Police as the incident had not taken place in his presence. To a court question put to him, he admitted that he has not seen the occurrence from the window.

13. PW-7 Vimla Devi, PW-8 Lakshmi, PW-9 Surender Kumar, PW-10 Roop Lal, PW-11 Bachitar Singh, PW-12 Sanjeev Kumar, PW-13 HC Sant Ram, PW-14 Lokender Singh, PW-15 Suram Singh and PW-16 HC Vikas Arora, are all formal witnesses.

14. PW-17 Dr. Angdui Dorje has conducted post mortem examination on the body of deceased Om Parkash. He noticed that there was bleeding from right nasal oris, bruise bilateral eyes and over right leg above knee joint measuring 2 x 3 cm. There was haematoma in frontal aspect of skull with fracture bilateral temporal region of linear type, fracture cranial spine No. 3 and 4 that is of post mortem type. According to Ext. PW-17/C, cause of death was due to poly-trauma. He has explained the cuttings made in the Ext. PW-17/C. He has admitted in his cross-examination that initially probable duration between death and post-mortem was written as more than 24 hours, however, he has corrected it. Similarly, he has admitted that earlier he has written probable time between injury and death as less than 12 hours. It was written hurriedly but, later, it was corrected as more than 32 hours. He had initialled the cuttings.

15. PW-18 Ramesh Kumar, PW-19 S.L. Krishan Chand and PW-20 Dr. Tilak Bhagra are formal witnesses.

16. PW-21 Neeraj Sharma deposed that he used to reside at village Sidhpur. He used to be present at site at Lunta during day time. On 21.2.2012 at about 7.30 pm, he was returning from Kangra when one person made a telephone call to him and informed that Phimu sustained the injuries and he had to shift to hospital. Deceased had told Manoj and Jitender that he had sustained injuries due to fall and thereafter he made a telephonic conversation with deceased Om Parkash alias Phimu. He was under the influence of liquor and he told him on telephone that he has sustained injuries due to fall. He was declared hostile and was cross-examined by the learned Public Prosecutor. In his cross-examination, he has admitted that he purchased land from the deceased. He also admitted that he has not gone to the spot till 23.2.2012 and he also admitted that he has not provided medicines to the deceased. He also did not inform the police about the occurrence. He also admitted that he did not reach the spot after the death of Om Parkash. Police told that Om Parkash was murdered. People at the spot were also telling police this fact.

17. PW-22 SI Mukesh Kumar visited the spot on 23.2.2012. He recorded statement of Rattan Chand under Section 154 CrPC vide Ext. PW-1/A. FIR Ext. PW-19/A was registered. Post-mortem of body was got conducted. Case property was taken into possession. Site map was also prepared. Danda was recovered.

18. It is duly established from the statement of PW-2 Janam Singh, PW-5 Chaman Singh and PW-6 Jaspal Singh that accused Deep Kumar and Bhota had given beatings to the deceased with Danda. PW-2 Janam Singh has seen Bhota and Deep Kumar going inside the room on 21.2.2012. He has seen them coming out from room. PW-5 has also seen accused going inside room. Room was bolted from inside. Deep Kumar was

carrying Danda in his hand and Bhota was not having anything. Incident was also seen by PW-6 from the window. He has seen accused giving beatings to Phimu with Danda. Deep Kumar has given beatings to the deceased with Danda. Bhota had given beatings to deceased with fist blows. Statement of PW-21 Neeraj Sharma was declared hostile but he has admitted in his cross-examination by the learned Public Prosecutor. He has not visited the spot till 23.2.2012. He was told by the police that Phimu was murdered. People at the spot were also telling the police this fact. Recovery of Danda has been made on the basis of disclosure statement made by accused vide Ext. PW-2/C. Danda was recovered from bushes. Deceased had died due to poly-trauma as per Ext. PW-17/C. Corrections made by PW-17 Dr. Angdui Dorje have been duly and properly explained. Though PW-21 has deposed that Om Parkash was drunk but no poison/ alcohol was detected in the report of the RFSL Dharamshala, Ext. PN.

19. Prosecution has duly proved charges against the accused. There is no occasion for us to interfere with well reasoned judgment of the trial Court.

20. In view of the discussion and analysis made hereinabove, there is no merit in the appeal and the same is dismissed. Pending applications, if any, are also disposed of.

****

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

Gurbax Singh .....Appellant

Versus

State of Himachal Pradesh & others ....Respondents

LPA No. 64 of 2009
Decided on : 31.08.2015

Constitution of India, 1950- Article 226- Petitioner had issued a legal notice on the basis of which an order was passed- he had taken the benefit of the Rule 2 of Demobilized Armed Forces Personnel Rules, 1972- he cannot make a U-turn and plead that he is a fresh appointee- appeal dismissed.

For the Appellant : Mr. Peeyush Verma, Advocate.

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

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This Letters Patent Appeal is directed against the judgment dated 30th March, 2009, passed by the learned Single Judge in **CWP (T) No. 2519 of 2008**, titled **Shri Gurbax Singh versus State of Himachal Pradesh & others,** whereby the writ petition came to be dismissed, hereinafter referred to as 'the impugned judgment'.

2. It appears that the writ petitioner had filed Original Application 938 of 1995 before the Himachal Pradesh State Administrative Tribunal, (hereinafter referred to as 'the Tribunal'), which on its abolition, was transferred to this Court and came to be diarized as CWP (T) No. 2519 of 2008.

3. The petitioner had sought quashment of order dated 19th November, 1994, which was outcome of legal notice issued by the petitioner on 12th November, 1993. It is apt to record herein that the petitioner has not questioned his pay fixation (Annexure P-2), till 1990. Thus, the claim of the petitioner is belated.

4. The petitioner has taken the benefit in terms of Rule 2 of the Demobilized Armed Forces Personnel Rules, 1972, hereinafter referred to as 'the Rules', cannot make U-turn and plead that he is a fresh appointee. If he is a fresh appointee, he is not entitled to the main relief in terms of Rule 5 of the Rules.

5. The respondents have specifically given details in their reply. It is apt to reproduce paras -3, 6(b) and 6(d) of the reply to the writ petition herein:-

> *"3. That the application against the order is not maintainable. It is submitted that the benefit of these advance increments is only admissible to a fresh entrant and not to a person who is already in service or who has been given the benefit of past service. Since the applicant has been extended the benefit of his past military service, therefore, he cannot be extended the benefit of two advance increments as he cannot be considered afresh appointee. Therefore, he does not deserve the benefit of three advance increments and the fixation made is thus correct.*
>
> *4, 5 & 6(A).....*
>
> *6(B) That at the initial appointment, the benefit of advance increments was given. The case of the applicant is different. Since his past military service was counted, he cannot be said to be a fresh entrant. Hence the contention is wholly misleading, irrational and illogical.*
>
> *6(C) .....*
>
> *6(D) That the benefit of three advance increments is allowed on the minimum of the scale of Rs. 570/- on 15.9.78. But the basic pay of the applicant has arisen to Rs. 680/- as on 15.9.78. He cannot be allowed the benefit of three advance increments on Rs. 680.- as contended."*

6. Having said so, we are of the considered view that the Writ Court has rightly passed the impugned judgment. No interference is required. Accordingly, the impugned judgment is upheld and the appeal is dismissed.

****

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

Chandra Bhan Sharma Petitioner.
Versus
State of H.P. Respondent.

Cr.MMO No.264 of 2015.
Date of decision: 1.9.2015.

Code of Criminal Procedure, 1973- Section 439- Petitioner was admitted on bail subject to the condition that he will not leave India- petitioner prayed that he is Director of the Company and is required to visit abroad in connection with his work- the trial pending before the Learned Judicial Magistrate was stayed by the Supreme Court of India- therefore, trial will not suffer by the absence of the petitioner- petitioner had also not abused liberty granted to him, hence, permission granted to the petitioner to visit abroad.

For the petitioner: Mr. T.P.S.Kang Advocate with Ms. Shalini Thakur, Advocate.
For the respondent: Mr. Vivek Singh Attri, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

The petitioner applicant is alleged to have committed offences punishable under Sections 498-A, 406 IPC recorded in F.I.R. No. 100 of 2013 registered at Police Station, Boileauganj. However, the petitioner applicant has been afforded the facility of bail by the learned Additional Sessions Judge-1, Shimla, H.P. One of the conditions in the order of the learned Additional Sessions Judge-1, Shimla, while affording the facility of bail to the petitioner enjoins upon the latter to not leave India without the prior permission of the Court. Consequently, the petitioner through the instant petition seeks the indulgence of this Court to permit him to proceed to UAE, Oman and GCC area from 3rd September, 2015 to 22nd September, 2015. The necessity of the petitioner travelling to the countries aforesaid is comprised in the fact his being Director of Metropolitan, Equipments and Consultants Pvt. Ltd. and in the aforesaid capacity for exploring new business opportunities is required to visit the countries aforesaid for the period aforesaid. This Court while proceeding to afford in favour of the petitioner the relief as canvassed in his application, is not to remain oblivious to the fact of its affording permission to the petitioner not begetting the ensuing effect of the trial of the case by the Magistrate concerned being unnecessarily delayed. However, the factum as manifesting in the order of the Hon'ble Apex Court, placed on record by the learned counsel for the petitioner of it having stayed further proceedings in Criminal Case No. 6-2 of 2014 pending before the court of the learned Judicial Magistrate 1st Class, Court No.5, Shimla arising out of F.I.R. No. 100 registered with the police station concerned besides this Court in its rendition in Cr.MMO No. 240 of 2014 having stayed the proceedings in the Court aforesaid, obviously then the trial of the aforesaid criminal case against the petitioner would not suffer any casualty of its progress being delayed by the factum of the petitioner not appearing before it arising from his being permitted by this Court to travel abroad. Even otherwise, the permission previously afforded to the petitioner to travel abroad did not stand abused by the petitioner. Moreover, the status report does not divulge that the petitioner has violated any other terms and conditions of the order whereby the facility of bail was accorded in his favour by the Court of the learned Additional Sessions

Judge, Shimla. Cumulatively, this Court is constrained to allow the petition. The petitioner is permitted to travel abroad i.e. UAE, Oman and GCC area from 3rd September, 2015 to 22nd September, 2015 subject to his furnishing additional personal and surety bonds to the tune of Rs.1,00,000/- each to the satisfaction of the learned trial Magistrate and also submitting itinerary of his visits in the trial Court and undertaking that on all dates when his presence is essentially required in the trial Court in connection with the proceedings in the trial, he shall remain present in person. Also that on other dates he will attend the trial Court and in the event of being prevented from doing so on account of any unavoidable and unforeseen circumstances, he may seek exemption from appearance by filing an appropriate application, which the learned trial Magistrate shall consider and dispose of in accordance with law. The aforesaid failure on the part of the accused/petitioner in any manner whatsoever shall entail the consequence of cancellation of the facility of bail granted to him.

With the above observations, the petition stands disposed of, so also the pending application(s), if any.

****

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

Diwan Chand. ...Petitioner

Versus

Kala Devi. ...Respondent.

CMPMO No. 212 of 2015
Date of Decision: 01.09.2015

Code of Civil Procedure, 1908- Section 47- A decree for mandatory injunction was passed against JD- J.D filed the objections to its execution stating that he had not encroached upon the suit land and a demarcation be carried out to verify this fact- objections were dismissed on the ground that no evidence was led to establish that J.D had not encroached upon the suit land- held, that trial Court had fallen in error by not appointing a Commissioner to verify, whether defendant had encroached upon the suit land or not- direction issued to the trial Court to appoint a Local Commissioner to carry out the demarcation. (Para-2 to 4)

For the petitioner: Mr.Kamaljeet Sharma, Advocate.
For the Respondent: Mr.Balwant Singh Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The respondent-decree holder pressed before the learned executing court for execution of a decree of mandatory injunction. The decree of mandatory injunction was rendered qua a portion of the suit land standing on the holding of the decree holder and it having come to be purportedly encroached upon by the judgment debtor. A graphic and vivid enunciation of the portion of the suit land purportedly encroached upon by the judgment debtor stands constituted in Aks Tatima Ext.PW.1/B. However, the judgment debtor raised objections to the execution of the decree of mandatory injunction. His objections were purportedly founded upon the factum of his having not encroached upon

any part of the holding of the decree holder, for determination thereof he sought demarcation of the contiguous boundaries of his estate with the estate of the decree holder.

2. To succor his contention, he had concerted before the learned executing Court that the demarcation of the boundaries of his estate adjoining the estate of the decree holder be directed by it to be carried out by the Revenue Officer concerned for ascertaining, whether any portion of the holding of the decree holder depicted in Aks Tatima Ext.PW.1/B stands or stands not encroached upon at his instance. The learned executing Court dismissed the objections preferred before it by the judgment debtor on the score of the objector-judgment debtor having omitted to adduce evidence in support of his objections to the execution petition despite his having been afforded a last opportunity to adduce it. However, the learned executing court has fallen into a grave fallacy in seeking elicitation from the judgment debtor evidence qua the fact whether the latter had or not encroached upon any part of the holding of the decree holder enunciated in Ext.PW.1/B. On the contrary, when the rendition of a direction by it to the Revenue Officer concerned for demarcation of the boundaries of the adjoining estate of the decree holder with his estate and the Revenue Officer concerned in compliance thereto having carried out the necessary demarcation and his pronouncing in his report, whether the land depicted in Ext.PW.1/B stood or stood not encroached upon by the decree holder, would have entailed the sequel of the objections raised by the judgment debtor, hence, necessitating theirs being dispelled or sustained. Obviously, the learned executing Court, in having abandoned its duty to appoint a Revenue Officer concerned as a Local Commissioner to carry out demarcation of the boundaries of the adjoining estate of the decree holder with that of the judgment debtor for facilitating it, to on receiving from the Local Commissioner a demarcation report, render a decision qua the veracity or otherwise of the objections raised to the execution petition by the judgment debtor, has forestalled emanation of clinching evidence qua the factum probandum, hence, committed a grave illegality besides a legal impropriety.

3. In aftermath, when for sustaining the objections or stripping them of their legal efficacy, a direction by the learned executing Court to the Local Commissioner to carry out the demarcation of the boundaries of the adjoining estates of the decree holder with that of judgment debtor was necessary and which report of the demarcating officer was un-adducible besides untenderable at the instance of the decree holder. As a corollary, then the concert of the learned executing Court to seek elicitation of the aforesaid report from the judgment debtor was unwarranted besides even when opportunities to adduce the aforesaid evidence, remained un-availed by the judgment debtor, the non-availment thereof cannot be construed to be outstripping the learned executing Court of jurisdictional competence to elicit apposite evidence, by appointing a Local Commissioner to carry out demarcation of boundaries of the adjoining estate of the decree holder with that of the judgment debtor, for establishing or de-establishing the factum of the judgment debtor having or having not encroached upon the estate of the decree holder as divulged in Ext.PW.1/B. Therefore, when the elicitation of the aforesaid piece of evidence was within the domain of or within the jurisdictional competence of the learned executing Court by its rendering a direction to the Revenue Officer concerned to carry out demarcation aforesaid for unearthing the facet aforesaid necessarily then when the said evidence was neither in possession of the judgment debtor nor he could come to possess it without the intervention of the Court in the manner aforesaid. In aftermath, the learned executing Court having closed his evidence on score of his having not availed opportunities to adduce it, necessitates intervention.

4. With the aforesaid observations, the petition stands allowed. The learned executing Court is directed to appoint a Local Commissioner to carry out the demarcation of

the contentious boundaries of the adjoining estate of the decree holder with that of the judgment debtor and shall within three months decide the execution petition.

5. It is made clear that the observations, made hereinabove, shall have no bearing on the merits of the case.

****

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

Hukam Chand Petitioner.

Versus

Smt. Bhintra Devi Respondent.

CMPMO No. 250 of 2015.
Date of decision: 1.9.2015.

Code of Civil Procedure, 1908- Section 151- Plaintiff filed a suit seeking permanent prohibitory injunction claiming that his passage was blocked by the defendant by stacking stones on it- plaintiff filed an application seeking direction from the trial Court to the Revenue Agency to place on record copy of Tatima after carrying out demarcation to determine whether the passage was blocked by the defendant or not – application was rejected on the ground that it amounted to the collection of the evidence on the part of the plaintiff- held, that dispute between the parties could have been resolved only by conducting the demarcation to determine, whether defendant had encroached upon the passage or not- application allowed and trial Court directed to issue necessary direction.

For the petitioner: Mr. G.R.Palsra, Advocate.
For the respondent: Mr. Rajiv Jiwan, Sr. Advocate with Ms. Kiran Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

The plaintiff instituted a suit for permanent injunction as well as mandatory injunction against the defendant/respondent herein. The act of the defendant/respondent herein which actuated the plaintiff to institute the suit aforesaid against the former is grooved in the factum of the respondent herein having by stacking stones on a path providing access to the Abadi of the plaintiff deterred its user by the plaintiff/petitioner herein. During the pendency of the suit before the learned trial Court the petitioner applicant instituted an application under Section 151 CPC seeking a direction from the learned trial Court to the revenue agency concerned to after carrying out the necessary demarcation place on record a Tatima depicting whether the user of path by the plaintiff/petitioner to access his Abadi stood hindered besides deterred in the manner aforesaid. However, the application stood rejected by the learned trial Court on the score that the acceptance of the application would result in collection of evidence at the instance of the learned trial Court in favour of the plaintiff-petitioner herein. The aforesaid reason is perse legally frail and necessitates its being discountenanced especially for the reason that when the parties are at contest qua the fact whether the defendant/respondent by the act attributed to her by the plaintiff/petitioner has precluded access to the petitioner besides to

other villagers to their respective Abadis necessarily when the said issue would have stood mitigated besides would have been clinched only in the face of a direction being rendered by the learned trial Court to the revenue agency concerned to carry out the purpose disclosed in the application. As a corollary then the learned trial Court in not proceeding to accept the application has defacilitated the emergence of or sprouting of clinching evidence to rest at peace the controversy engaging the parties at lis. In aftermath the learned trial Court misdirected itself in law in dismissing the application of the petitioner. Accordingly, the instant petition is allowed and the impugned order is set-aside. In sequel the application preferred by the plaintiff before the learned trial Court under Section 151 CPC is allowed and the learned trial Court is directed to issue necessary orders to the Tehsildar Tehsil Kotli to visit the site and after service of summons upon the parties at contest proceed to in their presence carry out demarcation and thereupon prepare a spot map accompanied by a report disclosing whether the path providing access to the Abadi of the petitioner as well as to the Abadi of other villagers stands obstructed by the defendant-respondent in the manner averred in the plaint. However, the observations made herein shall have no bearing on the merits of the case and the learned trial Court shall decide the civil suit uninfluenced by any observations made hereinabove.

****

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

M/s. Surya Filling Station. ...Petitioner.

Versus

Indian Oil Corporation and another. ...Respondents.

CWP No. 1543 of 2014
Reserved on: 25.8.2015
Decided on: 1.9.2015

Constitution of India, 1950- Article 226- A letter of intent was issued to the petitioner- an agreement was entered between the parties, however, Retail outlet dealership was terminated on the ground of concealment of facts – petitioner contended that her marriage was solemnized in the temple- some ceremonies were held thereafter and record was corrected on the basis of subsequent ceremonies- held, that petitioner had not led any evidence to show that she had married earlier- her plea that she had to marry again was also not acceptable- different dates of marriage were recorded in panchayat register - name of the husband of petitioner was also recorded different- petitioner had concealed his marriage as well as the fact that her mother was a partner in the Agency at Hamirpur, therefore, respondent had rightly cancelled the allotment made in favour of the petitioner- petition dismissed. (Para-3 to 11)

For the Petitioner : Mr. Dushyant Dadwal, Advocate.
For the Respondents : Mr. K.D. Sood, Sr. Advocate with Ms. Divya Sood, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Applications were invited for the retail petrol outlet at Village Nagni situated on the State Highway 39 on the Palampur-Shimla Highway on 11.2.2004. Petitioner also

participated in the selection process. Petitioner was issued interview letter for 12.8.2004. Letter of intent was issued in favour of the petitioner on 3.9.2004. An agreement was entered into between the parties on 18.9.2004. Show cause notice was issued to the petitioner on 30.4.2013. She filed reply to the same. Retail outlet dealership was terminated vide Annexure P-14 on 24.2.2014.

2. Case of the petitioner precisely is that she got married with one Sh. Rajesh Thakur alias Rohit on 15.12.2003 at Chamunda Mandir in presence of their parents and relatives. However, since the marriage was solemnized hurriedly, some ceremonies were held on 30.11.2007 and the marriage was again solemnized on this date. The marriage was entered in the Gram Panchayat by their relations and they were not aware about previous marriage, which led to the overall confusion and the date in the Panchayat records has also been corrected to 15.12.2003 and also the name of husband was wrongly entered in the Gram Panchayat records as Rakesh instead of Rajesh.

3. The letter of intent, as noticed hereinabove, was issued on 3.9.2004. The agreement between the parties was entered on 18.9.2004. Clause 28 of the application form reads as under:

> **"If any information/declaration given by me in my application or in any document submitted by me in support of my application for the award of RO dealership or in this undertaking shall be found to be untrue or incorrect or false, M/s IBP Co. Ltd. would be within its rights to withdraw the Letter of Intent/terminate the dealership (if already appointed) and that I would have no claim, whatsoever, against M/s IBP Co. Ltd. for such withdrawal/termination."**

4. Para 6 of the affidavit dated 10.3.2014 reads as under:

> **"If any information/declaration given by me in my application or in any document submitted by me in support of my application for the award of RO dealership or in this undertaking shall be found to be untrue or incorrect or false, M/s IBP Co. Ltd. would be within its rights to withdraw the Letter of Intent/terminate the dealership (if already appointed) and that I would have no claim, whatsoever, against M/s IBP Co. Ltd. for such withdrawal/termination."**

5. Clause 45 (1) of the Dealership Agreement dated 18.9.2004 lays down as under:

> **"Notwithstanding anything to the contrary herein contained, the erstwhile IBP now Corporation shall be at liberty at its entire discretion to terminate this Agreement forthwith upon or ast any time after the happening of any of the following events namely....(i) If any information given by the dealer in his application for appointment as dealer or in any document supplied herewith or filed in support thereof shall be found to be untrue or incorrect."**

6. Mr. Dushyant Dadwal, learned counsel for the petitioner, has vehemently argued that the marriage of the petitioner was solemnized on 15.12.2003 and not on 30.11.2007. However, while making entry in the Panchayat record, name of husband of

petitioner as Rakesh has been wrongly incorporated. He has also contended that there is violation of principles of natural justice.

7. Mr. K.D. Sood, learned Senior Advocate, has vehemently argued that the marriage of the petitioner in fact was solemnized with one Sh. Rakesh Kumar on 30.11.2007 and the earlier marriage was shown to have been solemnized only to get herself eligible for the retail outlet with intention to show separate family. He has also contended that petitioner's mother was already a partner in the SKO Agency M/s Goverdhan Singh and Sons, Hamirpur, H.P.

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

9. Petitioner has not led any tangible evidence to establish that she was married on 15.12.2003 with Rajesh Thakur alias Rohit. Once the petitioner had already married, there was no occasion for her to again marry as per Hindu rites on 30.11.2007. In the Panchayat records, name of the petitioner's husband has been recorded as Rakesh and the marriage has been solemnized on 30.11.2007. The plea of the petitioner that the relations did not know about the previous marriage solemnized on 15.12.2003 cannot be believed. The entry in Pariwar register is made by a public servant in the discharge of his official duties.

10. According to Rule 21 of the Himachal Pradesh Panchayati Raj (General) Rules, 1997, after the Government has established a Gram Sabha, a Pariwar Register is required to be prepared for every Gram Sabha in form 19. Pariwar Register contains the names and particulars of all persons, family-wise, residing in a village which forms part of the Sabha area. The register is required to be prepared by the Panchayat Secretary and the same is required to be verified by the Panchayat Inspector of the concerned block containing births, deaths and marriages.

11. There is no merit in the contention of Mr. Dushyant Dadwal that in the Gram Panchayat records Rakesh was wrongly incorporated instead of Rajesh Thakur. Annexure P-10 is an afterthought to cover up earlier illegality committed by the petitioner. Petitioner has misled, misrepresented and concealed the true facts from the respondent-corporation at the time of submitting her application dated 11.3.2004 pursuant to advertisement dated 11.2.2004. She has concealed her marriage as well as the fact that her mother was already a partner in the SKO Agency M/s Goverdhan Singh and Sons at Hamirpur, H.P. Respondent-corporation was within its right to cancel the agreement as per clause 28 of the application and para 6 of the affidavit dated 10.3.2004 read with clause 45 (i) of the agreement entered into between the parties on 18.9.2004. Act of the petitioner showing herself married to one Rajesh Thakur alias Rohit on 15.12.2003 besides being illegal is also immoral. No party would ever solemnize marriage twice, as contended by the petitioner. It cannot be believed that relations of the petitioner were not aware of the previous marriage. The relations knew about the exact date of marriage, therefore, they got entry of marriage recorded in the Panchayat records whereby the name of petitioner's husband Rakesh was incorporated.

12. There is no violation of principle of natural justice since the petitioner has been issued detailed show cause notice on 30.4.2013 and the reply has also been considered while terminating the retail outlet on 24.2.2014.

13. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed. Pending application(s), if any, also stands disposed of. No costs.

****

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

M/s Techno Electric and Engineering Co. Ltd. .....Appellant
Versus
M/s Satluj Jal Vidyut Nigam Ltd. .....Respondent

Arb. Appeal No.9 of 2009.
Judgment reserved on 25.8.2015
Date of decision: 1st September, 2015

Arbitration and Conciliation Act, 1996- Section 37 (1) (b)- a dispute arose between the parties, before the contract could be concluded- writ petition was filed which was dismissed holding that there was no concluded contract between the parties- arbitration proceedings were initiated by the appellant after the dismissal of the writ petition- Arbitrator passed an award- respondent questioned the award on the ground that there was no concluded contract between the parties, Arbitrator had no jurisdiction to enter upon the reference and to pass the award, and disputed questions of facts and laws are involved - objections were partly allowed- appellant questioned the findings recorded by the Arbitrator that no concluded contract had come into existence – held, that the award announced by the Arbitrator was rightly set aside as there was no concluded contract between the parties – appeal dismissed. (Para-3 to 12)

Case referred:
Associate Builders versus Delhi Development Authority , (2015) 3 SCC 49

For the appellant: Mr. Lovneesh Kanwar, Advocate.
For the respondent: Mr. Ramakant Sharma, Sr Advocate with Ms. Devyani Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this appeal, the appellant has invoked the jurisdiction of this Court, under Section 37 (1) (b) of the Arbitration and Conciliation Act, 1996 for short, "the Act" and has questioned the judgment dated 15.6.2009, passed by the learned Single Judge of this Court in Arbitration Case No. 30 of 2007, whereby the objections filed by the respondent/Objector have been partly allowed, for short the "impugned judgment."

2. Heard.

3. It appears that a tender notice was issued vide letter of intent (LOI) to the respondent on 26.12.2001 for executing certain works on turnkey basis of Cables, Cabling and Cable Trays, Package-IX, the details of which are given in the appeal as well as in the

impugned judgment. Before the contract was concluded, a dispute arose in between the parties, constraining the appellant herein to file Civil Writ Petition No. 247 of 2002, which was found merit less and was dismissed by this Court on 23.7.2002. However, the petitioner was left to have recourse to appropriate remedy, as permissible under law.

4. The Writ Court has held that there was no concluded contract between the parties and it was cancelled at the very threshold stage, i.e., before the execution and signing the form of contract in view of the terms and conditions contained in the document. It is apt to reproduce operative part of the judgment herein.

> *"Now the question was whether the petitioners are entitled to the relief sought for by them in the writ petition or not. It is true that many matters could be decided after referring to the contention raised in the affidavits and counter affidavits but that would hardly be a ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. In State of Bihar and others vs. Jain Pulastics and Chemicals Ltd. (2001) 1 SCC 216 the facts before their lordships were whether the alleged non-supply of road permits by the appellants would justify breach of contract by the respondent would dependent upon facts and evidence and is not required to be decided or dealt with in a writ petition under Article 226 of the Constitution. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted Civil Suit rather than by a Court exercising prerogative of issuing writs. In this view of the matter, we are of the view that no relief sought for by the petitioners in this writ petition can be granted to them by this Court in exercise of its extra ordinary jurisdiction under Article 226 of the Constitution.*
>
> *In the result, there is no merit in this writ petition which is accordingly dismissed. There will be no order as to costs. It would be open to the petitioners to have recourse to other appropriate remedy as permissible under law. Stay order shall stand vacated. All miscellaneous applications filed by the petitioners shall stand disposed of."*
>
> *[Emphasis supplied]*

5. The parties have not questioned the aforesaid judgment passed by the Writ Court, thus has attained finality.

6. After noticing the judgment, it appears that the appellant had initiated arbitration proceedings before the Arbitrator. The Arbitrator, after examining the record, passed the award on 8.5.2007, constraining the respondent to file application under Section 34 of the Act referred to above before this Court by the medium of Arbitration Case NO. 30 of 2007. The respondent questioned the award precisely on the ground that (i) there was no concluded contract between the parties therefore, he had not violated any terms and conditions of the contract (ii) the disputed questions of facts and law are involved, (iii) the Arbitrator had no jurisdiction to enter upon the reference and make the award.

7. The learned Single Judge, after examining the pleadings framed two issues which are reproduced in para 9 of the impugned judgment. The learned Single Judge has rightly held that the contract was not concluded, thus, the Arbitration proceedings were not maintainable but partly allowed the objections and held that the respondent had made admission before the Arbitrator that he was ready to pay Rs.4,01,712/- to the appellant herein, which was also not seriously disputed even before the learned Single Judge, which fact stands recorded in para 23 of the impugned judgment. It is also worthwhile to record herein that even the respondent has not questioned the impugned judgment so far it relates to maintaining award on Claim No. (ii), as recorded in para 23 of the impugned judgment, referred to supra.

8. The appellant has not questioned the judgment made by the learned Single Judge in CWP No. 247 of 2002, which has attained finality. Thus, it cannot lie in the mouth of the appellant that the contract was concluded or any arbitral dispute had arisen to be agitated before the Arbitrator or Arbitrator had jurisdiction to enter upon the said dispute.

9. The learned Single Judge in CWP No. 247 of 2002 filed by the appellant herein has recorded the findings at page 21 of the impugned judgment that contract was not concluded and it was within the competency of the respondent-Corporation to withdraw the LOI and LOA issued to the petitioners before the concluded contract would come into existence. It is apt to reproduce relevant para at page 21 of the judgment herein:

> *"In the light of the above-said decision of the Supreme Court and the factual situation of the present case stated herein-above, we are of the view that the action of competent authority of respondent-Corporation withdrawing LOI and LOA issued to the petitioners before the concluded contract would come into existence and before the petitioners actually started the work for which the tender notice was issued to them would not attract the doctrine of promissory estoppel....."*

10. The learned Single Judge has rightly framed issues and has held that the award of the Arbitrator was not tenable, in view of the fact that it was against the public policy of India.

11. The Supreme Court in ***Associate Builders versus Delhi Development Authority*** reported in ***(2015) 3 SCC 49***, has discussed on what grounds an award can be set aside, when it is found against the public policy of India. It is apt to reproduce paras 19 to 26 of the said judgment herein.

> *"19.When it came to construing the expression "the public policy of India" contained in Section 34 (2) (b) (ii) of the Arbitration Act, 1996, this Court in ONGC v. Saw Pipes, 2003 5 SCC 705, held-*
>
> *"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence,*

in our view in addition to narrower meaning given to the term "public policy" in Renusagar case, 1994 Supp1 SCC 644 it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to:

(a) Fundamental policy of Indian law; or

(b) The interest of India; or

(c) Justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

74. In the result, it is held that:

(A) (1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The court may set aside the award:

(i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other

substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

(vii) In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract."

The judgment in ONGC v. Saw Pipes has been consistently followed till date.

In Hindustan Zinc Ltd. v. Friends Coal Carbonisation, 2006 4 SCC 445, this Court held:

"14. The High Court did not have the benefit of the principles laid down in Saw Pipes, 2003 5 SCC 705 , and had proceeded on the assumption that award cannot be interfered with even if it was contrary to the terms of the contract. It went to the extent of holding that contract terms cannot even be looked into for examining the correctness of the award. This Court in Saw Pipes, 2003 5 SCC 705 has made it clear that it is open to the court to

consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

In McDermott International Inc. v. Burn Standard Co. Ltd., 2006 11 SCC 181, this Court held:

"58. In Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp1 SCC 644 this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression "public policy" was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in ONGC Ltd.v. Saw Pipes Ltd., 2003 5 SCC 705 (for short "ONGC"). This Court therein referred to an earlier decision of this Court in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, 1986 3 SCC 156 wherein the applicability of the expression "public policy" on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act. In ONGC, 2003 5 SCC 705 this Court, apart from the three grounds stated in Renusagar, 1994 Supp1 SCC 644 , added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

60. What would constitute public policy is a matter dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (See State of Rajasthan v. Basant Nahata, 2005 12 SCC 77.)"

In Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd., 2006 11 SCC 245, Sinha, J., held:

"103. Such patent illegality, however, must go to the root of the matter. The public policy, indisputably, should be unfair and unreasonable so as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act."

104. What would be a public policy would be a matter which would again depend upon the nature of transaction and the nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant so as to enable the court to judge the concept of what was a public good or public interest or what would otherwise be injurious to the public good at the relevant point as contradistinguished by the policy of a particular government. (See State of Rajasthan v. Basant Nahata, 2005 12 SCC 77.)"

In DDA v. R. S. Sharma and Co., 2008 13 SCC 80, the Court summarized the law thus:

"21. From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the award in respect of Claims 1 to 3 and Additional Claims 1 to 3 of the claimant or the appellant DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties."

J.G. Engineers (P) Ltd. v. Union of India, 2011 5 SCC 758, held:

"27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd., 2003 5 SCC 705 held that a court can set aside an award under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy."

Union of India v. Col. L.S.N. Murthy, 2012 1 SCC 718, held:

"22. In ONGC Ltd. v. Saw Pipes Ltd., 2003 5 SCC 705 this Court after examining the grounds on which an award of the arbitrator can be set aside under Section 34 of the Act has said: (SCC p. 727, para 31)

"31. ... However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp1 SCC 644 it is required to be held that the award could be set aside if it is patently illegal".

12. Applying the test in this case, the learned Single Judge has rightly passed the impugned judgment.

13. It is apt to record herein that the respondent has not questioned the impugned judgment so far as it has gone against it, thus reluctantly it is upheld.

14. In view of the foregoing discussion, no interference is called for. The appeal is dismissed, alongwith pending applications, if any.

****

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

Manish Dharmaik Petitioner.

Versus

Shyam Sharma Respondent.

CMPMO No. 242 of 2015.
Date of decision: 1.9.2015.

Indian Evidence Act, 1872- Section 45- Plaintiff filed a civil suit for recovery of Rs. 7 lacs on the basis of cheque – defendant pleaded that signatures on the reverse of the cheque did not belong to him- application was filed by the plaintiff for sending signatures to the expert

for comparison which was dismissed by the trial Court on the ground of delay- held, that report of the expert would have helped in determining whether the signatures on the reverse of the cheque were put by the defendant or not – this opinion is necessary for determination of the dispute pending between the parties- application allowed.

For the petitioner: Mr. Sanjeev Kumar Suri, Advocate.
For the respondent: Mr. G.S.Rathore, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

The plaintiff instituted a suit for recovery of Rs.7 lacs against the defendant. The amount of Rs.7 lacs as endeavoured to be recovered by the plaintiff from the defendant was comprised in a cheque Ext.PW-2/C on reverse whereof the signature of the defendant/respondent herein purportedly exist for manifesting the fact of his having presented Ext.PW-2/C before the bank concerned and his having come to withdraw the amount comprised in it. On the defendant-respondent herein withdrawing from the bank concerned the amount constituted in Ext.PW-2/C led the plaintiff to institute a suit for its recovery from the defendant-respondent herein. The defendant had concerted to escape his liability to pay a sum of Rs.7 lacs to the plaintiff on the strength of his purported signatures on the reverse of Ext.PW-2/C not belonging to him. The plaintiff to disprove the factum of denial by the defendant of his signatures not existing on the reverse of Ext.PW-2/C whereupon the defendant foisted a ground to escape his liability towards the plaintiff to defray to the latter a sum of Rs.7 lacs besides to belie the defendant-respondent herein in his contesting his signatures existing on the reverse of Ext.PW-2/C, concerted to before the learned trial Court institute an application under Section 45 of the Indian Evidence Act for the purportedly disputed signatures of the defendant respondent herein existing on the reverse of Ext.PW-2/C being sent for comparison with the admitted signatures of the defendant respondent herein to the expert concerned for eliciting from the latter an opinion whether the contest by the defendant to the factum of his signatures existing on the reverse of Ext.PW-2/C is or is not ingrained with falsity. The application as instituted before the learned trial Court came to be dismissed on a mere flimsy pretext of it having been belatedly instituted. The belated institution of the application aforesaid before the learned trial Court by the plaintiff was not a formidable reason to reject the application, especially when the opinion obtained from the expert concerned on his comparing the disputed signatures of the defendant on the reverse of Ext.PW-2/C with the latter's admitted signatures would have facilitated, in case the opinion rendered by the expert concerned unearthed the factum as canvassed by the defendant herein of his signatures on the reverse of Ext.PW-2/C not belonging to him, a conclusion rather in support of the contention of the defendant respondent herein on anvil whereof endeavoured to escape his liability to the plaintiff to pay to the latter a sum of Rs.7 lacs besides when hence the rendition of an opinion by the expert concerned would have put to rest the controversy qua the tenability of demand of Rs.7 lacs by the plaintiff from the defendant. Consequently, the mere belated institution of the application before the learned trial Court was not a vigorous reason to reject it. The learned counsel for the defendant respondent herein contends that the elicitation from the expert concerned of an opinion after his having compared the disputed signatures of the defendant on the reverse of Ext.PW-2/C with his admitted signatures would at this stage tantamount to an abuse of process of law. However, the said argument stands negated for the reason that when the rendition of an opinion by the expert concerned would clinch the factum

whether the contest or resistance by the defendant to the suit of the plaintiff is harbored upon truth or not, hence obviously for reiteration the opinion of the expert concerned would rather facilitate and aid the learned trial Court in decreeing the suit of the plaintiff or non suiting the plaintiff. In aftermath when the adduction into evidence of the opinion of the expert would facilitate, aid and assist the learned trial Court in determining the acerbic contest interse the parties at contest necessarily then its elicitation from the expert by allowing the application would in no manner constitute abuse of process of law. The impugned order is manifestly ridden with glaring impropriety besides is ridden with gross illegality necessarily then it warrants interference by this Court. Hence, the order of the learned trial Court is set-aside. The petition stands allowed. In sequel, the application preferred by the plaintiff before the learned trial Court is allowed. However, the observations made herein shall have no bearing on the merits of the case and the learned trial Court shall decide the civil suit uninfluenced by the observations made hereinabove.

****

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

LPA No. 14 of 2009 alongwith connected matters.
Date of decision: 1st September, 2015.

LPA No. 14 of 2009.
Namrta Sharma .....Appellant
Versus
H.P. State Environment Protection and Pollution Control Board and others ....Respondents.

LPA No. 21 of 2009.
H.P. State Environment Protection and Pollution Control Board .....Appellant
Versus
Miss Deepa Sharma and others .....Respondents.

LPA No. 24 of 2009.
Parveen Gupta .....Appellant
Versus
H.P. State Environment Protection and Pollution Control Board and another .....Respondents.

LPA No. 48 of 2009.
S.P. Vasudeva .....Appellant
Versus
Ms. Deepa Sharma and others .....Respondents.

Constitution of India, 1950- Article 226- 'N' was engaged as a Junior Scientific Assistant- 'D' had also participated in the selection process- appointment was for a period of one year, which was extended by another year- writ Court had allowed the writ petition filed by the 'D' and had cancelled the appointment of 'N' – writ court also directed the recovery of the salary paid to 'N' from the members of Selection Committee- held, that period of contract has come to an end and the appeal has become infructuous – members of the Selection Committee

were not arrayed as parties before the Writ Court and order could not have been passed against them- appeal allowed and order directing the recovery of money set aside.

(Para-4 and 5)

For the appellant(s): Mr. Hamender Chandel, Advocate, for the appellant in LPA No. 14 of 2009, Mr. T.S. Chauhan, Advocate, for the appellant in LPA No. 21/2009, Mr. Dilip Sharma, Sr. Advocate with Ms. Nishi Goel, Advocate, for appellant in LPA No. 24 of 2009 and Mr. Bimal Gupta, Advocate, Sr. Advocate, with Mr. Vineet Vishisht, Advocate, for the appellant in LPA No. 48 of 2009.

For the respondent(s): Mr. Neel Kamal Sood, Advocate, for respondent No. 2 in LPAs No. 14 and 24 of 2009 and for respondent No. 1 in LPAs No. 21 and 48 of 2009

Mr. Bimal Gupta, Sr. Advocate with Mr. Vineet Vashisht, Advocate, for respondent No. 3 in LPA No. 14/2009 and for respondent No. 2 in LPA No. 21/2009.

Mr. Hamender Chandel, Advocate, for respondent No. 5 in LPA No. 21/2009 and for respondent No. 3 in LPA No. 48/2009.

The following judgment of the Court was delivered:

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

All these Letters Patent Appeals are directed against the judgment dated 9.1.2009, made by the learned Single Judge of this Court in CWP(T) No.2394/2008, titled *Deepa Sharma vs. H.P. State Environment Protection and Pollution Control Board and others,* whereby the writ petition came to be allowed and contractual engagement of Namrta Sharma-appellant herein was quashed with command to respondent No. 1 in the writ petition to effect recovery of the salary paid to appellant Namrta from the members of the Selection Committee, for short "the impugned judgment."

2. Ms. Namrta Sharma-appellant herein has questioned the impugned judgment by the medium of LPA No. 14 of 2009 for setting aside the impugned judgment and the other appellants-members of the Selection Committee, through the medium of LPAs No. **21/2009, 24/2009 and 48/2009,** have questioned the impugned judgment so far it relates to effecting the recovery from them.

3. We have gone through the impugned judgment.

4. It appears that Ms. Namrta Sharma was engaged as Junior Scientific Assistant in terms of the advertisement notice dated 30th April, 2006 published in "Divya Himachal" and Ms. Deepa Sharma has also participated in the selection process. The selection was only for a period of one year, i.e., w.e.f. 2.12.2006, has come to an end on 1.12.2007, was extended by another one year on 2.1.2008. The said period has also come to an end. Thus, the appeal filed by appellant Ms. Namrta Sharma has become Infructuous. No other relief was granted in favour of Ms. Deepa Sharma, has not questioned the impugned judgment on any ground.

5. The impugned judgment, so far it relates to recovery, is not tenable for the reasons that the appellants-members of the Selection Committee in LPAs No. **21/2009,**

24/2009 and 48/2009, were not parties before the Writ Court and came to be condemned unheard. The appellant-Namrta Sharma has worked for the said period and she cannot be divested of her pay as she has performed her duty.

6. Having said so, the impugned judgment so far it relates to effecting the recovery, is set aside.

7. Accordingly, the impugned judgment is modified as indicated hereinabove and all the LPAs are disposed of alognwith pending applications if any.

****

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

Sh. Nikku Ram .....Petitioner.
Versus
State of H.P. & ors. .....Respondent.

CWP No. 1938 of 2010.
Reserved on: 25.8.2015
Decided on: 1.9.2015.

Constitution of India, 1950- Article 226- Petitioner was appointed as a Salesman on 50% commission basis- his services were terminated – surcharge proceedings were initiated against the petitioner- he was directed to refund the amount of Rs. 31,012.60/- along with interest- representation made by the petitioner was decided by the speaking order after affording opportunity of being heard- petitioner had admitted his liability – surcharge proceedings were initiated on the basis of inquiry/audit report of the society- appeal dismissed. (Para-4 and 5)

For the petitioner: Mr. Vivek Singh Thakur, Advocate.
For the respondent: Mr. Parmod Thakur, Addl. AG with Mr. Neeraj K. Sharma, Dy. AG for the respondent-State.
Mr. Surinder Saklani, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner was appointed as Salesman by respondent No. 4-Society on 50% commission basis. A sum of Rs. 17,080.60 and Rs. 13,932.00 was recoverable as advance/balance stock. Respondent No. 4-Society terminated the services of the petitioner vide resolution dated 3.6.2001. The petitioner made representation against his termination before the competent Authority. The same was decided by the Assistant Registrar, Co-operative Societies, Palampur on 21.8.2002. Thereafter, surcharge proceedings were also commenced against the petitioner under Section 69 of the Himachal Pradesh Co-operative Societies Act, 1968 (hereinafter referred to as the Act), since the petitioner had embezzled Rs. 31,012.60. The Assistant Registrar, Co-operative Societies directed the petitioner and one Sh. Sansar Chand to repay/refund the embezzled/misappropriated/mis-utilized amount

vide order dated 8/6/2004, within 60 days from the date of order, failing which, they were liable to pay interest @ 15% and 2% penal interest. The petitioner preferred an appeal before the learned Registrar, Co-operative Societies, against the order dated 8.6.2004. The Addl. Registrar, Co-operative Societies, dismissed the appeal on 3.4.2007. The petitioner filed further appeal against the order dated 3.4.2007 before the Special Secretary (Co-operative) bearing Case No. 47 of 2007. It was subsequently converted into revision petition under Section 94 of the Act. The same was dismissed by the Special Secretary (Co-operative) on 20.4.2010. Hence, this petition.

2. Mr. Vivek Singh Thakur, Advocate, has vehemently argued that the petitioner was not heard before the passing of order dated 3.6.2001. He then contended that his client has not embezzled the amount rather it was the responsibility of Sansar Chand, being the Secretary to repay the amount. He lastly contended that on 3.6.2001, quorum was not complete. On the other hand, Mr. Parmod Thakur, Addl. Advocate General and Mr. Surinder Saklani, Advocate, for the respective respondents, have supported the orders passed by the competent Authorities below.

3. The petitioner was engaged, as noticed hereinabove, on 19.5.1989. He was terminated on 3.6.2001. He was issued notices vide resolutions dated 24.6.2000, 11.8.2000 and 12.4.2001. He has not filed any reply to these show cause notices/resolutions.

4. It is also evident that as per the byelaws No. 23 of the Society, the quorum of general house is 1/3rd or 30, whichever is less. In the present case, more than 60 members were present and thus, the quorum was complete.

5. The representation made by the petitioner has been decided by passing a speaking order by the Assistant Registrar on 21.8.2002, after affording him reasonable opportunity of being heard. The surcharge proceedings initiated against the petitioner and Sansar Chand were also strictly in conformity with Section 69 of the Act. The petitioner has admitted his liability as per Annexure R-I. The Asstt. Registrar, Co-operative Societies has given specific findings that the petitioner as well as Sansar Chand have misutilized/misappropriated and embezzled the amount of the Society in connivance with each other and have caused loss to the Society. The order passed by the Addl. Registrar, Co-operative Societies dated 3.4.2007 is a speaking order. The contention raised by the petitioner with regard to the non-compliance of principles of natural justice, has specifically been dealt with by him. The submission raised by the petitioner that the quorum was not complete on 3.6.2001 has also been specifically dealt with by the Addl. Registrar, Co-operative Societies. The surcharge proceedings were passed on the basis of enquiry/audit report of the Society. The petitioner has filed an appeal, as discussed hereinabove, against the order dated 3.4.2007. The appeal filed by the petitioner was converted into revision and the same was also not maintainable since the petitioner had already availed the remedy of appeal. The orders dated 3.6.2001, 3.4.2007 and 20.4.2010 are in conformity with the statutory provisions of the Act.

6. Accordingly, there is no merit in this petition, the same is dismissed, so also the pending application(s), if any.

****

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

Pushpa Devi .....Appellant
Versus
Om Parkash .....Respondent

FAO(HMA) No. 371/2008
Reserved on: 25.8.2015
Decided on. 1.9.2015

Hindu Marriage Act, 1955- Section 13- Marriage between the parties was solemnized as per Hindu rites and customs- wife started misbehaving with her husband and her in-laws- she gave beatings to the mother of the husband and used abusive language against her father-in-law – matter was reported to the Gram Panchayat and police- wife also filed a complaint under Section 498-A read with Section 34 of I.P.C and left the home in the month of October, 2001- wife admitted that no dowry was ever demanded by her husband or his relatives – she was not given any beatings by her husband- wife had threatened the husband to commit suicide by consuming poisonous substance- husband had filed a divorce petition which was compromised- wife had filed a complaint against husband only when the husband had filed a petition for divorce – it was duly proved that wife had caused mental and physical cruelty to the husband- she had left her matrimonial home without any reasonable cause- held, that Court had rightly granted the divorce. (Para-11 to 14)

Cases referred:
Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511
Manisha Tyagi vs. Deepak Kumar 2010(1) Divorce & Matrimonial Cases 451
Bipinchandra Jaisinghbai Shah versus Prabhavati, AIR 1957 SC 176
Jagdish Singh v. Madhuri Devi reported in (2008)10 SCC 497

For the Appellant : Mr. Anand Sharma, Advocate.
For the Respondent : None.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

This appeal has been instituted against Judgment dated 31.5.2008 rendered by learned Presiding Officer/ Additional District Judge, Fast Track Court, Hamirpur, District Hamirpur, Himachal Pradesh in HMA Petition No. 49/2004/ RBT No. 37/2005.

2. "Key facts" necessary for the adjudication of the present appeal are that respondent has instituted a petition under Section 13 of the Hindu Marriage Act, 1955 for dissolution of marriage between the parties by way of a decree of divorce against appellant. Marriage between the parties was solemnised on 10.2.2000 as per Hindu rites and customs. Appellant started misbehaving with the respondent and her in-laws. She gave beatings to the mother of the respondent. She used abusive language against father of the respondent. Matter was also reported to the Gram Panchayat, Jol Sapar and also police station Nadaun. Father of the respondent also filed a complaint before Superintendent of Police, Hamirpur complaining about the mis-behaviour of the appellant towards the respondent. Appellant

also filed a complaint under Section 498-A/ 34 IPC against the respondent and his parents. She deserted him in the month of October, 2001. Petition was contested by the appellant. According to the averments contained in the reply, she has not mal-treated the respondent or members of his family. She was ready and willing to stay with the respondent. Rejoinder was filed by the respondent.

3. Issues were framed by learned Court on 5.1.2005. Petition was allowed on 31.5.2008. Hence, this appeal.

4. Mr. Anand Sharma, Advocate, has vehemently argued that his client has not subjected the respondent to any physical or mental cruelty nor his client has ever deserted the respondent without a reasonable cause.

5. I have heard the learned counsel for the appellant and also gone through the record and judgment carefully.

6. Respondent has appeared as PW-1. According to him, appellant used to quarrel and beat his parents. She used to leave the matrimonial house at her own. Matter was reported to the police. Appellant filed complaint against him and his family members under Section 498-A IPC. He was arrested by the police. In his cross-examination, he admitted that earlier also he had filed a divorce petition. It was withdrawn. However, situation did not improve.

7. PW-2 Ranjit has deposed that the appellant used to quarrel and abuse the respondent and his parents.

8. PW-3 is the father of the respondent and he has also deposed about the misbehaviour of the appellant with the respondent and his family members. Appellant has given beatings to her mother-in-law. Matter was reported to police vide Mark 'A' and Mark 'B'. Complaint was also filed with the police against respondent and his family members under Section 498-A IPC. He has provided separate accommodation to the appellant but she did not stay there.

9. Respondent has appeared as RW-1. According to her, parents of the respondents did not behave properly with her. She was forced to live in a cowshed. She denied about the beatings given by her to her mother-in-law. However, she has admitted that a case under Section 498-A IPC was registered against the respondent and his parents. She has categorically admitted that neither respondent gave beatings to her nor at any time demanded dowry from her parents. She also admitted that respondent filed complaint before Mahila Ayog against her.

10. Biasan Devi RW-2 is the mother of appellant. According to her, appellant came with the respondent to her parents' house at the time of delivery. She went back to the house of respondent. In her cross-examination, she has admitted that that appellant never complained about respondent or his parents regarding any misbehaviour.

11. What emerges from the material on record is that appellant has filed a complaint against respondent and his family members under Section 498-A IPC. Respondent was arrested. Appellant has also given beatings to the mother of the respondent. Copy of Rapat Rojnamcha is Ext. PA dated 4.8.2002. Respondent was also constrained to approach the Mahila Ayog. Appellant has admitted that neither respondent nor his family members have ever demanded dowry from her parents. She was not given beatings by the respondent. Appellant has rather threatened the respondent to commit suicide by

consuming some poisonous substance. Respondent earlier filed a divorce petition. The matter was compromised. However, situation did not improve hence, respondent was constrained to file fresh petition against appellant seeking divorce. Appellant has left the company of the respondent without any reasonable cause. It has come in the statement of respondent as well as father of the respondent that appellant has left the company of the respondent. Complaint has been filed by the appellant against the respondent and his family members under Section 498-A IPC only after the divorce petition was filed by the respondent against her. Facts enumerated herein above have definitely caused mental and physical cruelty to the respondent. Appellant has deserted the respondent as notice herein above, without reasonable cause.

12. Their Lordships of the Hon'ble Supreme Court in **Samar Ghosh vs. Jaya Ghosh** reported in **(2007) 4 SCC 511**, have enumerated some instances of human behaviour, which may be important in dealing with the cases of mental cruelty, as under:

> **"98. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.**
>
> **99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.**
>
> **100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.**
>
> **101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.**
>
> **(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not**

make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger

or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

13. Their Lordships of the Hon'ble Supreme Court in **Manisha Tyagi vs. Deepak Kumar** reported in **2010(1) Divorce & Matrimonial Cases 451**, have explained the term 'cruelty' as under:

"24. This is no longer the required standard. Now it would be sufficient to show that the conduct of one of the spouses is so abnormal and below the accepted norm that the other spouse could not reasonable be expected to put up with it. The conduct is no longer required to be so atrociously abominable which would cause a reasonable apprehension that would be harmful or injurious to continue the cohabitation with the other spouse. Therefore, to establish cruelty it is not necessary that physical violence should be used. However, continued ill-treatment cessation of marital intercourse, studied neglect, indifference of one spouse to the other may lead to an inference of cruelty. However, in this case even with aforesaid standard both the Trial Court and the Appellate Court had accepted that the conduct of the wife did not amount to cruelty of such a nature to enable the husband to obtain a decree of divorce."

14. Their Lordships of the Hon'ble Supreme Court in ***Bipinchandra Jaisinghbai Shah*** *versus* ***Prabhavati***, AIR 1957 SC 176 have held that two essential conditions must be there to prove the desertion: (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Their Lordships have held that desertion is a matter of interference to be drawn from the facts and circumstances of each case. Their Lordships have held as under:

"What is desertion? "Rayden on Divorce" which is a standard work on the subject at p.128 (6th Edn.) has summarized the case-law on the subject in these terms:-

"Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".

The legal position has been admirably summarized in paras 453 and 454 at pp. 241. to 243 of Halsbury's Laws of England (3rd Edn.), VoL 12, in the following words:-

"In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases. Desertion is not the withdrawal from a place but from the state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated. The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".

Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandons the other spouse in a state of temporary passion, for example anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without

specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances to each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co- exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the (animus deserendi) coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end, and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard CJ. in the case of Lawson v. Lawson, 1955-1 All E R 341 at p. 342(A), may be referred to :-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution..... "

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there

was a bona fide offer by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back.

15. Their Lordships of the Hon'ble Supreme Court in **Jagdish Singh v. Madhuri Devi** reported in (2008)10 SCC 497, have held that before an appellate Court reverses findings of trial Court, it has to look into following instances:

(i) it applies its mind to reasons given by the trial court;

(ii) it has no advantage of seeing and hearing the witnesses; and

(iii) it records cogent and convincing reasons for disagreeing with the trial court.

16. Learned Court below has rightly appreciated the oral as well as documentary evidence on record.

17. In view of the discussion and analysis made herein above, there is no merit in the appeal and the same is dismissed. Pending application(s), if any, also stand disposed of. No costs.

****

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

Rajesh Kumar ....Petitioner.
Versus
State of H.P. & Others ....Respondents.

CWP No. 6037 of 2010.
Decided on: 1st September, 2015.

Constitution of India, 1950- Article 226- Respondent No. 3 was selected as Gram Rojgar Sewak- petitioner challenged her appointment before Additional District Magistrate- respondent No. 3 had obtained the highest marks followed by respondent No. 4- petitioner had secured third position- petitioner contended that diploma in the computer application and the certificate of experience produced by respondent No. 3 were false and fabricated- respondent No. 3 had produced diploma showing her proficiency in computer data entry- she had five years experience and two marks were awarded for each year's experience- affidavit of the owner of the institution was filed regarding the correctness of the experience certificate- further, affidavits of the students who studied with respondent No. 3 were also filed- merely because respondent No. 3 had acted as a part time agent of Mahila Pradhan Kashetriya Bachat is not sufficient to doubt the affidavits- petition dismissed. (Para-3 to 6)

For the Petitioner: Mr. Mehar Chand, Advocate.
For Respondents No.1 & 2: Mr. Vivek Singh Attri, Deputy Advocate General.
For respondent No.3: Mr. B.C. Negi, Senior Advocate with Mr. Narender Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The learned Deputy Advocate General Submits that he has instructions on behalf of respondent No.1 to adopt the reply filed by respondent No.2, hence, the learned Deputy Advocate General is relieved of his duty to institute on behalf of respondent No.1 a separate reply to the writ petition.

2. Respondents No.1 and 2 issued a notification for filling up post of Gram Rojgar Sewak in the State of Himachal Pradesh. The eligible aspirants applied for theirs being considered for selection to the post aforesaid. The duly constituted Interviewing Committee in the interview held on 1.07.2008 selected respondent No.3. On hers being selected, respondents No.1 and 2 issued an appointment letter to her for hers being posted as Gram Rozgar Sewak. However, the petitioner herein challenged before the Additional District Magistrate, Bilaspur the appointment of respondent No.3 as Gram Rozgar Sewak.

3. This Court has heard counsel on either sides. A perusal of the merit list drawn up by the Interviewing Committee concerned, upsurges the imminent fact of respondent No.3 having secured the highest marks and hers being succeeded in merit by respondent No.4, whereas, the petitioner herein has secured the third position. The gravamen of the challenge laid by the petitioner herein before the authority concerned against the selection and appointment of respondent No.3 as Gram Rojgar Sewak was embedded in the factum of the Interviewing Committee concerned having awarded 10 marks to respondent No.3 on the score of hers possessing a diploma in computer application, besides having awarded 10 marks for hers possessing experience of working as Computer Operator. The untenability of meting of the marks aforesaid by the Interviewing Committee concerned to respondent No.3 is anvilled upon the factum of the diploma in computer training and trade held by respondent No.3 as manifested in Annexure P-5 for hers being construed to be possessing proficiency in computer data entry is false and fabricated. Concomitantly, it was canvassed before the Authority concerned that the experience possessed by respondent No.3 constituted in Annexure P-6 whereupon 10 marks were meted to respondent No.3 by the Interviewing Committee concerned, too could not be tenably awarded or meted in favour of respondent No.3 as the proficiency possessed by respondent No.3 in computer data entry unravelled by hers possessing diploma in regard thereto comprised in Annexure P-5 which being fabricated rendered the experience acquired by respondent No.3 by working as a Computer Operator cum Data Entry Operator at ALMA constituted in Annexure P-6 to be also stripped of its vigour.

4. Before proceeding to test the vigour of the submissions addressed before this Court by the learned counsel appearing for the petitioner herein to constrain it to interfere with the findings and conclusions recorded by the authority concerned comprised in Annexure P-4, it is necessary to extract the apposite portions of Annexure P-1 which enunciate the factum of the aspirants concerting to seek selection and appointment to the post of Gram Rojgar Sewak being enjoined to possess proficiency in computer data entry. The relevant portion of the notification comprised in Annexure P-1 reads as under:

> "(i) Minimum educational qualification:
>
> The candidate to be deployed as Gram Rozgar Sewak must possess minimum education qualification as under:
>
> (i) Matric with second division or 10+2 from Board of School Education recognzied by the Himachal Pradesh Government.

(ii) Proficiency in computer data entry."

Moreover, it is also necessary to extract the other relevant portion of Annexure P-1 which postulates the manner of awarding of marks by the Interviewing Committee to the aspirants who concert to seek selection and consequent appointment to the post of Gram Rozgar Sewak. The relevant portion whereof reads as under:-

"(3) Distribution of Marks:

In order to make out merit of the candidates appeared before the selection committee the maximum marks would be 100 to be distributed in the following manner:-

(I).....

(I).....

(II).....

(III).....

(IV) Having basic course in computer application (3 months duration) 10 marks

(B) Experience.

(Two marks shall be awarded for every one year of experience in relevant nature of duties in any Panchayati Raj Institution/ RDD/watershed projects/Government office/Government undertaking/Institution or experience of working as computer operator in any institution). : Subject to the maximum of 10 marks"

5. A perusal of the afore extracted relevant portion of Annexure P-1 manifests the obvious fact of the Interviewing Committee concerned being empowered to award 10 marks to a candidate possessing a basic course in computer application, besides an advertence to the germane portion of Annexure P-1 disinters the factum of its empowering the Interviewing Committee concerned to award marks for experience garnered by an aspirant by rendering or performing work in the capacity of a computer operator in any institution. Consequently, with the aforesaid relevant portions of the rules empowering the interviewing committee concerned to award 10 marks to an aspirant possessing a basic course in computer application, besides to award two marks for every year of experience obtained by an aspirant while rendering duties as a computer operator in any institution, in sequel, the awarding of 10 marks by the Interviewing Committee concerned to respondent No.3 while hers possessing Annexure P-5 displaying the fact of hers holding a diploma personifying her proficiency in computer data entry, besides the awarding of 10 marks to her by the Interviewing Committee concerned on score of Annexure P-6, the certificate of experience displaying the apposite factum of respondent No.3 having rendered work in the capacity of a Computer Operator-cum-Data Entry Operator at ALMA Information Technology Swarghat, District Bialspur, H.P., for five years, cannot be discounted on the ground of its suffering from any infirmity rather when the relevant portion of the rules extracted hereinabove empower the Interviewing Committee concerned to award two marks for every year of experience in the capacity aforesaid, obviously when as pronounced by Annexure P-6, with respondent No.3 herein having rendered work in the apposite capacity for five years, as a corollary fortifyingly then the meting of 10 marks to her for hers possessing experience

while hers having rendered duties as Computer Operator-cum-Data Entry Operator, was wholly vindicable, besides justifiable.

6. Now the trite controversy which necessitates being put to rest is whether both Annexures P-5 and P-6 are false and fabricated so as to render the awarding of marks on their anvill by the Interviewing Committee concerned to respondent No.3 to be grossly unwarranted. While gauging the onslaught on score aforesaid to Annexures P-5 and P-6 by the learned counsel for the petitioner and theirs concomitantly impinging upon the marks thereupon awarded to respondent No.3 by the Interviewing Committee concerned, it is necessary to bear in mind Annexure P-4 which is the impugned order rendered by the Authority concerned. Its incisive reading portrays that it had in extenso while eliciting an affidavit of the owner of the institution wherein respondent No.3 had acquired experience in tandem with the prescription of the apposite rules as a computer operator-cum-Data Entry Operator for five years w.e.f. 01.04.2003 to 30.04.2008, dwelt upon its probative worth besides its legal efficacy, hence, imputed truth to it, besides concomitantly fastened truth to Annexure P-6. The owner of the institution aforesaid had preceding the rendition by the authority concerned comprised in Annexure P-4 tendered his affidavit aforesaid. The apposite factum aforesaid as displayed in the affidavit of the owner of the institution concerned wherefrom respondent No.3 had obtained an experience certificate, on anvill whereof she was meted out 10 marks for hers having worked therein in the apposite capacity, though was open to be repulsed or countered or repudiated by the petitioner herein by concerting to cross-examine the owner of the institution concerned. Nonetheless, it appears on a reading of the impugned order that the petitioner herein did not concert to avail any opportunity though could have been made available in case sought, besides when its denial to the petitioner herein by the authority concerned is not evinceable by demonstrable material on record, to shred apart truth thereof. Consequently, in face of the petitioner having omitted to concert, besides having abandoned to exercise his right to rip it of its veracity in any manner known to law at an appropriate stage, in sequel, it is not open to the petitioner herein to before the writ Court make an endeavour to impute falsity to the affidavit sworn by the owner of the institute concerned, whereupon the authority concerned imputed truth to Annexure P-6. Obviously then for reiteration, it is not open to the counsel for the petitioner to canvass before this Court that the fastening of veracity or truth to annexure P-6 by the authority concerned was not embedded upon any tangible or legally sound material. Moreover, the counsel for the petitioner herein has vehemently canvassed that Annexure P-5 which is a diploma obtained by respondent No.3 from the institute concerned, in satiation of hers possessing a basic course in computer applications on score whereof 10 marks in consonance with the apposite rules was meted to respondent No.3 is also false and fabricated. Nonetheless, the said facet of falsity being acquired by Annnexure P-5 too has come to be ad nauseam dwelt upon by the authority concerned. The authority concerned while fastening legitimacy to Annexure P-5 has relied upon the affidavits sworn by the students, who along with respondent No.3 had prosecuted studies in the subject concerned in the institute concerned and on completion of course had obtained from the institute concerned a diploma. The affidavits sworn by the students, who along with respondent No.3 herein completed the curriculum in the institute concerned and on completion whereof had obtained the necessary diploma, for hence infusing Annexure P-5 with probative succor, have not been endeavoured to be repulsed by the petitioner herein before the authority concerned by cross-examining the aforesaid colleagues of respondent No.3 at the time of theirs tendering into evidence affidavits containing the portrayals aforesaid. The omission on the part of the petitioner herein to in the aforesaid manner at the apposite stage rip or shred apart the veracities of the affidavits of the colleagues of

respondent No.3 herein while supporting respondent No.3 of hers having along with them studied in the institute concerned and on completion of the course, the necessary diploma having been issued respectively in their favour, cannot now equip the learned counsel for the petitioner to in writ proceedings concert to shred apart their veracities. In aftermath, the reliance by the authority concerned upon the aforesaid material and thereupon imputing legitimacy to Annexures P-5 and P-6 cannot be said to be ridden with any infirmity.

7. The learned counsel for the petitioner has adverted to Annexure P-7 for dispelling the efficacy of Annexure P-6. However, in Annexure P-7 there is a portrayal of respondent No.3 having performed duties as a part time agent under Mahila Pradhan Kashetriya Bachat Yojna. Nonetheless, the petitioner herein having not before the authority concerned relied upon the said material nor placed any adequate material before it to pronounce the fact that even while respondent No.3 as pronounced by Annexure P-7 was performing duties as a part time Mahila Pradhan Kashetriya Bachat Yojna was required to throughout the day perform at the place depicted therein duties in the aforesaid capacity so as to preclude her to perform duties as a Computer Operator-cum-Data Entry Operator at ALMA, besides when the counsel for the petitioner abstained though he could have before the authority concerned placed on record apposite and cogent material to pronounce that respondent No.3 while performing her duties in the capacity as pronounced in Annexure P-6 was required to perform duties therein throughout the day. Consequently, it appears that even when it stands pronounced by Annexure P-7 of respondent No.3 working as a part time agent of Mahila Pradhan Kashetriya Bachat, the disclosure therein would not to the considered mind of this Court conflict with for the reasons aforesaid with the performance of duties by respondent No.3 in the capacity as enunciated in Annexure P-6. Preponderantly, the concerts herein by the learned counsel for the petitioner to over come the efficacy of Annexure P-6 when remained un-exercised at his instance before the authority concerned cannot repulse the conclusions and findings recorded by the authority concerned in the impugned Annexure P-4 nor hence it can be concluded that the authority concerned discarded the unadduced aforesaid material, necessarily then any reliance by the counsel for the petitioner upon Annexure P-7 to benumb the efficacy of Annexure P-6 without there being any apposite portrayals constituted in the aforesaid materials which however were receivable before the authority concerned and have remained unadduced before it, would sequel gross injustice.

8. For the foregoing reasons, there is no merit in this petition which is accordingly dismissed. All pending applications also stand disposed of. No costs.

****

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

CWP No.1007 of 2015 with CWP No.1014 of 2015
& CWP No.2735 of 2015
Reserved on: 25th August, 2015.
Pronounced on: September 1, 2015.

CWP No.1007 of 2015:
Sandeep Bhardwaj .....Petitioner.
versus
State of H.P. and others. .....Respondents.

CWP No.1014 of 2015:
Rajiv Negi .....Petitioner.
versus
State of H.P. and others. .....Respondents.
CWP No.2735 of 2015:
Jai Dev Banka Gram Vikas Committee, Kharela .....Petitioner.
versus
State of H.P. and others. .....Respondents.

Constitution of India, 1950- Article 226- State inviting bids for the construction of the road – petitioners submitted their tender- technical and financial bids were opened- cases were being proceeded when the Tender Evaluation Committee recommended that entire tender process be cancelled on the ground that some of the contractors were not aware of the condition No. 26.5 contained in the tender notice- tender was cancelled on the recommendation of the committee- held, that once tender notice was published, it does not lie in the mouth of any person to say that he was not aware of the terms and conditions of the policy- Committee had not stated that cancellation was necessary in the public interest – administrative action of the State authority can be reviewed to prevent arbitrariness or favourtism- tenderer has an enforceable right which cannot be taken away without any justification- Court has power to examine the illegality and irregularity of the tender process- commencement of fresh process will delay the construction of the road and will deprive the public of the benefit of the right- petition allowed. (Para-10 to 17)

Cases referred:
Jagdish Mandal vs. State of Orissa and others, (2007) 14 SCC 517
Michigan Rubber (India) Limited, (2012) 8 SCC 216
Tejas Constructions and Infrastructure Private Limited vs. Municipal Council, Sendhwa and another, (2012) 6 SCC 464
M/s Siemens Aktiengeselischaft & S. Ltd. vs. DMRC Ltd. & Ors., JT 2014 (3) SC 290,
Villianpur Iyarkkai Padukappu Maiyam vs. Union of India and others, (2009) 7 SCC 561
Heinz India Private Limited and antoher vs. State of Uttar Pradesh & ors, (2012) 5 SCC 443
Food Corporation of India versus M/s Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71
Tata Cellular versus Union of India, (1994) 6 Supreme Court Cases 651
Maa Binda Express Carrier and another versus North-East Frontier Railway and others, (2014) 3 Supreme Court Cases 760
M/s. Siemens Aktiengeselischaft & S. Ltd. versus DMRC Ltd. & Ors., 2014 AIR SCW 1249
Bangalore Development Authority vs M/s. Vijaya Leasing Ltd. & Anr., 2013 AIR SCW 3463
Asia Foundation & Construction Ltd. vs Trafalgar House Construction (I) Ltd. and others, (1997) 1 Supreme Court Cases 738
Mohinder Singh Gill vs. Chief Election Commissioner, (1978) 1 SCC 405
Rashmi Metaliks Limited and another vs. Kolkata Metropolitan Development Authority and others, (2013) 10 Supreme Court Cases 95.

For the Petitioner(s): Mr.R.K. Bawa, Senior Advocate, with
Mr.Amit Kumar Dhumal, Advocate, in CWP No.1007 of 2015.
Mr.Ajay Mohan Goel, Advocate, in CWP No.1014 of 2015.
Mr.Pranay Pratap Singh, Advocate, in CWP No.2735 of 2015.

For the respondents: Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma & Mr.Anup Rattan, Addl.A.Gs., and Mr.J.K. Verma & Mr.Vikram Thakur, Dy.A.Gs., for respondents-State.
Mr.J.S. Bhogal, Senior Advocate, with Mr.Parmod Negi, Advocate, for respondent No.7, in CWP No.1014 of 2015.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

All the three writ petitions are being disposed of together by this common judgment as the issue involved is common and overlapping.

2. The petitioners in CWP No.1007 of 2015 and CWP No.1014 of 2015 have invoked the jurisdiction of this Court challenging the action of the respondents-State, whereby the tenders of the petitioners have been cancelled, while in CWP No.2735 of 2015, the petitioner has sought directions to the State Authorities to complete the construction of the road, (also the subject matter of CWP No.1014 of 2015, supra), expeditiously, on the grounds taken in memos of the writ petitions.

3. Facts, as are emerging, in brief, are that the respondents-State invited bids, vide notice inviting tenders, dated 27th August, 2014, (hereinafter referred to as the tender notice), for the following two works:

> *"Sr.No.1 Name of Work C/O link road from Shalabag Kuhal Dharanaghatti road in km 0/000 to 3/645 (SH:- Formation cutting 5/7 mtrs. i/c Retaining/Breast Wall, X drainage works, P/L Kharanja stone soling C/O Katcha side drain, C/O PCC parapets, C/O dumping site in km. 0/000 to 3/645) (UNDER NABARD RIDF-XIX), Estimated Cost 1,48,38,615/-, EMD 1,81,000/-, Cost of Tender 5000/-, Eligible class of Contractor Class A.*
>
> *Sr.No.2, Name of Work C/O Bhutti Kharahan Dealth road (portion Lahru to Khadaila in km. 5/840 to 10/360) (SH:- Formation cutting 5/7 mtr. wide i/c R/Wall, X-drainage work, P/L essential soling C/O Katcha drain, C/O dumping site in km. 5/840 to 10/360) (Under NABARD RIDF-XIX, Estimated Cost 2,78,20,151/-, EMD 3,11,000/-, Cost of Tender 5000/-, Eligible class of Contractor Class A."*

4. In pursuance to the aforesaid tender notice, the petitioner in CWP No.1007 of 2015 submitted his tender for the work mentioned at Sl.No.1, while the petitioner in CWP No.1014 of 2015 submitted his tender for the work mentioned at Sl.No.2 of the tender notice, alongwith other bidders. Thereafter, the technical bids of all the participant bidders were opened. The technical bids of the petitioners were found responsive, so the financial bids were opened by the respondents. It is averred that the cases of the petitioners were processed further for allotment of the works in question. It is further averred that in pursuance to the meeting of the Tender Evaluation Committee held on 13th January, 2015, it was recommended that the entire tender process be cancelled and it was directed that fresh tenders be invited for the works in question on the ground that some of the contractors were not aware of condition No.26.5 contained in the tender notice. Thus, the petitioners, in both the writ petitions, have sought quashment of the decision taken by the Tender Evaluation Committee in its meeting held on 13th January, 2015.

5. Respondents have filed replies and have made an effort to justify the impugned action. The petitioners filed rejoinders thereto.

6. We have heard the learned counsel for the parties and have gone through the material placed on the record.

7. The learned counsel for the petitioners in CWPs No.1007 and 1014 of 2015 submitted that the action of the respondents-State, whereby the entire tender process has been cancelled, is arbitrary, erroneous and suffers from material illegality. It was further submitted that the State Authorities cannot take a U-turn and cancel the tender process on the sole ground that some of the contractors were not aware of condition No.26.5 of the tender notice, after the opening of the financial bids. It was also submitted that the decision making process of cancelling the tender process is bad in law and the withdrawal of the tender notice has adversely affected the petitioners.

8. On the other hand, the learned Advocate General submitted that the action of the respondents in annulling the tender process was in the larger public interest and no mala fides are attributable to the respondents. He further submitted that in tender matters, the scope of judicial review is very limited. Judicial review is permissible only in case decision is mala fide or intended to favour someone or the same is irrational. He further submitted that in the instant petitions, there is nothing on the file to show that the respondents-State have acted in an arbitrary manner or with a view to favour someone or the decision taken is against the interests of the public at large. It was further submitted that the respondents-State have annulled the tender process in order to have best persons to execute the works in question.

9. In support of his submissions, the learned Advocate General relied upon the decisions in cases **Jagdish Mandal vs. State of Orissa and others, (2007) 14 SCC 517, Michigan Rubber (India) Limited, (2012) 8 SCC 216, Tejas Constructions and Infrastructure Private Limited vs. Municipal Council, Sendhwa and another, (2012) 6 SCC 464, Mass Binda Express Carrier and another (supra), Tata Cellular vs. Union of India (supra), M/s Siemens Aktiengeselischaft & S. Ltd. vs. DMRC Ltd. & Ors., JT 2014 (3) SC 290, Villianpur Iyarkkai Padukappu Maiyam vs. Union of India and others, (2009) 7 SCC 561,** and **Heinz India Private Limited and antoher vs. State of Uttar Pradesh and others, (2012) 5 SCC 443.**

10. Thus, the core issue needs to be determined in CWPs No.1007 of 2015 and 1014 of 2015 is – Whether a tender notice can be withdrawn midway, particularly, when the technical bids and the financial bids of the participants were opened, on the ground that the Contractors were not aware of a particular condition, which was duly published in the tender notice. The answer is in the negative for the following reasons.

11. The Tender Evaluation Committee held its meeting on 13th January, 2015. A perusal of the minutes of the meeting, on the basis which the tender process has been cancelled, shows that the Members of the Committee observed that fair competition could not be held as some of the contractors were not aware of condition No.26.5 of the tender notice. It is apt to reproduce relevant portion of the minutes of the meeting, dated 13th January, 2015, hereunder:

> *"Hence from the perusal of available records the committee feels that some of the contractor are not aware of the condition No.26.5 of aforesaid DNIT and consider that during qua tender process fair competition could not be held as such committee*

unanimously decides that these tender should be cancelled and works should be re-tendered, so that there is fair competition."

12. Thus, a glace of the minutes of the meeting of the Tender Evaluation Committee, held on 13th January, 2015, would show that there is nothing which is suggestive of the fact that the said decision was taken in larger public interest. No doubt, it has been mentioned in the minutes of the meeting that, in order to have a fair competition, the entire tender process requires to be cancelled, however, the foundation for the said decision, as has been given in the minutes of the meeting, is that some of the contractors were not aware of some conditions in the tender notice, for which reason they failed to participate in the tender process. Once the tender notice was published, it does not lie in the mouth of any person to say that he was not aware of the terms and conditions contained in the tender notice.

13. Respondents have tried to justify the decision of the Committee by stating that there was no fair competition and therefore, the tender process was annulled in the larger public interest. However, a perusal of the minutes of the meeting (supra) shows that no such ground is spelled out in the said minutes. It is nowhere said that the decision taken by the Committee was in the interest of the public. Only what the Committee has said, at the cost of repetition, is that since there was no fair competition amongst the eligible bidders, therefore, the Committee decided to annul the entire process in order to have a fair competition, which was not a ground available, especially at a stage when the financial bids of the responsive bidders stood opened by the respondents-State. Thus, all this exercise appears to be an afterthought.

14. Viewed thus, the submissions of the learned Advocate General are devoid of any force and the decisions referred to are distinguishable. On the contrary, the ratio laid down in all these decisions is that the tender process is also subject to judicial review.

15. The Apex Court in series of judgments has laid down the tests and guidelines as to how, in contract matters, an administrative action can be questioned.

16. The Apex Court in case titled as **Food Corporation of India versus M/s Kamdhenu Cattle Feed Industries, reported in (1993) 1 Supreme Court Cases 71,** has laid down the guidelines where the Court can intervene. It is apt to reproduce paras 7 and 8 of the judgment herein:

> *"7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of*

law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not y itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of la and operates in our legal system in this manner and to this extent."

17. The Apex Court in **Tata Cellular versus Union of India,** reported in **(1994) 6 Supreme Court Cases 651,** has held that it is the duty of the Court to make a balance and the administrative action of the State Authorities can be reviewed by the Courts, in order to prevent arbitrariness or favouritism**.** It is apt to reproduce paragraphs 70, 71 and 74 of the judgment herein:

"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justifiable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

72. .....

73. .....

74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself."

18. The Apex Court in a latest judgment rendered in the case titled as **Maa Binda Express Carrier and another versus North-East Frontier Railway and others,** reported in **(2014) 3 Supreme Court Cases 760,** held that the tenderer has an enforceable right under law and that right cannot be taken away without any justification and in case the same is done, the action is subject to judicial review. It is apt to reproduce paras 9 to 11 of the judgment herein:

> *"9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the Court who is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (See: Meerut Development Authority v. Association of Management Studies and Anr. etc. (2009) 6 SCC 171 and Air India Ltd. v. Cochin International Airport Ltd. (2000) 1 SCR 505).*
>
> *10. The scope of judicial review in contractual matters was further examined by this Court in Tata Cellular v. Union of India (1994) 6 SCC 651, Raunaq International Ltd.'s case (supra) and in Jagdish Mandal v. State of Orissa and Ors. (2007) 14 SCC 517 besides several other decisions to which we need not refer.*
>
> 11. In Michigan Rubber (India) Ltd. v. State of Karnataka and Ors. (2012) 8 SCC 216 the legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review *identified in the following words: (SCC p. 229, paras 23-24)*
>
> > *"23. From the above decisions, the following principles emerge:*
> >
> > *(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;*
> >
> > *(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;*
> >
> > *(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;*
> >
> > *(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and*

> *(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.*
>
> 24. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:
>
> *(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and*
>
> *(ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226.""*

19. It is worthwhile to note here that the ground which is projected and which is made the foundation for passing the impugned order was also available to the respondents at the time of opening the technical bid. The respondents opened the technical bids, declared the successful bidders and thereafter, they opened the financial bids and found who was the lowest bidder and after a considerable period, passed the order, is suggestive of the fact that the respondents have not exercised the said power at the relevant point of time and therefore, it becomes imperative for the Court to examine whether the decision making process was fair, reasonable and transparent.

20. Our this view is fortified by the decision of the Apex Court in case titled as **M/s. Siemens Aktiengeselischaft & S. Ltd. versus DMRC Ltd. & Ors.,** reported in **2014 AIR SCW 1249,** wherein it has been held that the Court has powers to examine the illegality and the irregularities of the process relating to contract and the Court can examine whether the decision making process was fair, reasonable and transparent. It is apt to reproduce para 22 of the judgment herein:

> *"22. There is no gainsaying that in any challenge to the award of contact before the High Court and so also before this Court what is to be examined is the legality and regularity of the process leading to award of contract. What the Court has to constantly keep in mind is that it does not sit in appeal over the soundness of the decision. The Court can only examine whether the decision making process was fair, reasonable and transparent. In cases involving award of contracts, the Court ought to exercise judicial restraint where the decision is bonafide with no perceptible injury to public interest."*

21. The Writ Court, while exercising powers under Article 226 of the Constitution, has wide powers and can reach injustice wherever found. It is apt to reproduce paras 14 and 18 of the judgment rendered by the Apex Court in the case titled as **Bangalore Development Authority versus M/s. Vijaya Leasing Ltd. & Anr.,** reported in **2013 AIR SCW 3463,** herein:

> *"14. To appreciate the legal position we only wish to refer to two of the decisions of this Court reported in Dwarakanath v. Income Tax Officer -1965 (2) SCJ 296 and Gujarat Steel Tubes Ltd & Ors. v. Gujarat Steel Tubes*

Mazdoor Sabha & Ors. - 1980 (2) SCC 593. In Dwarakanath case the Supreme Court stated as under:

> *"This article is couched incomprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression 'nature', for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the Article itself."*
>
> *(Emphasis added)*

15 .....

16. .....

17. .....

18. Therefore, while exercising the extraordinary jurisdiction under Article 226 of the Constitution, the learned Single Judge came across the above incongruities in the proceedings of the Hon'ble Minister which resulted in the issuance of de-notification dated 05.10.1999. We fail to note as to how the ultimate order of the learned Single Judge in setting aside such a patent illegality can be held to be beyond the powers vested in the Constitutional Court. The conclusion of this Court in Gujarat Steel Tubes Case (supra) that judicial daring is not daunted when glaring injustice demands even affirmative action and that authorities exercising their powers should not exceed the statutory jurisdiction and correctly administer the law laid down by the statute under which they act are all principles which are to be scrupulously followed and when a transgression of their limits is brought to the notice of the Court in the course of exercise of its powers under Article 226 of the Constitution, it cannot be held that interference in such an extraordinary situation to set right an illegality was unwarranted."

22. The Apex Court in the case titled as **Asia Foundation & Construction Ltd. versus Trafalgar House Construction (I) Ltd. and others, reported in (1997) 1 Supreme Court Cases 738,** has held that the Court should intervene in the given facts of a particular case. It is apt to reproduce para 11 of the judgment herein:

> "11. This being the position, in our considered opinion, the High court was not justified in interfering with the award by going into different clauses of the bid document and then coming to the conclusion that the terms provided for *modifications or corrections even after a specified date and*

further coming to the conclusion that respondent 1 being the lowest bidder there was no reason for the Port Trust to award the contract in favour of the appellant. We cannot lose sight of the fact of escalation of cost in such project on account of delay and the time involved and further in a coordinated project like this, if one component is not worked out the entire project gets delayed and the enormous cost on that score if rebidding is done. The High court has totally lost sight of this fact while directing the rebidding. In our considered opinion, the direction of rebidding in the facts and circumstances of the present case instead of being in the public interest would be grossly detrimental to the public interest."

23. The learned Advocate General also sought to justify the impugned order on the grounds which are not spelled out in the impugned order. Therefore, another important question is – Whether the respondents can support their decision on the reasons which are not given in the impugned order. The answer is in the negative for the simple reason that the impugned order is to be tested on the language used and the reasons assigned in the same. It cannot be supplemented by any other reason by way of pleadings and affidavits.

24. Our this view is fortified by the decision of the Apex Court in **Mohinder Singh Gill vs. Chief Election Commissioner, (1978) 1 SCC 405,** which decision has been discussed by the Apex Court in its latest decision in **Rashmi Metaliks Limited and another vs. Kolkata Metropolitan Development Authority and others, (2013) 10 Supreme Court Cases 95.** It is apt to reproduce paragraphs 14 to 16 of the said decision hereunder:

"14. So far as the first point is concerned, it needs to be dealt with short shrift for the reason that the Courts below have not thought it relevant for discussion, having, in their wisdom, considered it sufficient to non-suit the Appellant-company for its failure on the second count. It has, however, been explained by Mr. Vishwanathan, learned Senior Counsel for the Appellant-company that at the material time there was no blacklisting or delisting of the Appellant-company and that in those circumstances it was not relevant to make any disclosure in this regard. The very fact that the Tendering Authority, in terms of its communication dated 22nd July 2013 had not adverted to this ground at all, lends credence to the contention that a valid argument had been proffered had this ground been raised. Regardless of the weight, pithiness or sufficiency of the explanation given by the Appellant-company in this regard, this issue in its entirety has become irrelevant for our cogitation for the reason that it does not feature as a reason for the impugned rejection. This ground should have been articulated at the very inception itself, and now it is not forensically fair or permissible for the Authority or any of the Respondents to adopt this ground for the first time in this second salvo of litigation by way of a side wind.

15. The impugned Judgment is indubitably a cryptic one and does not contain the reasons on which the decision is predicated. Since reasons are not contained in the impugned Judgment itself, it must be set aside on the short ground that a party cannot be permitted to travel beyond the stand adopted and expressed by it in its earlier decision.

16. The following observations found in the celebrated decision in Mohinder Singh Gill vs. The Chief Election Commissioner, New Delhi, are relevant to this question :

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may,

by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (AIR p. 18, para 9)

'9. .....Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.'

Orders are not like old wine becoming better as they grow order."

25. The re-tendering may result in cost escalation, which is against the interest of public at large who have invoked the jurisdiction of this Court by way of CWP No.2735 of 2015 with the prayer that the road (subject matter of CWP No.1014 of 2015) be constructed as early as possible. The action of the respondents-State has delayed the process and in case fresh process is to be started, that will amount to depriving the general public of enjoying the facility of road, which is considered to be the lifeline in the present scenario, and shall also adversely affect the State exchequer.

26. This Court, in a similar set of facts, in **CWP No.1756 of 2014, titled M/s Andritz Hydro Pvt. Ltd. vs. Himachal Pradesh Power Corporation Limited**, decided on **26th May, 2014**, has held that in contractual matters, the Court has the power to intervene and therefore, directed the respondents to take the tender process to its logical end, which decision of this Court has attained finality.

27. Applying the tests in this case, the petitioners in both the writ petitions have carved out a case for quashing the impugned decision, dated 13th January, 2015, taken by the Tender Evaluation Committee, (Annexure P-5 in CWP No.1007 of 2015 and Annexure P-7 in CWP No.1014 of 2015), and the same are quashed. The respondents-State are directed to do the needful as per the law/Rules occupying the field expeditiously. All the three petitions are accordingly disposed of.

****

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

Geeta Chopra ...Petitioner.

Versus

Kulwant Singh Bakshi ...Respondent.

CMPMO No. 52 of 2015.
Date of decision: 2.9.2015.

Code of Civil Procedure, 1908- Section 151- A counter claim was filed by the defendant pleading that plaintiff had encroached upon his land- plaintiff filed a complaint against the defendant before Deputy Commissioner that defendant had violated Section 118 of H.P. Tenancy and Land Reforms Act - complaint was accepted and land was ordered to be vested in the State of Himachal Pradesh - this order was affirmed by Financial Commissioner (Appeals)- plaintiff contended that in view of the orders, defendant had no locus standi to

seek any relief- application was filed for placing the orders on record- application was dismissed by the trial Court on the ground that writ petition is pending before the High Court assailing the order passed by Financial Commissioner- held, that since the order has not attained finality, it can not be relied upon by the plaintiff – petition dismissed.

For the petitioner: Mr. Anirudh Sharma, Advocate.
For the respondent: Mr. P.S.Goverdhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

The petitioner herein instituted a suit against the respondent herein before the learned Civil Judge, Sr. Division, Solan. The suit as instituted by the petitioner herein against the defendant-respondent herein was for compensation arising from the purported act of the respondent herein constituted in his resorting to unscientifically excavate his land adjoining to the land of the plaintiff/petitioner herein having caused damage to it. Besides a relief of injunction was also claimed against the respondent/defendant before the learned trial Court. However, the respondent-defendant before the learned trial Court had filed a counter claim canvassing therein that the petitioner herein plaintiff before the learned trial Court had encroached upon his land. Succor to the aforesaid fact of the petitioner herein having encroached upon the land of the counter claimant/respondent herein defendant before the learned trial Court, was embedded in the factum of the demarcation of the suit land having been carried out by the Field Kanungo.

2. The learned Deputy Commissioner, Solan while deciding a complaint instituted before him by the plaintiff/petitioner herein against the defendant respondent herein arising from the latter having contravened the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act had allowed the complaint and ordered for vesting in the State of Himachal Pradesh the land of the counter claimant/defendant/respondent herein. The counter claimant/defendant/ respondent stood aggrieved by the rendition of the Deputy Commissioner, Solan, hence, proceeded to assail it by filing an appeal before the Divisional Commissioner, Shimla. The Divisional Commissioner, Shimla accepted the appeal preferred before him by the counter claimant/defendant/ respondent herein. Consequently, the order of the Deputy Commissioner, Solan directing the vesting in the State of Himachal Pradesh the land of the counter claimant/defendant/respondent herein stood quashed and set-aside. The plaintiff/petitioner herein was aggrieved by the rendition aforesaid of the Divisional Commissioner, Shimla, hence, she took to assail it by filing a revision before the Financial Commissioner (Appeals), H.P., who accepted the revision. In sequel, the rendition of the Deputy Commissioner, Solan ordering the vestment in the State of Himachal Pradesh the land of the counter claimant/defendant/ respondent herein, stood affirmed. The rendition of the Financial Commissioner (Appeals) stands as stated at bar by the learned counsel for the counter claimant/respondent assailed at the instance of the counter claimant/defendant/respondent herein before this Court by his instituting a writ petition before it. The petitioner herein had during the pendency of the suit before the learned trial Court concerted to, on the strength of the rendition of the learned Financial Commissioner (Appeals), who affirmed the rendition of the Deputy Commissioner, Solan whereby the latter had ordered the vestment in the State of Himachal Pradesh the land of the counter claimant/defendant/respondent herein, oust the locus of the defendant/counter claimant to espouse in his counter claim besides to seek a decree from the Court of the learned Civil

Judge Sr. Division, Solan, of possession of his land encroached upon by the plaintiff/petitioner herein besides a decree of mandatory injunction. The aforesaid manner of ouster of the locus of the counter claimant/ defendant/respondent herein stood concerted by the petitioner herein by her proceeding to file an application under Section 151 CPC before the learned Civil Judge, Sr. Division, Solan, canvassing therein that the rendition of the learned Financial Commissioner (Appeals) which ordered for the vestment in the State of Himachal Pradesh of the land of the counter claimant/defendant/respondent herein be permitted to be placed on record, its being both essential and imperative to succor her contest to the locus of the defendant/counter claimant/respondent herein to press for the reliefs agitated by him in his counter claim besides its adduction being essential to clinch the aforesaid facet. The learned Civil Judge, Sr. Division, Solan, however, did not permit the petitioner herein to place it on record. The learned Civil Judge, Sr. Division, Solan, having not permitted the petitioner herein to place it on record, appears not to have misdirected itself in law or committed any grave illegality especially in the face of the counter claimant/defendant/respondent, as submitted by the learned counsel for the counter claimant/respondent herein, having assailed the rendition of the Financial Commissioner (Appeals) ordering the vestment in the State of H.P. of his land arising from the purported infraction on his behalf of the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act, by his preferring a writ petition before this Court. Necessarily then given the pendency of a writ petition at the instance of the respondent herein against the afore referred rendition of the Financial Commissioner (Appeals) any reliance at this stage upon the rendition of the Financial Commissioner (Appeals) with pronouncements therein aforesaid was misplaced, naturally when hence given the pendency of the writ petition before this Court assailing its findings and conclusions it was bereft of any conclusiveness or finality. In aftermath, the fact of its not acquiring any conclusiveness besides finality in clinching the factum of ousting the locus of the counter claim, any reliance thereupon was inchoate while it not possessing probative vigour. Moreover, naturally its adduction at this stage was not only unnecessary besides unessential for determining the facet aforesaid. Moreover, the plaintiff before the learned trial Court had sought to oust the counter claimant respondent herein from claiming a decree of possession of his land purportedly encroached upon by the plaintiff/petitioner herein, which decree of possession was concerted to be sustained besides being viewed with sustenance on the factum of a demarcation having been carried out by the Field Kanungo. However, when during pendency of the suit, the demarcation of the suit land carried out by the Field Kanungo who had unearthed the factum of the plaintiff/petitioner herein having encroached upon the land of the defendant counter-claimant stood impugned before the Assistant Collector 1st Grade, Solan, who accepted the appeal preferred before him by the petitioner herein against the report of the Field Kanungo. Moreover, when the defendant while standing aggrieved by the order of the Assistant Collector 1st Grade instituted an appeal before the Collector Sub Division, Solan, who dismissed the appeal preferred before him by the counter claimant respondent herein. Thereupon counter claimant preferred a revision before the Divisional Commissioner, who accepted the revision petition and forwarded it for affirmation to the Financial Commissioner (Appeals), H.P. However, the Financial Commissioner (Appeals) did not affirm the decision arrived at by the Divisional Commissioner, Shimla. A perusal of the order of the Financial Commissioner (Appeals) discloses that the reason which prevailed upon him for not affirming the rendition of the Divisional Commissioner, Shimla, is founded upon the factum of Financial Commissioner (Appeals) having affirmed the order of the Deputy Commissioner, Solan, whereby the latter ordered the vesting in the State of Himachal Pradesh the land of the counter claimant/respondent herein. Nonetheless, when the order of the Financial Commissioner (Appeals) ordering the vesting in the State of Himachal Pradesh of the land of

the respondent herein has been as submitted by the learned counsel for the counter claimant/respondent herein to have come to be assailed by the respondent herein before this Court by his filing a Civil Writ Petition and when the said factum has been constituted in the order of the Financial Commissioner (Appeals) to constrain him to not accept the report of the Field Kanungo who had carried out the demarcation of the suit land and had unearthed the factum therein of the land of the defendant/counter claimant having stood encroached upon by the plaintiff/petitioner herein which foisted a ground for the former to claim a decree of possession besides a decree of mandatory injunction against the plaintiff/petitioner herein, necessarily when the said report of the Field Kanungo cannot for reasons aforesaid be concluded to acquire any finality or conclusiveness any reliance thereupon by the petitioner herein to oust the locus of the defendant counter claimant to claim relief of possession besides of mandatory injunction cannot at this stage be concluded to be either having any probative sinew nor its adduction at this stage being either just besides essential nor imperative to succor the contention of the plaintiff petitioner herein that its placing on record would dislodge the claim ventilated by the counter claimant respondent before the Civil Judge, Sr. Division, Solan. Accordingly, I find no merit in the petition, which is dismissed. No costs.

****

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

LPAs No. 20 & 119 of 2011 &
CWP No. 7292 of 2011
Decided on : 02.09.2015

1. **LPA No. 20 of 2011**	
Gehru Ram	.....Appellant
Versus	
State of Himachal Pradesh & others	....Respondents
2. **LPA No. 119 of 2011**	
Gehru Ram	.....Appellant
Versus	
Ghanshyam & others	....Respondents
3. **CWP No. 7292 of 2011**	
Shri Shanshayam	...Petitioner
Versus	
State of Himachal Pradesh & others	...Respondents

Constitution of India, 1950- Article 226- Appellant was selected for the post of Forest Guard- Private respondent filed various complaints against him that false certificates were filed by the appellant- Respondent also filed a petition challenging the appointment of appellant- an inquiry was conducted by SDO (Civil) who found that appellant did not belong to IRDP and Below Poverty Line category- his services were terminated- Writ Court held that appellant did not belong to IRDP category and his termination was legal- SDO(Civil) was directed to inquire, as to whether respondent belonged to IRDP category or not- Secretary, Gram Panchayat Kasol appeared before the High Court and produced the record after which

Court held that appeallant belongs to IRDP category- Respondent had participated in the inquiry and findings were recorded against him- in view of this, appeals are allowed with all the consequential benefits. (Para-8 to 17)

LPAs No. 20 & 119 of 2011

For the Appellant(s) : Mr. Sanjeev Kuthiala and Ms. Ambika Kotwal, Advocates.

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

Mr. Lokender Paul Thakur, Advocate, for respondent No. 4 in LPA No. 20 of 2011 and for respondent No. 1 in LPA No. 119 of 2011.

CWP No. 7292 of 2011

For the Petitioner : Mr. Lokender Paul Thakur, Advocate.

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

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

These Letters Patent Appeals are directed against the common judgment and order dated 9th December, 2010, passed by the learned Single Judge in **CWP No. 219 of 2009**, titled **Gehru Ram** versus **the State of H.P. & others** and **CWP No. 1339 of 2009,** titled **Ghanshayam** versus **The State of H.P. & others,** for short 'the impugned judgment'.

2. Gehru Ram, appellant has questioned the impugned judgment, by the medium of LPAs, in hand, on the grounds taken in the memo of the appeals.

3. Ghanshayam has not questioned the impugned judgment, but has accepted the same and participated in the inquiry proceedings before the SDO (Civil), in terms of the impugned judgment, which has gone against him. He has questioned the same by the medium of CWP No. 7292 of 2011, titled **Shri Shanshyam versus State of Himachal Pradesh & others,** on the grounds taken in the writ petition.

4. In the given circumstances, this judgment will govern both the appeals and the writ petition, in hand.

5. It is necessary to give brief facts of the case, the womb of which has given birth to the LPAs and the writ petition, in hand.

6. The Himalayan National Park, Shamshi, invited applications for appointment of Forest Guards. Selection process was taken to its logical end. Gehru Ram figured at Sr. No. 11 in the general category and at Sr. No. 1 in the IRDP category.

7. Ghanshayam figured at Sr. No. 12 in the main list, i.e. general category list and at Sr. No. 2 at Sr. No. in the IRDP category.

8. Gehru Ram was appointed, constraining Ghanshayam to make various complaints on the ground that IRDP certificate issued in favour of the father of Gehru Ram, was false and he was not belonging to the IRDP category.

9. Ghanshayam had also invoked the jurisdiction of the Himachal Pradesh State Administrative Tribunal, by the medium of Original Application No. 2457 of 2008, which was transferred to this Court and diarized as CWP (T) No. 78 of 2008 and came to be disposed of by commanding the concerned Authority to consider and decide the representation of Ghanshyam, in accordance with law.

10. Thereafter, the SDO (Civil) conducted inquiry in the matter and reported that Gehru Ram was not belonging to the IRDP category and the family of 'Below Poverty Line' category. His services were terminated on the said ground, constraining him to file CWP No. 219 of 2009, whereby he sought quashment of the termination order.

11. In the meantime, Ghanshyam reported for joining, but he was not allowed to join on the ground that CWP No. 219 of 2009 filed by Gehru Ram was pending before this Court, constraining him to file a writ petition.

12. The Writ Court after examining the pleadings and the law applicable held that Gehru Ram did not belong to an IRDP family, the termination was legal one and directed the concerned SDO (Civil) to inquire as to whether Ghanshayam belongs to an IRDP family. It is apt to reproduce para-6 of the impugned judgment herein:

> "(i) *That Gehru Ram did not belong to IRDP family and was not entitled to apply for the post against such category and therefore, his termination is not legal;*
>
> *(ii) that the SDO (Civil) concerned shall inquire into the allegations leveled against petitioner Ghanshayam as to whether he belongs to an IRDP family or not. He shall give an opportunity to both Gehru Ram and Ghanshayam to put forth their case and shall decide whether Ghanshayam actually belongs to an IRDP family;*
>
> *(iii) the SDO (Civil) is directed to conduct and complete this inquiry latest by 30th December, 2010. In case, it is found that Ghanshayam does not belong to an IRDP family then his petition shall be deemed to be dismissed;*
>
> (iv) *In case, the SDO (Civil) comes to the conclusion that Ghanshyam belongs to an IRDP family then the State within two months thereafter shall issue a letter of appointment in favour of Ghanshayam."*

13. At the cost of the repetition, one Gehru Ram questioned the impugned judgment, so far as it relates to him. Thus, the only question to be determined in these appeals is whether-Gehru Ram was belonging to the IRDP category i.e. 'Below Poverty Line' family ?

14. Secretary, Gram Panchayat, Kasol appeared before this Court on 29th August, 2011, in terms of the order dated 2nd August, 2011 and prayed for time to examine the case and to submit report. On 19th September, 2011, he appeared before this

Court and placed report on the file, disclosing therein the parameter for issuing certificate in favour of the person who belongs to the IRDP category or 'Below Poverty Line' family.

15. The Court after examining the said report and hearing the parties held that appellant Gehru Ram belonged to the family of the category of 'Below Poverty Line', i.e. 'IRDP' category. Ghanshyam was arrayed as party respondent in both the appeals. It is apt to reproduce the order dated 19th September, 2011, herein:

> *"19.09.2011 :*
>
> *Present: Mr. Sanjeev Kuthiala, Advocate, for the appellant.*
>
> *Mr. R.K. Bawa, AG with Mr. Ankush Dass Sood, Addl, A.G. and Mr. J.K. Verma, Dy. A.G. for respondents/State.*
>
> *Shri Duni Chand, Panchayat Secretary and the Pradhan, Gram Panchayat, Kasol are present. They have placed on record the report in terms of order dated 29.8.2011. As per the report, out of 34-04-00 bighas of land only 10-13-00 bighas is cultivable. Mr. Ankush Dass Sood, learned Addl. Advocate General has also placed a letter dated 29.1.2007 issued by the Director, Village Development Department showing the guidelines with respect to the persons who fall under the BPL category and according to those guidelines and going by the report, the appellant falls within the family of Below Poverty Line.*
>
> *Shri Ghanshyam is impleaded as a party respondent in LPA No. 20/2011. The appellant will take notice dasti to the said respondent returnable for* ***110th October, 2011.*** *Steps for the service be taken within two days positively. The presence of the Secretary and the Pradhan is dispensed with."*
>
> *Sd/-"*

16. Ghanshyam appeared and both the appeals were admitted on 5th December, 2012. He has not questioned the order dated 19th September, 2011. Thus, it has attained finality.

17. Ghanshyam has accepted the impugned judgment and the inquiry proceedings before SDO (Civil) has gone against him, as discussed hereinabove.

18. Having said so, both the appeals merit to be allowed and are accordingly allowed with all consequential benefits. The impugned judgment so far as it relates to CWP No. 219 of 2009 is set aside and termination order is quashed. Writ Petition No. 219 of 2009 is allowed and the impugned judgment so far it relates to Writ Petition No. 1339 of 2009 is maintained.

19. In view of the above, Writ Petition No. 7292 of 2011 is also dismissed.

20. A copy of this judgment be placed on each of the files.

****

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

International Institute of Telecom Technology. ...Appellant

Versus

Jai Pal and others. ...Respondents.

FAO (WCA) No. : 416 of 2007
Reserved on: 18.8.2015
Decided on: 2.9.2015

Workmen Compensation Act, 1923- Section 4- Deceased and the others were engaged for maintenance and up-keep of the college building and furniture- deceased was electrocuted during the employment- no tangible evidence was led to prove that deceased was employed by the contractor- he was employed as a workman by the appellant and, therefore, there was relationship of employer and employee between the appellant and the deceased- petition dismissed. (Para-10 to 12)

Case referred:
Luxminarayannan Shetty vs. Shantha and another, 2002-III-LLJ 523

For the Appellant : Mr. Anuj Nag, Advocate.
For the Respondents : Mr. Sunil Mohan Goel, Advocate.

The following judgment of the Court was delivered:

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

This appeal is instituted against the order dated 30.7.2007 rendered by the Commissioner under Workmen Compensation Act, Nahan, in case No. 3/2006.

2. "Key facts" necessary for the adjudication of this appeal are that respondents No.1 to 4 (hereinafter referred to as the "claimants") instituted a petition under section 4 of the Workmen's Compensation Act seeking compensation on account of death of Manish Kumar. Appellant engaged deceased Manish Kumar alongwith others for maintenance and up-keep of the college building and furniture. On 1.6.2005 at about 12.45 P.M., deceased Manish Kumar was electrocuted while he was in the employment of appellant. He was being paid a sum of Rs. 4,500/- per month as wages. He was 19 years old.

3. Petition was contested by the appellant. Relationship of employer and employee was denied. According to the appellant, deceased was engaged by one Sh. Babu Ram.

4. Issues were framed by the Commissioner. He awarded a sum of Rs. 4,50,440/- alongwith interest @ 12% from the date of accident till the recovery/deposit of the entire amount of compensation. The claimants were also held entitled to penalty @ 20% of the compensation vide order dated 30.7.2007. Hence, the present appeal. It was admitted on the following substantial questions of law on 4.3.2008:

i) "Whether the deceased was a workman covered under the Act?

ii) Whether the Apex Court Judgment reported as LIJ 2002-III-523 Luxminarayannan Shetty vs. Shantha squarely covers the present case."

5. Mr. Anuj Nag has vehemently argued that deceased was not a workman and the case was squarely covered by the judgment rendered by the Hon'ble Supreme Court in case ***Luxminarayannan Shetty*** vs**.** ***Shantha and another*****,** 2002-III-LLJ 523.

6. Mr. Sunil Mohan Goel has supported the order dated 30.7.2007.

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

8. Since both the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid repetition of discussion of evidence.

9. PW-1 Jai Pal has deposed that his son was engaged by the appellant for doing the work of paint, polish and white wash in the college building. His son died during the course of employment on 1.6.2005. He has proved copy of FIR Ex.P-1 and post-mortem report Ex.P-2.

10. PW-2 Subhash Chand has deposed that deceased was doing the work of white wash and paint in the college. He was paid Rs. 150/- per day. Deceased died while he was white washing in temple.

11. RW-1 Amit Kansal has proved receipt Ex.D-1 signed by Subhash Chand. However, this document does not clarify whether the payment was made for rate contract or wages for doing the work by the alleged contractor.

12. There was employer and employee relationship between the deceased and appellant. Deceased was engaged by the appellant. Claimants are legal heirs of deceased Manish Kumar. Appellant has not led any tangible evidence that deceased was employed by the contractor. In view of this, the judgment ***Luxminarayannan Shetty*** vs**.** ***Shantha and another*****,** 2002-III-LLJ 523 cited by Mr. Anuj Nag is not applicable to the facts of present case. It is reiterated that deceased was employed as workman by the appellant and not by any contractor. The monthly wages of the deceased were Rs. 4,500/-. Learned Commissioner has correctly applied the factor of 225.22 since the age of the deceased was 19 years. Claimants have rightly been granted interest @ 12% with penalty @ 20% of the compensation amount.

13. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. No costs.

****

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

Krishan Chand ...Appellant

Vs.

State of HP & ors ...Respondents.

LPA No. 76 of 2012
Reserved on 31.08.2015
Decided on: 02.09.2015

Constitution of India, 1950- Article 226- Case of the appellant was rejected on the ground that he had not completed 10 years of continuous services with the minimum 240 days in each calendar year and, therefore, he was not entitled for regularization- he filed a writ petition against this order pleading that his services were wrongly retrenched while his juniors were retained thereby violating principles of 'last come first go'- Conservator of Forest filed his personal affidavit stating that no person junior to the appellant was retained by the department and services of the appellant were never retrenched by the department- petition was dismissed by the writ Court- there was no material on record to show that services of the appellant were retrenched while his juniors were retained- the chart prepared by the petitioner was also not correct- held, that writ Court had rightly dismissed the petition. (Para-13 to 18)

Cases referred:
Dharam Chand V. State of HP & anr 2010(2) Him.L.R.1084
State of HP & anr V Kapil Dev 2011 (3) Him L.R.(DB) 1145
Himachal Pradesh State Electricity Board V.Shri Charan Dass 2012 (1) Him.L.R.(DB) 320
Paras Ram V. Himachal Pradesh State Electricity Board Limited 2013 (1) Him L.R.465

For the Appellant : Ms. Anjana Mahindroo, Advocate.
For the Respondents : Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals, Mr. J.K. Verma and Mr.Kush Sharma, Deputy Advocate General for the respondents.

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 petition filed by the appellant came to be dismissed.

2. The appellant initially filed CWP No. 7098 of 2010, claiming therein the following reliefs:

> *"1. That writ in the nature of mandamus may very kindly be issued by directing the respondents to re-engage the services of the petitioner with seniority, arrears and all consequential benefits;*
>
> *2. That respondents may further be directed to regularize the services of the petitioner with effect from 18.10.2007 when persons junior to the petitioner have been regularized."*

3. This petition was disposed of at the threshold with a direction to the second respondent to look into the matter and verify the facts specially adverting to the grievance of the appellant and take a decision in accordance with law within a period of four months.

4. The case of the appellant was duly considered, but rejected on the ground that he had not completed 10 years of continuous service with the minimum of 240 days in each calendar year and, therefore, was not entitled for regularization.

5. This led the appellant to file CWP No. 1772 of 2011, wherein he claimed the following reliefs:

"1. That writ in the nature of certiorari may kindly be issued, quashing and setting aside the impugned office order No. 206/2011 dated 9.3.2011 (Annexure P-3) passed by the Principal Chief Conservator of Forests, Himachal Pradesh;

2. That writ in the nature mandamus may kindly be issued , directing the respondents to re-engage the petitioner as Mate in Forest Sub Division, Chowari, District Chamba in Forest Division, Dalhousie and to grant work charged status to the petitioner after completion of 10 years service with continuity of service, seniority except back wages in light of the judgment passed by the Hon'ble Supreme Court in Mool Raj Upadhyaya Vs. State of HP as well as judgment passed by this Hon'ble Court in CWP (T) No. 5721 of 2008, titled as Dharam Chand Vs. State of HP & anr and also in light of policy of the State Government for regularization of daily waged workers, who have completed 10 years service."

6. According to the appellant, he had been supplied by the Forest Guard in the office of Forest Division, Chowari the mandays put by him which are as under:

Year	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Man-days	138	270	251	259	244	298	317	246	-	-	-	-

It was further alleged that the services of the appellant had been illegally retrenched whereas his juniors had been retained thereby violating the principle of 'first come last go'.

7. In the reply filed by respondents, it was averred that since the appellant had not completed 240 days in each calendar year except during the year 1997, 1998 and 1999, therefore, he was not entitled to the regularization of his services. Respondents had also annexed the mandays chart which is as under:

Year	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Man-days	35	104	153	185	247	250	289	219	111	91	0	24

It was also denied that the juniors had been retained.

8. When the proceedings were pending before the learned writ court, it vide orders dated 12.9.2011 directed the respondent State to file supplementary affidavit clarifying therein whether the persons junior to the appellant had been retained at the time of his retrenchment.

9. In compliance to the directions, the then Conservator of Forest Mr. Suresh Kumar, filed his personal affidavit wherein it was specifically stated that no person junior to

the appellant had been retained by the department. Rather, it was clarified that the services of appellant in fact had never been retrenched by the department.

10. The learned writ court, after taking into consideration the pleadings and documents on record, dismissed the petition.

11. The appellant/petitioner has assailed the aforesaid order reiterating all the grounds as had been taken before the learned writ court. The appellant would urge that that learned writ court had erred in not taking into consideration the fact that his services had been illegally retrenched in September, 2004, whereas his juniors had been retained. It is also averred that the learned writ court had failed to take note of the mandays chart as appended with the petition.

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

13. We, in order to satisfy ourselves about the actual working days put in by the appellant, had summoned the original record, which tallies with the mandays chart appended with the reply of respondents and, therefore, belies the mandays chart relied upon by the appellant.

14. We find no material whatsoever on the record which may also prima facie prove that the services of the appellant had in fact been retrenched or that his juniors had been retained thereby violating the principles of "first come last go."

15. To be fair to the learned counsel for the appellant, it may be mentioned that she placed reliance on the judgments of this court reported in **Dharam Chand** V. **State of HP & anr 2010(2) Him.L.R.1084, State of HP & anr** V **Kapil Dev 2011 (3) Him L.R.(DB) 1145, Himachal Pradesh State Electricity Board** V.**Shri Charan Dass 2012 (1) Him.L.R.(DB) 320** & **Paras Ram** V. **Himachal Pradesh State Electricity Board Limited 2013 (1) Him L.R.465.**

16. The judgment in Paras Ram's case (supra) was relied upon to canvass that the plea of abandonment or relinquishment of service is required to be proved like any other fact.

17. Likewise judgments in Dharam Chand, Kapil Dev and Charan Dass (supra) were pressed into service to canvass that in case there was violation of Section 25 G & H of the Industrial Disputes Act (hereinafter referred to as the 'Act'), then the workman was not required to complete 240 days preceding his retrenchment.

18. There can be no quarrel with the proposition of law laid down in the aforesaid judgments, but the moot question is whether these judgments are applicable to the facts of the instant case. As per case set up by the appellant himself, he had worked upto the year 2000, whereas it is only on 28.2.2010 that the appellant for the first time approached this court for the redressal of his grievances by filing CWP No.7098 of 2010. In such circumstances, it is not only reasonable but also legitimate to infer that the appellant had on his own abandoned the job or else he would have agitated the matter within a reasonable time.

19. Insofar as the applicability of the provisions of Section 25 G & H of the Industrial Disputes Act are concerned, as already observed, the appellant has failed to prove that any of his juniors had in fact been retained in service, rather he even failed to even

prove that his services had been retrenched. Having said so, we find no merit in the appeal and accordingly the same is dismissed, leaving the parties to bear the costs.

****

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

Lalit Narain Mishra ...Petitioner

Vs.

State of HP & others ...Respondents.

CWP No. 1449 of 2015
Judgment reserved on: 26.8.2015
Date of decision: 02.09.2015

Constitution of India, 1950- Article 226- Petitioner contended that University had not conducted the examination of first hourly, mid-term, second hourly and practical examination despite repeated request- petitioner had submitted his assignment but he was shown absent- he was denied the access to the answer book when so demanded by him- respondent contended that petitioner had failed to submit his assignment up to the end-term examination and did not turn up for final practical examination - he was rightly shown as absent- all other students except the petitioner had checked their answer books but the petitioner had never reported to check his answer books- answer books were produced before the High Court, which showed that petitioner had appeared and his answers were marked by the University- held, that petitioner had not come to the Court with clean hands and had not disclosed the material facts- no proof was filed to show that petitioner had submitted his assignment and was wrongly shown absent- petition dismissed. (Para-6 to 8)

For the Petitioner : Mr. Varun Thakur, Advocate.

For the Respondents : Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma and Mr. Anup Rattan, Addl. Advocate Generals, for respondent No.1.

Ms. Ranjana Parmar, Senior Advocate, with Ms. Komal Kumari, Advocate, for respondents No. 2 to 6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioner by medium of this writ petition has challenged the actions of respondent No.2 i.e. Dr. Y.S. Parmar University of Horticulture and Forestry by claiming therein various reliefs, but however, during the course of hearing, the petitioner has confined his claim to reliefs No. (c) and (d), respectively, which are as follows:

> *"(c). That the respondent-University may be directed to show the answer sheets/books of the petitioner of the examination of 2nd Semester of 2nd Year M.Sc.(Horticulture), in First hourly, Mid term, Second hourly and Practical Examination for course No. FSC-516/Course title Systematics of Fruit Crops, Academic Year 2013-2014 and the copy of notification of dates of examination for the said examination, for which grading has been reported at Annexure P-1.*

(d) That the respondent–University may be directed to show or place on records the answer sheets/books of the petitioner in examination of Practical examination and final examination of M.Sc (Horticulture), academic year 2013-14, Course No. FSC-506, 2nd semester, Course Title: Breeding of Fruit Crops, Cr. Hrs: 2+1 for which grading has been shown at Annexure P-2."

2. The petitioner would contend that the respondent-University did not conduct the examination of first hourly, mid-term, second hourly and practical examination of Programme: M.Sc. (Horticulture), Academic Year 2013-2014, Course No. FSC-516, Course title : Systematics of Fruit Crops, Cr.Hrs. 2+1 of the petitioner nor the date of examination for the same was notified on the notice board of the College. This all happened despite the fact that the petitioner met the respondent No.6 time and again to know the date of examination prior to conducting the end-term examination but was told that the petitioner should prepare his assignments of the papers. It is further alleged that although the petitioner had submitted his assignment for the said paper, but in the result card, in the column of 'Assignment' 'absent' has been shown marked which is incorrect.

3. It is then averred that the petitioner was allotted less marks in practical examination and final examination in Course No. FSC-506, Course Title – Breeding of Fruit Crops as per result card due to malafide intention of respondents No. 4 and 6. The respondent No.6 in fact did not conduct first hourly examination of Course No. FSC-506 and the petitioner was denied access to his answer book when so demanded by the petitioner.

4. That respondents have filed their separate replies the crux whereof is that the petitioner had appeared in both the aforesaid examinations and based upon his performance, he had been assigned the marks accordingly. It is further averred that the petitioner failed to submit his assignment upto the end-term examination and did not turn up for final practical examination and was rightly shown as 'absent' in the course No. FSC-516. It is also averred that all the other students excluding the petitioner in terms of academic regulations of the University had checked their answer books, but the petitioner had never reported to check his answer books. Lastly, it is averred that since overall performance of the petitioner was poor in all the semesters, he was eventually dropped from the course.

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

6. On 27.5.2015, the respondent-University had produced before us the answer sheets and details of marks of the petitioner in two sealed covers which were opened and thereafter kept in the safe custody of this Court. The sealed envelopes have again been re-opened and the same contain the answer books of the petitioner of both the courses i.e. FSC-506 and FSC-516. The marks allotted therein with respect to different semesters completely belies the allegations levelled by the petitioner that he did not appear in these papers and therefore the allegations to this effect in the petition are palpably false and incorrect.

7. As per settled law, the party who invokes the extraordinary jurisdiction of the Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation and one cannot be permitted to pick and choose the facts he likes to disclose and to suppress or not to disclose other facts. The very basis of the writ jurisdiction of this Court rests on disclosure of true and complete facts. It is equally well settled that a petitioner who does not come with candid facts and

clean hands cannot hold a writ of the Court with soiled hands. Suppression or concealment of material facts is most reprehensible. In a writ proceeding, if the petitioner does not disclose all the material facts fairly and truly but states them in a distorted manner with a view to mislead or deceive the Court, the Court is bound to protect itself and to prevent an abuse of its process. Jugglery has no place in equitable and prerogative jurisdiction.

8. That apart, we find that there is no material whatsoever placed by the petitioner which may even remotely indicate that the petitioner had in fact submitted his assignments and had therefore wrongly been shown to be absent. The respondents have explained the position in detail in their replies duly supported by affidavits and we see no reason to disbelieve the same.

9. As the petitioner has based his claim on falsehood and has not come with clean hands, we would have normally awarded exemplary costs, but we refrain from doing so since the petitioner is only a student.

10. In view of the aforesaid discussion, we find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

****

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

Mohinder Chand. ...Petitioner.

Versus

State of H.P. and another. ...Respondents.

CWP No. 4040 of 2014
Reserved on: 5.8.2015
Decided on: 2.9.2015

Land Acquisition Act, 1894- Section 45- A notice was issued to the petitioner informing him that sum of Rs. 3,65,598/- had been awarded in his favour- it was reported by Patwari that notice was received by 'C' and not by the petitioner- petitioner sought the reference but the reference was declined - it was not the case of the respondent that petitioner could not be found despite the exercise of due diligence and, therefore, service had to be effected on the 'C'- respondent had erred in law by not making the reference to the District Judge when the petitioner was not served in accordance with law- reference can be made within 6 weeks of the pronouncement of the award in case of service or within 6 months from the date of the knowledge- petitioner had immediately approached the Collector on coming to know about the award- his petition cannot be said to be beyond limitation- Writ petition allowed.

(Para-2 to 6)

Case referred:

Bhagwan Das and others vs. State of Uttar Pradesh and others, (2010) 3 SCC 545

For the Petitioner : Mr. B.S. Chauhan, Sr. Advocate with Mr. Vaibhav Tanwar, Advocate.

For the Respondents : Mr. Neeraj Sharma, Dy. A.G.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Land of the petitioner bearing Khasra No.201 measuring 00-10-22 hectares situated at Mauza Badhan, Tehsil Jubbal, District Shimla was acquired vide notification dated 28.7.2008 issued under section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the "Act) and used for construction of Badhal Link Road. The award was made by respondent No.2 bearing Award No.47/2011 on 20.8.2011. Notice was issued to the petitioner under section 12 (2) of the Act on 2.9.2011 by respondent No.2 informing him that a sum of Rs. 3,65,598/- has been awarded in his favour. Patwari has observed that perhaps petitioner may have been served and the reference was made under section 18 of the Act on 2.9.2011. Respondent No.2 on 7.4.2012 observed that "It is doubtful whether the petitioner has received the notice, hence, the service of notice be checked". The Patwari again checked the service and he submitted the report on 30.5.2012 whereby he reported that the notice has been received by Chaman Lal and not by the petitioner. However, surprisingly despite the fact that petitioner has not been served under section 12 (2) of the Act, respondent No.2 has refused to make the reference being time barred on 8.8.2012. It is imperative for the Collector under sub-section (2) of Section 12 of the Act to give notice to the interested persons who are not present at the time when the award is made. In the instant case, as noticed hereinabove, petitioner was not served. The notice was received by one Sh. Chaman Lal son of Sh. Mohan Lal on 8.9.2011.

2. There is a detailed procedure the manner in which service is to be effected under section 45 of the Act. According to the plain language of section 45 of the Act, whenever it may be practicable, the service of the notice shall be made on the person named therein and when such person cannot be found, the service may be made on any adult male member of his family residing with him and if no such adult male member can be found, the notice may be served by fixing the copy on the outer door of the house in which the person therein named ordinarily dwells or carries on business or by fixing a copy thereof in some conspicuous place in the office of the officer or collector or in the court house and also in some conspicuous part of the land to be acquired.

3. It is not the case of respondent No.2 that petitioner could not be found and despite that service has been effected on Chaman Lal. Respondent No.2 has erred in law by not making the reference to the learned District Judge for enhancement of compensation by taking a very hyper technical view and also over looking very important aspect that petitioner was not served in accordance with law under section 12 (2) of the Act. Petitioner was not served even before 25.7.2008. According to the reply filed, petitioner was served only through Hira Lal son of Mohan Lal. Petitioner was to be served as per the procedure laid down under section 45 of the Act and not through one of the co-sharers.

4. Their Lordships of the Hon'ble Supreme Court in ***Bhagwan Das and others*** vs. ***State of Uttar Pradesh and others***, (2010) 3 SCC 545 have held that if award is not made in presence of person interested (or his authorized representative), he has to make application seeking reference within six weeks of receipt of notice from Collector under section 12 (2) and if person interested (or his representative) was not present when the award was made, and if he does not receive notice under section 12 (2) from Collector, he can make application within six months of the date on which he actually or constructively came to know about contents of the award. Their Lordships have held as under:

> **"[28] The following position therefore emerges from the interpretation of the proviso to section 18 of the Act :**

(i) If the award is made in the presence of the person interested (or his authorized representative), he has to make the application within six weeks from the date of the Collector's award itself.

(ii) If the award is not made in the presence of the person interested (or his authorized representative), he has to make the application seeking reference within six weeks of the receipt of the notice from the Collector under section 12(2).

(iii) If the person interested (or his representative) was not present when the award is made, and if he does not receive the notice under Section 12(2) from the Collector, he has to make the application within six months of the date on which he actually or constructively came to know about the contents of the award.

(iv) If a person interested receives a notice under section 12(2) of the Act, after the expiry of six weeks from the date of receipt of such notice, he cannot claim the benefit of the provision for six months for making the application on the ground that the date of receipt of notice under section 12(2) of the Act was the date of knowledge of the contents of the award."

5. In the instant case, petitioner immediately after coming to know about the award through other co-sharers made an application under section 18 of the Act for making reference to the District Judge for enhancement of compensation.

6. Accordingly, in view of the analysis and discussion made hereinabove, the writ petition is allowed. Order dated 8.8.2012 is set aside. Respondent No.2 is directed to make a reference to the learned District Judge under section 18 of the Act within a period of four weeks from today. Pending application(s), if any, also stands disposed of. No costs.

****

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

Principal, Himachal Dental College & another ...Appellants.

Versus

Union of India & others ...Respondents.

LPA No. 19 of 2010
Decided on: 02.09.2015

Constitution of India, 1950- Article 226- Petitioner was appointed as a lecturer in Himachal Pradesh Dental College, Sunder Nagar- pay scale was revised - petitioner filed a representation for fixing his salary as per revised pay scale which was rejected- no reply was filed by the respondent, therefore, averments made in the writ petition had remained unrebutted - writ Court had granted the relief on the ground that petitioner was entitled for the revised pay scale which cannot be faulted- appeal dismissed. (Para-3 to 11)

For the appellants: Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lall and Mr. Sanjeev Kumar, Advocates.

For the respondent: Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Nipun Sharma, Advocate, for respondents No. 1 and 4.

Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondent No. 2.
Mr. J.L. Bhardwaj, Advocate, for respondent No. 3.
Mr. Dilip Sharma, Senior Advocate, with Ms. Nishi Goel, Advocate, for respondent No. 5.

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 01.05.2007, made by the learned Single Judge in CWP No. 1156 of 2002, titled as Pradip Singh versus U.O.I. and others, whereby the writ petition filed by the writ petitioner-respondent No. 5 herein came to be allowed (for short "the impugned judgment").

2. The writ petitioner-respondent No. 5 herein invoked the jurisdiction of this Court by the medium of writ petition, being CWP No. 1156 of 2002, seeking direction to the appellants-writ respondents No. 5 and 6 to release the pay scale as was payable and admissible to the similarly situated persons with effect from July 1996, on the grounds taken in the memo of writ petition.

3. The writ petitioner-respondent No. 5 herein was appointed as Lecturer in the Himachal Dental College, Sunder Nagar in the year 1995 in terms of Annexure P-1 to the writ petition, dated 12.04.1995. It is apt to reproduce relevant portion of Annexure P-1 to the writ petition herein:

> *"With reference to your application dated 4.3.95 for the post of Lecturer in this college. I write to offer you an appointment in the scale of 2200-50-2400-75-3000-100-4000 with basic pay @ Rs. 2,200/- per month + usual Allowances, only as accepted by you at the time of interview on purely temporary basis or for one year as per Himachal Dental College rules.*
>
> *That you will be on probation for a period of 12 months during which period your services are liable to be terminated without any reason or notice. In the event your work is found satisfactory you will be made permanent on this job.*
>
> *In the matter of leave and general conditions of service, you will be governed by the rules of Himachal Dental College, Sundernagar. You will be allowed to attend conference etc. according to the Govt. rules.*
>
> *That you join duty immediately and submit your joining report in writing on that date."*

4. Thereafter, revision of pay scales was made and pay scale of 2200-75-2800-100-4000 was revised to 8000-275-13500 in terms of Annexure P-2 to the writ petition. It is apt to reproduce clause 1 of Annexure P-2 to the writ petition herein:

Sl.	*Category*	*Existing scales of pay*	*Revised scales of*

No.			*pay*
	University and College Teachers		
1.	*Lecturer*	*2200-75-2800-100-4000*	*8000-275-13500*

5. The writ petitioner-respondent No. 5 herein filed representation for releasing his salary as per the revised scales, was rejected, constraining him to file writ petition wherein he has given the details as to how he is entitled to the said relief.

6. The writ respondents failed to file reply, thus, the averments contained in the writ petition have remained unrebutted.

7. The appellants filed appeal, being LPA No. 27 of 2007, against the impugned judgment, which was dismissed as withdrawn with liberty to the appellants to seek appropriate remedy - review petition, vide judgment and order, dated 26.03.2008.

8. Civil Review Petition, being C. Review No. 12 of 2008, was filed before the learned Single Judge, which was dismissed on 24.04.2009.

9. It is apt to record herein that the appellants have not questioned the order in terms of which the review petition came to be dismissed, but have only questioned, by the medium of the instant appeal, the impugned judgment, dated 01.05.2007.

10. The perusal of Annexure P-1, reproduced hereinabove, does disclose that the Rules of Himachal Dental College, Sunder Nagar were applicable and the service conditions contained in those Rules were also applicable to the writ petitioner-respondent No. 5 herein.

11. As discussed hereinabove, the averments contained in the writ petition have remained unrebutted. Thus, in terms of the mandate of Order VIII of the Code of Civil Procedure (for short "CPC"), the writ petition was to be granted. However, the learned Single Judge examined the writ petition and granted the relief simply on the ground that after revision of pay scales, the writ petitioner-respondent No. 5 herein was entitled to the pay scale of 8000-13500 and accordingly, held the writ petitioner-respondent No. 5 herein entitled to the said pay scale with effect from 01.01.1996.

12. Having said so, the impugned judgment merits to be upheld and the appeal is to be dismissed. Accordingly, the impugned judgment is upheld and the appeal is dismissed.

13. The appellants herein-writ respondents No. 5 and 6 are directed to pay the arrears with effect from 01.01.1996 till the date the writ petitioner-respondent No. 5 herein has left the service.

14. Pending applications, if any, are also disposed of.

****

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

Rekha. ...Petitioner.

Versus

State of H.P. and another. ...Respondents.

CWP No. 4042 of 2014
Reserved on: 5.8.2015
Decided on: 2.9.2015

Land Acquisition Act, 1894- Section 45- A notice was issued to the petitioner informing him that sum of Rs. 3,65,598/- had been awarded in her favour- it was reported by Patwari that notice was received by 'C' and not by the petitioner- petitioner sought the reference but the reference was declined - it was not the case of the respondent that petitioner could not be found despite the exercise of due diligence and, therefore, service had to be effected on the 'C'- respondent had erred in law by not making the reference to the District Judge when the petitioner was not served in accordance with law- reference can be made within 6 weeks of the pronouncement of the award in case of service or within 6 months from the date of the knowledge- petitioner had immediately approached the Collector on coming to know about the award- her petition cannot be said to be beyond limitation- Writ petition allowed. (Para-2 to 6)

Case referred:
Bhagwan Das and others vs. State of Uttar Pradesh and others, (2010) 3 SCC 545

For the Petitioner : Mr. B.S. Chauhan, Sr. Advocate with Mr. Vaibhav Tanwar, Advocate.
For the Respondents: Mr. Neeraj Sharma, Dy. A.G.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Land of the petitioner bearing Khasra No.184 measuring 00-14-10 hectares situated at Mauza Badhan, Tehsil Jubbal, District Shimla was acquired vide notification dated 28.7.2008 issued under section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the "Act) and used for construction of Badhal Link Road. The award was made by respondent No.2 bearing Award No.47/2011 on 20.8.2011. Notice was issued to the petitioner under section 12 (2) of the Act on 2.9.2011 by respondent No.2 informing her that a sum of Rs. 4,27,890/- has been awarded in her favour. Patwari has observed that the petitioner was served through her brother Chaman Lal. However, surprisingly despite the fact that petitioner has not been served under section 12 (2) of the Act, respondent No.2 has refused to make the reference being time barred on 7.4.2012. It is imperative for the Collector under sub-section (2) of Section 12 of the Act to give notice to the interested persons who are not present at the time when the award is made. In the instant case, as noticed hereinabove, petitioner was not served. The notice was received by one Sh. Chaman Lal son of Sh. Mohan Lal on 8.9.2011.

2. There is a detailed procedure the manner in which service is to be effected under section 45 of the Act. According to the plain language of section 45 of the Act, whenever it may be practicable, the service of the notice shall be made on the person named therein and when such person cannot be found, the service may be made on any adult male

member of his family residing with him and if no such adult male member can be found, the notice may be served by fixing the copy on the outer door of the house in which the person therein named ordinarily dwells or carries on business or by fixing a copy thereof in some conspicuous place in the office of the officer or collector or in the court house and also in some conspicuous part of the land to be acquired.

3. It is not the case of respondent No.2 that petitioner could not be found and despite that service has been effected on Chaman Lal. Moreover, in the present case, petitioner after marriage had shifted to village and Post Office Dhar, Tehsil Jubbal. Respondent No.2 has erred in law by not making the reference to the learned District Judge for enhancement of compensation by taking a very hyper technical view and also over looking very important aspect that petitioner was not served in accordance with law under section 12 (2) of the Act. Petitioner was not served even before 25.7.2008. According to the reply filed, petitioner was served only through Hira Lal son of Mohan Lal. Petitioner was to be served as per the procedure laid down under section 45 of the Act and not through one of the co-sharers.

4. Their Lordships of the Hon'ble Supreme Court in ***Bhagwan Das and others*** vs. ***State of Uttar Pradesh and others***, (2010) 3 SCC 545 have held that if award is not made in presence of person interested (or his authorized representative), he has to make application seeking reference within six weeks of receipt of notice from Collector under section 12 (2) and if person interested (or his representative) was not present when the award was made, and if he does not receive notice under section 12 (2) from Collector, he can make application within six months of the date on which he actually or constructively came to know about contents of the award. Their Lordships have held as under:

> **"[28] The following position therefore emerges from the interpretation of the proviso to section 18 of the Act :**
>
> **(i) If the award is made in the presence of the person interested (or his authorized representative), he has to make the application within six weeks from the date of the Collector's award itself.**
>
> **(ii) If the award is not made in the presence of the person interested (or his authorized representative), he has to make the application seeking reference within six weeks of the receipt of the notice from the Collector under section 12(2).**
>
> **(iii) If the person interested (or his representative) was not present when the award is made, and if he does not receive the notice under Section 12(2) from the Collector, he has to make the application within six months of the date on which he actually or constructively came to know about the contents of the award.**
>
> **(iv) If a person interested receives a notice under section 12(2) of the Act, after the expiry of six weeks from the date of receipt of such notice, he cannot claim the benefit of the provision for six months for making the application on the ground that the date of receipt of notice under section 12(2) of the Act was the date of knowledge of the contents of the award."**

5. In the instant case, petitioner immediately after coming to know about the award through other co-sharers made an application under section 18 of the Act for making reference to the District Judge for enhancement of compensation.

6. Accordingly, in view of the analysis and discussion made hereinabove, the writ petition is allowed. Order dated 7.4.2012 is set aside. Respondent No.2 is directed to make a reference to the learned District Judge under section 18 of the Act within a period of four weeks from today. Pending application(s), if any, also stands disposed of. No costs.

****

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

Shashi Bhushan. ...Petitioner

Versus

State of Himachal Pradesh and others. ...Respondents

CWP No. 9492 of 2014
Judgment Reserved on 10.8.2015
Date of decision: 02.9.2015

Constitution of India, 1950- Article 226- HRTC took a decision to fill up 680 posts of TMPAs by cancelling the earlier process- written tests and interviews were conducted- selection process was challenged- General Rules framed by the State Government regarding H.P. Subordinate Services Selection Board will not be applicable to HRTC, unless it is proved that notification was issued after the consultation with the corporation- advertisement is required to specify the rules and instructions under which the applications are being invited and on the basis of which selection is to be made- respondent/corporation is a State and cannot act arbitrarily – therefore, in absence of the guidelines, selection process has to be set aside- petition allowed. (Para-7 to 30)

Cases referred:

A. Srinath and others Vs. A.P. State Road Transport Corporation & ors., (2002) 9 SCC 750
M.P.S.R.T.C. Bairagarh Bhopal Vs. Ramchandra and others, AIR 1977 M.P. 243) (FB)
Krishan Yadav and another Vs. State of Haryana and others (1994) 4 SCC 165
M.P. State Coop. Bank Ltd., Bhopal Vs. Nanuram Yadav and others (2007) 8 SCC 264

For the Petitioner: Mr. Ajay Sharma, Advocate.

For the Respondents: Mr.Sharwan Dogra, Advocate General with Mr.Anup Rattan and Mr.Romesh Verma, Additional Advocate Generals with Mr.J.K. Verma, Deputy Advocate General for respondents No. 1 & 6.
Mr. Ajay Mohan Goel, Advocate, for respondents No. 2 & 4.
Mr.Surender Sharma, Advocate, for respondent No. 3.
Ms. Archana Dutt, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

By medium of this petition, the selection for the posts of Transport Multipurpose Assistants (Conductors) in the Himachal Pradesh Road Transport Corporation (for short "Corporation") has been questioned by the petitioner.

2. The facts in brief may be noticed:

The Corporation in its 126th meeting of Board of Directors held on 27th June, 2014 took a decision to fill up 680 posts of TMPAs by cancelling the earlier process for recruitment of conductors (contract basis) initiated on 22.7.2012 and 20.5.2013, respectively. Thereafter, advertisement was published on 18.7.2014 in the newspapers, pursuant to which the written test was conducted by respondent No. 3 and thereafter the interviews were conducted by respondent No. 2.

3. It is averred by the petitioner that the respondents have failed to maintain transparency and therefore, the entire process stands vitiated and should be quashed and set aside. In addition thereto the selection has also been challenged on the following amongst other grounds:-

(a) That change as is made with respect to question papers, particularly of General Knowledge from the previous years is malafidely made in order to confer an advantage upon the favorites.

(b) Selection process of TMPAs was not handed over as per guidelines to respondent No. 5, which is an independent selecting agency specifically engaged for appointment of Class III posts in all boards, corporations, undertakings etc. in the State of Himachal Pradesh.

(c) Respondent No. 2, HRTC and respondent No. 3 Technical Services Board are headed by one Hon'ble Minister.

(d) Respondent No. 3 was not having particular expertise available with it to conduct the selection.

(e) Panel of paper setters is provided by respondent No. 2 to respondent No. 3 which has no nexus sought to be achieved.

(f) Though the test is to be conducted by respondent No. 3 but yet interviews are to be again conducted by respondent No. 2, resulting in illegal selection.

(g) Before conducting interviews result of screening test have been illegally handed over by respondent No. 3 to respondent No. 2.

(h) Respondent No. 2 has continuously interfered in the selection conducted by respondent No. 3.

(i) There are certain candidates whose addresses are through missing in their admit cards yet they have been interviewed and selected.

4. The Corporation in its reply after raising certain preliminary objections has categorically maintained that it has ensured complete transparency in the entire selection process.

5. The H.P. Technical Education Board, which has been arrayed as respondent No. 3 has in its reply averred that it has sufficient experience in the field of conducting the entrance tests/screening tests and therefore, the task of filling up the posts of TMPAs was rightly assigned to it by the Corporation. It is further claimed that it had earlier conducted the screening tests for the recruitment of Pump Operators, which was entrusted to it by the Irrigation and Public Health Department. It also maintained that the entire process in the

instant case was carried out in a transparent, impartial and secret manner and no complaint of any kind of any irregularity was ever received.

6. The H.P. Subordinate Service Selection Board, i.e. proforma respondent No. 5 in its reply maintained that except for recruitment of some posts which have specifically been kept out of its purview by the State Government, it has been assigned the task of making recruitments of all Class-III posts of all Government Departments, Boards, Corporations etc. and for this purpose has relied upon Sub Rule 4.2 of the Rules of Business and Procedure of the Board, which provides *"all such Class-III posts of the State Public Sector Undertaking, Boards, Corporations, Universities and Local Bodies as may be entrusted to the Board by such Boards/Corporations/Universities and Local Bodies etc. keeping in view the Acts and byelaws governing them".*

We have heard the learned counsel for the parties and have gone through the records of the case as also the instructions and other records, including records of selection as were made available to us at the time of final hearing.

7. The learned counsel for the petitioner has vehemently contended that respondent No. 2, Himachal Pradesh Road Transport Corporation Limited is admittedly constituted under the provisions of Road Transport Corporation Act, 1950 (for short the "Act") and is, therefore, bound by the directions issued by the State Government from time to time, more particularly the directions relating to recruitment, condition of service etc., of its employees. He would contend that State Government vide notification dated 6th October, 1998 had issued general instructions, whereby all the State Public Sector Undertakings, Boards, Corporations, Universities and Local Bodies were directed to fill up all Class-III posts, falling within their purview only through respondent No. 5.

8. Respondent No. 5 in turn has supported this claim of the petitioner and would contend that respondent No. 5, Board in fact has been primarily constituted to make appointments to Class-III posts in all Public Sector Undertakings including respondent No. 2, Corporation.

9. It is not in dispute that as per Section 34 of the Act, the State Government has been vested with power to give directions to the Corporations by way of general instructions, which are required to be followed by the Corporations and such instructions may include directions relating to recruitment, condition of service and training of its employees etc.

Section 34 of the Act reads thus:-

> *"34. **Direction by the State Government**.—(1) The State Government may, after consultation with a Corporation established by such Government, give to the Corporation general instructions to be followed by the Corporation, and such instructions may include directions relating to the recruitment, conditions of service and training of its employees, wages to be paid to the employees, reserves to be maintained by it and disposal of its profits or stocks.*
>
> *(2) In the exercise of its powers and performance of its duties under this Act, the Corporation shall not depart from any general instructions issued under sub-section (1) except with the previous permission of the State Government."*

10. However, the moot question is as to whether the notification issued on 6.10.1998 (supra) can be considered to be "directions" issued by the State government, as contemplated under Section 34 of the Act. The relevant portion of this notification reads thus:-

> *"2.* ***Function of the Board:-*** *(1) All initial appointments to the Class. III services or posts, under the Himachal Pradesh Government, except the following, shall be made on the advice of the Board:-*
>
> *(i) Posts in the High Court of Himachal Pradesh;*
>
> *(ii) Posts in the HP Vidhan Sabha;*
>
> *(iii) Posts in the HP Administrative Tribunal and posts in HP Public Service Commission;*
>
> *(iv) Appointment to Class. III posts of wards of Govt. servants who die in harness;*
>
> *(v) Class.III posts/service recruitment to which is to be made against reserved vacancies for ex-servicemen including one dependent of the defence service personnel killed in action or disabled in action and rendered unfit for civil employment and Physically Handicapped;*
>
> *(vi) Such other posts, as may, from time to time, be excluded by the State Govt. from the purview of the Board.*
>
> *(2) All such Class.III posts of the State Public Sector, Undertakings, Boards, Corporations, Universities and Local Bodies etc. as may be entrusted to the Board by such Boards, Corporations, Universities and Local Bodies etc. keeping in view the Acts and Byelaws governing them."*

11. Here we may also note that the State Government vide notification dated 28.1.2004 has framed "Rules of Business & Procedure" of Himachal Pradesh Subordinate Service Selection Board, setting out there in a detailed procedure and mechanism for filing up Class-III posts.

12. Now in case the notification dated 6.10.1998 (supra) is minutely perused, it reveals that it is far too general in nature and makes no specific reference to the Himachal Pradesh Road Transport Corporation and therefore, mere mentioning of the "Corporations" in the notification would not make it applicable to all the Corporations, unless it is further proved that the notification was in fact issued after consultation with the respondent-Corporation, as envisaged under Section 34 of the Act.

13. Similar issue came up before the Hon'ble Andhra Pradesh High Court regarding the applicability of a Government order issued by the State Government of Andhra Pradesh laying down policy to be adopted by Public Sector Undertakings for payment of stipend to direct recruitees as trainees. There was no reference of Andhra Pradesh State Road Transport Corporation or its being consulted in the Government order and it was held by learned Single Judge that mere mentioning of all Public Sectors at the beginning of the Government order would not make it applicable to all the Public Sector Undertakings and accordingly the order was held to be beyond the purview of Section 34 of the Act.

14. The judgment of learned Single Judge was affirmed by learned Division Bench and finally when the matter was carried before the Hon'ble Supreme Court in case reported as ***A. Srinath and others Vs. A.P. State Road Transport Corporation and***

others, (2002) 9 SCC 750, it was held that the employees of the Corporations would be governed by the Rules and Regulations framed by the Corporations, as it was creation of statute and Government orders relating to the condition of service, as such, would not apply to the Corporation employees. It was observed as under:-

> *"3. On examining the relevant provisions of the Act, Rules and the Regulations framed and the materials on record, we do not find any substance in the aforesaid contentions raised by the learned Counsel appearing for the appellants. The very advertisement that was issued nowhere indicated that the officer under training during the period of training should be given any particular scale of pay. Notwithstanding the provisions contained in the Act conferring powers on the Corporation to frame regulations governing the service conditions of its own employees and such regulations having been framed there is no provision shown to us which says that such trainees would be given a specific scale of pay. The Corporation being the employer and having conferred the power to determine the service conditions of its own employees and no such stipulation being there in any of the Rules and Regulations framed by the Corporation, the stipend that was being given to these appellants cannot be said to be arbitrary or unreasonable so as to be interfered with by this Court in exercise of its power under Article 136 of the Constitution of India, It is no doubt true that the Government in exercise of its powers under Article 162 of the Constitution of India has issued a GOMs which would be applicable to the employees of the Government. Until and unless the Corporation itself adopts the same or by a general order accepts that all conditions of service issued by the Government for its own employees would also be applicable to the employees of the Corporation, it is difficult for us to accept the condition of Mr. Sita Rama appearing for the appellants that the Corporation employees like the appellants should have been governed by the aforesaid GOMs issued by the State Government."*

15. In view of the aforesaid, it can safely concluded that the instructions issued vide notification dated 6th October, 1998 cannot be held to be directions as contemplated under Section 34 of the Act.

16. In this background, the next question which then falls for our consideration is as to on what basis was the advertisement inviting applications for filing up the posts of TMPAs issued on 18.7.2014 and published in newspapers i.e. Divya Himachal and Tribune.

17. As per the minutes of the 126th meeting relating to appointment of TMPAs, the Rules were yet under contemplation and had been ordered to be finalized by a committee consisting of Principal Secretary (Transport), Managing Director, HRTC and Executive Director, HRTC and at the same time the process earlier initiated for recruitment of Conductors (on contract basis) on 12.7.2012 and 20.5.2015 had been ordered to be cancelled. It is apt to reproduce relevant agenda item, which reads thus:-

> *"126.02 Al* ***Policy for Passenger Services Assistant in Himachal Road Transport Corporation.***
>
> *The BOD approved to designate Passenger Services Assistant as TMPA. Rules will be finalized by the Committee consisting*

of Principal Secretary (Transport), Managing Director, HRTC and Executive Director, HRTC.

The processes initiated for recruitment of Conductor (on contract) on 12.07.2012 and 20.05.2013 were cancelled.

Fresh applications will be called for recruitment of TMPAs on monthly remuneration of Rs.4000/- + ½ % incentive on the revenue generated. The application forms will be printed by H.P. Takniki Siksha Board Dharamshala and sold by the Regional Managers, HRTC. The HRTC will charge Rs.100/- per candidate as processing fee. The candidates will submit their applicatiosn in the office of Secretary, H.P. Takniki Siksha Board Dharamshala by the stipulated date. The Admit cards will be prepared and posted by H.P. Takniki Siksha Board Dharamshala and uploaded on website by them. They will provide Centerwise list, cutlist and attendance sheet to the HRTC. The question papers will be set by the H.P. Takniki Siksha Board Dharmshala and printed question papers & answer sheets will be provided to HRTC as per requirement. The test will be conducted by HRTC and answer sheets will be handed over to H.P. Takniki Siksha Board by HRTC. The evaluation process will be done by H.P. Takniki Siksha Board Dharamshala. The categorywise list of candidates for conducting interviews will be provided by H.P. Takniki Siksha Board. Interviews will be conducted by the HRTC Offices. Interview marks will be handed over to H.P. Takniki Siksha Board and final result after incorporating the marks of interview will be prepared by H.P. Takniki Siksha Board Dharamshala. The HRTC will pay Rs. 20 lakhs for these activities to the H.P. Takniki Siksha Board Dharamshala."

18. Why the issuance of advertisement assumes great relevance in the instant case is because admittedly despite there being no mechanism in place whether by way of guidelines, draft Rules, or even a decision by any authority, much less a competent authority, the advertisement surprisingly lays down certain conditions with respect to age and other eligibility conditions and also makes reference to the reservation etc. Here it would be apt to reproduce the relevant extract of the advertisement, annexed with the reply as Annexure R-1, which reads thus:-

***"2. Age & other eligibility conditions**:-*

A person/candidate shall be eligible to be selected as Transport Multi Purpose Assistant if:

a) His/her age on 1st January of the year in which he/she applied for the post is between 18 to 45 years relaxable to SC & ST candidates for five years.

b) He/She is bonafide resident of Himachal Pradesh.

c) He/She is of sound mind and good health. He has not been disqualified for appointment for Public Service or removed from Public Services on disciplinary ground or has sought voluntary retirement under any Government policy.

d) *He/She has not been convicted for any offence criminal or on moral turpitude."*

3. ***Category-wise number of vacancies is mentioned below:-***

Gen	*Gen (BPL)*	*Gen (FF)*	*Gen (Ex-Ser)*	*Gen (Sports)*	*SC*	*SC (BPL)*
232	*55*	*07*	*61*	*20*	*106*	*20*
SC (FF)	*SC (Ex-Ser)*	*ST*	*ST (BPL)*	*ST (Ex-Ser)*	*OBC*	*OBC (BPL)*
04	*20*	*20*	*07*	*07*	*85*	*20*
OBC (FF)	*OBC (Ex-Ser)*					
03	*13*					

7. *The last date for receipt of application is 14.08.2014 up to 5.00 P.M.*

12. *The written test will be of matric standard consisting of English, Hindi, Math and G.K. The detail is available on HRTC website.*

15. ***The applicants who have applied in response to our earlier advertisement dated 12.07.2012 & 20.05.2013 have to apply afresh on the prescribed application form for this post."***

It is evident from clause 7 of the advertisement that last date for receipt of application was 14.8.2014, whereas the Rules came to be finalized and notified only on 30.8.2014.

19. Now, in absence of any rules, regulations, executive orders, guidelines or instructions or even a decision by a competent authority, how the aforesaid qualifications came to be incorporated in the advertisement, is anybody's guess. When called upon, the learned counsel for respondent No. 2 was at a total loss to explain this position and has candidly conceded that he could not improve the position, as was available on record.

20. It is a trite that an important requirement of public appointment is that of transparency. Therefore, the advertisement is required to specify the Rules or instructions under which the applications are being invited and upon the basis of which the selection is to be made. The advertisement has essentially to comply with the procedure prescribed in the Rules or guidelines of selection.

21. The requirement of the advertisement being in consonance to the procedure adopted for conducting the selection is necessary to prevent arbitrariness and to avoid change of criteria of procedure during or after the selection process. The absence of arbitrary power is the first postulate of rule of law upon which our whole constitutional edifice is based. In a system governed by rule of law, discretion when conferred upon an executive authority must be confined within clearly defined limits. If the discretion is exercised without any principle or without any rule, it is a situation amounting to the antithesis of rule of law. Discretion means sound discretion guided by law or governed by known principles of rules and not by the whim or fancy or caprice of the authority.

22. Learned counsel for respondent No. 2 would however vehemently argue that the advertisement has no relevance in view of the Rules now formulated by it under Section 45 of the Act.

23. Before adverting to the provisions of Section 45 of the Act, it is necessary to examine certain other provisions of the Act, which have important bearing on the subject

matter of the instant case. Section 2(b) defines "Corporation" to mean the Road Transport Corporation established under Section 3 of the Act. Section 3 relates to establishment of Road Transport Corporation in States. Under Section 4, every Corporation shall be a body corporate, by the name notified under Section 3, having perpetual succession and a common seal, and shall by the said name sue and be sued. Section 5 relates to the management of the Corporation and to its Board of Directors and under Sub-section (1), the general superintendence, direction and management of the affairs and business of a Corporation shall vest in a Board of Directors which, with the assistance of its committees and Managing Director, may exercise all such powers and do all such acts and things as may be exercised or done by the Corporation. Section 45 relates to the power to make regulations and reads as under:-

> *"45.* ***Power to make regulations****.—(1) A Corporation may, with the previous sanction of the State Government, make regulations, not inconsistent with this Act and the rules made thereunder, for the administration of the affairs of the Corporation.*
>
> *(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:—*
>
> *(a) the manner in which, and the purposes for which, persons may be associated with the [Board] under section 10;*
>
> *(b) the time and place of meetings of the [Board] and the procedure to be followed in regard to transaction of business at such meetings;*
>
> *(c) the conditions of appointment and service and the scales of pay of officers and [other employees of the Corporation other than the Managing Director, the Chief Accounts Officer and the Financial Adviser or, as the case may be, the Chief Accounts Officer-cum-Financial Adviser];*
>
> *[(d) the issue of passes to the employees of the Corporation and other persons under section 19;*
>
> *(e) the grant of refund in respect of unused tickets and concessional passes under section 19.]"*

24. Undoubtedly, Section 45 of the Act empowers the Corporation to make regulations, but that is subject to the previous sanction of the State Government. This necessarily requires three steps:-

(i) The Corporation "frames or "proposes" regulations by its resolution. These have to be sent to the State Government for according sanction.

(ii) The State Government then accords its sanction. In this power of the Government it is implicit that it may reject or suggest amendment or modification in the proposed regulations and eventually accord its sanction.

(iii) After the State Government accords its sanction, the Corporation "makes" regulations.

This third step is necessary because the expression "previous sanction of the State Government" necessarily denotes that the Corporation in order to "make" the regulation has to do something "after" the sanction of the State Government. To put it differently the

"previous sanction" is a step earlier than the "making of the regulations." (refer ***M.P.S.R.T.C. Bairagarh Bhopal Vs. Ramchandra and others, AIR 1977 M.P. 243***) ***(FB).*** Indisputably, none of the aforesaid processes has been followed by respondent No. 2 before issuing notification dated 30.8.2014.

25. The power conferred on the Corporation to make regulations is a power which, under Section 5(1), vests in and is exercised by the Board of Directors of the Corporation. Whereas, the power to make regulations relating to the conditions of service of officers and other employees of the corporation, under Section 45(2)(c) is vested in the Board of Directors of the Corporation and such a power to make regulations (commonly termed as Rules by the Corporation) can only be exercised with the previous sanction of the State Government.

26. Once statute is clear and unambiguous and clearly uses the words "previous sanction", there can be no matter of doubt that before resorting to any exercise which would fall within the purview of Section 45 of the Act, the concurrence of the State Government is required whereas the records reveal that no such sanction has been obtained. Therefore, it can safely be concluded that the so called Rules/regulations have not legally come into force.

27. It is more than settled that public offices, both big and small, are sacred trusts. Such offices are meant for use and not abuse and in case large scale fraud is committed so as to shock the conscious of the Court, then the law is not that powerless and would step into quash the entire selection. This was so observed by the Hon'ble Supreme Court in ***Krishan Yadav and another Vs. State of Haryana and others (1994) 4 SCC 165*** as under:-

> *"**16**. Having regard to all the above, the irresistible conclusion is "fraud has reached its crescendo". Deeds as foul as these are inconceivable much less could be perpetrated. We are reminded of the words of Shakespeare:*
>
> > *"Thus much of this, will make Black, white; foul, fair; wrong, right; Base, noble; Ha, you gods! why this?"*
> >
> > *(Timon of Athens, Act IV, Sc. 3)*
>
> ***17**. It may not be too much to draw an inference that all these were motivated by extraneous considerations. Otherwise, how does one account for selection without interview, fake and ghost interviews, tampering with the final records, fabricating documents, forgery? Each of this would attract the penal provisions of Indian Penal Code. They have been done with impunity.*
>
> ***18**. The story does not end here. From out of the "selection list" secret Communications have been sent to the candidates. Selections were made without medical test or verification of antecedents.*
>
> ***19**. It is highly regrettable that the holders of public offices both big and small have forgotten that the offices entrusted to them are sacred trusts. Such offices are meant for use and not abuse. From a Minister to a menial everyone has been dishonest to gain undue advantages. The whole examination and the interview have turned out to be farcical exhibiting base character of those who have been responsible for this sordid episode. It shocks our conscience to come across such a systematic fraud. It is somewhat surprising the High Court should have taken the path of least*

Resistance stating, in view of the destruction of records, that it was helpless. It should have helped itself. Law is not that powerless.

***20**. In the above circumstances, what are we to do? The only proper course open to us is to set aside the entire selection. The plea was made that innocent candidates should not be penalised for the misdeeds of others. We are unable to accept this argument. When the entire selection is stinking, conceived in fraud and delivered in deceit, individual innocence has no place as "fraud unravels everything". To put it in other words, the entire selection is arbitrary. It is that which is faulted and not the individual candidates. Accordingly we hereby set aside the selection of Taxation Inspectors.*

***24**. All these efforts by us are aimed at cleansing the public administration. No doubt, it may be stupendous task but we do hope this small step will make great strides in the days to come. Accordingly, the appeals stand allowed."*

28. In ***M.P. State Coop. Bank Ltd., Bhopal Vs. Nanuram Yadav and others (2007) 8 SCC 264*** the Hon'ble Supreme Court has culled out the following principles to be followed in the matter of public appointments:-

"24. It is clear that in the matter of public appointments, the following principles are to be followed:

(1) The appointments made without following the appropriate procedure under the Rules/Government Circulars and without advertisement or inviting applications from the open market would amount to breach of Articles 14 & 16 of the Constitution of India.

(2) Regularisation cannot be a mode of appointment.

(3) An appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularization.

(4) Those who come by back door should go through that door.

(5) No regularization is permissible in exercise of the statutory power conferred under Article 162 of the Constitution of India if the appointments have been made in contravention of the statutory Rules.

(6) The Court should not exercise its jurisdiction on misplaced sympathy.

(7) If the mischief played so widespread and all pervasive, affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, it will neither be possible nor necessary to issue individual show-cause notice to each selectee. The only way out would be to cancel the whole selection.

(8) When the entire selection is stinking, conceived in fraud and delivered in deceit, individual innocence has no place and the entire selection has to be set aside."

29. Respondent No. 2 being creation of statute is admittedly a State within the meaning of Article 12 of the Constitution of India and cannot therefore, act like a private individual, who can act in a manner whatsoever he likes, unless it is interdicted or prohibited by law. Rather its power as an employer are more limited than that of a private employer inasmuch as it is subject to constitutional limitations and cannot be exercised arbitrarily. It is trite that the State and its instrumentalities have to act strictly within the four corners of law and all its activities are governed by rules, regulations and instructions. It is more then settled that when a statutory authority is required to do a thing in a particular manner then the same must be done in that manner or not at all.

30. Now once it is established that there was no credible mechanism in place whether, by way of guidelines, rules, regulations or instructions, or even a decision by any authority, much less a competent authority on the basis of which the advertisement for filling up the posts of TMPAs has been issued and thereafter the selection conducted, the entire process of selection as undertaken by respondent No. 2 stands vitiated and is therefore, declared as null and void, besides being arbitrary and is accordingly set aside. In such circumstances, the other contentions as raised in this petition are rendered academic and therefore, need not be adverted to. Accordingly, the writ petition is allowed, leaving the parties to bear their costs.

****

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

State of Himachal Pradesh .....Appellant.

Versus

Reeta Devi & others ....Respondents.

Cr. Appeal No. 734 of 2008.
Reserved on: 21.08.2015.
Date of Decision: 2nd September, 2015.

Indian Penal Code, 1860- Sections 372, 376 (2)(g), 506, 120-B- **Immoral Traffic (Prevention) Act, 1956-** Sections 5 and 6- Prosecutrix was called by 'S' - she was asked to accompany to the house of 'R', daughter of 'S'- 'R' took her to the house of someone where she was raped- 'R' gave her Rs. 1,000/-- prosecutrix was taken to a hotel where she was again raped- 'R' gave her Rs. 200/- and one mobile phone- prosecutrix was taken to a rest house where she was raped by two person - 'R' again gave her Rs. 500/- 'R' also threatened the prosecutrix- prosecutrix filed a written complaint narrating these incidents- date of birth of the prosecutrix was recorded to be 10.6.1992 in the school leaving certificate- however, record of the school, where prosecutrix was initially admitted was not produced in the evidence- date of birth was also recorded in PW-9/A but this entry was made in ink pen, whereas rest of the entries were made in ball pen – the person who exhibited the documents was not examined- the age of the prosecutrix was stated to be 15-17 years by radiologist with the margin of 2-3 years and thus, prosecutrix is not proved to be a minor – prosecutrix had not mentioned the specific dates and had reported the matter to the police belatedly- no satisfactory explanation for delay was given - there were inter-se contradictions between the FIR and the statement recorded by the Magistrate- there was no evidence that accused were kept with their faces muffled after their arrest- I.O/SHO remained present during

identification, which made identification doubtful- held, that in these circumstances, prosecution case was not established and the trial Court had rightly acquitted the accused.

(Para-9 to 15)

For the Appellant:	Mr. M.A. Khan, Additional Advocate General with Mr. P.M. Negi, Deputy Advocate General and Mr. Ramesh Thakur, Assistant Advocate General.
For Respondents No.1 to 3:	Mr. G.R. Palsra, Advocate.
For Respondents No.4 to 8:	Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed by the State of H.P. against the judgment of the learned Additional Sessions Judge (II), Kangra at Dharamshala, rendered in Sessions Case No. 14-P/VII/2007, whereby, the learned trial Court acquitted the accused for theirs having allegedly committed offences punishable under Sections 372, 376 (2)(g), 506, 120-B of the IPC and Sections 5 and 6 of Immoral Traffic (Prevention) Act.

2. Briefly stated the facts of the prosecution case are that on 4.2.2007 a written complaint addressed by the prosecutrix to In-charge Police Station, Jogindernagar accompanied by the copy of daily diary No.9 of 4.2.2007, Police Station Jogindernagar, District Mandi was received in Police Station, Palampur disclosing therein that she is the resident of Samlot, Tehsil Jogindernagar, District Mandi, H.P., aged 14 years and she used to go to ration shop of one Partap Singh to purchase ration for her house. Smt. Soma Devi, the wife of Partap Singh, called her one day to her room and thereafter she had a sweet talks with her and thereafter asked the prosecutrix to accompany her to the house of her daughter by making any excuse to her grand-mother as to claim to visit her friend's house and thereafter the victim was taken by Soma Devi to the house of her daughter Reeta Devi at Village Harabag where the victim was persuaded to enter upon for committing bad act as it had no effect since Soma Devi claimed her approach to Dy. S.P. and thereby police could not damage her. On the next day Reeta Devi met the victim at Jogindernagar and called her to Baijnath in a bus along al-alone as Reeta Devi said her to meet her there and thereby none would suspect as onwards Reeta undertakes to accompany her. The victim has further disclosed in her complaint that Reeta took her to Nagrota to some one's house where she was made to sit in a room and Reeta left to some other room and after some time one person came over there who bolted the room from inside and started teasing her and when she cried and called Reeta to be her sister then Reeta coming over there from the other room and bolted the room from outside and thereafter the victim was raped and she became unconscious and when she regained her consciousness Reeta Devi gave her Rs.1000/- and left at Baijnath from where the victim came to Jogindernagar. The victim has further disclosed in her written complaint that second time she was taken by Reeta to Hotel Pops, Gopalpur as the victim was accompanied by another woman namely Poonam where she was raped in a Hotel by two persons and thereafter Reeta gave her Rs.200/- and one Mobile Phone. The victim has further disclosed in her complaint that after some days she was taken to Palampur Rest House where she was raped by two persons and in the evening Reeta accompanied her upto Baijnath where she was given Rs.500/- by Reeta. The victim has further disclosed in her written complaint that Reeta threatened her thereafter if she

disclosed these facts to any one and further proclaimed to be lifted her from her house as the the victim claimed herself to be poor person and thereby sought assistance of the police. On the basis of aforesaid facts FIR was registered in Police Station, Palampur and the investigation was carried out. During the course of the investigation the victim was sought to be medically examined and on her medical examination she was opined to be habitual of sexual intercourse and her bone age was opined to be between 15 to 17 years. The police, during investigation obtained the birth certificates of the prosecutrix from Senior Secondary Girls School, Jogindernagar and Nagar Panchayat Jogindernagar in which the date of birth of the victim was found to be 10.06.1992. Thereafter, accused Reeta, and Poonam Thakur were arrested. The places of occurrences were identified by the victim and the visitors register maintained in Hotel Pops was taken into possession and thereafter accused Happy and Nek Ram were arrested and they were got medically examined. The police also get the place of occurrence to be identified from accused Reeta and Poonam Thakur and thereafter arrested accused Hoshiar Singh. During the course of identification parade accused Hoshiar Singh, Nek Ram and Happy were identified by the victim. The police has also arrested the accused Rajesh Saini and Harinder Pal Singh and both of them on theirs being subjected to medical examination by the medical officer, they were opined to be capable of doing sexual intercourse. During identification parade accused Rajesh Saini and Harinder Pal Singh were also identified by the victim. On completion of the investigation, the police came to the conclusion that accused Soma Devi and Reeta after giving allurement to the victim persuaded her for illicit intercourse and thereby used her for prostitution being minor and as such Soma Reeta and Poonam Thakur used to accompany the victim to be taken outside her house and thereby practiced prostitution and also used the victim being minor for the purpose of prostitution for consideration as the victim was taken on 20.01.2007 by Reeta Devi to Pops Hotel, Chachian where the victim was raped by Rajesh Saini and Harinder Pal Sodhi and Reeta had also sexual intercourse with accused Rajesh Saini and Harinder Pal Singh Sodhi and thereafter Reeta paid Rs.1000/- to the victim. The police had also come to the conclusion that the victim was taken on 21.1.2007 by accused Reeta to HPSEB, Rest House, Palampur where accused Nek Ram committed rape with the victim as the accused Happy brought the accused Nak Ram and accused Hoshiar Singh provided room of the rest house to accused as also had sexual intercourse with accused Reeta Devi and paid Rs.500/- to the victim. The police had also come to the conclusion that accused Baboo, Rajiv Gaga and Sushil as well as Deepu and Patiyal could not be arrested as their identity has not been established for want of complete description, though Reeta and Poonam Thakur accompanied the victim at Varuni House, Chaudhary Cottage, Mecloadganj and Jagtamba Hotel Dahad where the victim was raped by the accused and Reeta and Poonam had also sexual intercourse and thereafter paid consideration to the victim.

3. On conclusion of the investigation, into the offences, allegedly committed by the accused, report under Section 173 of the Code of Criminal Procedure was prepared and filed in the competent Court.

4. Accused Reeta Devi, Soma Devi, Poonam Thakur were charged for theirs having committed offences under Sections 372, 506 and 120-B of the IPC and Sections 5 and 6 of the Immoral Traffic (Prevention) Act and accused Hoshiar Singh, Rajesh Saini, Nek Ram, Happy and Harinder Pal Singh were charged for theirs having committed offences punishable under Sections 376(2)(g), 506 and 120-B of the IPC by the learned trial Court. In proof of the prosecution case, the prosecution examined 26 witnesses. On conclusion of recording of the prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the Court, in which the accused claimed false implication.

5. The learned trial Court on appreciation of the evidence on record, returned findings of acquittal in favour of the accused.

6. The State of H.P. is aggrieved by the findings of acquittal recorded by the learned trial Court. The learned Additional Advocate General appearing for the appellant/State has concertedly and vigorously contended that the findings of acquittal recorded by the learned trial Court are not based on a proper appreciation of evidence on record, rather, they are sequelled by gross mis-appreciation of material on record. Hence, he contends that the findings of acquittal be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction.

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

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

9. The prosecution version is spelt out in Ex.PW7/A, besides in Ex.PW7/H. The former is the complaint lodged by the prosecutrix with the police station concerned and the latter is the statement under Section 164 of the Cr.P.C., recorded by the prosecutrix before the Magistrate concerned The prosecutrix is alleged to have been on or before 29.10.2006, 31.12.2006, 20/21.1.2007 while being facilitated for consideration by accused Soma, Rita and Punam Thakur subjected to while hers being a minor, forcible sexual intercourse at Pops Hotel, Chachian, HPSEB Rest House Palampur, Varuni House Khada Danda Road Mcleodganj and Chauhdary Cottage Jogibara Road Macleodganj. However, the report qua the alleged occurrences with the police station concerned came to be lodged on 04.02.2007. The sole testimony of the prosecutrix while engendering trustworthiness, besides inspiring confidence can constitute the anvil for securing findings of conviction against the accused/respondents herein. The factum whether the statement of the prosecutrix is ingrained with credit worthiness would ad nauseam be adverted to hereinafter. At the out set, it is imperative to determine whether the prosecutrix at the time of the alleged occurrence was a minor especially when the evidence on record, whose probative worth would be adverted to, besides evaluated hereinafter may unfold the factum of the sexual intercourses to which she was allegedly forcibly subjected to, by the accused were aroused by her consent. Ex.PW8/A records the factum of date of birth of the prosecutrix to be 10.06.1992. However, Ex.PW8/A is the school leaving certificate of the prosecutrix. It merely manifests the fact of hers having been admitted in 6th class in Senior Secondary Girls School, Jogindernagar and having been withdrawn therefrom in 7th Class. The occurrence of an entry of the date of birth of the prosecutrix therein would acquire tenacity only in the event of the prosecution having adduced into evidence the record maintained in the school where the prosecutrix stood admitted. Since, the record of the school where the prosecutrix was admitted remained unadduced by the prosecution whereas it constituted the best evidence to display that the recording of the date of birth of the prosecutrix in school leaving certificate constituted in Ex.PW8/A portrayed an accurate depiction thereof, in sequel, absence of its adduction, constrains an inference that the reflections in Ex.PW8/A qua the date of birth of the prosecutrix being 10.06.1992 cannot be imputed credence nor hence it can be concluded to be an authentic date of birth of the prosecutrix, more so, when the adduction into evidence of the records of the school where the prosecutrix stood admitted would have portrayed whether the entry recorded therein

was or was not at the instance of the father of the prosecutrix for, hence, its being imbued with legal vigour or its being legally frail. Reiteratedly for non adduction of the records of the school where the prosecutrix stood admitted, a firm conclusion which comes to be drawn by this Court is that the entry qua the date of birth of the prosecutrix recorded in Ex.PW8/A is neither founded upon nor embedded in the apposite best evidence nor when the authenticity of source thereof, besides its probative efficacy is obscure, hence, unreliable. Besides Ex.PW9/A reflects the date of birth of the prosecutrix to be 10.06.1992 yet it too does not acquire any hue of veracity given the occurrence in the deposition of PW-9 of the entry qua the date of birth of the prosecutrix therein having come to be recorded with an ink pen whereas the remaining entries in the register are in ball pen. Moreover, the person who incorporated the entry qua the date of birth of the prosecutrix in Ex.PW9/A though deposed by PW9 to be in service yet when he remained unexamined for eliciting from him, the basis on which he entered with an ink pen the date of birth of the prosecutrix in Ex.PW9/A renders hence the incorporation of the date of birth of the prosecutrix in Ex.PW9/A to be ridden with suspicion hence not reliable, being engineered as well as manipulated. PW-6 Dr. Kalpana Mahajan, Radiologist has in Ex.PW6/C opined the bone age of the prosecutrix to be 15 to 17 years, besides she in her cross-examination admits that a variance of 2-3 years occurs in the age of the prosecutrix opined by her to be ranging between 15 to 17 years. In sequel, when the benefit of the upper margin is to be given to the accused, hence, the prosecutrix is to be construed to be aged above 17 years hence not a minor at the time of the alleged occurrence. Reinforcingly, with the prosecutrix in her cross-examination having admitted that her mother had left her when she was aged 3 years and that it was 17 years ago when her mother had left her engenders an inference that the prosecutrix as portrayed by the aforesaid discussion was not a minor at the time of the alleged occurrence.

10. Having determined that the prosecutrix at the time of the alleged occurrence was not a minor, the further factum which remains to be fathomed is whether the testimony of the prosecutrix constituted in Ex.PW7/A and in Ex.PW7/H has remained unfaulted for occurrences therein of any intra se contradictions, besides whether the revelations qua the occurrences by the prosecutrix in both Ex.PW7/A and in Ex.PW7/H do not suffer from the taint of any intra se contradictions with her deposition recorded on oath in Court. Moreover, it has also to be determined whether the deposition of the prosecutrix in her examination-in-chief stands uneroded in her cross-examination. In the event of intra se contradictions existing in the narration qua the occurrences by the prosecutrix in Ex.PW7/A vis-a-vis Ex.PW7/H, besides with her deposition on oath recorded in Court underscoring contradictions with both Ex.PW7/A and Ex.PW7/H, as also, with her testimony in her examination-in-chief having suffered erosion by hers contradicting it in her cross-examination, would lend impetus to a natural inference that the testimony of the prosecutrix is legally un-worthwhile besides incredible.

11. Ex.PW7/A is the complaint lodged by the prosecutrix with the police station concerned on 4.2.2007. In Ex.PW7/A though she has disclosed that she was taken to different places on different dates during the month of December, 2006 and January, 2007 yet she has not mentioned therein the specific dates when she was subjected to alleged forcible sexual intercourses by the male accused while hers having been facilitated by the female accused for consideration to be subjected to forcible sexual intercourses by the former. The specific dates on which she was subjected by the accused to the commission of offences upon her remains unmentioned even in Ex.PW7/H. The prosecutrix in Ex.PW7/A advances a purported explanation for the belated lodging of a report qua the incident comprised in the fact of hers having been threatened by accused Rita to be lifted from her house in case of any disclosure qua the occurrence to any one. Nonetheless, the meting out

of or advancing of threats by accused Rita Devi to her against hers disclosing the incident to anyone remains unenunciated in her deposition recorded on oath by the learned trial Court. Consequently, the version spelt out by the prosecutrix in Ex.PW7/A qua threats against hers disclosing the incident to anyone having been advanced to her by accused Rita and its purportedly constituting the explanation for the belated lodging of the FIR when remains un-communicated in her recorded deposition on oath, obviously when the version aforesaid in Ex.PW7/A constituting the purported explanation for the belated lodging of the FIR having hence suffered intra se contradictions comprised in her reticence in unfolding the said version in her recorded deposition on oath renders the said version qua its succoring a conclusion qua its constituting a tenable explanation qua the belated lodging of an FIR qua the occurrence, to be bereft of veracity rather ridden with the taint of falsity. Consequently, with the delay in the lodging of the FIR having remained unexplained, the version constituted in Ex.PW7/A and Ex.PW7/H qua the incident, besides her version on oath qua the incident before the learned trial Court has to be construed to be an invention or a concoction being engineered by an afterthought. Moreover, when hence the aforesaid fact of hers having not divulged the incident to anyone earlier than on 4.2.2007 qua occurrences which took place in the months of December, 2006 and January, 2007, especially when the inferences drawn hereinabove dispel the fact of any impressions of exertion of any threat or duress against her disclosing the incident enuring or remaining etched in her psyche has invited an inference of the narrations qua the incident comprised in Ex.PW1/A to be an afterthought. The further omission on her part while traveling alone from her house to board the bus at Jogindernagar for commuting thereof to Baijnath and Dharamshala and commuting from the latter places to home, to not disclose the incident to the passengers occupying the bus or her relatives or her grandmother, besides reticences on her part as also omissions on her part to raise an outcry against the commission upon her, if any, at the instance of the accused of the offences alleged against them for attracting the attention of the employees or of the occupants of the hotels/rest houses which she occupied, facilitates a deduction that the penal acts, if any, attributed by the prosecutrix to the accused were consensual. Moreover, the lack of specificity of dates of occurrence of the alleged penal acts attributed to the accused by her which nebulousness qua the aforesaid facet in both Ex.PW7/A and Ex.PW7/H as well as in her deposition recorded on oath constrains a conclusion that her version qua the alleged occurrences does not engender the confidence of this Court. The fact that in Ex.PW7/H, she propounds that she visited 7 places on different dates yet when she in Ex.PW7/H underscores the fact of one Saini and one Sardar being present at Pops Hotel yet does not name them to be the persons who committed penal misdemeanors upon her, leads to an apt sequel that with the prosecutrix having in Ex.PW7/A named Saini and Sardar to be the persons who at Pops Hotel perpetrated sexual intercourse upon her, whereas, in Ex.PW7/H she exculpates them of an incriminatory role previously attributed by her to them hence with intra se contradictions having occurred vis-a-vis the attribution by her of an incriminatory role to Saini and Sardar in Ex.PW7/A with Ex. PW7/H wherein there is an exculpation of an incriminatory role to the aforesaid, that as such the version spelt out by the prosecutrix in Ex.PW7/A attributing an incriminatory role to Saini and Sardar is rendered legally unwrothwhile and untrustworthy. Consequently, qua both Saini and Sardar as aptly concluded by the learned trial Court no findings of conviction can be returned for the charges for which they stood charged. Moreover, in Ex.PW7/A, the prosecutrix narrates that at Palampur in HPSEB Rest House two persons committed rape upon her. On the other hand, in Ex.PW7/H she has divulged therein that only Nek Ram perpetrated a penal misdemeanor upon her. Obviously, with the prosecutrix having hence unfolded a rife contradiction while attributing in Ex.PW7/A an inculpatory role to two persons in the incident which occurred at Palampur in HPSEB Rest

House, whereas in Ex.PW7/H there is an attribution of an inculpatory role to only one Nek Ram renders her attribution of an inculpatory role to Nek Ram also to be a concoction as well as an invention. In Ex.PW 7/H, the prosecutrix has alleged several incidents of penal misdemeanors having been perpetrated upon her initially at Nagrota Bagwan, then at the Rest House/Guest House at Dharamshala as well as at Chaudhary cottage Mecloadganj, Varuni Hotel Mecloadganj and in Jagtamba Hotel Malan. However, the persons who perpetrated the penal misdemeanors upon the prosecutrix at the places aforesaid stand unimpleaded as accused nor the occurrences aforesaid detailed in Ex.PW7/H find any recital in Ex.PW7/A. The fifth occurrence is alleged to have occurred at Pops hotel wherein there is an attribution of an inculpatory role to Saini and Sardar which attribution of an inculpatory role to them for the reasons aforesaid is legally frail. In addition, the sixth incident which occurred at Palampur in HPSEB Rest House, qua which in Ex.PW7/H there is an attribution of an inculplatory role to accused Nek Ram, which attribution for the reasons constituted hereinabove, has been construed to be suffering legal emasculation arising from the fact of hers in contradiction in Ex.PW7/A recited the fact of hers being at the place aforesaid forcibly subjected to sexual intercourse by two persons. Besides the prosecutrix proclaims that the 7th incident of a penal misdemeanor perpetrated upon her person occurred at Bhunter yet the persons who perpetrated the penal misdemeanor upon her remained unimpleaded as accused to face the trial given the statement of the Investigating Officer that the whereabouts and identity of those persons could not be established, even when the prosecutrix during her recorded deposition on oath before the learned trial Court had specifically named the persons. Even otherwise with the prosecutrix in Ex.PW7/H having proclaimed that the 7th incident of penal misdemeanor was perpetrated upon her at Bhuntar by one Rajender or Rabender yet when she has neither therein recited the specific date of the alleged occurrence nor she has pronounced therein that at Bhunter she was subjected to forcible sexual intercourse, consequently, with hers for the reasons aforesaid being a major, she is to be concluded to have voluntarily visited Bhuntar and consensually succumbed to the sexual overtures of Rajender or Rabender.

12. Apart therefrom, the attribution by the prosecutrix in Ex.PW7/H of an incriminatory role to Deepu and Patiyal of theirs having subjected her to sexual intercourse at Jagdamba Hotel, Malan, besides to one Babbu of his at Varuni Hotel, Mecloadganj having too subjected her to sexual intercourse cannot constitute evidence against the aforesaid of theirs at the places aforesaid having subjected her to forcible sexual intercourses especially when she in Ex.PW7/H has not with specificity articulated the dates on which the alleged occurrences took place for gauging whether they stood committed upon her at a time proximate to the narrations unraveling an incriminatory role to the aforesaid in Ex.PW7/H. In sequel, the inevitable conclusion is that the persons aforesaid named in Ex.PW7/H are to be inferred to have perpetrated sexual intercourse upon her while it having been spurred from consent meted to them by the prosecutrix. More so, for the reasons aforesaid their naming in Ex.PW 7/H is to be construed to be remotely distant or improximate in time to the occurrences attributed to them in Ex. PW7/H and with the delay in the imputations against them by the prosecutrix having remained unexplained renders their naming by the prosecutrix in Ex.PW7/H to be a contrived mechanism on her part.

13. Furthermore, the efficacy of entries Ex.PW13/C and Ex.PW13/D in Register Ex.PW13/B purportedly in substantiation of the factum of the prosecutrix along with the woman accused besides one Saini and Sardar having occupied room No.202 in Pops Hotel, Chachian, stands effaced by the fact that the said entries stand recorded in different ink vis-a-vis the other entries recorded in hotel register in Ex.PW13/B, hence, in face thereof and with PW-14 Raj Kumar, the Manager of Pops Hotel being unable to spell out in his

deposition that the accused or the prosecutrix had occupied the hotel, an inference which ensues is that the version of the prosecutrix of hers along with the accused having visited Pops Hotel stands to face obliteration. Even the deposition of PW-11 underscoring the fact that the rooms in HPSEB, Rest House, Palampur are allotted with the permission of the S.D.O., repulses the effect of the version of the prosecutrix of hers having stayed at HPSEB, Rest House, Palampur along with the male accused while theirs being accompanied by the lady accused. When the entries comprised in Ex.PW13/C and Ex.PW13/D construed in conjunction with deposition of PW-14, who has been unable to spell out in his deposition the fact of the prosecutrix or the accused having purportedly stayed therein, besides with PW-11 having proclaimed that the rooms in HPSEB, Rest House, Palampur cannot come to be alloted except with the permission of the SDO, constrains a conclusion, especially when there is no evidence to portray that when the prosecutrix along with the accused purportedly stayed therein the prior permission of the SDO stood obtained for portraying that hence it stood occupied at any stage by the prosecutrix along with the accused, that neither accused Rita nor accused Punam and Soma had along with the prosecutrix and the male accused stayed there.

14. The identification of the accused under memos Ex.PW21/O and Ex.PW26/J wherein the prosecutrix identified the accused cannot make the said factum stand on a sacrosanct pedestal especially when the said identification of the accused by the prosecutrix comprised in the aforesaid exhibits to acquire evidentiary worth it was peremptorily required to be pronounced by PW26 of the accused having been after their arrest shown to the prosecutrix with muffled faces, yet when in his examination-in-chief PW-26 though has deposed that the accused were after their arrest taken with muffled faces yet when in his cross-examination he has specifically admitted that he did not mention in the record the fact of any such accused having been taken with muffled faces. Besides, when the prosecutrix in her statement has disclosed that when she proceeded to identify the accused in the identification parade held in the jail premises the IO/SHO remained present throughout, leads to an apt sequel that the efficacy of the said memos comprising the identification of the accused by the prosecutrix stands eroded, more so, when for the reasons assigned hereinabove her testimony while being rife with intra se contradictions vis-a-vis her statement recorded in EX.PW7/A and in Ex.PW7/H, is rendered unworthy of credit.

15. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

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

****

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

Sumit Kumar Sharma ...Appellant.

Versus

State of H.P. ...Respondent.

Cr.Appeal No.386 of 2014
Reserved on: 28.08.2015.
Decided on: September 02, 2015.

Indian Penal Code, 1860- Section 302- Deceased was shot by the accused- post mortem examination showed that she had sustained injury which could have been caused by means of fire arm- bullets were recovered from the body at the time of post mortem examination- country made pistol was also recovered from the accused- testimonies of eye-witnesses corroborated each other- held, that in these circumstances, accused was rightly convicted. (Para-14 to 16)

For the Appellant: Mr.Y.P.S.Dhaulta, Advocate.
For the Respondent: Mr.Ramesh Thakur, Asstt.Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed against the judgment, rendered on 30.06.2014 by the learned Sessions Judge, Chamba in Sessions Trial No. 30/2012 (43 of 2013), whereby the appellant has been convicted and sentenced to suffer imprisonment for life for his having committed an offence punishable under Section 302 IPC besides sentence of fine of Rs.1,00,000/- has been imposed upon him and in default of payment of fine he has been ordered to be sentenced to undergo further imprisonment for two years. The appellant has been further convicted to undergo five years rigorous imprisonment for offences punishable under Sections 25 and 27 of the Arms Act and a fine of Rs.10,000/-. In default of payment of fine, the appellant has been ordered to be sentenced to undergo further imprisonment for one year. All the sentences have been ordered to run concurrently.

2. The brief facts of the case are that on 8.5.2012 at about 3.05 p.m. Trilok Thakur, Superintendent of CHC Killar, telephonically informed at Police Station, Pangi that his niece Sapna daughter of Shri Ram Singh, resident of village Mahaliyat had gone to graze her cattle below her village and she had been shot by accused Sumit Kumar around 2.30 p.m with intention to kill her and she had been brought to the hospital in an injured condition. It was further reported that the accused was seen fleeing away after firing by Sangita D/o Chain Singh of the same village. This information was recorded in the DDR of the police station on the basis of which F.I.R was registered against the accused.

3. ASI/SHO Naseeb Singh, alongwith other police officials, reached CHC Killar. He moved an application to the Medical Officer as to whether injured was fit to make a statement or not. However, the Medical Officer disclosed that the victim was not in a condition to make statement and seeing her critical condition, the injured was referred to Kishatwar hospital. ASI Naseeb Singh proceeded to the place of occurrence where a number of people had already assembled including two girls, namely, Sangita and Neetu. The Pradhan of the Panchayat was also present there. The driving licence, two ATM Cards, one

broken watch, one broken mobile alongwith SIMs, some pieces of papers, cash memos, photographs, cap, one umbrella, etc. were found lying at the spot, which were taken into possession by the police. The police also got clicked photographs of these articles. Five empty rounds were found scattered near the place of occurrence which were also packed in a parcel in the presence of witnesses. The police also collected blood stained cotton swab from the spot.

4. Thereafter, investigating officer recorded the statements of the witnesses Sangita, Neetu, Satish Sharma and Chetan. The police had already deputed two teams to look for the accused in the area. The team headed by ASI Surjeet Singh was detailed to proceed Dharwas side whereas ASI Naseeb Singh alongwith other police officials proceeded towards Bheem Peir side which place leads towards Manali side and reached there at about 9.30 p.m. The police party headed by ASI Naseeb Singh had concealed itself behind a stone boulder. At about 2.00 a.m. in the night, accused reached at Bheem Peir and he was nabbed by the police and he was disarmed of his country made pistol which he was carrying in his hand. On his checking two live rounds were found in the pocket of his trouser which were taken into possession by the police. On inquiry, the accused disclosed his name and address. The accused was arrested and his jamatalashi was also carried out. He was brought to the police station. Injured Sapna died while being taken to Kishatwar hospital. Her post mortem was got conducted at CHC Killar on 9.5.2012. During custody, accused made a disclosure statement and in pursuance thereto he identified the spot.

5. During investigation, witnesses Sangita and Neetu informed the police that on the date of occurrence, injured was grazing her cattle at a distance of about 50 meters from them and at about 2.25 or 2.30 p.m. both of them heard sound of firing from the place where Sapna was sitting and they rushed towards her. When both these girls reached at the spot, accused was found firing at the deceased with a pistol in his hands. On this, both these girls raised noise for help and accused fled away from the spot towards river Chanderbhaga. Deceased Sapna had sustained gun shot at her nose, cheek, etc. and blood was oozing out from the injuries and Sapna became unconscious. Sangita and Neetu made a phone call to the sister of deceased namely Risha, who was studying at Shimla at that time, who in turn telephonically informed her brother Neeraj Kumar who was studying in College at Killar. Neeraj Kumar alongwith Rakesh and Rohit rushed to the spot and deceased was brought to CHC Killar from where Trilok Thakur, telephonically informed the police about the incident.

6. The investigating officer also procured MLC of deceased Sapna and the medical officer opined that the injuries sustained by her were possible with firearm/pistol recovered from the accused. On post mortem examination, the medical officer had noticed one bullet embedded in the middle left lung which was extracted. Another bullet was found just below the skin near upper margins of left breast which was found entered from the back side i.e. scapula about 6 cms lateral to the first vertebra of the deceased. The Medical Officer also noticed fracture of the thoracic first vertebrae and penetrating wound over left third intercoestal space with other multiple injuries as mentioned in the post mortem report. In the opinion of the Medical Officer, the deceased had died due to haemorrhage shock because of the gun shot injuries. The medical officer preserved the articles and clothes of the deceased and handed over to the police for chemical examination. The police also collected the call details of the phone number of the accused and the deceased. Prosecution sanction to prosecute the accused was also obtained from the District Magistrate, Chamba. During investigation, it was found that accused was working in a factory at Baddi, where one Naresh Kumar was also working in UNISON Pharma Company who is resident of Tehsil

Pangi, from whom accused had procured phone number of the deceased and he started talking with her on her mobile phone. It has also come in the investigation that accused had visited Chamba in the month of March, 2011 as deceased was studying at Chamba. Accused again met Sapna in the month of April, 2011 at Chamba and he has given her some money and phone etc. Accused was also found to have visited Killar Pangi via Sach in October, 2011 on 25.12.2011 and again on 30.1.2012 via J & K. In December, 2011 and January, 2012, accused was found to have stayed in the house of one Vijay Kumar in village Mahaliyat as his friend. Earlier, accused had also visited the quarter of Risha, sister of deceased, at Shimla. Accused wanted to marry deceased Sapna and had talked about it with Risha and father of deceased on their mobile phones.

7. On interrogation, the accused disclosed to the police that he had purchased the country made pistol and rounds in the years 2004-2005 at Hydrabad without any licence. During investigation, it was further revealed that when deceased Sapna and her parents refused the proposal of accused for marriage with Sapna, he visited Pangi on 5.5.2012 and met the deceased and when she refused to solemnize marriage with him, accused fired five gun shots at her arm, nose, right cheek and two rounds on the backside of neck, as a result of which Sapna died.

8. On completion of the investigation, into the offence, allegedly committed by the accused, report under Section 173 Cr.P.C. was prepared and filed in the Court.

9. The accused was charged for his having committed offences punishable under Sections 302 of the IPC and Sections 25 and 27(3) of the Indian Arms Act by the learned trial Court to which he pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined as many as 22 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded, in which he pleaded innocence and claimed false implication.

10. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant.

11. The appellant/accused is aggrieved by the judgment of conviction, recorded by the learned trial Court. The learned counsel appearing 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 exercise of its appellate jurisdiction and be replaced by findings of acquittal.

12. On the other hand, the learned Assistant 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.

13. 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.

14. The deceased Sapna after hers having been fired at by the accused with country made pistol Ext.P-1 was brought before PW-1 for hers being subjected to medical examination by the former. PW-1 has proved MLC Ext.PW-1/B prepared by him after his having conducted medical examination on the body of the deceased. Therein he has

recorded his having observed on the body of Sapna Kumari the hereinafter extracted injuries:

1) Laceration of about 6 cms x 1 cms over the nose extending to the middle of the nose on right side to tip of the nose on left side. Completely separating the nose into two half. Margins were sharp. Fresh bleed was present there which was bright red in colour.
2) Slit like entering wound about 2 cms 1 cms over right side of the face about 5 cms lateral to nose. The margins were inverted. Fresh bleeding from the wound was there. It was penetrating wound.
3) Loss of incisor teeth, upper jaw was fractured and missed. Fresh blood was present.
4) Entering wound about 3 cms in diameters at the level of thoracic vertebrae. The margins were inverted. Fresh bleed was there. Blacking of tissue was there and the directions anterior inferior.
5) Entering wound about 3 cms just 6 cms lateral to the above mentioned fourth wound on left side. The margins were inverted. Blacking of tissue was there with fresh bleed. The direction was interio inferior.
6) Entering wound about 1.5 cms x 5 m over lateral aspect of right arm near elbow. It was slit like. The margins were inverted and fresh bleed was there.
7) Exist would about 2 cms x half mm over medical aspect of right arm near elbow. It was slit light and margins were ever ted. Fresh bleed was present.
8) Multiple stellate shape abrasions over the forehead, face, chin and upper chest was there.

Furthermore, he has in his examination-in-chief deposed that the injuries observed by him to be occurring on the body of Sapna are possible with user of fire arm Ext.P-1. Furthermore, he has also proved Ext.PW-1/E , the post mortem report prepared by him in sequel to his having conducted post mortem on the body of deceased Sapna. During his examination-in-chief he has deposed, that while his having conducted post mortem on the body of deceased Sapna he had noticed one bullet embedded in the middle left lung, which was extracted by him and handed over to the police for its being further handed over to the F.S.L. concerned. He further deposes that another bullet was found embedded below the skin near the upper margins of left breast, which had gained entry therein from the back side, inasmuch as from the scapula 6 cms lateral to the first vertebra. In addition he deposes that he had observed existence of a fracture of the thoracic first vertebrae besides detected a penetrating wound over the left third interoestal space. Furthermore, the pleura was found lacerated in two places. The upper and middle lobe of the left lung was also found lacerated and fracture of the maxillary bone was found existing on the right side and there was loss of incisor upper teeth. He has unequivocally deposed that the demise of the deceased is attributable to hemorrhage shock arising from the gun shot injury. In his examination-in-chief he has proved his opinion qua the cause of demise of deceased Sapna recorded in PMR Ext.PW-1/E. The enunciation by PW-1 of the cause of demise of deceased Sapna being sequelled by hemorrhage shock arising from gun shot injury is lent fortification by portrayals, in the reports of the FSL concerned comprised in Ext.PA and Ext.PB, of the mechanism of the country made pistol as sent to it for examination being in order, besides

of firearm discharge residues having been detected in the barrel of the "Desi Katta" and of bullets sent to it for examination for formation of an opinion qua firing thereof from Ext.P-1 unraveling the factum of theirs having come to be fired from the "Desi Katta". The unequivocal pronunciation in Ext.PW1/E of the deceased having died owing to hemorrhage shock arising from gun shot injury having been lent impetus by the reports of the FSL concerned constituted in Ext.PA and Ext.PB arising from a communication occurring therein of Ext.P-1 a country made pistol having been used to fire bullets Ext.P-2 and P-3 extracted by PW-1 from the body of deceased Sapna when he came to subject it to post mortem examination on extraction whereof he enclosed them in a container and handed them to the police, concomitantly also boosts a conclusion of user of as manifested by ocular evidence of Ext.P-1 by the accused to fire shots therefrom at the deceased sequelling the latters demise. Furthermore, when PW-7 has proven recovery of Ext.P-1 under memo Ext.PW-7/A besides of live cartridges Ext.P-41 and Ext.P-42, which recovery of the aforesaid under memo Ext.PW-7/A has been deposed by him to have been effected at 2 a.m. on the intervening night of 8/9.5.2012 at the place of Nakka on arrival whereto of the accused he pounced upon him and found him carrying a country made pistol in his right hand and two live cartridges in the pocket of his trousers, as a corollary it imputes efficacy to the recovery of Ext.P1, P-41 and P-42 from the person of the accused, especially when the deposition of PW-7 underscoring the factum therein of his having recovered Ext.P-1, besides Ext.P-41 and P-42 from the person of the accused has remained untorn and unshred during the course of his having come to be subjected to cross examination. The effect of the portrayals aforesaid emanating from the deposition of PW-1 besides from reports of FSL concerned comprised in Ext.PA and PB as also the imminent fact upsurging from the deposition of PW-7 of recovery of Ext.P-1, P-41 and P-42 having come to be effectuated in a legally efficacious manner underscores an unflinching conclusion that the accused had used Ext.P-1 to fire therefrom pellets Ext.P-2 and P-3 at the deceased which sequelled the latter's demise.

15. Apart therefrom, the identification of the place of occurrence by the accused under memo Ext.PW-7/F in the presence of witnesses Satish Sharma and Sukhdev Raj preceding which a disclosure statement of the accused comprised in Ext.PW-7/G was recorded lends immense succor to a conclusion, of the accused having at the place depicted in Ext.PW-7/F fired Ext.P-2 and P-3 at deceased Sapna from Ext.P-1 which begot her demise. Probative efficacy qua the site of occurrence as stood identified by the accused in Ext.PW-7/F is garnered besides lent sustenance by existence thereon both of blood stained soil and of five empty cartridges Ext.P-15 to Ext.P-19. With Ext.PW-5/E manifesting the factum of soil smeared with blood as occurring at the site of occurrence having been lifted therefrom besides recovery of Ext.P-15 to P-19 having been effectuated therefrom under Ext.PW-5/A constitutes evidence displaying the fact of the ill-fated occurrence having taken place at the site identified by the accused under memo Ext.PW-7/F. Though the aforesaid discussion indubitably underscores the guilt of the accused nonetheless vigorous sustenance to the incriminatory role attributed to the accused by the prosecution stands afforded by the testimonies of eye witnesses to the occurrence, who deposed as PW-3 and PW-4. Both in their respective examinations in chief have deposed in harmony besides corroborated the pivotal fact existing in their respective examinations in chief of theirs having seen the accused firing at the deceased with a pistol carried by him in his hand. Both were subjected to cross-examination by the learned defence counsel yet during the ordeal of an exacting cross-examination which they faced both remained unscathed besides did not render therein a version qua the incident in contradiction to the version qua it as spelt out by them in their respective examinations in chief. Consequently, with both the eye witnesses to the occurrence having lent intra se corroboration to their respective ocular accounts qua the occurrence besides theirs having not displayed any inter se contradictions

in the version qua the incident comprised in their respective examinations in chief with the version qua it rendered in their respective cross-examinations, renders their testimonies to be untainted besides unblemished. Consequently their ocular version qua the incident is to be imputed credence, theirs having as emanable from the discussion aforesaid rendered a natural and unconcocted version qua it, as a corollary, the naturalness of their testimonies qua the ill fated occurrence undermines, besides wanes the effect, if any, of theirs while being related to the deceased theirs having hence out of interestedness proceeded to smother the truth or lent a partisan version qua the incident.

16. In view of the aforesaid analysis and discussion, the appeal, preferred by the accused/appellant, is dismissed and the judgment of conviction and sentence rendered by the learned Sessions Judge, Chamba, H.P., in Sessions Trial No.30 of 2012 is affirmed and maintained. Records be sent down back forthwith.

****

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

Vijay Kumar Sood .....Appellant.
Versus
Smt. Krishna Devi Sud & or. .....Respondents.

RSA No. 41 of 2004.
Reserved on: 01.09.2015.
Decided on: 02.09.2015.

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit seeking permanent prohibitory injunction for restraining the defendants from constructing overhanging verandah, which will hamper the light and air to the first and ground floors of the building which are in possession of the plaintiff- defendants pleaded that they had not raised any construction and verandah was already constructed by them in the year 1979 after obtaining permission from Municipal Corporation, Shimla- plaintiff had admitted that he had raised construction of the first floor of the verandah- another verandah was in existence on the top floor – it was not understandable as to how construction of the verandah on the second floor was going to affect the right of the plaintiff regarding light and air- plaintiff had raised unauthorized construction and is not entitled for the discretionary relief of injunction.

(Para-11 and 12)

For the appellant(s): Mr. J.S.Bhogal, Sr. Advocate with Mr. Parmod Negi, Advocate.
For the respondents: Mr. Rajeev Sood, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Shimla, H.P. dated 24.12.2003, passed in Civil Appeal No.47-S/13 of 2001.

2. "Key facts" necessary for the adjudication of this regular second appeal are that appellant-plaintiff (hereinafter referred to as the plaintiff) has instituted suit for

permanent prohibitory injunction against the respondents-defendants (hereinafter referred to as the defendants for convenience sake). According to the averments contained in the plaint, the defendants had carried out extensive repairs in the second floor of the building in contravention of the sanctioned municipal plans and without obtaining any permission from the Municipal Authorities. The defendants have also left girders to the extent of 5 feet towards the southern lower bazaar side of the suit premises, with a view to take their support and construct overhanging verandah in the second floor. The defendants had no right to construct overhanging verandah, which will hamper the light and air to the first and ground floors of the building, which was in possession of the plaintiff.

3. The suit was contested by the defendants. According to the defendants, they have not carried out any extensive repair work. They were not extending any verandah over the common Galli. The verandah had already been constructed by them in the year 1979, after obtaining permission from Municipal Corporation, Shimla. They only wanted to replace the old wooden planks. They have also filed the complaint against the plaintiff for raising unauthorized construction.

4. The issues were framed by the learned trial Court on 19.10.1993 and 17.11.2000. The suit was decreed by the learned Sub Judge, Ist Class, Court No. 1, Shimla on 28.2.2001. The defendants, feeling aggrieved, preferred an appeal before the learned District Judge, Shimla. The learned District Judge, Shimla, allowed the appeal on 24.12.2003. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 28.4.2004:

> "1. Whether in view of the admissions of the defendants to the extent that the Ext. DW-3/A was not sanctioned in their name and no completion plan had been submitted by them since 1979, it could be held that defendants were not liable to be restrained from constructing the balcony?"

6. Mr. J.S.Bhogal, Sr. Advocate, appearing for the appellant, on the basis of substantial question of law framed, has vehemently argued that the defendants have carried out the unauthorized construction without seeking necessary sanction from the M.C. Shimla. On the other hand, Mr. Rajeev Sood, Advocate, for the respondents has supported the judgment and decree dated 24.12.2003.

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

8. The plaintiff has appeared as PW-1. He has exhibited sale deed Ext. PW-1/A and sanction plan Ext. PA. According to him, if the verandah is constructed by the defendants, it will obstruct the light and air. The defendants have laid four girders for laying verandah. In his cross-examination, he admitted that the defendants have obtained the sanction for repair but denied that there was any verandah in the set of the defendants. In his rebuttal evidence, PW-1 Vijay Kumar could not depose as to whether defendants had obtained permission from the Municipal Corporation on 14.3.1990.

9. DW-1 Naveen Sood deposed that the suit premises were purchased by his mother in the year 1974. They were doing repair work in the year 1990 and verandah already existed. They were replacing the wooden planks with girders. According to him, they have got the house plan passed in the year 1979. They have raised the verandah in the year 1979. They have again tried to repair it in the year 1990.

10. Sh. Deewan Chand, JE, M.C. Shimla, DW-2 has exhibited the sanction plan Ext. DW-2/A dated 11.9.1979. According to him, the work was started within one year after the issuance of sanction letter. He did not know whether any work was undertaken in the year 1979.

11. The case of the plaintiff, precisely, was that his air and light was adversely affected if the verandah was raised. The plaintiff has not examined any independent expert to prove whether the proposed construction of verandah would actually affect the air and light of the plaintiff or not. There is no evidence except the bald statement of the plaintiff while appearing as PW-1. DW-1 Naveen Sood has categorically denied that the proposed construction of verandah would interfere with the right of light and air of the plaintiff. The plaintiff has admitted that he himself has constructed the verandah on the first floor of the building. It was also extending approximately 3 feet towards the Municipal Galli. However, the matter was compounded. The plaintiff has also admitted that on the top floor of the building also, one verandah was constructed. It is, thus, evident that the plaintiff had constructed verandah on the first floor and another verandah was in existence on the top floor. It is, thus not understandable as to how the construction of a verandah by defendants on the second floor was going to affect the right of the plaintiff in respect of air and light.

12. The defendants have filed complaint against the plaintiff for raising unauthorized construction by extending verandah by 3 feet towards the M.C. Galli. The plaintiff, besides raising verandah has also constructed bathroom and kitchen in the ground floor of the building. Since the plaintiff himself has raised the unauthorized construction, he was not entitled to discretionary relief of prohibitory injunction for restraining the defendants on the ground of alleged violation of Municipal Corporation Bye-laws. The M.C. Shimla, was also a necessary party in the present case. The learned first appellate Court has correctly appreciate the oral as well as documentary evidence placed on record, more particularly, Ext. DW-2/A. The substantial question of law is answered accordingly.

13. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

****

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

Vinod Kumar & another ...Appellants.

Versus

State of H.P. ...Respondent.

Cr. Appeal No. 125 of 2013-A
Judgment reserved on: 27.07.2015
Date of Decision: September 2, 2015

Indian Penal Code, 1860- Section 302 read with Section 34- Accused murdered the deceased and cut his dead body- they dumped parts of the body in a septic tank and put the remaining parts in a gunny bag, which was concealed under the stones and cow-dung-gunny bag was recovered by the villagers when the wife of the deceased observed foul smell-accused 'G' took a plea that deceased tried to rape her on which co-accused gave a blow to the deceased- held, that right of private defence commences as soon as reasonable

apprehension of danger to body arises - this right does not extend to inflicting of more harm than what is necessary to be inflicted for the purposes of defence- accused 'R' has to probablize his defence and not to prove the same beyond reasonable doubt- the version of the defence that deceased tried to rape the accused 'G' on which injury was inflicted on his person was not suggested to any prosecution witnesses and this fact was never disclosed to any person- it was duly proved by the testimonies of the witnesses as well as by the statements of the accused that deceased was last seen in the company of the accused- burden was upon the accused to establish as to what had happened to the deceased- accused had tried to destroy the evidence by concealing the dead body- recovery was effected pursuant to the disclosure statements made by the accused – in these circumstances, prosecution case was proved beyond reasonable doubt and the accused were rightly convicted. (Para-9 to 59)

Cases referred:

Brathi alias Sukhdev Singh v. State of Punjab, (1991) 1 SCC 519
Darshan Singh versus State of Punjab and another, (2010) 2 SCC 333
Sikandar Singh and others versus State of Bihar, (2010) 7 SCC 477
Ranjitham versus Basavaraj and others, (2012) 1 SCC 414
Suraj Narain Lal Versus Emperor, AIR 1933 Allahabad 213
Mohammad Shafi Versus Emperor, AIR 1934 Lahore 620
Vishwanath Versus The State of Uttar Pradesh, AIR 1960 SC 67
Vijayee Singh and others Versus State of U.P., (1990) 3 SCC 190
Pudhu Raja and another Vs State Represented by Inspector of Police, (2012) 11 SCC 196
Madhu Versus State of Kerala, (2012) 2 SCC 399
Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622
Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43
Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116
Padala Veera Reddy v. State of Andhra Pradesh and others, 1989 Supp (2) SCC 706
Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172
Balwinder Singh v. State of Punjab, 1995 Supp (4) SCC 259
Harishchandra Ladaku Thange v. State of Maharashtra, (2007) 11 SCC 436
State of U.P. v. Ashok Kumar Srivastava, (1992) 2 SCC 286
Ravirala Laxmaiah vs. State of Andhra Pradesh, (2013) 9 SCC 283
Nika Ram vs. State of H.P., (1972) 2 SCC 80
Ganeshlal vs. State of Maharashtra, (1992) 3 SCC 106
Trimukh Maroti Kirkan vs. State of Maharashtra, (2006) 10 SCC 681
Dharam Deo Yadav vs. State of Uttar Pradesh, (2014) 5 SCC 509
Krishnan alias Ramasamy & others, vs. State of Tamil Nadu, AIR 2014 SC 2548
Harivadan Babubhai Patel vs. State of Gujarat, (2013) 7 SCC 45
Rohtash Kumar vs. State of Haryana, (2013) 14 SCC 434
Anthony D'Souza & others vs. State of Karnataka, (2003) 1 SCC 259
State of Maharashtra vs. Suresh, (2000) 1 SCC 471
Swapan Patra vs. State of W.B. (1999) 9 SCC 242
Raj Kumar v. State of Madhya Pradesh, (2014) 5 SCC 353
Neel Kumar vs. State of Haryana, (2012) 5 SCC 766
Gian Chand vs. State of Haryana, (2013) 14 SCC 420

For the Appellants: Mr. Ankush Dass Sood, Sr. Advocate with Mr. Vinay Thakur, Advocate.

For the Respondent: M/s Ashok Chaudhary, V.S. Chauhan, Addl. AGs., and J.S. Guleria, Asstt. AG., for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In this appeal filed under Section 374 Cr.P.C., convicts Vinod Kumar and Gaitri Devi have assailed judgment dated 28.12.2012, passed by Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, District Kangra, H.P., in Sessions Case No.1-B/VII/2011/Sessions Trial No.24 of 2012, titled as *State Versus Vinod Kumar & others*, whereby they stand convicted for having committed offences punishable under the provisions of Section 302 and 201, read with Section 34 of the Indian Penal Code and sentenced to serve rigorous imprisonment for life and pay fine in the sum of Rs.5,000/- each, for commission of offences punishable under the provisions of Section 302 read with Section 34 IPC and in default thereof, further to undergo rigorous imprisonment for a period of six months and also sentenced to serve rigorous imprisonment for three years and pay fine in the sum of Rs.2000/- each for the commission of offences punishable under the provisions of Section 201 read with Section 34 IPC and in default thereof, further to undergo rigorous imprisonment for a period of three months.

2. It is the case of prosecution that on 21.09.2010, Convict Vinod Kumar had liquor with deceased Pritam Chand in the shop of Surinder Kumar (PW.16) at village Padmal, Police Station, Baijnath, District Kangra, H.P. Then both of them left on a scooter driven by Pritam Chand. Same night, Gaitri Devi and Vinod Kumar (convicts) murdered the deceased. All the accused destroyed the body. Some parts of the dead body were cut and dumped in a septic tank and the remaining part was put in a gunny bag (Ex.P-4) and concealed under the stones and cow-dung. Finding Pritam Chand not to have returned home, his wife Urmila Devi (PW.9), made inquires from the local residents and eventually on 24.09.2010, lodged missing report (Ex.PW.12/A) at Police Station, Baijnath. Searching for her husband, on 25.09.2010, she came to village Sudhala. There she observed foul smell coming from the cowshed owned by the convicts. Villagers got together and recovered a gunny bag concealed under the pile of stones and cow-dung. Inside the gunny bag, dead body of Pritam Chand was found. Upon information furnished to the police, Investigating Officer, SI Kailash Nath (PW.23) arrived at the spot and recorded statement of Urmila Devi under the provisions of Section 154 of Cr.P.C. (Ex.PW.9/A), on the basis of which FIR No.126 of 2010, dated 25.09.2010 (Ex.PW.20/A) was registered at Police Station, Baijnath, District Kangra, H.P., against all the accused. Inquest reports (Ex.PW.10/B and Ex.PW.10.C) were prepared and vide recovery memo (Ex.PW.3/B) dead body was taken into possession. Samples of blood stained soil (Ex.P-2) so recovered from the spot was kept in a container (Ex.P-1) which was sealed and taken into possession vide memo (Ex.PW.3/A). Spot was got photographed. Gunny bag (Ex.P-4), Plastic piece (Ex.P-5), Pulinda (Ex.P-6) were taken into possession vide recovery memo (Ex.PW.3/C). Spot map was also prepared. Postmortem of the dead body was got conducted by Dr.Raj Kumar (PW.10), who issued postmortem report (Ex.PW.10/D). Investigation revealed that after committing murder of Pritam Chand, all the accused persons, destroyed the evidence. Disclosure statements dated 28.09.2010 (Ex.PW.5/A, Page-165) and 30.09.2010 (Ex.PW.5/B, Page-180), so made by convict Vinod Kumar and disclosure statements dated 28.09.2010 (Ex.PW.8/A, Page-166) and 02.10.2010 (Ex.PW.7/G, Page-183), so made by convict Gaitri Devi, further lead to discovery of

incriminating articles i.e. weapon of offence; the material used by the convicts; personal articles of the deceased and his body parts. Recovery was effected vide memos (Ex.PW.7/A, Ex.PW.7/B, Ex.PW.7/F & Ex.PW.7/H). Scientific evidence was collected 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 offences punishable under the provisions of Sections 302 and 201 read with Section 34 of the Indian Penal Code, to which they did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as twenty four witnesses and statements of the accused under Section 313 of the Code of Criminal Procedure were also recorded.

5. Appreciating the testimonies of the prosecution witnesses, Trial Court convicted accused Vinod Kumar and Gaitri Devi for having committed offences punishable under Sections 302 and 201 read with Section 34 of IPC and sentenced as aforesaid. Hence the present appeal by the convicts.

6. No appeal against the judgment of acquittal of co-accused Kamla, Suman Lata and Hem Kumar stands filed or is sought to be filed by the State. Statement dated 24.12.2014 is on record to such effect.

7. We have heard Mr. Ankush Dass, learned Senior Counsel and Mr.Vinay Thakur, learned counsel, on behalf of the convicts-appellants as also M/s Ashok Chaudhary and V.S. Chauhan, learned Addl. AGs., and J.S. Guleria, learned Asstt. AG., on behalf of the State. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find the findings returned by the trial Court to be based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice. Prosecution has been able to prove its case, beyond reasonable doubt against the convicts.

8. Undisputedly no appeal against the judgment of acquittal of co-accused stands filed by the State.

9. It is a settled principle of law that when allegedly several persons commit an offence in furtherance of common intention and all except one are acquitted, it is open to the appellate court to find out, on reappraisal of evidence, whether some of the accused persons stood wrongly acquitted, although it would not interfere with such acquittal in the absence of any appeal by the State Government. The effect of such finding is not to reverse the order of acquittal into one of conviction or visit the acquitted person with criminal liability. The finding is relevant only in invoking against the convicted person his constructive criminality. (See: *Brathi alias Sukhdev Singh v. State of Punjab,* (1991) 1 SCC 519).

10. We clarify that we have not gone into the criminality of such of those persons, who stand acquitted.

11. Certain undisputed facts have emerged on record, as is evident from the statements of the convicts, so recorded under Section 313 Cr.P.C. as also deposition of convict Gaitri Devi, who examined herself as defence witness (DW-1). Convict Vinod Kumar admits to have consumed alcohol in the company of deceased Pritam Chand in the shop of

Surinder Kumar (PW.16) at village Padmal. This was on 21.09.2010 at 7.30 PM. Thereafter, he admits to have left Padmal on the scooter of Pritam Chand. In his statement under Section 313 Cr.P.C. he has taken the following defence:-

> "I am innocent. At about 11 PM at night on 21.9.10 when I was sleeping I heard the cries of my mother. When I rushed to that place I found that Pritam Chand was grappling with my mother with intention to commit rape with her. When I reached there I found a small knife there. I pushed back Pritam and gave blow of knife on the chest of Pritam. I pushed my mother inside the room. Pritam fell down and what happened thereafter I do not remember. Pritam was under the influence of liquor at that time."

12. Convict Gaitri Devi without admitting any fact in her statement under Section 313 Cr.P.C., has taken the following defence:-

> "I am innocent. On 21.9.10 Pritam Chand came outside my room and knocked at the door at about 11 PM. When I opened the door, I found that Pritam was under the influence of liquor. He caught hold of me and tried to remove my salwar with intention to commit rape. I cried at the spot and my son Vinod Kumar arrived at the spot, who pulled Pritam Chand back and gave blow to Pritam with knife, which was lying there. Blow fell on chest of Pritam Chand. Vinod pushed me inside the room and in the meantime Pritam fell down on the ground. What happened thereafter I don't know. False case has been registered against me."

13. The law with regard to right of private defence is now well settled. It is a settled position of law that right of private defence commences as soon as reasonable apprehension of danger to body arises. The danger must be imminent, present and real. This right does not extend to inflicting of more harm than what is necessary to inflict for the purposes of defence. The right would be justified if the assault caused reasonable apprehension of death or grievous hurt to the person exercising such right. In order to find whether right of private defence is available or not, injuries received by the accused, imminence of threat to his safety, injury caused by the accused and the circumstance whether accused had time to take recourse to public authority are all relevant factors to be considered.

14. The Apex Court in *Darshan Singh versus State of Punjab and another,* (2010) 2 SCC 333 has culled out the following principles regarding right of private defence:-

> (i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.
>
> (ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.
>
> (iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused

apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.

15. Further the Apex Court in *Sikandar Singh and others versus State of Bihar*, (2010) 7 SCC 477 has held as under:-

> "24. Section 96, IPC provides that nothing is an offence which is done in exercise of the right of private defence. The expression "right of private defence" is not defined in the Section. The Section merely indicates that nothing is an offence which is done in the exercise of such right. Similarly, Section 97, IPC recognises the right of a person not only to defend his own or another's body, it also embraces the protection of property, whether one's own or another person's against certain specified offences, namely, theft, robbery, mischief and criminal trespass.
>
> 25. Section 99, IPC lays down exceptions to which rule of self-defence is subject. Section 100 IPC provides, inter alia, that the right of private defence of the body extends, under the restrictions mentioned in Section 99 IPC, to the voluntary causing of death, if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault. In other words, if the person claiming the right of private defence has to face the assailant, who can be reasonably apprehended to cause grievous hurt to him, it would be open to him to defend himself by causing the death of the assailant.
>
> 26. The scope and width of the right of private defence is further explained in Sections 102 and 105 IPC, which deal with commencement and continuance of the right of private defence of body and property respectively. According to these provisions, the

right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt or threat, to commit offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as reasonable apprehension of the danger to the body continues. (See: *Jai Dev v. State of Punjab, AIR 1963 SC 612*.)

27. To put it pithily, the right of private defence is a defensive right. It is neither a right of aggression nor of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger which is not self-created. Necessity must be present, real or apparent. (See: *Laxman Sahu v. State of Orissa, AIR 1988 SC 83*.)

28. Thus, the basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose.

29. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon host of factors like the prevailing circumstances at the spot; his feelings at the relevant time; the confusion and the excitement depending on the nature of assault on him etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence. (See: *Dharam v. State of Haryana*, *JT 2007 (1) SC 299 : (2007) 15 SCC 241*)

30. It is well settled that the burden of establishing the plea of self-defence is on the accused but it is not as onerous as the one that lies on the prosecution. While the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea of self-defence to the hilt and may discharge the onus by showing preponderance of probabilities in favour of that plea on the basis of the material on record.

31. In *Vidhya Singh v. State of Madhya Pradesh* [*(1971) 3 SCC 244*], this Court had observed that right of self-defence should not be construed narrowly because it is a very valuable right and has a social purpose. (Also see: *Munshi Ram & Ors. v. Delhi Administration, AIR 1968 SC 702*; *The State of Gujarat v. Bai Fatima*

& Anr., AIR 1975 SC 1478 and *Salim Zia v. State of Uttar Pradesh, AIR 1979 SC 391.*)

> 32. In order to find out whether right of private defence was available or not, the occasion for and the injuries received by an accused, the imminence of threat to his safety, the injuries caused by the accused and circumstances whether the accused had time to have recourse to public authorities are relevant factors, yet the number of injuries is not always considered to be a safe criterion for determining who the aggressor was. It can also not be laid down as an unqualified proposition of law that whenever injuries are on the body of the accused person, the presumption must necessarily be raised that the accused person had caused injuries in exercise of the right of private defence. The defence has to further establish that the injury so caused on the accused probabilise the version of the right of private defence."

16. Recently in *Ranjitham versus Basavaraj and others,* (2012) 1 SCC 414, the Apex Court has reiterated the aforesaid principles by holding that:-

> "It is well settled that the right of private defence cannot be weighed in a golden scale and even in absence of physical injury, in a given case, such a right may be upheld by the court, provided there is reasonable apprehension to life or reasonable apprehension of a grievous hurt to a person. Further, the onus of proof on the accused as to exercise of right of private defence is not as heavy as on the prosecution to prove guilt of the accused and it is sufficient for him to prove the defence on the touchstone of preponderance of probabilities. Furthermore, whether a person legitimately acted in exercise of his right of private defence is a question of fact to be determined on the facts and circumstances of each case. In a given case it is open to the Court to consider such a plea even if the accused has not taken it, but the surrounding circumstances establish that it was available to him. The burden is on the accused to establish his plea. The burden is discharged by showing preponderance of probabilities in favour of that plea. The injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and whether the accused had time to have recourse to public authorities, are all relevant factors to be considered."

17. The first question which needs to be examined is as to whether the defence taken by the convicts stands probablized on record or not. We shall examine the same in the backdrop of aforesaid statement of law.

18. From the suggestion(s) put to the prosecution witnesses, we do not find the same to have been probablized. Mr. Ankush Dass Sood, learned Senior counsel as also Mr. Vinay Thakur, painstakingly took us through the following decisions rendered by Hon'ble the Supreme Court of India, emphasizing the ratio of law with regard to the manner in which the defence is required to be probablized by the convicts: (i) *Suraj Narain Lal Versus Emperor,* AIR 1933 Allahabad 213; (ii) *Mohammad Shafi Versus Emperor,* AIR 1934 Lahore 620; *Vishwanath Versus The State of Uttar Pradesh,* AIR 1960 SC 67; and *Vijayee Singh and others Versus State of U.P.,* (1990) 3 SCC 190.

19. There is no dispute with regard to the ratio of law laid down therein. Convicts are only required to probablize the defence, so taken by them, unlike the burden which is sought to be discharged by the prosecution, which always has to be beyond reasonable doubt. But can it be said that the defence of the convicts stands probablized on record or not. In our considered view, not so. Such defence can be probablized even from the suggestion put to the prosecution witnesses. Prosecution witnesses have categorically denied the suggestion put to them and even by inference, the defence put to the witnesses can not be said to have been probablized. In fact, we find that the alleged act of attempt of rape on the part of the deceased, in self defence prompting convict Vinod Kumar to stab him, is not even suggested to the relevant prosecution witnesses.

20. Also we do not find the testimony of Gaitri Devi (DW.1), in any manner, to be inspiring in confidence. She states that on 21.09.2010, at about 11.30 PM someone knocked her door. On opening she found Pritam Chand, under the influence of liquor, to be there. He hugged her and tried to untie her salwar with an intent to commit rape. She tried to free herself from his clutches and cried for help. Soon her son Vinod Kumar (convict), who was sleeping in the adjoining room, came rushing and saw the deceased trying to commit rape. At that, Vinod Kumar pushed Pritam Chand on one side and after picking up a knife which was lying nearby, gave a blow in his chest. Then Vinod Kumar pushed her inside the room and Pritam Chand fell on the floor. What happened thereafter, she does not know. On 25.09.2010, Urmila Devi (PW.9) alongwith 10-15 other relatives came searching for Pritam Chand. From her cowshed foul smell was coming. Dead body of Pritam Chand kept in a gunny bag lying under the stones in the field near the cowshed was recovered. Same day at about 3.30 PM police arrived on the spot, when her two sons and daughters-in-law were also present. All of them were detained and taken to the Police Station where not only they were interrogated, but also beaten up severely. Nothing was handed over to the police either on 28.09.2010 or thereafter. She stands falsely implicated in the case. This she has stated in her examination-in-chief. Is this version of hers true? In our considered view, no. Her subsequent conduct belies the same.

21. Noticeably factum of attempt of rape on the part of Pritam Chand was never disclosed to any person either immediately after the occurrence of crime; when the police arrested the accused or they were produced before the Court. It is not that any scuffle took place in which both the convicts sustained injuries and fell down unconscious. Her testimony is conspicuously silent as to what happened after she was pushed inside the room by her son. She had seen convict Vinod Kumar stab Pritam Chand. She could have cried for help, but choose to remain silent. She could have informed the villagers or Pradhan, but did not so. What all did she do till the time of recovery of the dead body also remains unexplained by her. Burden so stipulated under Section 106 of the Evidence Act remains undischarged. It is not that she was under any fear, threat or intimidation till such time. She admits that disclosure statements (Ex.PW.7/G & Ex.PW.8/A), recovery memos (Ex.PW.7/B & Ex.PW.7/D) bear her signatures. It is not her version that papers were signed out of any threat, fear, coercion or as a result of beatings given by the police. Also there is nothing on record to even remotely suggest that either the villagers or the police officials had ever, ever given any beatings to the convicts, much less this witness. Frail attempt of explaining her signatures on blank papers, so obtained by the police, does not in any manner help her, in view of her admission of not having made any complaint in that regard with any authority.

22. It is not that the accused was armed which prompted the convict to stab him. The imminent threat or danger to life or dignity remains unexplained and unproven on

record. In a state of intoxication, deceased would attempt to commit rape of mother of his companion is not believable, more so in the absence of any prior history of his harbouring any evil eye on her.

23. In the present case, there is no direct evidence. Prosecution case is based on the following circumstances:-

1) Prior to occurrence of the incident, on 21.09.2010, convict Vinod Kumar and deceased Pritam Chand consumed liquor in the shop of Surinder Kumar (PW.16);

2) Deceased was lastly seen in the company of convict Vinod Kumar;

3) Deceased was found to be missing since the night of 21.09.2010;

4) Conduct of the accused;

5) Deceased died as a result of stab injuries;

6) Disclosure statements (Ex.PW.5/A & Ex.PW.5/B), so made by convict Vinod Kumar in the presence of HC Sampuran Singh (PW.5) and Surinder Kumar (PW.24);

7) Disclosure statements (Ex.PW.8/A & Ex.PW.7/G), so made by Gaitri Devi, in the presence of LC Mathura Devi (PW.8), Surinder Kumar (PW.24), Prabhat Chand (PW.7) and Suman Kumari (not examined);

8) Pursuant to the disclosure statements, recovery having been effected vide memos (Ex.PW.7/A, Ex.PW.7/B, Ex.PW.7/C, Ex.PW.7/D, Ex.PW.7/F & Ex.PW.7/H);

9) Recovery of dead body from the land /cowshed of the convicts;

10) Dragging of dead body of Pritam Chand and recovery of flesh/his body parts from the septic tank belonging to both the convicts.

24. Before we deal with the factual matrix, with profit, we discuss the law on the point.

Law on circumstantial evidence

25. Law with regard to circumstantial evidence is now well settled. It is a settled proposition of law that when there is no direct evidence of crime, the guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which the conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature, to fully connect the accused with the crime. All the links in the chain of circumstances must be established beyond reasonable doubt, and the proved circumstances should be consistent, only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, the Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence. [*Pudhu Raja and another Versus State Represented by Inspector of Police*, (2012) 11 SCC 196; *Madhu Versus State of Kerala*, (2012) 2 SCC 399; *Dilip Singh Moti Singh versus State of Gujarat*, (2010) 15 SCC 622, *Mulakh Raj and others Versus Satish Kumar and others*, (1992) 3 SCC 43; and *Sharad Birdhichand Sarda Versus State of Maharashtra*, (1984) 4 SCC 116.].

26. Also, apex Court in *Padala Veera Reddy v. State of Andhra Pradesh and others,* 1989 Supp (2) SCC 706, held that when a case rests upon circumstantial evidence, following tests must be satisfied:

> "(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
>
> (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."
>
> (See: *Ramreddy Rajesh Khanna Reddy v. State of A.P.,* (2006) 10 SCC 172; *Balwinder Singh v. State of Punjab,* 1995 Supp (4) SCC 259; and *Harishchandra Ladaku Thange v. State of Maharashtra,* (2007) 11 SCC 436).

27. Each case has to be considered on its own merit. Court cannot presume suspicion to be a legal proof. In the absence of an important link in the chain, or the chain of circumstances getting snapped, guilt of the accused cannot be assumed, based on mere conjectures.

28. The apex Court in *State of U.P. v. Ashok Kumar Srivastava*, (1992) 2 SCC 286, while cautioning the Courts in evaluating circumstantial evidence, held that if the evidence adduced by the prosecution is reasonable, capable of two inferences, the one in favour of the accused must be accepted. This of course must precede the factum of prosecution having proved its case, leading to the guilt of the accused.

Circumstances No. 1, 2, 3, 4 and 9:

29. From the testimony of Surinder Kumar (PW.16), it is evident that on 21.09.2010, at about 7.30 PM both Vinod Kumar and Pritam Chand had consumed liquor in his shop at village Padmal. Thereafter, Vinod Kumar left his shop alongwith Pritam Chand on his scooter. Such fact also stands corroborated by Raj Kumar (PW.6) and Urmila Devi (PW.9). In any event, this fact stands admitted by convict Vinod Kumar, in his statement under Section 313 Cr.P.C. It be only observed that distance between village Padmal and Sudhala, the place where dead body was recovered is not much.

30. Now from the testimonies of Surjit Singh (PW.1), Swarup Chand (PW.2), Raj Kumar (PW.6), Prabhat Chand (PW.7), Urmila Devi (PW.9) and Mohar Singh (PW.18), it is evidently clear that from the night of 21.09.2010 deceased Pritam Chand was missing. Urmila Devi searched for her husband. She contacted several persons, including Surinder Kumar (PW.16), who on 23.09.2010, informed her that Pritam Chand and convict Vinod Kumar had consumed liquor in his shop. On 24.09.2010, as is evident from the testimony of Urmila Devi, missing report was lodged with the police. Members of BDC and Panch accompanied her at that time.

31. Further Urmila Devi (PW.9) states that while searching for her husband, she went to village Sudhala, where she noticed foul smell coming from the cowshed belonging to convict Gaitri Devi. At that time, other villagers were also with her. Suspecting that her husband might have been killed, place was searched and one gunny bag/boru (Ex.P-4), so concealed under the pile of cow-dung and stones, was recovered. Bag was opened from which dead body of her husband (deceased Pritam Chand) recovered. Police arrived at the spot and her statement (Ex.PW.9/A) recorded. The dead body was identified by her vide memo (Ex.PW.3/B).

32. Inspector Kailash Nath (PW.23), who conducted the investigation, has corroborated such version. He has further deposed that the dead body was taken into possession vide memo (Ex.PW.3/B). Gunny bag (Ex.P-4) and Plastic piece (Ex.P-5), so found in the Pulinda (Ex.P-6), were recovered vide memo (Ex.PW.3/C). Factum of recovery of the dead body also stands corroborated by Surjit Singh (PW.1), Swarup Chand (PW.2), Anup Kumar (PW.3), Raj Kumar (PW.6), Prabhat Chand (PW.7), Urmila Devi (PW.9) and Mohar Singh (PW.18), who were present on the spot. The place of recovery of dead body has been identified to be that of the convicts.

Law on last seen & conduct:

33. Hon'ble the Supreme Court of India in *Ravirala Laxmaiah vs. State of Andhra Pradesh,* (2013) 9 SCC 283, after taking note of its earlier decisions rendered in *Nika Ram vs. State of H.P.,* (1972) 2 SCC 80; *Ganeshlal vs. State of Maharashtra,* (1992) 3 SCC 106 and *Trimukh Maroti Kirkan vs. State of Maharashtra,* (2006) 10 SCC 681 reiterated the principle that where accused is last seen with the victim, it becomes his duty to explain the circumstances under which the victim died. It is a strong circumstance indicative of the fact that he is responsible for the crime.

34. Hon'ble the Supreme Court of India in *Dharam Deo Yadav vs. State of Uttar Pradesh,* (2014) 5 SCC 509 has further held that:-

> "19. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. The conduct of the accused and the fact of last seen together plus other circumstances have to be looked into. Normally, last seen theory comes into play when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that the possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It will be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. However, if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. Reference may be made to the judgment of this Court in *Sahadevan vs. State,* (2003) 1 SCC 534." (Emphasis supplied)

35. In *Krishnan alias Ramasamy & others, vs. State of Tamil Nadu,* AIR 2014 SC 2548; and *Harivadan Babubhai Patel vs. State of Gujarat,* (2013) 7 SCC 45, the principle stands reiterated.

36. Significantly, in *Rohtash Kumar vs. State of Haryana,* (2013) 14 SCC 434, Hon'ble the Supreme Court of India has held that:-

> "34. Thus, the doctrine of "last seen together" shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him." (Emphasis supplied)

37. Thus, last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased died or is found dead, is so small that possibility of any person, other than the accused, being the author of crime becomes impossible. The burden would immediately shift upon the accused which remains undischarged. Testimony of Surinder Kumar of the deceased having left with the accused, late in the night, on the date of occurrence of crime is evidently clear.

38. Conduct of the convicts in the present case, is very relevant. Pritam Chand was last seen in the company of convict Vinod Kumar. According to the convicts deceased Pritam Chand came to their house is admitted by them. Now they did not lodge any report either with regard to alleged assault or indecent behaviour of Pritam Chand or disclosed anyone as to what happened to his body thereafter. In fact, Urmila Devi (PW.9) made enquiries from convict Vinod Kumar. Convicts tried to disappear the evidence by concealing the dead body and putting parts thereof in the pit.

Failure to explain incriminating material u/s 313 Cr.P.C.

39. In a case of circumstantial evidence, where no eyewitness account is available, when an incriminating circumstance is put to the accused and the said accused either offers no explanation for the same, or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. False answers given by the accused in Section 313 Cr.P.C. statement may offer an additional link in the chain of circumstances to complete the chain. [See: *Dharam Deo Yadav vs. State of Uttar Pradesh,* (2014) 5 SCC 509; *Harivadan Babudhai Patel vs. State of Gujarat,* (2013) 7 SCC 45; and *Rohtash Kumar vs. State of Haryana,* (2013) 14 SCC 434; *Anthony D'Souza & others vs. State of Karnataka,* (2003) 1 SCC 259; *State of Maharashtra vs. Suresh,* (2000) 1 SCC 471 and *Swapan Patra vs. State of W.B.* (1999) 9 SCC 242].

40. In *Sharad Birdhichand Sarda Versus State of Maharashtra,* (1984) 4 SCC 116, Hon'ble the Supreme Court of India has held that before a false explanation can be used as additional link, Court must be satisfied that various links in the chain of evidence led by the prosecution have been satisfactorily proved; the said circumstance points to the guilt of the accused with reasonable definiteness; and the circumstance is in proximity to the time and situation.

41. In *Raj Kumar v. State of Madhya Pradesh,* (2014) 5 SCC 353, Hon'ble the Supreme Court of India, held as under:-

> "22. The accused has a duty to furnish an explanation in his statement under Section 313 Cr.P.C. regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the

court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313 Cr.P.C. is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law. [Vide: Ramnaresh vs. State of Chhattisgarh, (2012) 4 SCC 257; Munish Mubar vs. State of Haryana, (2012) 10 SCC 464: AIR 2013 SC 912; and Raj Kumar Singh vs. State of Rajasthan, (2013) 5 SCC 722.]

23. In the instant case, as the appellant did not take any defence or furnish any explanation as to any of the incriminating material placed by the trial court, the courts below have rightly drawn an adverse inference against him. The appellant has not denied his presence in the house on that night. When the children were left in the custody of the appellant, he was bound to explain as under what circumstances Gounjhi died.

24. In Prithipal Singh vs. State of Punjab, (2012) 1 SCC 10, this Court relying on its earlier judgment in State of W.B. vs. Mir Mohammad Omar, (2000) 8 SCC 382, held as under:

> "53..... if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused."
>
> (Emphasis supplied)

[See also: Neel Kumar vs. State of Haryana, (2012) 5 SCC 766; and Gian Chand vs. State of Haryana, (2013) 14 SCC 420]"

42. It be also observed that none of the convicts have come forward to explain as to what happened after a stab injury was inflicted upon the deceased. It is not the case of either of the convicts that they sustained injuries or became unconscious.

43. Their conduct belies their innocence. Vinod Kumar has not come forward to explain as to where all did they go from the shop of Surinder Kumar (PW.16). Vinod Kumar does not state that Pritam Chand dropped him and left for his village on his scooter. Where did Pritam Chand go from there remains unexplained by him. The right of private defence in the given facts and circumstances does not arise.

44. Roshal Lal (PW.17) a revenue official has proved the factum of ownership of the place, where the dead body and the incriminating articles were recovered, to be that of the convicts vide revenue records (Ex.PW.17/B & Ex.PW.17/C).

45. Thus far prosecution has been able to establish recovery of the dead body from the premises belonging to the convicts and the factum of deceased Pritam Chand & Vinod Kumar having consumed liquor and seen together immediately prior to the occurrence of the incident. Also since then deceased was found to be missing.

Circumstance No.5

46. Postmortem of the dead body was conducted by Dr. Raj Kumar (PW.10), who issued report (Ex.PW.10/D). In view of advanced stage of decomposition of dead body, no exact opinion with regard to cause of death could be furnished. However, as per the doctor, considering the ligature marks and penetrating wounds on the chest, possibility of death as a result thereof, could not be ruled out. The doctor categorically opined that there was 2 cm. x 0.5 cm. penetrating wound on second intercostals stage, 5 cm. from midline with regular margins.

Circumstances No. 6, 7 and 8:

47. Disclosure statement dated 28.09.2010 of convict Vinod Kumar (Ex.PW.5/A) records that he had concealed mobile phone, purse, Phawra and knife, which he could get recovered from his house. Vide another disclosure statement dated 30.09.2010 (Ex.PW.5/B) he disclosed of getting recovered parts of body of deceased Pritam Chand which he had severed and then concealed in the septic tank of his toilets. These statements stand recorded in the presence of HC Sampuran Singh (PW.5) and Surinder Kumar (PW.24).

48. Surinder Kumar admits the disclosure statements to have been recorded in his presence. However, he was declared hostile only with regard to the factum of knife not being mentioned in the memo, by convict Vinod Kumar. But then such fact would not make any difference in view of admission of infliction of a knife blow to the deceased. If the weapon recovered was not the one so used by him, then obviously he is guilty of destruction of such evidence. Then where is the knife with which he stabbed the deceased**.**

49. S.I. Kailash Nath (PW.23) states that pursuant to the disclosure statement(s) convict(s) led the police party, in the presence of independent witnesses and got recovered articles vide recovery memos (Ex.PW.7/A, Page-167, Ex.PW.7/C, Page-171, Ex.PW.7/B, Page-167, Ex.PW.7/D, Page-174, Ex.PW.7/F, Page-181 & Ex.PW.7/H, Page-184). Recovery was effected in the presence of Smt. Urmila Devi (PW.9), Ward Panch Prabhat Chand (PW.7), Pradhan Smt. Suman Kumari (not examined) and Smt.Arpana (not examined).

50. When we peruse the testimonies of the witnesses so examined, we find there is no discrepancy with regard to the prosecution case of having effected recovery pursuant to such disclosure statements. Convict Vinod Kumar led the police to the place where he had concealed the mobile, spade and knife in his house and the cowshed where body parts (flesh) of deceased Pritam Chand were kept.

51. Scientific evidence (Ex.PW.23/T & Ex.PW.23/U) does not corroborate the prosecution version of the body parts being that of the deceased, but then this fact alone would not render the otherwise inspiring version of the witnesses to be false or incorrect. Spot map (Ex.PW.23/D) indicates the place where articles stood concealed by convict Vinod Kumar.

52. SI Kailash Nath (PW.23) states that convict Gaitri Devi made disclosure statements (Ex.PW.8/A & Ex.PW.7/G) to the effect that she could get the spot identified and the articles i.e. underwear, pants, one pair chappal, knife and two sickles (Darats) recovered of which she had personal knowledge. Disclosure statements were made in the presence of Prabhat Chand (PW.7), Mathura Devi (PW.8),) Surinder Kumar (PW.24) and Suman Kumari (not examined).

53. As per version of the Investigating Officer SI Kailash Nath (PW.23) as also independent witnesses, convict Gaitri Devi led the police to the place where such articles were concealed and get recovered vide memos (Ex.PW.7/B, Ex.PW.7/D and Ex.PW.7/H).

54. Bodh Raj (PW.11) is the Safai Karamchari of the Ayurvedic Department, who went into the septic tank and took out the parts of body of the deceased.

55. Thus, prosecution has been able to establish recovery of mobile phone, purse, Phawra, underwear, pants, chappal, knife, two sickles, body parts/flesh and currency notes, on the asking of the convicts, which were to their personal knowledge.

Circumstance No. 10:

56. There is yet another version which goes against the convicts. Pieces of bamboo, blade of grass, so recovered from the courtyard of the house of convicts as also room of Gaitri Devi, reveals that dead body stood dragged up to the septic tank. As has come in the testimony of Vijay Kumar (PW.4) and Prabhat Chand (PW.7) as also the Investigating Officer (PW.23), stones, blades of grass and bamboo were recovered and tell tale signs found on the spot.

57. The ocular version as also the documentary evidence clearly establishes complicity of the convicts in the alleged crime. The testimonies of prosecution witnesses are totally reliable and their depositions believable. There are no major contradictions rendering their version to be unbelievable**.**

58. From the material placed on record, it stands clearly established by the prosecution witnesses, beyond reasonable doubt, that the convicts are guilty of having committed the offences charged for. There is sufficient, clear, convincing, cogent and reliable piece of evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the convicts stands proved beyond reasonable doubt to the hilt. The chain of events stand conclusively established and lead only to one conclusion, i.e. guilt of the convicts. Circumstances when cumulatively considered, fully establish completion of chain of events, indicating the guilt of the accused and no other hypothesis other than the same. It cannot be said that convicts are innocent or not guilty or that they have been falsely implicated or that their defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

59. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that convicts Vinod Kumar and Gaitri Devi in furtherance of their common intention committed murder of Pritam Chand and after causing his death, with an intent of screening themselves from legal punishment, tried to destroy his dead body.

60. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and complete appreciation of the material so placed on record by the parties. Findings cannot be said to be erroneous in any manner. Hence, the appeal is dismissed. Records of the Court below be immediately sent back.

****

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

Bashir Mian ...Appellant
Versus
State of Himachal Pradesh ...Respondent

Cr. Appeal No. 378/2014
Reserved on: 2.9.2015
Decided on: 3.9.2015

N.D.P.S. Act, 1985- Section 20- Accused was found with a bag containing 1.1 kgs of charas when he was travelling in the bus- PW-11 admitted that he was aware that accused was occupying seat No. 27 which shows that police had prior intimation- however, police had not complied with the Section 42(2) of N.D.P.S Act, which is a mandatory requirement - accused was not apprised of his right under Section 50 of the N.D.P.S. Act- there were contradictions in the testimonies of the prosecution witnesses- accused acquitted. (Para-10 to 19)

Cases referred:
Beckodan Abdul Rahiman v. State of Kerala (2002) 4 SCC 229
Sukhdev Singh v. State of Haryana (2013) 2 SCC 212

For the Appellant: Mr. Paresh Sharma, Advocate vice Ms. Sheetal Khimta, Advocate.
For the Respondent: Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This appeal is instituted against Judgment dated 18.2.2014, rendered by learned Special Judge (Forests), Shimla, Himachal Pradesh in Sessions Case No. 12-T/7 of 2013/10, whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence punishable under Section 20 of Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), has been convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1.00 Lakh, and in default of payment of fine, to further undergo simple imprisonment for six months.

2. Case of the prosecution, in a nutshell, is that on 16.2.2010 at about 11.40 am, a police party had gone from police post for patrolling and detection of crime. At about 11.40 am, police party noticed a private bus bearing registration No. HP-9B-1911 coming from Chopal side. Bus was signalled to stop for checking. Police party entered the bus and stated checking in the presence of PW-1 Dinesh Kumar and PW-2 Naresh Kumar. Accused was occupying seat No. 27. He tried to escape. He was apprehended. Accused was carrying a red coloured bag. On checking of the bag, black coloured pants and a polythene bag were found. Polythene bag contained black coloured substance in the shape of sticks and balls. It was found to be *Charas* on the basis of experience. PW-3 Naresh Kumar was sent for weights and scale. Charas recovered from the possession of the accused was weighed and kept in a cloth parcel and sealed with seven seal impressions of seal 'K' in the presence of

witnesses. Sample of seal was taken. Impression of seal was put on NCB form. Seal after use was handed over to Dinesh Kumar. Investigating Officer prepared Rukka and sent it to the police station, on the basis of which FIR was registered. NCB form was also prepared on the spot. Parcel was deposited alongwith documents with Het Ram PW-4. Het Ram made entries in the Malkhana Register. Thereafter, case property was sent to Forensic Science Laboratory through PW-5 Bhupinder Kumar alongwith relevant papers. Report of the Forensic Science Laboratory is Ext. XZ. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 11 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. His case was that of denial simpliciter. Accused was convicted and sentenced as noticed herein above. Hence, this appeal.

4. Mr. Paresh Sharma, vice Counsel appearing on behalf of the appellant, argued that the prosecution has failed to prove its case against accused.

5. Mr. Ramesh Thakur, Assistant Advocate General has supported the judgment of conviction.

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

7. PW-1 Dinesh Kumar deposed that at about 11.40 am, a bus reached at Deha. Bus was signalled to stop. One person occupying seat No. 27, was in possession of one bag, red in colour. Accused got up and hurried towards exit. Police overpowered him. The red coloured bag available with the accused was checked. It contained one pant of black colour. There was another polythene packet. Polythene packet contained black substance, which was stated to be *Charas*. Police had sent for weights and scale. Charas was weighed. It weighed 1.100 kg. It was taken into possession vide recovery memo Ext. PW-1/A. Sealing procedure was completed at the spot. According to him, they remained on the spot for about 20-25 minutes.

8. PW-2 Naresh Kumar deposed that at about 11.40 am, a bus reached Deha. Bus was signalled to stop by the police. Accused person tried to hurriedly reach towards exit. Police apprehended him. He was carrying a bag Ext. P3. Ext. P3 was examined. It contained a polythene bag Ext. P1 containing Charas. It weighed 1.100 kg. Sealing process was completed at the spot. In his cross-examination, he has admitted that proceedings were conducted by the police outside the bus. Charas was weighed by the Police two times in the police post. Police took two hours to complete the process.

9. PW-3 Naresh Kumar deposed the manner in which accused was apprehended and codal formalities of seizure and sampling were completed at the spot. According to him, Charas was weighed outside the police post.

10. PW-4 Het Ram deposed that on 16.2.2010, Ram Paul Yadav deposited one sealed parcel sealed with 'A' alongwith sample seal 'A' and 'K' and NCB form in triplicate. He deposited the case property in registered. On 18.2.2010, he sent the sealed packet to FSL Junga through Constable Bhupender.

11. PW-5 Constable Bhupinder Singh deposed that he took case property to FSL Junga alongwith NCB form.

12. PW-7 Sub Inspector Ramesh Thakur deposed that HC Devender Kumar of police post Deha produced beore him one cloth parcel sealed with seven seals of 'K' alongwith sample seal and case file. He checked the sealed parcel, which was found intact.

As Malkhana was not in the police post Deha, he took the same to police station Theog. He produced the same before SHO Police Station Theog. Ramphal of Police Station Theog placed the same parcel in a separate cloth parcel and resealed the same with seal 'A'. He handed over the parcel to the MHC Police Station for being kept in safe custody.

13. PW-9 Sub Inspector Ram Paul Yadav deposed that on 16.2.2010, HC Devinder Kumar sent Rukka through Constable Naresh Kumar to Police Station Theog. FIR Ext. PW-3/B was registered. Ramesh Thakur also handed over one sealed parcel sealed with 'K' NCB form and sample seal impressions. Parcel was resealed by him with seal impression 'A'. He issued resealing certificate Ext. PW-9/C.

14. PW-10 Gopal Chauhan deposed that he alongwith police officials reached the spot. In his presence accused was found carrying red coloured bag containing pants and black coloured polythene. Police suspected it to be *Charas*. Charas was recovered. It weighed 1.100 kgs. In his cross-examination, he has admitted that he was associated when alleged *Charas* was already with them.

15. PW-11 Devender Kumar is a material witness. He deposed the manner in which accused was apprehended and codal formalities of seizure and sampling were completed at the spot. In his cross-examination, he has admitted that he was aware that accused was sitting on seat No. 27. They conducted personal search of the accused. He has categorically admitted in further cross-examination that he conducted personal search of the accused. He has not apprised him of his legal right to be searched before a gazetted officer or a Magistrate under Section 50 of the Act.

16. According to PW-2, Naresh Kumar, police has taken two hours to complete proceedings. However, PW-1 Dinesh Kumar deposed that he remained at the spot of recovery for about 20-25 minutes. He also deposed that tickets from the accused was conducted in his presence. PW-2 has deposed that Charas was weighed inside the police post. However, PW-3 Constable Naresh Kumar deposed that Charas was weighed outside by the police. PW-11 HC Devender Kumar in his cross-examination, as discussed above, has categorically deposed that he was aware that accused was occupying seat No. 27. Thus, the police had prior information that accused was in the bus and occupied Seat No. 27. However, despite that Section 42 (2) of the Act, was not complied with. Section 42 (2) is mandatory and its breach would vitiated the entire proceedings initiated against accused. PW-11 has also admitted in his cross-examination that they had conducted personal search of the accused but he has not apprised accused of legal right under Section 50 of the Act. Tickets were recovered from the possession of the accused. Police party before conducting search of accused was required to be given option whether he wanted to be searched before a gazetted officer or a Magistrate. IO himself has admitted that the accused was not apprised of his right to be searched before a gazetted officer or a Magistrate as laid down in Section 50 of the Act. Compliance of Section 50 of the Act was also mandatory in this case, when personal search of accused was carried out. PW-1 Dinesh Kumar has deposed that ticket was recovered from accused in his presence. PW-10 has also deposed that entire proceedings of weighing *Charas* was conducted at police post Deha thus, it is doubtful whether *Charas* was weighed outside police post or at the police post. It has also come on record that no search was carried of any person except accused, which fortifies the contention of the learned advocate appearing on behalf of the appellant that police had prior information with accused was traveling in the bus with eth contraband. PW-11 has deposed specifically in his cross-examination that it took him 4/5 hours to conduct the entire proceedings at the spot. There are major contradictions in the statement of these witnesses qua proceedings were conduct for 4/5 hours or 20-25 minutes.

17. Their Lordships of the Hon'ble Supreme Court in **Beckodan Abdul Rahiman v. State of Kerala** reported in (2002) 4 SCC 229 have held that keeping in mind the grave consequences which are likely to follow on proof of possession of illicit articles under the Act, namely, the shifting of the onus to the accused and severe punishment to which he becomes liable, the legislature has enacted and provided certain safeguards in various provisions of the act including Sections 42 and 50 of the Act. Their lordships have held as under:

> **"3. According to the prosecution, the Sub-Inspector of Police received a telephonic message on 6-10-1990 at about 8.30 a.m. that narcotic drugs were being sold at T.C. Junction. He recorded the information in the general diary and proceeded to the scene of occurrence in a jeep. On reaching T. C. Junction at about 8.45 a.m. he saw the accused carelessly walking from the bus shelter towards Kathu Parambu side. Allegedly seeing him in suspicious condition, the Sub-Inspector along with his party approached him and after disclosing his identity searched the person of the accused in presence of witnesses. It was found that inside the fold of Dhoti, which the appellant was wearing, opium had been concealed in a polythene bag. As he was found unauthorisedly possessing the opium, he was arrested and the opium seized was weighed to be 11 gms. Out of that 2 gms. each were separated and two samples were roped in plastic paper. On enquiry from the accused whether he would like to meet any higher official or Gazetted officer, he allegedly replied in negative. Section 42 of the Act provides :**
>
> > **"42. Power of entry, search, seizure and arrest without warrant or authorisation.- (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drug control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset-**
> >
> > **(a) enter into and search any such building, conveyance or place;**
> >
> > **(b) in case of resistance, break open any door and remove any obstacle to such entry;**
> >
> > **(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or be liable to confiscation under this Act and any document or**

other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance :

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sun set and sun rise after recording the grounds of his belief.

(2) Where an officer takes down any infomation in writing under sub-section (1) or records grounds for his belief under the proviso thereto he shall forthwith send a copy thereof to his immediate official superior."

Section 50 of the Act prescribes :

"50. Conditions under which search of persons shall be conducted.- (1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted officer or any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) female shall be searched by anyone excepting a female."

Keeping in mind the grave consequences which are likely to follow on proof of possession of illicit articles under the Act, namely, the shifting of the onus to the accused and severe punishment to which he becomes liable, the Legislature has enacted and provided certain safeguards in various provisions of the Act including Sections 42 and 50 of the Act. A Constitution Bench of this Court in State of Punjab v. Baldev Singh (1999 (6) SCC 172) has held that while conducting search and seizure in addition to the safeguards provided under the Code of Criminal Procedure, the safeguards provided under the Act are also required to be followed. The harsh provisions of the Act cast a duty upon the prosecution to strictly follow the procedure and compliance of the safeguards. In that case the Court observed :

"**Prior to the passing of the NDPS Act,1985 control over narcotic drugs was being generally exercised through certain Central enactments though some of the States also had enacted certain statutes with a view to deal with illicit traffic in drugs. The Opium Act, 1857 related mainly to preventing illicit cultivation of poppy, regulating cultivation of poppy and manufacture of opium. The Opium Act, 1878 supplemented the Opium Act,1857 and made possession, transportation, import, export, sale, etc., of opium also an offence. The Dangerous Drugs Act, 1930, was enacted with a view to suppress traffic in contraband and abuse of dangerous drugs, particularly derived from opium, Indian hemp and coca leaf etc.The Act prescribed maximum punishment of imprisonment for three years with or without fine, in so far as the first offence is concerned and for the second or the subsequent offence the punishment could go up to four years' R.I. These Acts, however, failed to control illicit drug traffic and drug abuse on the other hand exhibitedan upward trend. New Drugs of addiction known as psychotropic substances also appeared on the scene posing serious problems. It was noticed that there was an absence of comprehensive law to enable effective control over psychotropic substances in the manner envisaged by the International Convention on Psychotropic Substances, 1971. The need for the enactment of some comprehensive legislation on narcotic drugs and psychotropic substances was, therefore, felt. Parliament with a view to meet a social challenge of great dimensions, enacted the NDPS Act, 1985 to consolidate and amend existing provisions relating to control over drug abuse etc. and to provide for enhanced penalities particularly for trafficking and various other offences. The NDPS Act, 1985 provides stringent penalties for various offences. Enhanced penalties are prescribed for the second and subsequent offences. The NDPS Act, 1985 was amended in 1988 w.e.f. 29-5-1989. Minimum punishment of 10 years imprisonment which may extend up to 20 and a minimum fine of Rs. 1 lakh which may extend up to Rs. 2 lakhs have been provided for most of the offences under the NDPS Act, 1985. For the second and subsequent offices, minimum punishment of imprisonment is 15 years which may extend to 30 years while minimum fine is Rs. 1.5 lakhs which may extend to Rs. 3 lakhs. Section 31(a) of the Act, which was inserted by the Amendment Act of 1988, has even provided that for certain offences, after previous convictions, death penalty shall be imposed, without leaving any discretion in the court to award imprisonment for life in appropriate cases. Another amendment of considerable importance introduced by the Amendment Act, 1988 was that all the offences under the Act were made triable by a Special Court. Section 36 of the Act provides for constitution of Special Courts manned by a person who is a Sessions Judge or an Additional Sessions Judge. Appeals from the orders of the Special Courts lie to the High Court. Secion 37 makes all the offences under the**

Act to be cognizable and non-bailable and also lays down stringent conditions for grant of bail. However, despite the stringent provisions of the NDPS Act,1985 as amended in 1988 drug business is booming; addicts are rapidly rising; crime with its role in narcotics is galloping and drug trafficking network is ever-growing. While interpreting various provisions of the statute, the object of the legislation has to be kept in view but at the same time the interpretation has to be reasonable and fair.

After referring to host of judgments, the Constitution Bench of the Court held that the provisions of Sections 42 and 50 are mandatory and their non compliance would render the investigation illegal. It was reiterated that severer the punishment, greater the care to be taken to see that all the safeguards provided in the statute are scrupulously followed. The safeguards mentioned in Section 50 are intended to serve a dual purpose to protect the person against false accusation and frivolous charges as also to lend credibility to the search and seizure conducted by the empowered officer. If the empowered officer fails to comply with the requirements of the Section, the prosecution is to suffer for the consequences. The legitimacy of the judicial process may come under the cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice.

In State of Punjab v. Balbir Singh (1994 (3) SCC 299) it was held that under Section 42(2) the empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is a total non-compliance of the provisions the same affects the prosecution case. To that extent it is mandatory. To the same effect is the judgment in Saiyad Mohd. Saiyad Umar Saiyad and others v. State of Gujarat (1995 (3) SCC 610).

5. In this case the violation of the mandatory provisions is writ large as is evident from the statement of K.R. Premchandran (PW 1). After recording the information, the witnesses are not shown to have complied with the mandate of sub-section (2) of Section 42 of the act. Similarly the provisions of Section 50 have not been complied with as the accused has not been given any option as to whether he wanted to be searched in the presence of a gazetted officer or the Magistrate. The compliance with Section 50 is held to have been fulfilled on his (PW 1) asking the accused "whether I should search him in the presence of senior officers or a gazetted officer". The accused was required to be apprised of his right conferred under Section 50 giving him the option to search being made in the presence of a gazetted officer or the Magistrate. The accused is not shown to have been apprised of his right nor any option offered to him for search being conducted in the presence of the Magistrate."

18. Their Lordships of the Hon'ble Supreme Court in **Sukhdev Singh v. State of Haryana** reported in (2013) 2 SCC 212 have held that provisions of Section 42 are intended to provide protection as well as lay down a procedure which is mandatory and should be allowed positively by the Investigating Officer. He is obliged to furnish the information to his superior officer forthwith. That obviously means without any delay. But there could be cases where the investigating officer instantaneously, for special reasons to be explained in writing, is not able to reduce the information into writing and send the same information to his superior officers but could do it latter and preferably prior to recovery. The compliance of Section 42 is mandatory and there can not be an escape from its strict compliance. Their lordships have held as under:

> **"21. In the present case, the occurrence was of 4-2-1994. The trial of the accused concluded by judgment of conviction dated 4-7-1998. Thus, it will be the unamended Section 42 (2) of the NDPS Act that would govern the present case. The provisions of section 42 are intended to provide protection as well as lay down a procedure which is mandatory and should be followed positively by the Investigating Officer. He is obliged to furnish the information to his superior officer forthwith. That obviously means without any delay. But there could be cases where the Investigating Officer instantaneously, for special reasons to be explained in writing, is not able to reduce the information into writing and send the said information to his superior officers but could do it later and preferably prior to recovery. Compliance with Section 42 is mandatory and there can not be an escape from its strict compliance."**

19. Accordingly, the present appeal is allowed. Judgment dated 18.2.2014, rendered by learned Special Judge (Forests), Shimla, Himachal Pradesh in Sessions Case No. 12-T/7 of 2013/10 is set aside. Accused is acquitted of the offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985. He is ordered to be released forthwith, if not required by the Police in any other case. Fine amount if any, deposited by accused, be refunded to him. Registry is directed to prepare the release warrant of the accused and send the same to the concerned Superintendent of Jail immediately.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Shri Deepak Arora and another ...Appellants.

Versus

Shri Vijay Khanna ...Respondent.

LPA No. 65 of 2015
Reserved on: 20.08.2015
Decided on: 03.09.2015

Code of Civil Procedure, 1908- Section 144- An application was filed for execution of the award passed by the Arbitrator- a notice was issued in which J.D was proceeded ex-parte and the attached property was ordered to be sold- J.D deposited an amount of Rs. 4,68,25,228/- - J.D filed an application pleading that there was an error in calculation and the D.Hs are entitled to Rs. 3,70,49,770.80/-- he prayed for the return of the excess amount – record shows that Arbitrator had awarded a specific sum to the DH- Learned Single Judge

had found that D.Hs are entitled to the amount of Rs. 3,70,49,770.80/- and not for Rs. 4,68,25,228/-- Executing Court was bound to execute decree passed by the arbitrator- when specific amount was awarded, J.D is only liable to pay that amount- mere wrong calculation by the Executing Court will not confer any right upon the D.Hs – J.D had made the payment of the excess amount without his being liable - claim of the J.D cannot be said to be barred by principles of res-judicata due to calculation error made by the Court- held, that Court had rightly passed the order for the refund of the amount. (Para-15 to 64)

Cases referred:

Raja Sahib of Poonch versus Kirpa Ram, AIR 1954 Jammu & Kashmir 23
L. Janakirama Iyer and others versus P.M. Nilakanta Iyer and others, AIR 1962 SCC 633
Samarendra Nath Sinha and another versus Krishna Kumar Nag, AIR 1967 SCC 1440
Bishnu Charan Das versus Dhani Biswal and another, AIR 1977 Orissa 68
Abdul Kader versus Chinnaswamy Padayachi, AIR 1980 Madras 116,
Jayalakshmi Coelho versus Oswald Joseph Coelho, AIR 2001 Supreme Court 1084
State of Punjab versus Darshan Singh, AIR 2003 Supreme Court 4179
Srihari (Dead) through LR Smt. Ch. Niveditha Reddy versus Syed Maqdoom Shah and others, 2014 AIR SCW 6068
Jagendra Nath Singh versus Hira Sahu and others, AIR 1948 Allahabad 252
Mahijibhai Mohanbhai Barot versus Patel Manibhai Gokalbhai and others, AIR 1965 Supreme Court 1477
Kavita Trehan and another versus Balsara Hygiene Produces Ltd., AIR 1995 SCC 441
South Eastern Coalfields Ltd. versus State of M.P. and others, (2003) 8 SCC 648
State of Gujarat & Ors. versus Essar Oil Limited and Anr., 2012 AIR SCW 1008
The Sales Tax Officer, Banaras and others versus Kanhaiya Lal Makund Lal Saraf, AIR 1959 Supreme Court 135
Indian Council for Enviro-legal Action versus Union of India and others, (2011) 8 SCC 161
Amar Singh versus Gulab Chand, AIR 1960 Rajasthan 280
Rajkishore Mohanty and another versus Kangali Moharana and others, AIR 1972 Orissa 119
Barkat Ali and another versus Badrinarain (dead) by LRs, (2008) 4 SCC 615
Sheoratan Kurmi and after his death Akhji Devi and others versus Kalicharan Ram and others, AIR 1968 Patna 270
Radhey Shyam Gupta versus Punjab National Bank & Anr., 2008 AIR SCW 8284
Shivshankar Gurgar versus Dilip, 2014 AIR SCW 1099

For the appellants: Mr. R.L. Sood & Mr. Ashwani Sharma, Senior Advocates, with Mr. Sanjeev Kumar, Advocate.
For the respondent: Mr. Ajay Mohan Goel and Mr. Rajesh Mandhotra, Advocates.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This Letters Patent Appeal is directed against the order, dated 02.05.2015, made by the learned Single Judge, whereby OMP No. 44 of 2015 filed by the respondent-Judgment Debtor in Execution Petition No. 10 of 2013, titled as Shri Deepak Arora and another versus Shri Vijay Khanna, came to be allowed (for short "the impugned order").

2. A very important question of law has been raised by the parties in the present lis. In order to determine the issue, the narration of brief facts of the case is required.

3. Execution Petition No. 10 of 2013 was filed before the learned Single Judge for the execution of award, dated 01.12.2012, made by the Arbitrator in favour of the appellants and against the respondent. Notice was issued in terms of Order XXI of the Code of Civil Procedure (for short "CPC") and attachment order was passed.

4. Vide order, dated 08.01.2015, the respondent-Judgment Debtor was proceeded ex-parte and the attached property was ordered to be put to sale in accordance with the mandate of Order XXI CPC, constraining the respondent-Judgment Debtor to deposit an amount of Rs.4,68,25,228/- with Collector, Kangra at Dharamshala. Thereafter, the respondent-Judgment Debtor moved OMP No. 44 of 2015 under Sections 144 and 151 CPC with the plea that an error has crept-in while making calculations, the appellants-Decree Holders are entitled to Rs.3,70,49,770.80/- in terms of the award and prayed for refund of excess amount.

5. The said application was resisted by the appellants-Decree Holders on the ground that the respondent has not filed reply in the Execution Petition despite show cause notice issued in terms of Order XXI Rules 22 and 23 CPC. The learned Single Judge, after examining the record, directed the respondent-Judgment Debtor to satisfy the award/decree. The order for attachment of the property was made and it was also directed to conduct the sale by auction. The respondent-Judgment Debtor deposited an amount of Rs.4,68,25,228/-. He has also admitted in OMP No. 457 of 2014 that the said amount is due to the appellants-Decree Holders. Further stated that in OMP No. 196 of 2014, the respondent-Judgment Debtor in para 4 of the said application has admitted that the appellants-Decree Holders are entitled to the amount as claimed by them. The respondent-Judgment Debtor has also stated before the learned Single Judge that he was ready to make the said payment and his property be not put to sale, as recorded in the orders, dated 02.01.2015 and 24.02.2015. He has also admitted that an amount of Rs.4,68,25,228/- is due to the Appellants-Decree Holders while making application before the Collector, Kangra at Dharamshala.

6. While going through the applications and the grounds of attack in the memo of appeal, it appears that the appellants-Decree Holders have resisted OMP No. 44 of 2015 on the following grounds:

> *(i) That the amount was determined by the Executing Court while passing orders from time to time, is a decree, cannot be reviewed or altered subsequently or in different proceedings;*
>
> *(ii) That the respondent-Judgment Debtor has admitted, while making applications, that the amount to the tune of Rs.4,68,25,228/- is due to the appellants-Decree Holders and even deposited the same before the Collector, Kangra at Dharamshala, thus, cannot be said to be mistake, but is a determination by the Executing Court and accepted by the respondent-Judgment Debtor; and*
>
> *(iii) That the respondent-Judgment Debtor is caught by principle of constructive resjudicata.*

7. We have heard the learned counsel for the parties and examined the entire record.

8. Mr. R.L. Sood, learned Senior Counsel appearing on behalf of the appellants-Decree Holders, argued that the learned Single Judge has fallen in an error in making the impugned order.

9. Mr. Ajay Mohan Goel, learned counsel appearing on behalf of the respondent-Judgment Debtor, argued that the impugned order is just and legal one, needs no interference.

10. It pains us to record herein that the parties are litigating from a pretty long time, have been dragged from pillar to post and post to pillar. Ultimately, the respondent-Judgment Debtor deposited the amount and after depositing the amount, realized that some mistake has crept-in while making calculations and made an application, being OMP No. 44 of 2015, that the excess amount deposited by him be refunded.

11. The provisions contained in Part-II of the CPC and Order XXI Rules 1 to 106 CPC contain the procedure how to execute a decree/award. The word "decree" has been used in all the provisions right from Section 36 CPC to Section 74 CPC and also in Order XXI, Rules 1 to 106 CPC.

12. It is necessary to reproduce the relevant /operative portion of the award herein:

> *".....Thus, the total payable amount (as of today) by the Respondent to the Claimants come to*
>
> *a) Amount due as on 26.5.2008* *Rs. 1,84,58,030/-*
>
> *b) Interests from 26.5.2008 to* *Rs. 99,67,342/-*
>
> *26.11.2012 @ 12% p.a.* _____
>
> *Total=* *Rs.2,84,25,372/-*
>
> *In case the amount found due is not paid within one month from the date of receipt of the copy of the duly signed award, the Respondent shall be further bound to pay interest in accordance with Section 17(7) (b) of the Act 26 of 1996 i.e. @ Rs. 18% per annum on the amount of Rs. 1,84,58,030/- till the date of its payment.*
>
> *.....*
>
> *lump sum costs in the sum of Rs. 15 lacs (Rupees fifteen lacs) are also ordered to be awarded to both the Claimants to be paid by the Respondent in addition to the claim amount so awarded through this Award."*

13. While going through the award, it can be safely said that the Arbitrator has specifically held as to what amount was payable by the respondent-Judgment Debtor to the appellants-Decree Holders.

14. In terms of the award/decree, it is to be calculated as to what is the amount due. While going through the impugned order, it appears that the learned Single Judge has made discussions as to how the appellants-Decree Holders are entitled to an amount of Rs.3,70,49,770.80/- and not to the sum of Rs.4,68,25,228/-.

15. It was for the parties to question the award in case any of the parties was aggrieved by the same. None has questioned the award and it has attained finality. Thus, the learned Single Judge has rightly recorded para 22 of the impugned order and held that the appellants-Decree Holders are entitled to the amount to the tune of Rs.3,70,49,770.80/-.

16. The issues raised by the appellants-Decree Holders before the learned Single Judge and this Court are devoid of any force for the following reasons:

17. It is beaten law of land that the Executing Court cannot travel beyond the decree.

18. As discussed hereinabove, the Executing Court cannot add or subtract the decree/award and has to implement the decree/award as it is. The learned Single has rightly computed the awarded amount in terms of the impugned order, but the Executing Court, while passing orders from time to time, had recorded the awarded amount to be Rs.4,68,25,228/-. It is not a determination, but is a mere calculation. The determination has already been made by the Arbitrator while making the award.

19. By no stretch of imagination, it can be said and held that the respondent-Judgment Debtor is precluded from bringing to the notice of the Executing Court that the amount calculated and deposited is in excess to the amount awarded and be refunded.

20. The attachment order was issued, the sale was yet to be conducted and the sale proceedings were put on hold on deposition of the amount by the respondent-Judgment Debtor, as discussed hereinabove.

21. It is beaten law of land that no person should be prejudiced by the act of the Court based on latin maxim *'actus curiae neminem gravabit'*.

22. CPC contains mechanism and provides remedy to any person/suitor who feels that he is prejudiced by the act of the Court.

23. We deem it proper to reproduce Sections 151 and 152 CPC herein:

> *"**151. Saving of Inherent powers of Court.** - Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.*
>
> ***152. Amendment of judgments, decrees or orders.** - Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties"*

24. These provisions of law mandate that the Court has powers to make rectifications if any mistake has crept-in while passing the interim orders or in final judgment. Even, the Court has the power to restore the position which a suitor loses because of some mistake here and there.

25. The High Court of Jammu and Kashmir, while dealing with the issue of the similar nature in the case titled as **Raja Sahib of Poonch versus Kirpa Ram,** reported in **AIR 1954 Jammu & Kashmir 23,** held that the Court has inherent power to amend the

decree in terms of Sections 151 and 152 CPC. It is apt to reproduce para 10 of the judgment herein:

> *"10. The appellant did not take the two proceedings for the execution of the decree and for its amendment simultaneously. The application for amendment of the decree was made after the application for execution of the decree was finally rejected by the High Court. It is also unfortunate that the District Judge in exercise of his appellate jurisdiction after he had interpreted the operative part of his judgment as laying down no time limit for the payment of the increased amount and that the decree was executable, did not exercise his inherent jurisdiction to amend the decree so as to bring it in conformity with the judgment. And his order directing the execution of the decree simpliciter without amending the decree led the High Court to set aside his order on the ground that the executing Court could not go behind the decree. Whether something could not be done by the District Judge or by the High Court in the exercise of their inherent jurisdiction to prevent this unnecessary litigation, it is now unnecessary to consider and in the events that have happened it is not necessary to disturb the decree of the High Court dated Maghar 28, 2002. (Emphasis added)"*

26. The Apex Court in the case titled as **L. Janakirama Iyer and others versus P.M. Nilakanta Iyer and others,** reported in **AIR 1962 Supreme Court 633,** held that the High Court was within its jurisdiction under Sections 151 and 152 CPC to make correction even after the appeals to Supreme Court had been admitted. It is apt to reproduce para 23 of the judgment herein:

> *"23. The next question which has been raised on behalf of defendant 14 is in regard to the amendment made by the High Court in its decretal order. It is urged that this amendment was made after the appeals to this Court had been admitted and so it is without jurisdiction. It appears that the certificate was granted by the High Court to the respective defendants who have come to this Court as appellants on November 26, 1954 and the appeals were admitted on December 4, 1955, whereas the amendment has been made after the appeals were admitted. The application for the amendment in question was made under Ss. 151 and 152 of the Code; and it became necessary because the decretal order drawn in the High Court referred to the profits of which accounts were directed as mesne profits. The use of the words "mesne profits" would have inevitably brought in the period of three years beyond which accounts could not be claimed. By their application the plaintiffs alleged that the use of "mesne profits" in the decretal order was inconsistent with the judgment which had directed accounts of the net profits and so they claimed that the decretal order should be corrected in cl. III, sub-cl. (3). According to the prayer thus made it was suggested that the clause should read as follows*

that the defendants 12, 13 and 14 are liable for the net profits of the properties purchased by them under schedule V, schedule II and schedule I respectively". The word "net profit" was used in the place of "mesne profits" originally introduced in the order. When this application for amendment was argued before the High Court the defendants pleaded that the use of the words "mesne profits" was proper and should not be changed. It was urged on their behalf that in its judgment the High Court had introduced the words "mesne profits" deliberately and so the decretal order was perfectly correct. This contention has been negatived by the High Court, and in our opinion rightly. It appears that in the earlier portion of his judgment Krishnaswami Naidu, J. summarised in one paragraph the effect of the decree passed by the trial court; and in giving this summary he observed that under the decree defendants 12, 13, 14 and 16 were held entitled to be paid the respective considerations of the sales and mortgages together with interest they being liable to account for mesne profits as per the terms of the decree. Two things are cler. This part of the judgment does not contain the decision of the High Court at all. It is really concerned with the narration of the relevant fcts and it purports to summarise the effect of the decree and nothing more. Besides, the use of the words "mesne profits" in the context is obvisuly the result of inadvertence because the decree of the trial court had in the relevant clause used the words "net profits" and not "mesne profits". Thus, there can be no doubt that the decretal order drawn in the High Court through error introduced the words "mesne profits" and such an error could be corrected by the High Court under Ss. 151 and 152 of the Code even though the appeals may have been admitted in this Court before the date of correction." (Emphasis added)"

27. In the case titled as **Samarendra Nath Sinha and another versus Krishna Kumar Nag,** reported in **AIR 1967 Supreme Court 1440,** the Apex Court held that the errors can be corrected subsequently not only in the decree drawn up by ministerial officer but even in judgment pronounced and signed by Court. It is apt to reproduce para 11 of the judgment herein:

"11. Now, it is well settled that there is an inherent power in the court which passed the judgment to correct a clerical mistake or an error arising from an accidental slip or omission and to vary its judgment so as to give effect to its meaning and intention.

"Every court", said Bowen L. J. in Mellor v. Swire, (1885) 30 Ch. D. 239, "has inherent power over its own records so long as those records are within its power and that it can set right any mistake in them. An order even when passed and entered may be amended by the Court so as to carry out its intention and express the meaning of the court when the order was made."

> *In Janakirama Iyer v. Nilakanta Iyer, AIR 1962 SC 633 the decree as drawn up in the High Court had used the words "mesne profits" instead of "net profits". In fact the use of the words "mesne profits" came to be made probably because while narrating the facts, these words were inadvertently used in the judgment. This court held that the use of the words "mesne profits" in the context was obviously the result of inadvertence in view of the fact that the decree of the Trial Court had specifically used the words "net profits" and therefore the decretal order drawn up in the High Court through mistake could be corrected under Sections 151 and 152 of the Code even after the High Court had granted certificate and appeals were admitted in this court before the date of the correction. It is true that under O. 20, R. 3 of the Code once a judgment is signed by the Judge it cannot be altered or added to but the rule expressly provides that a correction can be made under Section 152. The Rule does not also affect the court's inherent power under Section 151. Under Section 152, clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court either on its own motion or on an application by any of the parties. It is thus manifest that errors arising from an accidental slip can be corrected subsequently not only in a decree drawn up by a ministerial officer of the court but even in a judgment pronounced and signed by the court."*

28. The Orissa High Court, while dealing with such a legal issue in the case titled as **Bishnu Charan Das versus Dhani Biswal and another,** reported in **AIR 1977 Orissa 68,** invoked the powers under Section 152 CPC and held that the Court is within its powers. It is apt to reproduce para 4 of the judgment herein:

> *"4. Section 152, Civil P. C. is based on two important principles. The first of them is the maxim that an act of the" Court shall prejudice no party and the other that the Courts have a duty to see that their records are true and that they represent the correct state of affairs. In proceedings for amendment of a decree, the inquiry is confined only to seeing whether the decree correctly expresses what wag really decided and intended by the Court. Order 20, Rule 6 clearly provides that the decree shall agree with the judgment. If the decree is not in harmony with the judgment the Court has no alternative but to rectify the mistake which has been committed. As the power to amend is exercised for the promotion of justice, it should be exercised liberally so as to make the decree conform to the judgment on which it is founded. I am fortified in this view by an earlier decision of this Court reported in AIR 1966 Ori 225, (Sagua Barik v. Bichinta Barik) wherein it was held on a review of the authorities that if the decree is not in conformity with the judgment it must be allowed to be amended under Sections*

152 and 151 to bring it in line with the judgment and that in exercising the power under Sections 151 and 152 the Court merely corrects the mistake of its ministerial officer by whom the decree was drawn up."

29. The Madras High Court in the case titled as **Abdul Kader versus Chinnaswamy Padayachi,** reported in **AIR 1980 Madras 116,** has discussed the scope of Sections 151 and 152 CPC. It is apt to reproduce para 8 of the judgment herein:

"8. Order 6, P. 17 relates only to the amendment of pleadings. Such an amendment can be made even before the appellate court when it is not of such a character as to be objectionable either as changing the subject matter of the suit or as being otherwise unfair. In this matter, there was no pleading to be amended, for the proceedings are under the Land Acquisition Act. Section 151 CPC however, in my view, is wide enough to provide for such amendment, as have been prayed for.

In fact, it has been held that even the inherent powers of the court are not limited to Secs. 151 and 152. Dealing with the powers of the court under Section 546 of the Code of 1882, Woodroffe J. observed as follows -

"Court has an inherent power ex debito justitiae to consolidate, postpone. pending the decision of a selected action and to advance the hearing of suits; to stay on the ground of convenience cross suits ; to ascertain whether proper parties are before it; to enquire whether the plaintiff is entitled to sue as an adult to entertain application of a third person to be made a party, to add a party, to allow defence in forma pauperis etc."

Of course, the inherent 'powers are Intended for exceptional cases and are non intended to enable courts to ignore the provisions of law which govern procedure nor could all the inherent powers of a court be used in order to relieve a party from the consequences of his own mistake or to enable him to evade the law of limitation. The Code has reserved to every court 'under Section 151 the inherent power to make such orders as should be made ex debito Justitiae, and every court should have In view. The shortening of litigation preventing duplication of proceedings, and saving the parties from harassment and expenses. Where a purely clerical error is brought to the notice of a High Court when it is seized of the matter as court of appeal, it can, correct the error, and extensive powers of amendment may be exercised under Sections 151 and 153. The provisions of Section 152 give power to the court not only to correct clerical or arithmetical mistakes in judgment, decrees or orders but also errors arising therein from any accidental slip or omission and such correction may be done at any time by the court, even without an application by any of the parties (vide(1941) 2 Mad LJ 452). The court's powers of amendment are not restricted to

errors that have crept in the judgment or decree but extend to errors that have crept in plaint, decree, sale certificate etc. Where a property was wrongly described in a plaint in mortgage suit and the mistake is repeated in the and final decree without being noticed either by the parties or by the court, the court has ample powers to amend the plaint, decrees and the judgment and correct the mistakes. Under Section 153, the court has extensive powers to correct mistakes in applications or plaints and it was held that where in a suit on a mortgage the name of the village in which the mortgaged property was situated was miss described and the mistake is discovered an appeal it is the duty of the appellate court to allow an amendment of the plaint and thus rectify a clerical mistake.

Lord Buckmaster observed in (1921) ILR 48 Cal 832, as follows:-

"All rules of court are nothing but provisions intended to secure the proper, administrations of justice, and it is therefore, essential that they should be made to serve and be subordinate to that purpose so that full Powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another-, nor to change by means of amendment the subject matter of the suit".

30. In another case titled as **Jayalakshmi Coelho versus Oswald Joseph Coelho,** reported in **AIR 2001 Supreme Court 1084,** the Apex Court held that in terms of Section 152 CPC, any error occurred in the decree on account of arithmetical or clerical error or accidental slip may be rectified by the Court.

31. The Apex Court in the case titled as **State of Punjab versus Darshan Singh,** reported in **AIR 2003 Supreme Court 4179,** held that the basis of the provision under Section 152 CPC is founded on the maxim '*actus curiae neminem gravabit',* i.e. an act of Court shall prejudice none. It is apt to reproduce paras 11 and 12 of the judgment herein:

"11. Section 152 provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very Court or the Tribunal cannot, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to the conditions or limitations provided therein. The powers under Section 152 of

the Code are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the Court concerned under the guise of invoking after the result of the judgment earlier rendered, in its entirety or any portion or part of it. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the Court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 as if it is looking into it for the first time, for which the proper remedy for the aggrieved party if at all is to file appeal or revision before the higher forum or review application before the very forum, subject to the limitations in respect of such review. It implies that the Section cannot be pressed into service to correct an omission which is intentional, however erroneous that may be. It has been noticed that the Courts below have been liberally construing and applying the provisions of Sections 151 and 152 of Code even after passing of effective orders in the lis pending before them. No Court can, under the cover of the aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order. Similar view was expressed by this Court in Dwaraka Das v. State of Madhya Pradesh and another (1999 (3) SCC 500) and Jayalakshmi Coelho v. Oswald Joseph Coelho (2001 (4) SCC 181).

12. The basis of the provision under S. 152 of the Code is founded on the maxim "actus curiae neminem gravabit" i.e. an act of Court shall prejudice no man. The maxim "is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law," said Cresswell, J. in Freeman v. Tranah (12 CB 406). An unintentional mistake of the Court which may prejudice the cause of any party must and alone could be rectified. In Master Construction Co. (P) Ltd. v. State of Orissa (AIR 1966 SC 1047) it was observed that the arithmetical mistake is a mistake of calculation, a clerical mistake is a mistake in writing or typing whereas an error arising out of or occurring from accidental slip or omission is an error due to careless mistake on the part of the Court liable to be corrected. To illustrate this point it was said that in a case where the order contains something which is not mentioned in the decree, it would be a case of unintentional omission or mistake as the mistake or omission is attributable to the Court which may say something or omit to say something which it did not intend to say or omit. No new arguments or re-arguments on merits can be entertained to facilitate such rectification of mistakes. The provision cannot be invoked to modify, alter or add to the terms of the original order or decree so as to, in effect, pass an effective judicial order after the judgment in the case."

32. The Apex Court in the recent judgment rendered in the case titled as **Srihari (Dead) through LR Smt. Ch. Niveditha Reddy versus Syed Maqdoom Shah and others,** reported in **2014 AIR SCW 6068,** has discussed the scope of Section 152 CPC**.** It is apt to reproduce para 22 of the judgment herein:

> *"22. This Court has earlier also reiterated in U.P.SRTC vs. Imtiaz Hussain,(2006) 1 SCC 380 : (AIR 2006 SC 649) has reiterated that the basis of provision of Section 152 of the Code is found on the maxim 'actus curiae neminem gravabit' i.e. an act of Court shall prejudice no man. As such an unintentional mistake of the Court which may prejudice the cause of any party must be rectified. However, this does not mean that the Court is allowed to go into the merits of the case to alter or add to the terms of the original decree or to give a finding which does not exist in the body of the judgment sought to be corrected."*

33. Applying the test to the instant case, it is a fit case where the Court has to invoke the powers in terms of Sections 151 and 152 CPC to rectify the mistake and refund the excess amount deposited by the respondent-Judgment Debtor to him in order to do complete justice between the parties.

34. The mistake, which was projected before the learned Single Judge and before this Court, is not a mistake which goes to the root of the case. It is not the basic foundation of any of the order(s) passed by the Executing Court, but, it is only a calculation, which was made by it while examining the operative portion of the award made by the Arbitrator and recorded as to what amount was due to the appellants-Decree Holders. Thus, how it can be said to be a determination. By no stretch of imagination, it can be said that the respondent-Judgment Debtor is caught by law of waiver, estoppel, constructive res judicata or by his admission. Thus, it cannot lie in the mouth of the appellants-Decree Holders that the respondent-Judgment Debtor is not entitled to restitution.

35. It is apt to reproduce Section 144 CPC herein:

> *"**144. Application for restitution.** - (1) Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order shall, on the application of any party entitled in any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified; and, for this purpose, the Court may make any orders including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order.*
>
> *Explanation. - For the purposes of sub-section (1), the expression "Court which passed the decree or order" shall be deemed to include, -*

> *(a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance;*
>
> *(b) where the decree or order has been set aside by a separate suit, the Court of first instance which passed such decree or order;*
>
> *(c) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.*
>
> *(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub- section (1)."*

36. The mandate of the above reproduced provision is to come to the rescue of a suitor who has made payment or parted with the property in terms of the decree of Court, which has no legal foundation.

37. The Allahabad High Court in the case titled as **Jagendra Nath Singh versus Hira Sahu and others,** reported in **AIR 1948 Allahabad 252,** while discussing the mandate of Section 144 CPC, held that the provisions of Section 144 CPC lay down a procedure where effect can be given to the general provision of the law whereunder every Court has a paramount duty to ensure that the order passed by the Court is not adversely working against any litigant and should not be allowed to work _injury on the suitors. It is apt to reproduce paras 45 and 46 of the judgment herein:

> *"45. Every Court has a paramount duty to ensure that it does no injury to any litigant, and the provisions of Section 144, - as was pointed out by Mukerji, J. in Sohan Bibi v. Baihnath Das - lay down a procedure whereunder effect can be given to that general provision of the law. In my opinion the Court should be slow so to construe this section as to impose a restriction upon its obligation to act "rightly and fairly according to the circumstances towards all parties involved."*
>
> *46. In Jai Berham v. Kedar Nath, 9 A.I.R. 1922 P.C. 269, a sale in execution of a decree was set aside against a purchaser who was a stranger to the decree. The purchaser was held to be entitled, before restoring the property, to be paid the excess of the purchase price over the mesne profits, the Privy Council holding that the Court's duty to order restitution arose under Section 144, as well as under its general jurisdiction. This decision is, in my opinion, authority for the view that the provisions of Section 144, have not to be narrowly construed. As I have said, the decree of the Subordinate Judge in the present case has been varied by a subsequent decree of this Court : and I do not think there is any good ground, either on principle or authority for not holding that the application of the appellant for restitution*

comes within the ambit of Section 144. I agree with the judgment of Malik J. and the order proposed by him."

38. The Apex Court in the case titled as **Mahijibhai Mohanbhai Barot versus Patel Manibhai Gokalbhai and others,** reported in **AIR 1965 Supreme Court 1477,** has laid down the same principle. It is apt to reproduce para 23 of the judgment herein:

"23. With this background the Legislature in passing the Code of Civil Procedure 1908 introduced sec. 144 therein. The said section is more comprehensive than sec. 583 of the Code of 1882. Sec. 144 of the present Code does not create any right of restitution. As stated by the Judicial Committee in Jai Berham v. Kedar Nath Marwari, 49 Ind App 351 at p. 355 : (AIR 1922 PC 269 at p. 271),

"It is the duty of the Court under sec. 144 of the Civil Procedure Code to place the parties in the position which they would have occupied but for such decree or part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved."

The section to avoid the earlier conflict prescribes the procedure defines the powers of the Court and expressly bars the maintainability of a suit in respect of a relief obtainable under this section. The section does not either expressly or by necessary implication change the nature of the proceedings. Its object is limited. It seeks to avoid the conflict and to make the scope of the restitution clear and unambiguous. It does not say that an application for restitution which till the new Procedure Code was enacted was an application for execution should be treated as an original petition. Whether an application is one for execution of a decree or is an original application depends upon the nature of the application and the relief asked for. When a party who lost his property in execution of a decree seeks to recover the same by reason of the appellate decree in his favour he is not initiating any original proceeding but he is only concerned with the working out of the appellate decree in his favour. The application flows from the appellate decree and is filed to implement or enforce the same. He is entitled to the relief of restitution because the appellate decree enables him to obtain that relief either expressly or by necessary implication. He is recovering the fruits of the appellate decree. Prima facie therefore having regard to the history of the section there is no reason why such an application shall not be treated as one for the execution of the appellate decree."

39. The Apex Court in the case titled as **Mrs. Kavita Trehan and another versus Balsara Hygiene Produces Ltd.,** reported in **AIR 1995 Supreme Court 441,** held that restitutionary jurisdiction in terms of Sections 144 and 151 CPC is inherent in every Court. It is apt to reproduce para 13 of the judgment herein:

> *"13. The Law of Restitution encompasses all claims founded upon the principle of unjust enrichment. 'Restitutionary claims are to be found in equity as well as at law'. Restitutionary law has many branches. The law of quasi-contract is "that part of restitution which stems from the common indebitatus counts for money had and received and for money paid, and from quantum meruit and quantum valebat claims." (See 'The Law of Restitution' - Goff & Jones, 4th Edn. Page 3). Halsbury's Law of England, 4th Edn.Page 434 states :*
>
> > *"Common Law. Any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi contract or restitution.*
> >
> > *For historical reasons, quasi contract has traditionally been treated as part of, or together with, the law of contract. Yet independently, equity has also developed principles which are aimed at providing a remedy for unjustifiable enrichment. It may be that today these two strands are in the process of being woven into a single topic in the law, which may be termed "restitution"."*
>
> *Recently the House of Lords had occasion to examine some of these principles in Woolwich Equitable Building Society v. Inland Revenue Commissioners, 1993 AC 70."*

40. It would be profitable to reproduce paras 26 to 28 of the judgment rendered by the Apex Court in the case titled as **South Eastern Coalfields Ltd. versus State of M.P. and others,** reported in **(2003) 8 Supreme Court Cases 648,** herein:

> *"26. In our opinion, the principle of restitution takes care of this submission. The word 'restitution' in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the Court or in direct consequence of a decree or order (See Zafar Khan v. Board of Revenue, U. P., 1984 Supp SCC 505 : AIR 1985 SC 39). In law, the term 'restitution' is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; (iii) compensation or reparation for the loss caused to another. (See Black's Law Dictionary, Seventh Edition, P. 1315). The Law of Contracts by John D. Calamari and Joseph M. Perillo has been quoted by Black to say that 'restitution' is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done.*

> *"Often, the result in either meaning of the term would be the same. ..... Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non-tortious misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed."*

The principle of restitution has been statutorily recognized in S. 144 of the Code of Civil Procedure, 1908. Section 144 of the CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the Court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of final decision going against the party successful at the interim stage. Unless otherwise ordered by the Court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the Court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution would far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the Court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the Court at the stage of final decision, the Court earlier would not or ought not to have passed. There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

27. Section 144 of the CPC is not the fountain source of restitution; it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from S. 144 the Court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In Jai Berham v. Kedar Nath Marwari, (1922) 49 IA 351 : AIR 1922 PC 269, their Lordships of the Privy Council said: (AIR p. 271)

> *"It is the duty of the Court under S. 144 of the Civil Procedure Code to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved."*

Cairns, L. C. said in Rodger v. Comptoir D'Escompte de Paris, (1871) L.R. 3 PC 465 : 7 Moo PCC NS 314 : 17 ER 120: (ER p. 125)

> *"[O]ne of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression, the act of the Court is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the Case."*

This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it (A. Arunagiri. Nadar v. S. P. Rathinasami, (1971)1 MLJ 220. In the exercise of such inherent power the Courts have applied the principles of restitution to myriad situations not strictly falling within the terms of Section 144.

28. That no one shall suffer by an act of the Court is not a rule confined to an erroneous act of the court; the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the Court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the Court not intervened by its interim order when at the

> *end of the proceedings the Court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the Court would act in conjunction with what is the real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the Court withholding the release of money had remained in operation."*

41. The ratio of the Apex Court in the said judgment is that if a case does not squarely fall within the ambit of Sections 144 and 152 CPC, the Court has inherent powers under Section 151 CPC to pass order(s) in order to do complete justice between the parties and to restore the position.

42. In the case titled as **State of Gujarat & Ors. versus Essar Oil Limited and Anr.,** reported in **2012 AIR SCW 1008,** the Apex Court explained the concept of restitution. It is apt to reproduce paras 60, 62, 70, 71 and 73 of the judgment herein:

> *"60. Examining the aforesaid two contentions, this Court finds that there is an overlapping area between the two. The concept of restitution is basically founded on the idea that when a decree is reversed, law imposes an obligation on the party who received an unjust benefit of the erroneous decree to restitute the other party for what the other party has lost during the period the erroneous decree was in operation. Therefore, the Court while granting restitution is required to restore the parties as far as possible to their same position as they were in at the time when the Court by its erroneous action displaced them. In the case of Lal Bhagwant Singh v. Sri Kishen Das, 1953 AIR(SC) 136, Justice Mahajan speaking for a unanimous three-Judge Bench of this Court explained the doctrine of restitution in the following words:-*

"the principles of the doctrine of restitution which is that on the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that it is the duty of the Court to enforce that obligation unless it is shown that restitution would be clearly contrary to the real justice of the case "

61. .....

62. The concept of restitution is virtually a common law principle and it is a remedy against unjust enrichment or unjust benefit. The core of the concept lies in the conscience of the Court which prevents a party from retaining money or some benefit derived from another which he has received by way of an erroneous decree of Court. Such remedy in English Law is generally different from a remedy in contract or in tort and falls within a third category of common law remedy which is called quasi contract or restitution.

63 to 69. .....

70. The second principle that an act of court cannot prejudice anyone, based on latin maxim "actus curiae neminem gravabit" is also encompassed partly within the doctrine of restitution. This actus curiae principle is founded upon justice and good sense and is a guide for the administration of law.

71. The aforesaid principle of "actus curiae" was applied in the case of A.R. Antulay v. R.S. Nayak & another, 1988 2 SCC 602, wherein Sabyasachi Mukharji, J (as his lordship then was) giving the majority judgment for the Constitution Bench of this Court, explained its concept and application in para 83, page 672 of the report. His lordship quoted the observation of Lord Cairns in Rodger v. Comptoir D escompte De Paris,1871 3 LR 465 which is set out below:

"Now, their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

72. .....

> *73. It was made clear in the Antulay Case that when Court passes an order, which is rendered per incuriam, and the party suffered because of the mistake of the Court, it is the Court's duty to rectify the said mistake. It is in that context that the concept of actus curiae can be invoked. In the instant case the order passed by the High Court in the second PILs was overturned by this Court by its order-dated 19.01.2004 on a different interpretation of section 29 of the WPA."*

43. Section 144 CPC, as reproduced hereinabove, is a part of procedure which provides remedy to a suitor who has lost his/her position in the execution proceedings of the decree or order. It can be pressed into service on the following grounds:

> (i) The restitution sought must be in respect of the decree or order which had been varied or reversed;
>
> (ii) The party applying for restitution must be entitled to a benefit under a reversing decree or order; and
>
> (iii) The relief claimed must be properly consequential on the reversal or variation of the decree or order.

44. The remedy can be invoked even otherwise also. The word 'otherwise' used provides that restitution can be prayed whether or not a decree or order was altered, varied or reversed.

45. The suitor/aggrieved party is not supposed to file a suit but has to lay a motion in view of the mandate of sub-section (2) of Section 144 CPC.

46. Applying the test, it is a fit case where the Court has to interfere in terms of the mandate of Section 144 CPC.

47. Section 72 of The Indian Contract Act, 1872 (for short "Contract Act") provides that if a mistake is committed and money or thing is handed over to any person, he has to repay. It is apt to reproduce Section 72 of the Contract Act herein:

> *"**72. Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.** - A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."*

48. The Apex Court in the case titled as **The Sales Tax Officer, Banaras and others versus Kanhaiya Lal Makund Lal Saraf,** reported in **AIR 1959 Supreme Court 135,** has dealt with the issue and held that the word 'mistake' in Section 72 of the Contract Act comprises both mistake of law and fact and that the mistake, if established, entitles the party paying the money to recover it back from the party receiving the same. The learned Single Judge has discussed the judgment in the impugned order. We deem it proper to reproduce paras 23 and 24 of the judgment herein:

> *"23. The Privy Council resolved this conflict in Shiba Prasad Singh v. Srish Chandra Nandi. 76 Ind App 244 : (AIR 1938 PC 297). Their Lordships of the Privy Council observed that the authorities which dealt with the meaning of "mistake" in the section were surprisingly few and it could not be said that there was any settled trend of authority. Their Lordships were*

therefore bound to consider this matter as an open question, and,.stated at p. 253 (of Ind App) : (at p 301 of AIR) : -

> *"Those learned judges who have held that mistake in this context must be given a limited meaning appear to have been largely influenced by the view expressed in Pollock and Mulla's commentary on S. 72 of the Indian Contract Act, where it is stated (Indian Contract and Specific Relief Acts, 6th Ed. p. 402): "Mistake of law is not expressly excluded by the words of this section; but S. 21 shows that it is not included". For example, ILR 44 Bom 631: (AIR 1920 Bom 192) Macleod J. said referring to S. 72 "on the face of it mistake includes mistake of law. But it is said that under S. 21 a contract is not voidable on the ground that the parties contracted under a mistaken belief of the law existing in British India, and the effect of that section would be neutralized if a party to such a contract could recover what he had paid by means of S. 72 though under S. 21 the contract remained legally enforceable. This seems to be the argument of Messrs. Pollock and Mulla and as far as I can see it is sound." In AIR 1929 Mad 177 Ramesam and Jackson JJ. say : "Though the word 'mistake' in S. 72 is not limited it must refer to the kind of mistake that can afford a ground for relief as laid down in Ss. 20 and 21 of the Act .. . . .. Indian law seems to be clear, namely, that a mistake, in the sense that it is a pure mistake as to the law in India resulting in the payment by on person to another and making it equitable that the payee should return the money is no ground for relief." Their Lordships have found no case in which an opinion that "mistake" in S. 72 must be given a limited meaning has been based on any other ground. In their Lordships' opinion this reasoning is fallacious. If a mistake of law has led to the formation of a contract, S. 21 enacts that that contract is not for that reason voidable. If money is paid under that contract, it cannot be said that that money was paid under mistake of law; it was paid because it was due under a valid contract, and if it had not been paid payment could have been enforced. Payment "by mistake" in S. 72 must refer to a payment which was not legally due and which could not have been enforced; the "mistake" is thinking that the money paid was due when, in fact, it was not due. There is nothing inconsistent in enacting on the one hand that if parties enter into a contract under mistake in law that contract must stand and is enforceable, but, on the other hand, that if one party acting under mistake of law pays to another party money which is not due by contract or otherwise, that money must be repaid. Moreover, if the argument based on inconsistency with S. 21 were valid, a similar argument based on inconsistency with S. 22 would be valid and would lead to the conclusion that S. 72 does not even apply*

> *to mistake of fact. The argument submitted to their Lordshijs was that S. 72 only applies if there is no subsisting contract between the person making the payment and the payee, and that the Indian Contract Act does not deal with the case where there is a subsisting contract but the payment was not due under it. But there appears to their Lordships to be no good reason for so limiting the scope of the Act. Once it is established that the payment in question was not due, it appears to their Lordships to be irrelevant to consider whether or not there was a contract between the parties under which some other sum was due. Their Lordships do not find it necessary to examine in detail the Indian authorities for the wider interpretation of "mistake" in S. 72. They would only refer to the latest of these authorities, AIR 1946 Cal 245 in which a carefully reasoned judgment was given by Sen, J. Their Lordships agree with this judgment. It may be well to add that their Lordships' judgment does not imply that every sum paid under mistake is recoverable, no matter what the circumstances may be. There may in a particular case be circumstances which disentitle a plaintiff by estoppel or otherwise".*
>
> *24. We are of opinion that this interpretation put by their Lordships of the Privy Council on S. 72 is correct. There is no war rant for ascribing any limited meaning to the word 'mistake' as has been used therein and it is wide enough to cover not only a mistake of fact but also a mistake of law. There is no conflict between the provisions of S.72 on the one hand and Ss. 21 and 22 of the Indian Contract Act on the other and the true principle enunciated is that if one party under a mistake, whether of fact or law, pays to another party money which is not due by contract or otherwise that money must be repaid. The mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitles the party paying the money to recover it back from the party receiving the same."*

49. The Apex Court in the case titled as **Indian Council for Enviro-legal Action versus Union of India and others,** reported in **(2011) 8 Supreme Court Cases 161,** has laid down the same principle. It is apt to reproduce paras 151 to 156 of the judgment herein:

> *"151. Unjust enrichment has been defined as:*
>
> > *"Unjust enrichment. - A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense."*
>
> *See Black's Law Dictionary, Eighth Edition (Bryan A. Garner) at page 1573. A claim for unjust enrichment arises where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another*

against the fundamental principles of justice or equity and good conscience."

152. 'Unjust enrichment' has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.

153. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." A defendant may be liable "even when the defendant retaining the benefit is not a wrongdoer" and "even though he may have received [it] honestly in the first instance." (Schock v. Nash, 732 A.2d 217, 232-33 (Delaware. 1999). USA)

154. Unjust enrichment occurs when the defendant wrongfully secures a benefit or passively receives a benefit which would be unconscionable to retain. In the leading case of Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. 1943 AC 32 : (1942) 2 All ER 122 (HL), Lord Wright stated the principle thus : (AC p. 61)

> *".....(A)ny civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."*

155. Lord Denning also stated in Nelson v. Larholt, (1948) 1 KB 339 : (1947) 2 All ER 751 as under: (KB p. 343):

> *".....It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular frame-work. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."*

156. The above principle has been accepted in India. This Court in several cases has applied the doctrine of unjust enrichment."

50. Applying the principle to the instant case, it is a fit case where the Court has to intervene in order to ensure that the Judgment Debtor may not suffer in terms of the mandate of Section 72 of the Contract Act.

51. The execution is the enforcement of the decree/order by the process of the Court. The rules of procedure are enacted in Part-II of the CPC and minor rules are relegated to Order XXI CPC. The mandate of the said provisions govern the procedure, mode and manner of the execution of the decree or order as it is. Order(s) passed in execution petition relating to enforcement of the decree/order can operate as constructive res judicata in the same proceedings at the subsequent stages or in different proceedings. But, any order made by the Executing Court, which has the effect of modification, alteration or variation and addition of the decree or order, is without any competence, power and jurisdiction, cannot operate as res judicata.

52. It is profitable to reproduce Order XXI Rules 22 and 23 CPC herein:

"ORDER XXI

EXECUTION OF DECREES AND ORDERS

22. Notice to show cause against execution in certain cases. *- (1) Where an application for execution is made,-*

(a) more than two years after the date of the decree, or

(b) against the legal representative of a party to the decree or where an application is made for execution of a decree filed under the provisions of section 44A, or

(c) against the assignee or receiver in insolvency, where the party to the decree has been adjudged to be an insolvent,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than two years having elapsed between the date of the decree and the application for execution if the application is made within two years from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such

> *notice would cause unreasonable delay or would defeat the ends of justice.*
>
> *xxx xxx xxx*
>
> ***23. Procedure after issue of notice.*** *- (1) Where the person to whom notice is issued under rule 22 does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.*
>
> *(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit. "*

53. These provisions deal with the procedure for issuance of notice and after the notice is issued.

54. The Rajasthan High Court, while dealing with Order XXI Rule 23 CPC, in the case titled as **Amar Singh versus Gulab Chand,** reported in **AIR 1960 Rajasthan 280,** has laid down the tests. It is apt to reproduce para 11 of the judgment herein:

> *"11. As for choosing between the Allahabad and the Madras decisions, after a careful consideration of the reasoning of both the cases, I have no hesitation in preferring and accepting the Madras view. I cannot appreciate, on a consideration of general principles of constructive res judicata, why a judgment-debtor who ignores the notice of a court requiring him to show cause why execution should not issue against him and omits to raise any objection should be permitted to ignore an adjudication directing execution at a later stage. The effect of the order is that all pleas in bar, if any, go by the board.*
>
> *There is absolutely no justice or equity in his favour and it will be wholly undesirable to set a premium on default and contumacy. The consideration that a notice under Order 21 Rule 22 is not accompanied by a copy of the application for execution as also those relevant in connection with suits should not have much weight in execution cases which are concerned merely with the enforcement of decisions binding on parties. There is no reason why default on the part of the judgment-debtor in this connection should be seriously viewed."*

55. It would also be profitable to reproduce para 18 of the judgment rendered by the Orissa High Court in the case titled as **Rajkishore Mohanty and another versus Kangali Moharana and others,** reported in **AIR 1972 Orissa 119,** herein:

> *"18. As the decision of this Court in 34 Cut LT 758 = (AIR 1968 Orissa 183) is in accord with the view we have taken of the application of the princi ple of constructive res judicata to ex ecution proceedings, the observation in (1970) 1 Cut WR 255, (Sama Kishore Das v. Raj Kishore Das) (on which re liance is placed by the respondents) that the decision in 34 Cut LT 758 = (AIR 1968 Orissa 183) does not state the law*

properly and must be taken to have been impliedly overruled by the deci sion of the Supreme Court in AIR 1969 SC 971, does not appear to us to be correct."

56. The Apex Court in the case titled as **Barkat Ali and another versus Badrinarain (dead) by LRs,** reported in **(2008) 4 Supreme Court Cases 615,** upheld the judgment of the Rajasthan High Court in the case (supra), reported in **AIR 2001 Rajasthan 51** and has laid down the same principle. It is apt to reproduce para 13 of the judgment herein:

"13. The principles of res judicata not only apply in respect of separate proceedings but the general principles also apply at the subsequent stage of the same proceedings also and the same Court is precluded to go into that question again which has been decided or deemed to have been decided by it at an early stage."

57. Learned Senior Counsel appearing on behalf of the Decree Holders also argued that the Judgment Debtor is caught by principle of constructive res judicata. The argument is not legally correct for the reason that the Executing Court has not made any determination, it has made only the calculations and if calculations are wrongly made, the same can be corrected at any stage.

58. The Patna High Court in the case titled as **Sheoratan Kurmi and after his death Akhji Devi and others versus Kalicharan Ram and others,** reported in **AIR 1968 Patna 270,** held that the principle of constructive res judicata applies to an execution proceeding under Section 144 CPC in respect of a matter which was decided expressly or by implication in a proceeding. It is apt to reproduce the relevant portion of para 5 of the judgment herein:

"5. In this Court counsel for the appellants submitted that a second application for restitution, which was numbered as Miscellaneous Case No. 2 of 1963, was not maintainable so long the order dated the 13th March, 1963, dismissing the first application for default stood, because of the principle of constructive res judicata. It is well settled that the principle of constructive res judicata applies to an execution proceeding under Section 144 in respect of a matter which was decided expressly or by implication in a proceeding. But in the instant case nothing was decided expressly and nothing could have been decided by implication, because the application under Section 144 was dismissed for default and by that date the appellants-opposite party had not filed any objection to the restitution proceeding. The mere fact that the application was dismissed for default in presence of the opposite party-appellants does not justify the inference that any matter was decided....."

59. It is apt to reproduce para 25 of the judgment rendered by the Apex Court in the case titled as **Radhey Shyam Gupta versus Punjab National Bank & Anr.,** reported in **2008 AIR SCW 8284,** herein:

"25. We also agree with Ms. Shobha that the High Court could not have gone behind the decree in the execution proceedings

> *and the alteration in the manner of recovery of the decretal amount was erroneous and cannot be sustained. We also agree with Ms. Shobha that even after the retiral benefits, such as pension and gratuity, had been received by the appellant, they did not lose their character and continued to be covered by proviso (g) to Section 60(1) of the Code. Except for the decision in the Jyoti Chit Fund and Finance case (supra), where a contrary view was taken, the consistent view taken thereafter support the contention that merely because of the fact that gratuity and pensionary benefits had been received by the appellant in cash, it could no longer be identified as such retiral benefits paid to the appellant."*

60. The Apex Court in the case titled as **Shivshankar Gurgar versus Dilip,** reported in **2014 AIR SCW 1099,** held that Executing Court cannot go beyond the decree and it must execute the decree as it is. It is apt to reproduce para 15 of the judgment herein:

> *"15. Coming to the second reason i.e., the failure of the appellant to challenge the order of the executing court dated 23.11.2005 (by which the executing court granted 15 days time to the respondent to deposit the balance of the arrears of rent) debar the appellant to recover possession of the property in dispute is equally untenable, because:*
>
> *(i) in our opinion, the order of the executing court dated 23.11.2005 is beyond his jurisdiction and a nullity. The only source which confers powers on the civil court to enlarge time is found under Section 148 of the Code of Civil Procedure which reads as follows:-*
>
> *148. Enlargement of time - Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period not exceeding thirty days in total, even though the period originally fixed or granted may have expired.*
>
> *It is obvious from the language of the Section, such a power can be exercised only in a case where a period is fixed or granted by the court for doing of any act prescribed by this Court. In a compromise decree such as the one on hand, the stipulation that the judgment debtor is required to make the payment of the money within a specified period is a stipulation by agreement between the parties and it is not a period fixed by the court. Therefore, Section 148 CPC has no application to such a situation. We are fortified by the decision of this court in Hukumchand v. Bansilal and others, AIR 1968 SC 86.*
>
> *(ii) In our opinion, the order dated 23.11.2005 virtually amounts to the modification of the decree and is without jurisdiction on the part of the executing court, therefore, a nullity.*

It is a settled principle of law that the executing court cannot go beyond the decree. It has no jurisdiction to modify a decree. It must execute the decree as it is. This Court in Deepa Bhargava and Another v. Mahesh Bhargava and Others, [(2009) 2 SCC 294] : (AIR 2008 SC (Supp) 788) held thus:-

> *"9. There is no doubt or dispute as regards interpretation or application of the said consent terms. It is also not in dispute that the respondent judgment-debtors did not act in terms thereof. An executing court, it is well known, cannot go behind the decree. It has no jurisdiction to modify a decree. It must execute the decree as it is ."*

61. Learned Single Judge, while making the calculations, has not made any determination and cannot be said to be any decision. Thus, the principles of constructive res judicata are not applicable.

62. Having glance of the above discussions, we are of the considered view that it is just a mistake committed by the Executing Court while making calculations and in terms of that calculations, the respondent-Judgment debtor, who was facing attachment and sale of his property, was constrained to deposit an amount to the tune of Rs.4,68,25,228/- before the Collector, Kangra at Dharamshala. It cannot be said and held that he is caught by the principle of constructive res judicata.

63. It is also true that the respondent-Judgment Debtor has stated in various applications that the amount to the tune of Rs.4,68,25,228/- was due to the appellants-Decree Holders, his statement cannot be said to be binding because that amounts to alteration of the decree/award. Decree/award is a decree/award, which is to be satisfied as it is as per the mandate of the provisions of the CPC.

64. The mandate of the said provisions is that the Executing Court has to take steps and pass appropriate orders relating to the execution of award/decree. We have reproduced the relevant portion of the award herein, which is not shrouded in any ambiguity, but clearly contains what was granted by the Arbitrator in favour of the appellants-Decree Holders and to what amount they are entitled to.

65. Viewed thus, we are of the considered view that the learned Single Judge has rightly passed the impugned order, needs no interference.

66. Having said so, the impugned order is upheld and the appeal is dismissed alongwith all pending applications.

****

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

Kuldeep Chand .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 299 of 2014
Reserved on: September 2, 2015.
Decided on: September 03, 2015.

Indian Penal Code, 1860- Section 302- Deceased was working under the accused- accused approached PW-25 – security guard noticed that hands of the accused were smeared with the blood- he also found blood drops on the ground where accused was standing- accused informed PW-5 that some incident had taken place in his room in which deceased had sustained injuries and there was a lot of blood- PW-5 informed PW-8 and PW-9 about the incident- prosecution witnesses went to the room of the accused- the accused was standing outside his door with one hand on his neck and another hand raised up- he was bleeding - the deceased was lying on the floor and blood was found all around the room- accused and deceased were taken to hospital where deceased was found dead- cause of death was ante mortem injury- it was contended on behalf of accused that deceased had attacked the accused and the accused had caused injury to the deceased to save himself – accused had sustained injury on the neck which was not shown to be self inflicted – accused had not run away and had not disturbed the crime spot- 159.82 mg% alcohol was found in the blood of the deceased- this probablizes the defence taken by the accused that he had caused injuries to the deceased in exercise of right of private defence- however, the accused had caused more harm than was necessary- accused had no right to cause fatal injury to the deceased- accused convicted for the commission of offence punishable under Section 304(Part-I) instead of Section 302 of I.P.C. (Para-19 to 33)

Cases referred:
Jai Dev and another vrs. State of Punjab, AIR 1963 SC 612
The Munney Khan vrs. State of Madhya Pradesh, 1970 (2) SCC 480
Deo Narain vrs. The State of U.P., (1973) 1 SCC 347
Yogendra Morarji vrs. The State of Gujarat, AIR 1980 SC 660
Scaria alias Thankan vrs. State of Kerala, AIR 1995 SC 2342
Wassan Singh vrs. State of Punjab, (1996) 1 SCC 458
Rizan and another vrs. State of Chhattisgarh, (2003) 2 SCC 661
Laxman Singh vrs. Poonam Singh and others, 2003 Cri. L.J. 4478
V. Subramani and another vrs. State of T.N., (2005) 10 SCC 358

For the appellant: Mr. Satyen Vaidya, Sr. Advocate with Mr. Ajay Kochhar, Advocate.
For the respondent: Mr. M.A.Khan, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 30.7.2014, rendered by the learned Addl. Sessions Judge-I, Solan, H.P. in Sessions Trial No. 16-NL/7 of 2012,

whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Sections 302 IPC, has been convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 30,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that in the year 2012, M/S Gurmail Chaudhary Labour Contractor, Baddi, had supplied some labourers to M/S Jupiter Solar Power Ltd., Baddi. Dalip Kumar (deceased) son of Roop Lal was on roll of the said company as labourer. He was working with M/S Jupiter Solar Power Ltd., Baddi in March, 2012. He was residing in House No. A-50, Kailash Vihar, Baddi. The residence of the accused was situated across the security guard post of M/S Shree Cosmetics Company. He was residing in the ground floor of the building and had taken room on rent through Devinder Wallia (PW-16) on monthly rent of Rs. 2500/-. Deceased Dalip Kumar was peon in M/S Jupiter Solar Power Ltd., Baddi and was working under the accused. Sh. Manish Kumar (PW-25), was posted as security guard in Shree Cosmetics Company, Baddi. In the intervening night of 15/16.3.2012, at about 3:00 AM, accused approached him and asked him about the supervisor. He told that supervisor had left for his house and accused asked him to contact the supervisor. But, Manish Kumar PW-25, could not contact him as he was not having balance in the mobile. Thereafter, accused went back. Manish Kumar PW-25 found hands of the accused smeared with blood and even on the next morning when he went out for a round of company premises and found blood drops on the ground where accused was standing. Sh. Sudershan Jamwal PW-5 was Director of M/S Jupiter Solar Power Ltd.. On 16.3.2012, at about 3:07 AM, he received a call from accused that an incident had taken place in his quarter. He informed that peon Dalip Kumar had come to his quarter in the evening and stayed there for a night. Accused also informed him that Dalip Kumar sustained injuries and there was lot of blood. PW-5 asked accused whether Dalip Kumar was alive or not. Accused replied that he did not know. Thereafter PW-5, immediately rang up Sh. Deepak Sharda (PW-9), Manager HR and Sh. Nagpal (PW-8), Administrative Officer, informing them about the incident having taken place in the quarter of accused and asked them to reach the Company immediately. Sh. Sudarshan Jamwal went to Company premises, immediately, where he met Sh. Nagpal and he called Sh. Dinesh Kumar, driver (PW-10) through security guard (PW-7). They all went to the quarter of accused. They saw accused standing outside his door with one hand on his neck and another hand raised up. He was bleeding. They found Dalip Kumar lying on the floor bleeding in the quarter of accused and blood was found all around in the room. Accused alongwith Dalip Kumar were taken to NRI Hospital, Baddi, in a vehicle for treatment. Accused was immediately attended to by the doctor and given first aid. Sh. Deepak Sharda PW-9 informed ASI Rakesh Kumar PW-21 over telephone about the incident having taken place at Kailash Vihar. ASI Rakesh Kumar alongwith other police officials came to NRI Hospital, Baddi. He found dead body of Dalip Kumar lying there. Dalip Kumar was declared dead by the doctor. The accused was sent to PGI, Chandigarh for treatment. Rukka Ext. PW-3/A was prepared. FIR Ext. PW-3/B was registered. The knife Ext. P-2 was taken into possession. Doctor Atul Bhardwaj conducted autopsy on 16.3.2012. The accused was also medically examined. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 25 witnesses. The accused was also examined under Section 313 Cr.P.C. He specifically denied the incriminating circumstances put to him. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Satyen Vaidya, Sr. Advocate for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. M.A.Khan, Addl. Advocate General, appearing on behalf of the State, has supported the judgment of the learned trial Court dated 30.7.2014.

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

6. PW-5 Col. Sudershan Singh Jamwal (Retd.) deposed that the accused was posted as Administrative Officer in the Company. On 16.3.2012, at about 3:07 AM, he received a call from the accused that an incident has taken place in his quarter. He stated that their peon, Dalip Kumar had come to his quarter previous evening and stayed there for night. He told that Dalip Kumar sustained injuries and there was a lot of blood. He immediately rushed to the company. He rang up Mr. Deepak Sharda, HR Manager and Mr. Nagpal, Administrative Officer. He told them that some incident had taken place in the quarter of Kuldeep Chand Sharma and asked them to come to Company, immediately. He alongwith Nagpal and other security personnel went to the quarter of Kuldeep Chand Sharma. He saw Kuldeep Chand Sharma standing outside his door with one hand on his neck and one hand raised up. He was bleeding badly. He also saw Dalip Kumar deceased lying on the floor. He immediately, asked his staff to put them in the vehicle with intention to take them to NRI hospital for medical treatment. He asked HR Manager Mr. Deepak Sharda about his whereabouts. He said that he was coming to the Company. He asked him to go back to the NRI hospital and ask the doctor to be ready to attend the causalities. On checking, Mr. Dalip Kumar, the doctor declared him dead. After giving the first aid to Mr. Kuldeep Chand Sharma, he referred him immediately to PGI, Chandigarh. He detailed Mr. Nagpal, one security supervisor alongwith the guard to accompany him to PGI, Chandigarh. The police searched the quarter. One knife and blood stained sack were lying on the floor. One blood stained pair of chappal was also lying there. Knife was packed in a parcel. Blood was lifted from the spot. The case property was taken into possession. He identified knife Ext. P-2. In his cross-examination, he admitted that the accused told him on phone that Dalip Kumar had come to his room. He consumed liquor and stayed there in his room during night. He denied the suggestion that accused had told him on phone that Dalip Kumar deceased tried to cut his neck, while he was sleeping, with some sharp edged weapon. Volunteered that accused was being shifted to PGI after first aid. On asking, he intimated him that Dalip Kumar was trying to cut his throat with knife.

7. PW-6 Mohit Walia, deposed that the accused produced nothing before the police in his presence. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, by the learned Public Prosecutor, he admitted that the accused had shown the place of incident to the police and the police obtained his signatures on memo Ext. PW-6/A. He denied the suggestion that accused produced two broken teeth before the police which were put in a match box. It was packed and sealed and taken into possession. He also admitted his signatures on memo Ext. PW-6/B.

8. PW-7 Surinder Kumar deposed that he alongwith other persons went to the quarter of the accused. He noticed that accused was putting one hand on his neck and his other hand was raised. He was standing outside his room. The light of the room where Dalip Kumar was lying was on. He alongwith Nagpal and Dharam Singh accompanied accused to PGI Chandigarh in the vehicle. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, by the learned Public Prosecutor, he denied the suggestion that he got recorded in his statement made before the police that

accused told him at PGI Chandigarh that he caused the death of Dalip Kumar by inflicting knife blow.

9. PW-8 Nagpal, deposed that Col. Jamwal went to the quarter of accused in his vehicle whereas he alongwith the security personnel went in separate vehicle with driver. The hand and neck of the accused were bleeding. He was holding his hand which was bleeding. The doctor declared Dalip as "brought dead". The accused was taken to NRI hospital, first aid was given to him and he was sent to PGI, Chandigarh. He alongwith Dinesh, Dharam Pal and Surjeet Singh accompanied the accused to Chandigarh in the vehicle. On the way to Chandigarh, the accused did not tell anything to them about the incident. He was declared hostile and cross-examined by the learned Public Prosecutor.

10. PW-9 Deepak Sharda, deposed that he went to hospital and also apprised the police that injured had been shifted to NRI, Hospital at Baddi and they should come there. When they reached NRI Hospital, Col. Jamwal alongwith injured and others had already reached there. After some time, the Medical Officer told that Dalip was dead. They further told that the condition of other injured, namely the accused, was very critical and he was shifted to PGI, Chandigarh. He had seen Kuldeep on that day in NRI Hospital, Baddi. He did not have any talk with him on the way. One kitchen knife was lying on the floor but he did not notice whether it was stained with blood. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, by the learned Public Prosecutor, he admitted that all the memos and parcels bear the date. These memos were signed by him after going through the same.

11. PW-10 Dinesh deposed that he reached the spot and the accused was outside his house. He was bleedings. The accused boarded in his vehicle whereas the security officials brought Dalip from the room. He was also put into his vehicle. They took both the injured to NRI Hospital at Baddi. The first aid was given to accused and he was shifted to PGI, Chandigarh. He brought the accused to Chandigarh in official vehicle. He was also declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion in his cross-examination by the learned P.P. that while being taken to PGI, Chandigarh, the accused told them that Dalip had died because of stab wound inflicted by him.

12. PW-13 Dr. Atul Bhardwaj, has conducted the autopsy on 16.3.2012 around 2:00 PM. According to him, the injuries were ante mortem in nature. Injury No. 3(a) caused the death of the person. It was sufficient in the ordinary course of nature to cause death of a person. The person would have died instantaneously because of the wound and the time gap between death and post mortem was between 6-18 hours.

13. PW-17 Manoj Kumar deposed that on 18.3.2012 at about 2:30 PM, he and Mohit went to Kailash Vihar. Police people were present there and in their presence, the police disclosed the place where the incident happened. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, by the learned Public Prosecutor, he admitted that the accused had identified the place where the chappal and knife were lying in the room.

14. PW-18 HHC Kesar Singh deposed that the accused led the police party to Kailash Vihar, Baddi. The accused led to House No. A-50. The room was locked. The accused opened the lock of the door. Two teeth were also there on the floor. These were taken into possession in a match-box and put into parcel.

15. PW-21 ASI Rakesh Kumar deposed that on 16.3.2012 at about 3:35 PM, one Deepak Sharda telephonically informed that an altercation had taken place at Kailash Vihar and that injured had been brought to NRI Hospital, Baddi. Report Ext. PW-4/A was written. HC Amit Kumar went to NRI Hospital Baddi. The doctor had already declared Dalip Kumar brought dead. Accused Kuldeep was bleeding. He was referred to PGI, Chandigarh. The inquest papers vide memo Ext. PW-21/D was prepared. The accused was discharged from PGI, Chandigarh on 16.3.2012. He was arrested on 17.3.2012. In his cross-examination, he admitted that in chemical examiner's report, alcohol was found in the blood of the deceased.

16. PW-23 Naseeb Singh Patial, Scientific Officer has proved report Ext. PC.

17. PW-24 Dr. Abhilash Alex, has examined the accused. He proved MLC Ext. PW-24/B. According to him, the patient had 10 x 2 cm wound in the left side of the neck, 3 cm below the angle of mandible and at the level of the thyroid cartilage. The wound was only superficial and only muscle deep. There was no major vessel injury or laryngotracheal trauma otherwise the patient was stable. He also admitted that injury was possible with knife Ext. P-2 shown to him in the Court. In his cross-examination, he deposed that if the injury was slightly deeper received by the accused, it would have been fatal.

18. PW-25 Manish Kumar, deposed that on the intervening night of 15/16th March, 2012, at about 3:00 AM, accused approached him and asked him about his supervisor. He told him that he has left for his house. The accused asked him to contact him telephonically. He declined to do so as he was not having balance in his mobile phone. Thereafter, accused went back. At that time, the hands of the accused were smeared with blood. On the next morning, when he went out for round of the company premises, he found blood drops on the ground where the accused was standing on the previous night.

19. What emerges from the evidence discussed hereinabove, is that the deceased Dalip Kumar had gone to the house of accused. The accused informed PW-5 Col. Sudershan Singh that some incident has taken place at his residence. PW-5 Col. Sudershan Singh reached on the spot. He along with Nagpal and other security personnel went to the quarter of the accused. He saw accused standing outside his door with one hand on his neck and other raised up. The accused was bleeding badly. The accused and deceased were taken to the hospital. Dalip Kumar was declared 'brought dead' by the doctor at NRI Hospital, Baddi.
The accused was referred to PGI, Chandigarh on 16.3.2012 itself. The knife Ext. P-2 was recovered from the spot. The autopsy was conducted on the body of deceased Dalip Kumar. The cause of death was ante mortem injuries. The death was instantaneous. The time which had elapsed between death and post mortem was between 6-18 hours. The accused was also examined by PW-24 Dr. Abhilash Alex.

20. The deceased was working under the accused. He was working as Peon and the accused was the Administrative Officer. PW-13 Dr. Atul Bhardwaj, has noticed the following injuries on the body of the deceased:

> "1. 8 and 9 ribs on the left side were fractured. Corresponding with external gaping wound with slitting of corresponding thoracic wall and musculature. The pericardium was ruptured with massive blood collection with clotted blood lumps in left thoracic cavity. Anterior surface of heart bearing 3-4 cm curvilinear laceration exposing left ventricle chamber. The heart chambers were empty. No evidence of any congenital/valvular hurt disease.

2. The orodental hygiene was fair with no evidence of blood, vomitus or frothing from the upper aero-digestive tract. There was evidence of semi-digestive food with digestive enzymes/secretions in the stomach.

3. (a) There was nearly 4 x 1.5 cm gaping wound with clear cut inverted margins directed upwards and medially with fractured 8 and 9 ribs on left thorax nearly 5 cm below nipple. On probing the wound was tracked upto 10-12 cm piercing internal thoracic muscle and anterior surface of heart.

(b) Nearly 4 x 1 cm gaping wound with clear cut inverted margins on right side back nearly 5 cm from midline at thoracic 6-7 vertebrae level which could be probed upto nearly 5 cm directed downwards and medially."

21. Injury No. 3(a), according to him, was sufficient to cause the death of a person. Injury No. 3(a) was 4 x 1.5 cm gaping wound with clear cut inverted margins directed upwards and medially with fractured 8 and 9 ribs on left thorax, nearly 5 cm below nipple. The wound was tracked upto 10-12 cm piercing internal thoracic muscle and anterior surface of heart. Mr. Satyen Vaidya, learned Senior Advocate for the accused has vehemently argued that the accused was attacked by Dalip Kumar with knife. He has inflicted injury on the neck of the accused and thereafter in order to save his life, injuries were inflicted upon the deceased during scuffle by the accused. He has also referred to the statement of PW-24 Dr. Abhilash Alex, who has examined the accused on 16.3.2012. PW-24 Dr. Abhilash Alex, has categorically deposed that the accused had 10 x 2 cm wound in the left side of the neck, 3 cm below the angle of mandible and at the level of the thyroid cartilage. In his cross-examination, PW-24 Dr. Abhilash Alex, however, has admitted that if the injury was slightly deeper received by the accused, it would have been fatal. He has also admitted that the neck of a person is a vital part of the body as many vessels lead to brain through neck and if the injury on the neck part, if goes deep up to the vessels, it could prove to be fatal.

22. It has come on record that the accused was bleeding profusely when the witnesses, cited hereinabove, had approached his quarter. He was immediately taken to the NRI Hospital. He was given first aid and thereafter, he was referred to PGI, Chandigarh. The very fact that he was referred to PGI, Chandigarh, pre-supposes that he had received injuries and it required immediate attention by the doctors at PGI, Chandigarh. Since the injury was on the neck, the doctor at Baddi in his own wisdom, had referred the accused to PGI, Chandigarh. Thus, there is merit in the contention of Mr. Satyen Vaidya, Sr. Advocate appearing for the accused that the deceased firstly has inflicted injury upon the neck of the accused and thereafter accused, in order to save himself, has caused injuries to the deceased in a scuffle. The injury on the neck of the accused cannot be said to be self inflicted. However, the fact of the matter is that the accused has exceeded his right of private defence by inflicting several injuries on the body of the deceased. The accused himself has informed PW-5 Sudarshan Singh about the incident. He has not run away from the spot. He was present on the spot when the witnesses visited his house. He has not even disturbed the crime spot. The deceased had visited his house for staying overnight. It has also come on record that the deceased had also consumed liquor and the quantity of ethyl alcohol was 159.82 mg%. Moreover, no motive has been attributed to the accused. The defence put forth by the accused is probablized that the deceased firstly attacked the accused and thereafter, he apprehending imminent threat to his life or grievous hurt to him inflicted injuries on the deceased. The accused has used more force what was required on the occasion.

23. Their lordships of the Hon'ble Supreme Court in the case of ***Jai Dev and another vrs. State of Punjab,*** reported in ***AIR 1963 SC 612,*** have held that under Section 100, if the person claiming the right of private defence has to face assailants who can be reasonably apprehended to cause grievous hurt to him, it would be open to him to defend himself by causing the death of the assailant. It has been held as follows:

> "[11] Section 100 provides inter alia, that the right of private defence of the body extends under the restrictions mentioned in Section 99, to the voluntary causing of death if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault. In other words, if the person claiming the right of private defence has to face assailants who can be reasonably apprehended to cause grievous hurt to him, it would be open to him to defend himself by causing the death of the assailant."

24. In the case of ***The Munney Khan vrs. State of Madhya Pradesh,*** reported in ***1970 (2) SCC 480***, Hon'ble Mr. Justice V. Bhargava, has held that the right of private defence in that case was very limited one. It only extended to causing hurt of any kind to Reoti Singh, but it did not provide any justification for giving a fatal blow. Such a right of private defence is governed by Section 101 IPC and it is subject to two limitations; one is that, in exercise of this right of private defence any kind of hurt can be caused, but not death; and the other is that the use of force does not exceed the minimum required to save the person in whose defence the force is used. It has been held as follows:

> "[4] However, the main point that was canvassed and that arises on these facts is whether the conviction of the appellant for the offence under Section 302, I. P. C., is justified. The findings of fact show that the knife blow was given by the appellant to Reotisingh when Reotisingh, had picked up a quarrel with the appellant's brother Zulfiquar, had overpowered him was sitting on his chest, was giving him fist blows, and could not be prevented from doing so by the appellant by mere use of his fist. Clearly,in these circumstances, Reotisingh was the aggressor and was causing hurt to Zulfiquar, the brother of the appellant, so that a right of self-defence of body of his brother Zulfiquar had accrued to the appellant. That right, however, could not justify the act of appellant in stabbing Reotisingh in his back so as to cause his death. The right of private defence was a very limited one. It only extended to causing hurt of any kind to Reotisingh, but it did not provide any justification for giving a fatal blow. Such a right of private defence is governed by Section 101, I. P: C., and is subject to two limitations. One is that in exercise of this right of private defence, any kind of hurt can be caused, but not death, and the other is that the use of force does not exceed the minimum required to save the person in whose defence the force is used. In these circumstances, in the present case, when Zulfiquar was being given fist blows only, there could be no justification at all for the appellant to stab Reotisingh with a knife and particularly to give him a blow which could prove fatal by aiming it on his back. The use of the knife itself was in excess of the right of private defence and it became much more excessive when the blow with the knife was given on a vital part of the body which, in the ordinary course of nature, was likely to cause the death of Reotisingh. From the fact that the blow was given in the back with a knife an inference follows that the appellant intended to cause death or at least intended to cause such injury, as would, in the ordinary course of nature, result in his death. In adopting

> this course, the appellant would have been clearly guilty of the offence of murder had there been no right of private defence of Zulfiquar at all. Since such a right did exist, the case would fall under the exception under which culpable homicide does not amount to murder on the ground that the death was caused in exercise of right of private defence but by exceeding that right. An offence of this nature is made punishable under the first part of Sec. 304, I. P. C. Consequently, the conviction of the appellant must be under that provision and not under Section 302, I. P. C."

25. In the same judgment, Hon'ble Mr. Justice I.D. Dua, has observed that the right of private defence is codified in Section 96 to 100 IPC, which have all to be read together in order to have a proper grasp of the scope and the limitations of this right. By enacting these sections in the Code, the authors wanted to except from the operation of its penal clauses, class of acts done in good faith for the purpose of repelling unlawful aggression. This right is available against an offence and, therefore, where an act is done in exercise of the right of private defence such act cannot give rise to any right of private defence in favour of the aggressor in return. This would seem to be so even if the person exercising the right of private defence has the better of his aggressor provided of course he does not exceed his right because the moment he exceeds it, he commits an offence. There is also no right of private defence in cases where there is time to have recourse to the protection of public authorities. The right of private defence is essentially a defensive right circumscribed by the statute, available only when the circumstances clearly justify it. It has been held as follows:

> "[3] The right of private defence is codified in Sections 96 to100, I. P. C., which have all to be read together in order to have a proper grasp of the scope and the limitations of this right. By enacting these sections the authors of the Code wanted to except from the operation of its penal clauses classes of acts done in good faith for the purpose of repelling unlawful aggression. This right is available against an offence and, there fore, where an act is done in exercise of the right of private defence such act cannot give rise to any right of private defence in favour of the aggressor in return. This would seem to be so even if the person exercising the right of private defence has the better of his aggressor provided of course he does not exceed his right because the moment he exceeds it, he commits an offence. There is also no right of private defence in cases where there is time to have recourse to the protection of public authorities. The right of private defence is essentially a defensive right circumscribed by the statute, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed of as a pretext for a vindictive, aggressive or retributive purpose. According to Section 97 this right vests even in strangers for the defence of the body and property of other persons against offences mentioned therein. The courts have, therefore, to be careful in seeing that no one on the mere pretext of the exercise of the right of private defence takes sides in a quarrel between two or more persons and inflict injuries on the one or the other. In a case when two parties are having a free fight without disclosing as to who is the initial aggressor it may be dangerous as a general rule to clothe either of them or his sympathiser with a right of private defence. If, however, one of them is shown to be committing an offence affecting human body then that would of course seem to give rise to such right. If there is no initial right of private defence then there can hardly be any question of exceeding that

right. With these observations which I have considered proper to make in order to guard myself against any possible misunderstanding about the precise scope of the right of private defence I agree with my learned brother."

26. In this case, the conviction was converted from Section 302 to Section 304, Part I, IPC.

27. Their lordships of the Hon'ble Supreme Court in the case of ***Deo Narain vrs. The State of U.P.,*** reported in ***(1973) 1 SCC 347,*** have held that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed and such right continues so long as such apprehension of danger to the body continues. Their lordships have further held that in such moments of excitement or disturbed mental equilibrium, it is somewhat difficult to expect parties facing grave aggression to cooly weigh as if in golden scales, and calmly determine with a composed mind as to what precise kind and severity of blow would be legally sufficient for effectively meeting the unlawful aggression. It has been held as follows:

> "[5] In our opinion, the High Court does seem to have erred in law in convicting the appellant on the ground that he had exceeded the right of private defence. What the High court really seems to have missed is the provision of law embodied in Section 102, Indian Penal Code. According to that section the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed, and such right continues so long as such apprehension of danger to the body continues. The threat, however, must reasonably give rise to the present and imminent, and not remote or distant, danger. This right rests on the general principle that where a crime is endeavoured to be committed by force, it is lawful to repel that force in self-defence. To say that the appellant could only claim the right to use force after he had sustained a serious injury by an aggressive wrongful assault is a complete misunderstanding of the law embodied in the above section. The right of private defence is available for protection against apprehended unlawful aggression and not for punishing the aggressor for the offence committed by him. It is a preventive and not punitive right. The right to punish for the commission of offences vests in the State (which has a duty to maintain law and order) and not in private individuals. If after sustaining a serious injury there is no apprehension of further danger to the body then obviously the right of private defence would not be available. In our view, therefore, as soon as the appellant reasonably apprehended danger to his body even from a real threat on the part of the party of the complainant to assault him for the purpose of forcibly taking possession of the plots in dispute or of obstructing their cultivation, he got the right of private defence and to use adequate force against the wrongful aggressor in exercise of that right. There can be little doubt that on the conclusions of the two courts below that the party of the complainant had deliberately come to forcibly prevent or obstruct the possession of the accused persons and that this forcible obstruction and prevention was unlawful the appellant could reasonably apprehend imminent and present danger to his body and to his companions. The complainants were clearly determined to use maximum force to achieve their end. He was thus fully justified in using force to defend himself and if necessary also his

companions against the apprehended danger which was manifestly imminent. Again, the approach of the High Court that merely because the complainant's party had used lathis, the appellant was not justified in using his spear is no less misconceived and insupportable. During the course of a marpeet, like the present, the use of a lathi on the head may very well give rise to a reasonable apprehension that death or grievous hurt would result from an injury caused thereby. It cannot be laid down as a general rule that the use of a lathi as distinguished from the use of a spear must always be held to result only in milder injury. Much depends on the nature of the lathi, the part of the body aimed at and the force used in giving the blow. Indeed, even a spear is capable of being so used as to cause a very minor injury. The High Court seems in this connection to have overlooked the provision contained in Section 100, I.P.C. We do not have any of the lathi. The blow, it is known, was aimed at a vulnerable part like the head. A blow by a lathi on the head may prove instantaneously fatal and cases are not unknown in which such a blow by a lathi has actually proved instantaneously fatal. If, therefore, a blow with a lathi is aimed at a vulnerable part like the head we do not think it can be laid down as a sound proposition of law that in such cases the victim is not justified in using his spear in defending himself. In such moments of excitement or disturbed mental equilibrium it is somewhat difficult to expect parties facing grave aggression to coolly weigh, as if in golden scales, and calmly determine with a composed mind as to what precise kind and severity of blow would be legally sufficient for effectively meeting the unlawful aggression. No doubt, the High Court does seem to be aware of this aspect because the other accused persons were given the benefit of this rule. But while dealing with the appellant's case curiously enough the High Court has denied him the right of private defence on the sole ground that he had given a dangerous blow with considerable force with a spear on the chest of the deceased though he himself had only received a superficial lathi blow on his head. This view of the High Court is not only unrealistic and unpractical but also contrary to law and indeed even in conflict with its own observation that in such cases the matter cannot be weighed in scales of gold."

27. Their lordships of the Hon'ble Supreme Court in the case of ***Yogendra Morarji vrs. The State of Gujarat,*** reported in ***AIR 1980 SC 660,*** have laid down general principles embodied in the Penal Code, governing the exercise of right of private defence as follows:

"[13] The Code excepts from the operation of its penal clauses large classes of acts done in good faith for the purpose of repelling unlawful aggression but this right has been regulated and circumscribed by several principles and limitations. The most salient of them concerned the defence of body are as under: Firstly, there is no right of private defence against an act which is not in itself an offence under the code; Secondly, the right commences as soon as - and not before- a reasonable apprehension of danger to the body arises from an attempt or threat to commit some offence although the offence may not have been committed and it is conterminous with the duration of such apprehension (Section 102). That is to say, right avails only against a danger imminent, present and real; Thirdly, it is a defensive and not a punitive or retributive right. Consequently, in no case the right extends to the inflicting

> of more harm than it is necessary to inflict for the purpose of the defence. (Sec. 99). In other words, the injury which is inflicted by the person exercising the right should be commensurate with the injury with which he is threatened. At the same time, it is difficult to expect from a person exercising this right in good faith, to weigh "with golden scales" what maximum amount of force is necessary to keep within the right. Every reasonable allowance should be made for the bona fide defender "if he with the instinct of self-preservation strong upon him, pursues his defence a little further than may be strictly necessary in the circumstances to avert the attack." It would be wholly unrealistic to expect of a person under assault, to modulate his defence step by step according to the attack; Fourthly, the right extends to the killing of the actual or potential assailant when there is a reasonable and imminent apprehension of the atrocious crimes enumerated in the six clauses of Section 100. For our purpose, only the first two clauses of Section 100 are relevant. This combined effect of these two clauses is that taking the life of the assailant would be justified on the plea of private defence; if the assault causes reasonable apprehension of death or grievous hurt to the person exercising the right. In other words, a person who is in imminent and reasonable danger of losing his life or limb may in the exercise of right of self-defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened. This principle is also subject to the proceeding rule that the harm or death inflicted to avert the danger is not substantially disproportionate to and incommensurate with the quality and character of the perilous act or threat intended to be repelled; Fifthly, there must be no safe or reasonable mode of escape by retreat, for the person confronted with an impending peril to life or of grave bodily harm, except by inflicting death on the assailant; Sixthly; the right being, in essence, a defensive right, does not accrue and avail where there is "time to have recourse to the protection of the public authorities." (Sec. 99).”

28. Their lordships of the Hon’ble Supreme Court in the case of ***Scaria alias Thankan vrs. State of Kerala,*** reported in ***AIR 1995 SC 2342,*** have held that the accused by inflicting four injuries on the deceased and also a serious injury on another victim, he certainly exceeded the right of private defence. Thus, he was convicted under Section 304, Part I IPC instead of Section 302 IPC. Their lordships have held as follows:

> “[6] The High Court while upsetting that finding held that the accused had no right of private defence and he was armed with a knife and deliberately inflicted injuries on these persons. It may be mentioned that PW-1 who gave the report did not say anything about the accused having received any injury. No doubt, at a later stage, the prosecution has made an effort to explain away the injuries on the accused but when a specific plea has been put forward by the accused and the presence of injuries of him is corroborated by medical evidence, the Court has to see whether the plea set up by him is plausible. It is needless to say that the accused need not affirmatively establish that he had a right of private defence and he exercised the same in that manner. The General Exception which deals with the right of private defence lays emphasis on the reasonable apprehension in the mind of the accused while exercising the right of private defence. However, for the purpose of this case, we need not go into the various aspects that have to be

kept in mind in giving benefit of the General Exception to the accused. Suffice it to say that where an injury is found on the accused and if the accused comes forward with a specific plea, the same has to be considered in the facts and the surrounding circumstances obtaining in the case. Every kind of explanation put forward particularly at the belated stage by the prosecution will not be sufficient and cannot be held to be an appropriate explanation to reject the version put forward by the accused particularly when it does not appear to be false but, on the other hand, appears to be plausible. The injury was inflicted on the forehead of the accused which is on a vital part. In such a situation, it cannot be said that the accused had no reasonable apprehension that some hurt, at least, would be caused to him. Further, as pleaded by him, there were three persons who were about to attack. The presence of the three persons at the scene of occurrence is not in dispute. In such a case, naturally, a reasonable apprehension would have been there in the mind of the accused. It is in this back-ground we have to consider the plea set up by the accused and examine whether the accused was justified in exercise of right of private defence. At least, a reasonable doubt arises in this case when we consider the prosecution version as well as the version put forward by the accused in the light of the facts and surrounding circumstances and the situation in which the occurrence had taken place.

[7] As already mentioned, they are all closely related to each other. Though the trial court has not satisfactorily dealt with the aspect of right of self defence but we, having given our earnest consideration, are of the view that the plea set up by the accused cannot simply be brushed aside. Under these circumstances, it is quite reasonable to hold that the accused had the right of self-defence. However, having regard to the fact that he inflicted four injuries on the deceased and also a serious injury on PW-2, he certainly exceeded the same. Therefore, Exception (2) to Section 300 I.P.C. is attracted and not the General Exception, as held by the trial court.

[8] Accordingly, in the result, we set aside the conviction under Section 302 I.P.C. and sentence of life imprisonment awarded thereunder and convict him under Section 304, Part-I, I.P.C. and sentence him to undergo 7 years, R. I. The other sentences and convictions are, however, confirmed. The sentences are directed to run concurrently."

29. In the case of ***Wassan Singh vrs. State of Punjab,*** reported in ***(1996) 1 SCC 458,*** their lordships have held that reasonable apprehension of the accused that grievous hurt will be caused to him must be judged from the subjective point of view of the accused and cannot be subjected to microscopic and pedantic scrutiny. It has been held as follows:

[10] While judging the nature of apprehension which an accused can reasonably entertain in such circumstances requiring him to act on the spur of the moment when he finds himself assaulted, by number of persons, it is difficult to judge the action of the accused from the cool atmosphere of the courtroom. Such situations have to be judged in the light of what happens on the spur of the moment on spot and keeping in view the normal course of human conduct as to how a person would react under such circumstances in a sudden manner with an instinct of self-preservation. Such situations have to be judged from the subjective point of view of the accused concerned

who is confronted with such a situation on spot and cannot be subjected to any microscopic and pedantic scrutiny. In this connection it is profitable to refer to two decisions of this court. In the case of Mohd. Ramzani v. State of Delhi, a division bench of this court speaking through Sarkaria, J. made the following pertinent observations:

> ".. The onus which rests on an accused person under Section 105, Evidence Act, to establish his plea of private defence is not as onerous as the unshifting burden which lies on the prosecution to establish every ingredient of the offence with which the accused is charged, beyond reasonable doubt. It is further well established that a person faced with imminent peril of life and limb of himself or another, is not expected to weigh in 'golden scales' the precise force needed to repel the danger. Even if he in the heat of the moment carries his defence a little further than what would be necessary when calculated with precision and exactitude by a calm and unruffled mind, the law makes due allowance for it. . "

In the case of Deo Narain v. State of U. P. , this court was concerned with a situation where the accused had received a blow on his head by a 467 lathi' and in self-defence he had used his spear in retaliation. While holding :hat the accused was entitled to the right of private defence extending to iven causing death, in such a case, he was acquitted of the offence under Section 302 Indian Penal Code. In this connection Dua, J. , speaking for this court in paragraph 5 of the Report has made these pertinent observations:

> "In our opinion, the High court does seem to have erred in law in convicting the appellant on the ground that he had exceeded the right of private defence. What the High court really seems to have missed is the provision of law embodied in Section 102, Indian Penal Code. According to that section the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed, and such right continues so long as such apprehension of danger to the body continues. The threat, however, must reasonably give rise to the present and imminent, and not remote or distant danger. This right rests on the general principle that where a crime is endeavoured to be committed by force, it is lawful to repel that force in self-defence. To say that the appellant could only claim the right to use force after he had sustained a serious injury by an aggressive wrongful assault is a complete misunderstanding of the law embodied in the above section. The right of private defence is available for protection against apprehended unlawful aggression and not for punishing the aggressor for the offence committed by him. It is a preventive and not punitive right. The right to punish for the commission of offences vests in the State (which has a duty to maintain law and order) and not in private individuals. . the approach of the High court that merely because the complainant's party had used lathis, the appellant was not justified in using his spear is no less misconceived and insupportable. During the course of a marpeet, like the present, the use of a lathi on the head may very well give rise to a reasonable

> apprehension that death or grievous hurt would result from an injury caused thereby. It cannot be laid down as a general rule that the use of a lathi as distinguished from the use of a spear must always be held to result only in milder injury. Much depends on the nature of the lathi, the part of the body aimed at and the force used in giving the blow. Indeed, even a spear is capable of being so used as to cause a very minor injury. The High court seems in this connection to have overlooked the provision contained in Section 100, Indian Penal Code. We do not have any evidence about the size or the nature of the lathi. The blow, it is known, was aimed at a vulnerable part like the head. A blow by a lathi on the head may prove instantaneously fatal and cases are not unknown in which such a blow by a lathi has actually proved instantaneously fatal. If, therefore, a blow with a lathi is aimed at a vulnerable part like the head we do not think it can be laid down as a sound proposition of law that in such cases the victim is not justified in using his spear in defending himself. In such moments of excitement or disturbed mental equilibrium it is somewhat difficult to expect parties facing grave aggression to coolly weigh, as if in golden scales, and 468 calmly determine with a composed mind as to what precise kind and severity of blow would be legally sufficient for effectively meeting the unlawful aggression. No doubt, the High court does seem to be aware of this aspect because the other accused persons were given the benefit of this rule. But while dealing with the appellant's case curiously enough the High court has denied him the right of private defence on the sole ground that he had given a dangerous blow with considerable force with a spear on the chest of the deceased though he himself had only received a superficial lathi blow on his head. This view of the High court is not only unrealistic and impractical but also contrary to law and indeed even in conflict with its own observation that in such cases the matter cannot be weighed in scales of gold. "

30. Their lordships of the Hon'ble Supreme Court in the case of ***Rizan and another vrs. State of Chhattisgarh,*** reported in ***(2003) 2 SCC 661,*** have held that in order to find whether the right of private defence is available or not, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. It has been held as follows:

> [13] Then comes plea relating to alleged exercise of right of private defence. Section 96, IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The Section does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even

if the accused has not taken it. If the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872, the burden of proof is on the accused, who sets of the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram and others v. Delhi Administration, AIR 1968 SC 702; State of Gujarat v. Bai Fatima, AIR 1975 SC 1478; State of U.P. v. Mohd. Musheer Khan, AIR 1977 SC 2226 and Mohinder Pal Jolly v. State of Punjab, AIR 1979 SC 577). Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft quoted observation of this Court in Salim Zia v. State of U.P. (AIR 1979 SC 391). runs as follows :

> 'It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence.'

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

[14] The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilises the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstances. But mere non-explanation of the injuries by

the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. [See Lakshmi Singh v. State of Bihar (AIR 1976 SC 2263)]. In this case, as the Courts below found there was not even a single injury on the accused persons, while PW-2 sustained large number of injuries and was hospitalized for more than a month. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject-matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101, IPC define the limit and extent of right of private defence.

[16] In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. Thus, running to house, fetching a tabli and assaulting the deceased are by no means a matter of course. These acts bear stamp of a design to kill and take the case out of the purview of private defence. Similar view was expressed by this Court in Biran Singh v. State of Bihar, AIR 1975 SC 87 and recently in Sekar alias Raja Sekharan v. State represented by Inspector of Police, Tamil Nadu (2002 (7) Supreme 124).

31. Their lordships of the Hon'ble Supreme Court in the case of ***Laxman Singh vrs. Poonam Singh and others,*** reported in ***2003 Cri. L.J. 4478,*** have held that non-explanation of the injury sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance.

32. Their lordships of the Hon'ble Supreme Court in the case of ***V. Subramani and another vrs. State of T.N.,*** reported in ***(2005) 10 SCC 358,*** have held that whether the injuries were commensurate with the danger apprehended, should be considered pragmatically and not with mathematical precision and hyper technical approach. It has been held as follows:

[11] Only question which needs to be considered is the alleged exercise of right of private defence. Section 96, IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The Section does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short 'the Evidence Act'), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable artd probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram and Ors v. Delhi Administration, state of Gujarat v. Bai Fatima, State Of U. P V. Mohd. Musheer Khan and Mohinder Pal Jolly v. State of Punjab. Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft quoted observation of this Court in Salim Zia v. State of U. P. , runs as follows:

> "it is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence

evidence. " the accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

33. In view of the observations and analysis made hereinabove, the appeal is partly allowed. The accused is convicted under Section 304 (Part I) IPC, instead of Section 302 IPC. The accused be heard on the quantum of sentence for offence under Section 304 (Part I) IPC on 9.9.2015. The Registry is directed to prepare the production warrant and send the same to the concerned Superintendent of Jail for production of the accused on 9.9.2015.

****

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

Cholamandlam MS General Insurance Co. Ltd. .....Appellant

Versus

Smt. Jamna Devi and others .....Respondents

FAO (MVA) No. 692 of 2008

Date of decision: 4th September, 2015.

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving licence- Insurer did not examine the Officer who had issued the driving licence- therefore, the plea that driver did not have a valid driving licence was not established.

(Para-7)

Motor Vehicles Act, 1988- Section 169- Insurer moved an application under Order 11 Rule 14 C.P.C which was rejected by the Tribunal- held, that the technicalities or procedural wrangles and tangles have no role to play before MACT- all the provisions of Civil Procedure Code are not applicable and only some provisions have been made applicable- Order 11 Rule 14 is not applicable before MACT and the application was rightly dismissed.

(Para-10 to 14)

Cases referred:

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646

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

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

For the appellant: Mr. Neeraj Gupta, Advocate

For the respondents: Mr. G.R. Palsara, Advocate, for respondents No. 1 to 3.
Mr. Vikas Rajput, Advocate, for respondent No.4.
Mr. Vijay Bhatia, Advocate, for respondents No. 5 and 6.
Mr. Deepak Bhasin, Advocate, for respondent No.7.

The following judgment of the Court was delivered:

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

Subject matter of this appeal is the judgment and award dated 25.10.2008, made by the Motor Accident Claims Tribunal, Mandi, for short "the Tribunal" in Claim Petition No. 29 of 2006, titled *Smt. Jamna Devi and others versus Tek Chand and others,* whereby compensation to the tune of Rs.4,17,500/- came to be awarded in favour of the claimants and insurer was saddled with liability, hereinafter referred to as "the impugned award", for short.

2. Claimants, driver and owner/insured have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The insurer has questioned the impugned award on three counts, i.e., *(i)* that the driver was not having a valid and effective driving licence, *(ii),* the insured/owner has committed willful breach, *(iii),* the appellant/insurer moved application under Order 11 Rule 14 of the Code of Civil Procedure, for short "the Code" read with Section 169 of the Motor Vehicles Act, for short "the Act" was rejected illegally.

4. The claimants had invoked the jurisdiction of the Motor Accident Claims Tribunal, Mandi, for the grant of compensation to the tune of Rs.4,45,200/-, as per the break-ups given in the claim petition.

5. The claim petition was resisted and contested by the respondents and following issues came to be framed.

(i) *Whether the death of Khem Singh took place while traveling in vehicle Maruti car bearing No. HP-37-6667 which met with an accident on 22.1.2006 at about 9 p.m. at place Gutkar, NH-21, as alleged? OOPP*

(ii) *If issue No. 1 is proved, to what amount of compensation, the petitioner is entitled ? OPP*

(iii) *Whether the driver was not having valid and effective driving licence and the vehicle was being driven in violation of the terms and conditions of the insurance policy as alleged? OPR2*

(iv) *Whether the deceased was passenger and is not covered under the moor vehicle Act and insurance policy as alleged? OPR*

(v) *Relief.*

6. There is no dispute with respect to issue No. 1, thus, the findings returned on issue No. 1 are upheld.

7. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 and 4 which revolve around the issues raised by the appellant/insurer, supra. The insurer-appellant had to discharge the onus to prove that the driver was not having a valid and effective driving licence to drive the offending vehicle, has not made any whisper to summon the officer who has granted the driving licence. Having said so, the insurer-appellant has failed to discharge the onus and prove that the driver was not having a valid and effective driving licence. Accordingly findings on issue No. 3 are upheld.

8. **Issue No. 4**. It was for the insurer to prove this issue, has failed to lead any evidence. Accordingly, findings returned on this issue are also upheld.

9. The learned counsel or the appellant vehemently argued that he had moved an application under Order 11 Rule 14 of the Code which came to be rejected vide order dated 11.6.2007. The argument advanced by the learned counsel for the appellant is devoid of any force for the following reasons.

10. The mandate of Chapter XI of the Motor Vehicles Act provides for the grant of compensation to the victim without succumbing to the niceties and technicalities of procedure. It is beaten law of the land that technicalities or procedural wrangles and tangles have no role to play.

11. My this view is fortified by the judgment delivered by the apex court in ***Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another***, reported in (**2013) 10 Supreme Court Cases 646, N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354 and Oriental Insurance Co. versus Mst. Zarifa and others,** reported in **AIR 1995 Jammu and Kashmir 81.**

12. Section 169 of the Act provides as to which procedure is applicable to the claim petition. The mandate of this Section is that all the provisions of the Code are not applicable. Some of the provisions of the Code of Civil Procedure have been made applicable in terms of the provisions of the Rules framed by the Central Government as well as State Government. The State of Himachal Pradesh has also framed the Himachal Pradesh Motor Vehicles Rules, 1999 (for short "the Rules") in terms of Sections 169 and 176 (b) of the Motor Vehicles Act, and only some of the provisions of the Code of Civil Procedure have been made applicable.

13. It is apt to reproduce Rule 232 of the said Rules herein:

> *"**232. The Code of Civil Procedure to apply in certain cases:-***
>
> *The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall so far as may be, apply to proceedings before the Claims Tribunal, namely, Order V, Rules 9 to 13 and 15 to 30; Order IX; Order XIII; Rule 3 to 10; Order XVI, Rules 2 to 21; Order XVII; Order XXI and Order XXIII, Rules 1 to 3."*

14. Thus, Order 11 Rule 14 of the Code is not applicable. The application was to be dismissed in *liminie* and was rightly dismissed by the Tribunal.

15. Having said so, no interference is called for. The appeal is dismissed and the impugned award is upheld.

16. The insurer is directed to deposit the amount, if not already deposited, within six weeks from today in the Registry. On deposit, the entire amount be released in favour of the claimants, through payees' cheque account.

17. Send down the record forthwith, after placing a copy of this judgment.

****

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

Dinesh Kumar .....Appellant
Versus
Trishla Devi and another ....Respondents

FAO (MVA) No. 703 of 2008
Date of decision: 4th September, 2015.

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving licence- held, that driver had a valid driving licence to drive 'Light Motor Vehicle'- offending vehicle fell within the definition of 'Light Motor Vehicle'- therefore, driver was competent to drive the vehicle and the plea of the Insurer cannot be accepted. (Para-5 to 8)

Cases referred:
National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 SCC 1531
Oriental Insurance Company Ltd vs Smt. Amra Devi and others ILR 2015 XLV (II) H.P. 874

For the appellant: Mr. Sanjeev Kuthiala, Advocate
For the respondents: Mr. Anup Rattan, Advocate, for respondent No.1.
Mr. B.M. Chauhan, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

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

Subject matter of this appeal is the judgment and award dated 1.2.2008, made by the Motor Accident Claims Tribunal, Fast Track Court, Una, District Una, for short "the Tribunal" in MAC Petition No. 4/2004 RBT 45/05/04, titled *Trishla Devi versus Dinesh Kumar and another,* whereby compensation to the tune of Rs.1 lac came to be awarded in favour of the claimant and owner/insured was saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. Claimant, driver and insurer have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them. Thus, the only question to be determined in this appeal is whether the Tribunal has rightly exonerated the insurer from the liability? The answer is in negative for the following reasons.

3. The insurer has specifically taken the ground before the Tribunal that the owner has committed willful breach and the driver was not having a valid and effective driving licence to drive the offending vehicle and issues No. 3 and 4 came to be framed. It is apt to reproduce the issues framed by the Tribunal herein:

(i) Whether deceased Harbansi Devi had died because of rash and negligent driving of vehicle No.HP-19-A-3504 by respondent No.1 at the relevant time as alleged? OPP.

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

(iii) Whether the respondent No. 1 was not holding any valid and effective driving licence at the time of accident in question. If so, its effect? OPR.

(vi) Whether the vehicle in question was being plied against the terms and conditions of the policy at the time of accident in question. If so, its effect? OPR.

(vii) Relief.

4. It was for the insure to lead evidence to prove that the driver was not having a valid and effective driving licence, has not led any evidence to prove issue No. 4. I wonder how the Tribunal has discharged the insurer from the liability. The Tribunal has made discussion in para 14 of the impugned award, which is without logic and has based his finding on conjectures.

5. Admittedly, the driver was having a valid and effective driving licence to drive the vehicle, which is at page 147 of the record file. The offending vehicle was falling within the definition of "light Motor Vehicle" thus, the driver was competent to drive the said offending vehicle in terms of mandate of Sections 2 (17) (19) and (21), readwith Sections 3, 7 and 10 (2) (e) of the Act. It is apt to reproduce all the referred Sections herein:

***"Section 2 (17)**. "heavy passenger motor vehicle" means any public service vehicle or private service vehicle or educational institution bus or omnibus the gross vehicle weight of any of which, or a motor car the unladen weight of which, exceeds 12,000 kilograms;*

***2 (19).** "learners licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive as a learner, a motor vehicle or a motor vehicle of any specified class or description;*

***2(21).** "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 2 [7500] kilograms;*

"Section 3. No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle other than1[a motor cab or motor cycle] hired for his own use or rented under any scheme made under subsection (2) of section 75] unless his driving licence specifically entitles him so to do. (2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government."

***Section (7)** Where the Central Government is satisfied that it is necessary or expedient so to do, it may, by rules made in this behalf, exempt generally, either absolutely or subject to such conditions as may be specified in the rules, any class of persons from the provisions of sub-section (3), or sub-section (5), or both.*

(8) Any learners licence for driving a motor cycle in force immediately before the commencement of this Act shall, after such commencement, be deemed to be effective for driving a motor cycle with or without gear.

Section 10.(2)(e) *transport vehicle;] (i) road-roller; (j) motor vehicle of a specified description"*

6. My this View is also fortified by this Judgment delivered by the Apex Court in the case titled as *National Insurance Co. Ltd. versus Swaran Singh and others***,** reported in ***AIR 2004 Supreme Court 1531.*** It is apt to reproduce para 88 of the said judgment herein:

> *"88. Motor Vehicles Act, 1988 provides for "grant of learner's licence. (See Section 4(3), Section 7(2), Section 10(3) and Section 14). A learner's licence is, thus, also a licence within the meaning of the provisions of the said Act. It cannot, therefore, be said that a vehicle when being driven by a learner subject to the conditions mentioned in the licence, he would not be a person who is not duly licensed resulting in conferring a right on the insurer to avoid the claim of the third party. It cannot be said that a person holding a learner's licence is not entitled to drive the vehicle. Even if there exists a condition in the contract of insurance that the vehicle cannot be driven by a person holding a learner's licence, the same would run counter to the provisions of Section 149(2) of the said Act."*

7. This Court in **FAO NO. 125 of 2008 titled *Oriental Insurance Company Ltd versus Smt. Amra Devi and others*** decided on 17th April, 2015 has laid down the same principles of law.

8. Having said so, the findings returned by the Tribunal are set aside and insurer is saddled with the liability and has to satisfy the award.

9. The insurer is directed to deposit the amount, if not already deposited, within six weeks from today in the Registry. On deposit, the entire amount be released to the claimant, through payees' cheque account.

10. The statutory amount deposited by the appellant/insured shall be paid to the claimant as cost of the litigation, in addition to the amount of compensation.

11. The impugned award is modified, as indicated above and the appeal is allowed.

12. Send down the record forthwith, after placing a copy of this judgment.

****

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

Fateh Chand …Appellant

Versus

State of Himachal Pradesh …Respondent

Cr. Appeal No. 384/2014
Reserved on: 3.9.2015
Decided on: 4.9.2015

Indian Penal Code, 1860- Sections 376 and 506- **Prevention of Children from Sexual Offences Act, 2012-** Section 6- Prosecutrix was residing with her elder sister in the house of maternal grand-father- accused was her maternal uncle- she was alone in the house when she was raped by the accused- accused threatened her not to divulge the incident to anybody- prosecutrix suffered stomach ache and was taken to Doctor who told that prosecutrix was pregnant for 26-28 weeks- age of the prosecutrix was 13 years- Medical Officer also corroborated the sexual intercourse- the testimony of the prosecutrix was corroborated by other witnesses- according to the report, accused was biological father of the baby of the prosecutrix- held, that in these circumstances, prosecution version was duly proved. (Para-16 and 17)

For the Appellant: Mr. Lovneeesh Kanwar, Advocate.
For the Respondent: Mr. P.M. Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This appeal is instituted against Judgment dated 2.7.2014 rendered by learned Special Judge, Kullu, District Kullu, Himachal Pradesh in Session trial No. 25/2013(2671 of 2013), whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence punishable under Sections 376 and 506 IPC and Section 6 of the Prevention of Children from Sexual Offences Act, 2012, has been convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs.30,000/- for the commission of offence under Section 6 of the Prevention of Children from Sexual Offences Act, 2012, and in default of payment of fine, to further undergo rigorous imprisonment for one year. He has also been sentenced to undergo rigorous imprisonment for three years for the commission of offence under Section 506 IPC.

2. Case of the prosecution, in a nutshell, is that the prosecutrix was a student of 8th class. She was 13 years of age and had lost her parents. She alongwith her elder sister Gyatri Devi was residing in the house of her maternal grand father Kaile Ram at village Bashkola. Accused was her maternal uncle. Prosecutrix had gone to the jungle to bring wood. Gyatri Devi had gone to attend her job. Prosecutrix was alone. Accused came and forcibly took her inside the room and thereafter he forcibly committed sexual intercourse with her. He threatened her not to divulge this fact to anybody. Thereafter, on so many occasions accused had been coming to the house of the prosecutrix and committed forcible sexual intercourse with her. Prosecutrix had stomach-ache 3-4 days back. She was taken to a Doctor at Patlikuhal by Gyatri Devi. They were told that prosecutrix was pregnant by 26-28 weeks. Gyatri Devi telephoned child helpline Aleo, who asked Gyatri Devi to bring prosecutrix to their office. Thereafter, FIR was registered on 25.12.2012. Prosecutrix was medically examined. It has come in the MLC that prosecutrix was exposed to coitus and she was pregnant for 26-28 weeks. Vaginal swabs and sample of prosecutrix were taken and sent for medical examination at Regional Forensic Science Laboratory Gutkar. Accused was arrested. He was medically examined. DNA profiling of the accused and prosecutrix was conducted. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 12 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. His case was that of

denial simpliciter. Accused was convicted and sentenced as noticed herein above. Hence, this appeal.

4. Mr. Lovneeesh Kanwar, Counsel appearing on behalf of the appellant, argued that the prosecution has failed to prove its case against accused.

5. Mr. P.M. Negi, Deputy Advocate General, has supported the judgment of conviction.

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

7. PW-1 Pawan K. Kashyap has deposed that he was posted as Regional Coordinator, Child Helpline Manali. On 25.12.2012 at about 1.15 pm, he received a telephonic call from an unknown lady that prosecutrix aged 13 years, had become pregnant due to sexual intercourse committed by her maternal uncle Fateh Chand. He asked them to come to their office. Gyatri Devi alongwith prosecutrix reached their office. Ranjana and Lalita were the female staff. Prosecutrix told them that Fateh Chand committed sexual intercourse and she had become pregnant due to the same. Sexual intercourse was committed against her wishes. It transpired during the medical examination that she was carrying 5/6 months pregnancy.

8. PW-2 Dr. Shashi Wapa has medically examined the prosecutrix. She issued MLC Ext. PW-2/D According to her opinion, victim was exposed to coitus. She was pregnant for 26-28 weeks. It was confirmed by ultra-sound.

9. PW-3 Dr. M.K. Kapoor has proved his report Ext. PW-3/A. Age of the victim was estimated to be between 12 ½ years to 15 ½ years. He found in the ultra-sound examination one living foetus with normal skull and spine in the uterus.

10. PW-4 Dr. Tenzin Norbhu, has examined the accused and issued MLC Ext. PW-4/B.

11. PW-6 is the prosecutrix (name withheld). She was examined on oath. Her parents have expired. Her maternal uncle Fateh Chand came to her house. She was alone at that time. He asked about her maternal grand father. She told that he had gone to fetch wood. Her sister had gone to farm. Fateh Chand came inside the room and committed sexual intercourse with her forcibly. He threatened to do away with her life if she revealed the incident to anybody. Thereafter, accused used to come and commit sexual intercourse by threatening her. One day she had stomach-ache. She went to Patli-kuhal Hospital. Doctor told her that she was pregnant. Her sister contacted child helpline. Thereafter FIR Ext. PW-6/A was registered. Police got her medically examined. She also clarified that accused has committed rape on 25.12.2012 and also for the first time about 3-4 months prior to that.

12. Dr. R.J. Mahajan, deposed that an application Ext. PW-7/A was moved by the prosecution for preserving blood samples of prosecutrix and her bay for DNA profiling. She preserved blood samples of mother as well as of the baby.

13. Statement of sister of prosecutrix Gyatri Devi (PW-8) was also recorded. She testified that on 22.12.2012, her sister (prosecutrix) had a stomach-ache and she took her to the Doctor, who told her that her sister (Prosecutrix) was pregnant by 5/6 months. They

came to the house of their maternal grand father. Her sister told them that her maternal uncle had made her sister pregnant after committing sexual intercourse with her. She told her that the accused was committing sexual intercourse since long. They went to the police station and lodged FIR Ext. PW-6/A. In her cross-examination, she deposed that the house was at a lonely place. Her sister did not go to school after 22.12.2012.

14. PW-9 Ashok Kumar deposed that the prosecutrix alongwith her sister Gyatri Devi , Pawan Kashyap, Ranjana and Lalita came to police station and registered FIR Ext.PW-6/A. He visited the spot and prepared spot map. He got accused medically examined. Medical examination of the prosecutrix was also got conducted.

15. PW-10 ASI Mahant Ram Sharma deposed that on 14.3.2013, information at PS Manali was received from CHC that prosecutrix had delivered a child at DDU Hospital Shimla.

16. PW-11 Kaile Ram deposed that his daughter was married to Hari Chand. After marriage, his daughter Pritma used to reside with him. Pritma had two daughters, elder one Gyatri Devi and younger one is the Prosecutrix. At the time of occurrence, age of prosecutrix was 13 years. His daughter Pritma and his son-in-law had already died. Gyatri Devi and prosecutrix were residing with him. His sons Joginder and Fateh Chand were living separately. Accused Fateh Chand used to visit his house off and on. He used to go out in connection with work. His grand daughter told him about stomach-ache. She was taken to hospital at Patli-kuhal. Doctor told that prosecutrix was pregnant. Fateh Chand was questioned. He admitted his mistake and tendered apology. He denied the suggestion in cross-examination that Gyatri Devi used to remain in the house. PW-12 Neel Chand has proved FSL report Ext. PX and PY.

17. Prosecution has proved conclusively that the accused had raped prosecutrix. Prosecutrix became pregnant. She went to the police station and lodged FIR. She was medically examined. Accused was also medically examined. PW-2 Shashi Wapa in her report has deposed that prosecutrix was pregnant for 26-28 weeks. Hymen was fully ruptured. Vaginal swabs were taken. At the time of examination, interoitus was allowing two fingers with ease. Prosecutrix has appeared as PW-6. She has narrated entire sequence and manner in which accused used to rape her whenever she happened to be alone in the house. PW-8 is the sister of prosecutrix. According to her, prosecutrix told her that accused had committed sexual intercourse with her. Incident was also reported to Kaile Ram. He has summoned his son. He has admitted his mistake. Blood samples of the prosecutrix and her baby were preserved. According to report, Ext. PY, baby of prosecutrix was biological daughter of accused. Prosecutrix was minor at the time of the incident. Accused being maternal uncle instead of protecting the orphan has indulged in a heinous crime by repeatedly raping her. Prosecutrix was living with PW-1 Kaile Ram after loosing her parents. Delay in lodging FIR has been duly explained by the prosecution. Prosecutrix was minor and she did not know the consequences of becoming pregnant at the age of 13 years. Prosecution has fully proved its case against the accused.

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

****

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

National Insurance Company Ltd. ....Appellant
Versus
Changa Ram and others ....Respondents

FAO No.217 of 2009
Decided on: 04.09.2015

Motor Vehicles Act, 1988- Section 149 and 134(c) - Insurer contended that insured had not complied with the provisions of Section 134(c) of the Act- held, that Section 134(c) is not part of chapter X to XII dealing with the grant of compensation, it deals with the control of traffic- non-compliance of Section 134(c) cannot be made a ground for denying relief.

(Para-8 and 9)

Cases referred:

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

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

For the appellant: Mr.Lalit Kumar Sharma, Advocate.
For the respondents: Mr.Avneesh Bhardwaj, Advocate, for the LRs of respondent No.1.
Mr.Vikas Rathour, Advocate, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Subject matter of this appeal is the award, dated 20th December, 2008, passed by the Motor Accident Claims Tribunal, Mandi, H.P., (for short, the Tribunal), in Claim Petition No.102 of 2005, titled Ghantha Ram vs. Dhiraj Guleria and others, whereby compensation to the tune of Rs.1,02,000/- with interest at the rate of 9% per annum from the date of filing of the Claim Petition till deposit came to the awarded in favour of the claimant and the insurer/appellant was saddled with the liability, (for short the impugned award).

2. At the very outset, it may be placed on record that during the pendency of the appeal, the claimant had died and his legal representations were brought on record.

3. The owner, the driver and the claimant have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

4. The insurer/appellant has questioned the impugned award viz. a viz. the findings recorded by the Tribunal on issue No.4.

5. Onus to prove issue No.4 was on the appellant/insurer, has not led any evidence. As per the mandate of the Code of Civil Procedure, particularly, Order 14, read with the mandate of the Indian Evidence Act, 1872, it was for the insurer to lead evidence in order to claim exoneration.

6. It is well settled law that the insurer has to plead and prove that the insured has committed willful breach in view of the mandate of Sections 147 to 149 of the Motor

Vehicles Act, (for short, the Act), read with the terms and conditions contained in the insurance policy, as has been held by the Apex Court in **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531** and **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217.** The insurer, in the instant case, has not been able to prove that the insured was in breach of the terms and conditions contained in the insurance policy.

7. Having said so, the findings recorded by the Tribunal on issue No.4 need to be upheld.

8. At this stage, the learned counsel for the appellant/insurer argued that the insured had not complied with the mandatory provisions of Section 134(c) of the Act. Section 134(c) of the Act is not a part of Chapters X to XII of the Act, which deal with granting of compensation on 'no fault liability' and 'fault liability'. Section 134 pressed into service by the learned counsel for the insurer/appellant falls in Chapter VIII of the Act, which deals with 'control of traffic'. Therefore, by no stretch of imagination, compliance of Section 134(c) can be made a ground for denying relief to the insured. Moreover, granting of compensation is a social legislation, which mandates that the compensation should reach to the victims of a vehicular accident as early as possible without succumbing to the niceties and technicalities of law and procedural wrangles and tangles.

9. Having said so, the plea raised by the learned counsel for the insurer/appellant is rejected, being afterthought and misconceived.

10. In view of the above discussion, there is no merit in the appeal filed by the appellant/insurer and the same is dismissed. The Registry is directed to release the amount in favour of the legal representatives of the deceased-claimant in equal shares.

****

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

National Insurance co. Ltd. .....Appellant.

Versus

Smt. Gulaboo Devi and others ...Respondents

FAO (MVA) No. 245 of 2009.

Date of decision: 4th September, 2015

Motor Vehicles Act, 1988- Section 166- Deceased was a bachelor at the time of his death- his income was assessed as Rs.5,000/- per month- 1/2 share was to be deducted towards personal expenses- multiplier of '16' was applicable- thus, claimants are entitled to Rs.4,80,000/- (Rs.2500 x 12 x 16) as compensation. (Para-2 to 4)

Cases referred:

Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

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

For the appellant: Mr. Ashwani K. Sharma, Sr. Advocate with Ms. Monika Shukla, Advocate.

For the respondents: Mr. B.S. Chauhan, Sr. Advocate, with Mr. Vaibhav Tanwar, Advocate, for respondent No.1.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award dated 8.12.2008, made by the Motor Accident Claims Tribunal (II), Shimla in MAC Petition No. 40-S/2 of 2007, titled *Smt. Gulaboo Devi and another versus Rakesh Chauhan and others,* for short "the Tribunal", whereby compensation to the tune of Rs.6,88,200/- was awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

2. The short point involved in this appeal is whether the Tribunal has rightly deducted 1/3rd towards personal expenses. The answer is in negative for the following reasons.

3. Admittedly, the deceased, namely, Mohinder Singh, a bachelor, was 24 years of age, at the time of his death. The income assessed is Rs.5000/- per month and one half was to be deducted towards personal expenses in terms of ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***.

4. The multiplier of "16" was applicable in terms of the judgment, supra. Thus, it is held that the claimants are entitled to Rs.2500x12x16, total Rs.4,80,000/- with interest, as awarded by the Tribunal from the date of claim petition till its realization.

5. Accordingly, the appeal is allowed and the impugned award is modified as indicated herein above.

6. The Registry is directed to release the amount in favour of the claimants, strictly, in terms of the conditions contained in the impugned award, through payee's cheque account and excess amount if any, shall be refunded to the insurer.

7. Send down the record, forthwith, after placing a copy of this judgment.

****

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

FAOs No. 203 & 204 of 2009
Decided on: 04.09.2015

FAO No. 203 of 2009

The New India Assurance Company ...Appellant.
Versus
Smt. Bimla Devi and others ...Respondents.

.....

FAO No. 204 of 2009

The New India Assurance Company ...Appellant.

Versus

Smt. Lachhami and others ...Respondents.

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid and effective driving licence to drive the vehicle – licence was valid for driving Light Motor Vehicle (non-transport) but had no endorsement to drive transport vehicle- held that the gross weight of the vehicle was 1165 kilograms, as per R.C and the vehicle falls within the definition of Light Motor Vehicle - no endorsement of PSV is required in such cases- the plea of the Insurance Company that driver did not have a valid driving licence to drive the vehicle cannot be accepted. (Para-10 to 26)

Cases referred:

Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791

National Insurance Company Ltd. vs Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906

Kulwant Singh & Ors. versus Oriental Insurance Company Ltd., JT 2014 (12) SC 110

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

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

Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 SCC 217

For the appellant(s): Mr. B.M. Chauhan, Advocate.

For the respondents: Mr. Vinod Thakur, Advocate, for respondents No. 1 to 4 in FAO No. 203 of 2009 and for respondents No. 1 to 3 in FAO No. 204 of 2009.

Mr. Dheeraj K. Verma and Mr. K.K. Verma, Advocates, for respondents No. 5 & 6 in FAO No. 203 of 2009 and for respondents No. 4 & 5 in FAO No. 204 of 2009.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Both these appeals are outcome of one vehicular accident, which was caused by the driver, namely Shri Satish Kumar, while driving offending vehicle, Alto Car, bearing registration No. HP-01C-0139, rashly and negligently on 28.04.2007, at about 11.30 P.M., at place Karlenu Pargna Bathri, Tehsil Dalhousie, District Chamba, in which deceased, namely Shri Om Parkash and Shri Sadhu Ram, sustained injuries and succumbed to the injuries. Thus, I deem it proper to determine both these appeals by this common judgment.

2. Challenge in these appeals is to the judgments and awards, dated 16.01.2009, made by the Motor Accident Claims Tribunal, Fast Track Court, Chamba (HP) (for short "the Tribunal") in two claim petitions, being M.A.C. No. 11/2008/07, titled as Smt. Bimla Devi & others versus The New India Insurance Company Ltd. & others, and M.A.C. No. 12/2008/07, titled as Smt. Lachhami & others versus The New India Insurance Company Ltd. & others, whereby compensation to the tune of Rs.6,76,040/- and Rs.8,75,684/-, respectively, with interest @ 9% per annum from the date of the claim petitions till its realization came to be awarded in favour of the claimants and the insurer in

both the claim petitions was directed to satisfy the awards (for short "the impugned awards").

3. The claimants, the owner-insured and the driver of the offending vehicle have not questioned the impugned awards on any count, thus, have attained finality so far these relate to them.

4. The insurer has questioned the impugned awards, by the medium of both these appeals, on the ground that the Tribunal has fallen in an error in saddling it with liability as the driver of the offending vehicle was not having a valid and effective driving licence to drive the same.

5. Thus, the only question to be determined in these appeals is - whether the insurer came to be rightly saddled with liability or otherwise? The answer is in the affirmative for the following reasons:

6. The Tribunal, after examining the pleadings of the parties, framed similar set of issues in both the claim petitions. Thus, I deem it proper to reproduce the issues framed in one of the claim petitions herein:

> *"1. Whether Shri Om Parkash died in a motor vehicle accident, which took place on 28.4.07 at about 11.30 PM, at Karlenu within the jurisdiction of P.S. Dalhousie due to rash and negligent driving of driver of vehicle No. HP-01C-0139? OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioners are entitled for the grant of compensation, if so, to what amount and from whom? OPP*
>
> *3. Whether the driver of the vehicle involved in the accident was not holding a valid driving license at the time of accident? OPR-1*
>
> *4. Whether the vehicle involved in the accident was not insured with respondent No. 1 at the time of accident? OPR-1*
>
> *5. Whether the vehicle involved in the accident was not insured with respondent No. 1 at the time of accident? OPR-1*
>
> *6. Whether the petition is not maintainable? OPR-1*
>
> *7. Whether the petition is bad for non joinder of necessary parties? OPR-2 and 3*
>
> *8. Relief."*

7. The findings returned by the Tribunal on issues No. 1, 2 and 4 to 7 are not in dispute. Thus, the findings recorded by the Tribunal on these issues in both the impugned awards, are upheld.

8. The only dispute is qua issue No. 3. Learned counsel appearing on behalf of the appellant(s)-insurer argued that the Tribunal has fallen in an error in saddling it with liability as the driver of the offending vehicle was not having a valid and effective driving licence as the same was valid only for Light Motor Vehicle (non-transport) and was not having any endorsement to drive transport vehicle, i.e. the offending vehicle.

9. The argument of the learned counsel appearing on behalf of the appellant(s)-insurer, though attractive, is devoid of any force for the following reasons:

10. Admittedly, the driver was driving the offending vehicle, i.e. Alto Car, bearing registration No. HP-01 C-0139, at the relevant point of time, the gross vehicle weight of which is 1165 kilograms, as per the Certificate of Registration, Ext. R2, is a light motor vehicle.

11. I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle" as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the MV Act herein:

> *"2. .....*
>
> *(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.*
>
> *xxx xxx xxx*
>
> *(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.*
>
> xxx xxx xxx
>
> *(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.*
>
> *xxx xxx xxx*
>
> *(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."*

12. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

13. At the cost of repetition, definition of "light motor vehicle" includes the words "transport vehicle" also. Thus, the definition, as given, mandates the "light motor vehicle" is itself a "transport vehicle", whereas the definitions of other vehicles are contained in Sections 2(14), 2 (16), 2 (17), 2 (18), 2 (22), 2 (23) 2 (24), 2 (25), 2 (26), 2 (27), 2 (28) and 2 (29) of the MV Act. In these definitions, the words "transport vehicle" are neither used nor included and that is the reason, the definition of "transport vehicle" is given in Section 2 (47) of the MV Act.

14. In this backdrop, we have to go through Section 3 and Section 10 of the MV Act. It is apt to reproduce Section 3 of the Act herein:

> ***"3. Necessity for driving licence.*** *- (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.*
>
> *(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government."*

15. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for driving a transport vehicle. In this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

16. My this view is supported by Section 10 of the MV Act, which reads as under:

> *"**10. Form and contents of licences to drive.** - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*
>
> *(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-*
>
> *(a) motor cycle without gear;*
>
> *(b) motor cycle with gear;*
>
> *(c) invalid carriage;*
>
> *(d) light motor vehicle;*
>
> *(e) transport vehicle;*
>
> *(i) road-roller;*
>
> *(j) motor vehicle of a specified description."*

17. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, was substituted in terms of amendment of 1994, class of the vehicles specified in clauses (e) to (h) before amendment stands deleted and the definition of the "transport vehicle" stands inserted. So, the words "transport vehicle" used in Section 3 of the MV Act are to be read viz-a-viz other vehicles, definitions of which are given and discussed hereinabove.

18. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

> *"The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgment hereunder:-*
>
> > *"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.*
> >
> > *.....*
> >
> > *17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used*

for carriage of passengers i.e. a public service vehicle."

In the given circumstances of the case PSV endorsement was not required at all."

19. The mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:

"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi-trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. .....

21. .....

22. .....

23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods

vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi-trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

20. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,** reported in **2008 AIR SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. .....

10. .....

11. .....

12. .....

13. .....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. .....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

21. The Apex Court in the latest judgment in the case titled as **Kulwant Singh & Ors. versus Oriental Insurance Company Ltd.,** reported in **JT 2014 (12) SC 110,** held that PSV endorsement is not required.

22. Having glance of the above discussions, I hold that the endorsement was not required.

23. The Apex Court in the case titled as **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Court 1531,** has laid down principles, how can insurer avoid its liability. It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. .....
(i) .....
(ii) .....
(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.
(iv) The insurance companies are, however, with a view to avoid their liability, must not only the available defence(s) raised in the said but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.
(v).....
(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

24. In a case titled as **Lal Chand versus Oriental Insurance Co. Ltd.,** reported in **2006 AIR SCW 4832,** the owner had performed his job whatever he was required to do and satisfied himself that the driver was having valid driving licence. The Apex Court held the insurer liable. It is apt to reproduce paras 8, 9 and 11 of the judgment herein:

> *"8. We have perused the pleadings and the orders passed by the Tribunal and also of the High Court and the annexures filed along with the appeal. This Court in the case of United India Insurance Co. Ltd. v. Lehru & ors., reported in 2003 (3) SCC 338, in paragraph 20 has observed that where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). He will, therefore, have to check whether the driver has a driving licence and if the driver produces a driving licence, which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take test of the driver, and if he finds that the driver is competent to drive the vehicle, he will hire the driver.*
>
> *9. In the instant case, the owner has not only seen and examined the driving licence produced by the driver but also took the test of the driving of the driver and found that the driver was competent to drive the vehicle and thereafter appointed him as driver of the vehicle in question. Thus, the owner has satisfied himself that the driver has a licence and is driving competently, there would be no breach of Section 149(2)(a)(ii) and the Insurance Company would not then be absolved of its liability.*
>
> *10. .....*
>
> *11. As observed in the above paragraph, the insurer, namely the Insurance Company, has to prove that the insured, namely the owner of the vehicle, was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant point of time."*

25. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a*

> *driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."*

26. Having said so, it cannot be said that the driver was not having a valid and effective driving licence at the time of accident.

27. Viewed thus, the Tribunal has not committed an error in holding that the driver of the offending vehicle was having a valid and effective driving licence to drive the offending vehicle and the owner-insured has not committed any willful breach.

28. Learned counsel for the appellant(s)-insurer also argued that the amount awarded in both the claim petitions is excessive.

29. The appellant(s)-insurer has not sought permission in terms of Section 170 of the MV Act. Even otherwise, I have gone through the impugned awards and the record and am of the considered view that the amount awarded cannot be said to be excessive in anyway.

30. Having glance of the above discussions, the impugned awards merit to be upheld and both the appeals are to be dismissed. Accordingly, the impugned awards are upheld and both the appeals are dismissed.

31. Registry is directed to release the awarded amount in favour of the claimants in both the claim petitions strictly as per the terms and conditions contained in the respective impugned awards after proper identification.

32. Send down the record after placing copy of the judgment on each of the Tribunal's files.

****

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

FAO No.222 of 2009 and
FAO No.223 of 2009
Date of decision: 04.09.2015

1.	**FAO No.222 of 2009**	
	Oriental Insurance Co. Ltd.	.....Appellant
	Versus	
	Ranjana & others	.....Respondents
2.	**FAO No.223 of 2009**	
	Oriental Insurance Co. Ltd.	.....Appellant
	Versus	
	Asha and others	.....Respondents

Motor Vehicles Act, 1988- Section 149- Insurer contended that deceased were travelling in the vehicle as a gratuitous passengers- claimants had specifically stated that deceased were travelling in the vehicle with their goods- owner of the vehicle also admitted this fact- therefore, plea taken by the insurer that deceased were travelling in the vehicle as gratuitous passengers cannot be accepted. (Para-8 to 14)

Cases referred:
Nand Lal & another vs. Meena Devi & others, Latest HLJ 2014 (HP) Suppl.414
National Insurance Company Limited vs. Swaran Singh & Others, AIR 2004 Supreme Court 1531

In FAO No.222 of 2009

For the appellant:	Mr. Lalit K. Sharma, Advocate.
For the respondents:	Mr.D.S. Nainta, Advocate, for respondents No.1 to 4. Mr.Sunil Mohan Goel, Advocate, for respondent No.5.

In FAO No.223 of 2009

For the appellant:	Mr. Lalit K. Sharma, Advocate.
For the respondents:	Mr.D.S. Nainta, Advocate, for respondents No.1 to 3. Mr.Sunil Mohan Goel, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

The awards, impugned in these appeals, passed by Motor Accident Claims Tribunal (II), Shimla, Camp at Rohru, (for short, the Tribunal), are the outcome of one accident caused by driver Amar Singh, while driving Jeep (Bolero) bearing No.HP-63-0730 rashly and negligently, on 9th May, 2007. Therefore, both the appeals are being disposed of by this common judgment.

2. Facts of the case, in brief, are that on 9th May, 2007, the deceased were traveling in the offending vehicle as owners of the goods, being driven by its driver, namely, Amar Singh rashly and negligently, due to which the vehicle met with an accident near Ching Kenchi, in which Jagjewan Singh and Suresh died. The claimants of the deceased, thus, filed the Claim Petitions.

3. The Claim Petitions were resisted by the respondents on various grounds.

4. Issues were settled by the Tribunal and the evidence was led.

5. The Tribunal, after scanning the pleadings and the evidence led by the parties, allowed both the claim petitions and saddled the insurer/appellant with the liability.

6. The Claimants and the owner have not questioned the impugned awards on any count, thus, the same have attained finality so far as these relate to them.

7. Feeling aggrieved, the insurer has filed the instant appeals challenging the impugned awards on the grounds, namely – i) the owner has committed willful breach; and ii) the deceased were traveling in the offending vehicle as gratuitous passengers.

8. The plea that the deceased were traveling in the offending vehicle as gratuitous passengers was never raised before the Tribunal and no issue was framed to that effect by the Tribunal. The insurer/appellant has also not questioned the findings recorded by the Tribunal on issues No.3 and 4.

9. The claimants, in paragraph 24 of the Claim Petition, (subject matter of FAO No.222 of 2009) and in paragraph 10 of the Claim Petition, (subject matter of FAO No.223 of 2009), have clearly stated that the deceased were traveling in the offending vehicle with their goods. Paragraphs 24 and 10 are reproduced below:

> *"24. That on 09.05.2007 the deceased was traveling from Rohru to Nadpur to carry his goods in the said vehicle after paying freight to the driver. The vehicle was driven by the driver in a very rash and negligent manners and near Ching Kenchi the vehicle met with an accident in which three persons i.e. driver Amar Singh, Suresh Thakur & Jagjeewan Singh died on the spot. The deceased suffer multiple injures and died on the spot. Hence the respondents are jointly and severally liable to pay the compensation to the petitioner."*
>
> (FAO No.222 of 2009)
>
> *"10. The deceased Suresh boarded the ill-fated Bolero-camper HP-63-0730 alongwith goods from Hatkoti to Badiar which was being driven by the Driver of the vehicle named Amar Singh, who died on the spot."*
>
> (FAO No.223 of 2009)

10. The owner, in her replies to both the Claim Petitions, has admitted that the deceased were traveling in the offending vehicle with the goods. It is apt to reproduce paragraph 24 and 10 of the replies filed by the owner to the claim petitions, hereunder:

> *"24. .....Deceased Sh. Jiwan Singh might had traveled in the said vehicle with his goods by paying the freight of the goods to the driver, it being a public goods carrier vehicle....."*
>
> *"10. .....The deceased might have boarded the ill fated vehicle along with goods from Hatkoti to Badiyar, being a public carrier goods as alleged."*

11. Thus, it does not lie in the mouth of the insurer to say that the deceased were not traveling in the offending vehicle alongwith their goods.

12. Viewed thus, the plea raised by the learned counsel for the appellant/insurer that the deceased were traveling in the offending vehicle as gratuitous passengers is devoid of any force.

13. This Court, in **Nand Lal & another vs. Meena Devi & others, Latest HLJ 2014 (HP) Suppl.414,** has held that once the deceased was traveling in the vehicle as owner of goods, he cannot be termed as gratuitous passenger.

14. This Court in **FAO No.362 of 2012, titled ICICI Lombard General Insurance Company vs. Sumitra Devi and others**, while relying upon the judgment of the Apex Court in **National Insurance Company Limited vs. Swaran Singh & Others,** reported in **AIR 2004 Supreme Court 1531**, has held that the insurer has to plead and prove that the deceased was a gratuitous passenger.

15. It was for the insurer to plead and prove that the insured has committed willful breach in which it has failed.

16. Having said so, the Tribunal has rightly saddled the insurer with the liability and made the impugned awards.

17. In view of the above discussion, there is no merit in the appeals filed by the insurer and the same are dismissed. The Registry is directed to release the compensation amount in favour of the claimants strictly in terms of the impugned award.

****

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

Oriental Insurance Company .....Appellant
Versus
Sukhpal and others .....Respondents

FAO No.210 of 2009
Decided on: 04.09.2015

Motor Vehicles Act, 1988- Section 166- PW-5 stated that vehicle had rolled down 300 feet and was totally damaged- Insurance policy disclosed that insured value of the vehicle was Rs. 4 lacs- no specific evidence was led to prove the extent of damage- hence, amount of Rs. 3 lacs awarded in lump sum without any interest. (Para-4 to 7)

For the appellant: Mr.G.C. Gupta, Senior Advocate, with Ms.Meera Devi, Advocate.
For the respondents: Mr.Bimal Gupta, Senior Advocate, with Ms.Komal Chaudhary, Advocate, for respondent No.1.
Mr.Vineet Vashista, Advocate, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 30th October, 2008, passed by the Motor Accident Claims Tribunal-II, Solan, H.P., (for short, the Tribunal), in Claim Petition No.15-S/2 of 2007/06, titled Sukh Pal vs. Pushpinder Singh and others, whereby compensation to the tune of Rs.3.00 lacs with interest at the rate of 9.5% per annum from the date of filing of the Claim Petition till realisation came to the awarded in favour of the

claimant and the insurer/appellant was saddled with the liability, (for short the impugned award).

2. The claimant, the owner and the drivers have not questioned the impugned award, thus, the same has attained finality so far as it relates to them.

3. The learned Senior Advocate appearing for the appellant/insurer argued that the Tribunal has awarded Rs.3.00 lacs, with interest, without any proof on the file. I have gone through the impugned award. A perusal of paragraph 10 of the impugned award shows that the Tribunal has not spelled out as to how it has come to the conclusion that the claimant is entitled to Rs.3.00 lacs.

4. The claimant has examined PW-5 Prem Singh, Mechanic, who has stated that the accident was of such a high magnitude that the vehicle in question had rolled down around 300 feet and was totally damaged. I have also gone through the insurance policy, which discloses that the insured value of the vehicle in question was Rs.4.00 lacs. At the same time, it is also a fact that the claimant has not led specific evidence to prove the extent of damage, except PW-5 Prem Singh, Mechanic.

5. Keeping in view the aim and object of granting compensation, read with the fact that the claimant is in lis right from the year 2006, I deem it proper to exercise guess work. As discussed hereinabove, the total risk cover is Rs.4.00 lacs including damages of the vehicle.

6. In view of the above discussion, Rs.3.00 lacs, in lump sum, is just and appropriate compensation keeping in mind the value of the insured vehicle.

7. Accordingly, the impugned award is modified by providing that the claimant is entitled to Rs.3.00 lacs, in lump sum, without any interest. The Registry is directed to release the amount, as above, in favour of the claimant and the excess amount, if any, deposited by the insurer, along with up-to-date interest accrued thereon, be refunded to the insurance Company through payee's account cheque.

8. At this stage, it is submitted that 50% amount has already been released in favour of the claimant. This fact be taken care of by the Registry at the time of releasing the amount in favour of the claimant.

9. The appeal stands disposed of accordingly.

****

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

Raj Kumar alias Tilku .....Appellant.

Versus

State of H.P. .....Respondent.

Cr. Appeal No. 383 of 2014
Reserved on: September 03, 2015.
Decided on: September 04, 2015.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2.5 kgs. Of charas – witnesses admitted that constable was sent for calling independent witnesses from the Village located at a distance of ¾-1 km.- however, no independent witness was associated-

police was on the duty of traffic checking but no vehicle was stopped to associate independent person- there was no entry of the deposit of the contraband in the malkhana when it was received from FSL, Junga- no entry was made in the Malkhana register regarding taking out of the case property for production in the Court and re-deposit of the case property after its production in the Court, which casts doubt that case property produced in the Court is the same which was recovered from the accused- held, that in these circumstances, prosecution case was not proved beyond reasonable doubt - accused acquitted. (Para-13 to 17)

For the appellant: Mr. Y.P.S. Dhaulta, Advocate.
For the respondent: Mr. M.A.Khan, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 5.7.2014, rendered by the learned Special Judge, Kinnaur Sessions Division at Rampur Bushahr, H.P, in Sessions Trial No. 0100005 of 2013, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default of payment of fine, he was further ordered to undergo rigorous imprisonment for six months.

2. The case of the prosecution, in a nut shell, is that on 4.12.2012, police party headed by SI/SHO Rohit Mrigpuri and consisting of Probationer SI Ankur Sharma, HC Tain Singh and Const. Mukesh Kumar of PS Anni, had laid *naka* at Banigaad. At about 6:30 AM, a motorcycle bearing registration No. HP-35-1010 came from Kandugaad side. It was stopped for checking. The accused was riding the motorcycle. He was asked by SI/SHO Rohit Mrigpuri to show the documents of the motorcycle. The accused was carrying a carry bag on his back. In order to take out the documents of the vehicle, he put his bag on the motorcycle and started searching it by opening the zip. In the meantime, a plastic packet kept in the bag fell down on the ground. The packet was having ball and sticks shaped charas in it. Constable Mukesh Kumar (PW-2) was sent for search of independent persons to join the investigation. However, as the place was secluded and it was too early in the morning, no independent witnesses could be joined. SI/SHO Rohit Mrigpuri associated SI Ankur Sharma and HC Tain Singh as witnesses and gave his personal search to the accused. The contraband weighed 2.5 kg. On opening the outer pocket of the bag, currency worth Rs. 20,000/- was also recovered. The I.O. then put the contraband in the same bag and parceled up after sealing with seals of seal "H". The currency was separately packed and sealed. He also filled the necessary columns of NCB form. Rukka was sent to the Police Station, Anni through Const. Mukesh for registration of the FIR. The special report was prepared. Sample was sent for chemical analysis to FSL, Junga. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 9 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused has denied the prosecution case. According to him, he was falsely implicated. The learned trial Court convicted the accused, as noticed hereinabove.

4. Mr. Y.P.S. Dhaulta, Advocate, appearing on behalf of the accused, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, Addl. AG, for the State has supported the judgment of the learned trial Court dated 5.7.2014.

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

6. PW-1 probationer SI Ankur Sharma, deposed that on 4.12.2012, he alongwith HC Tain Singh, Const. Mukesh Kumar had gone to Banigaad on Nakabandi duty. At about 6:30 AM, one motorcycle came from Kandugaad and SI/SHO Rohit Mrigpuri stopped the motorcycle. The antecedents of the accused were ascertained. The accused was asked to produce the documents. The accused was having a rucksack bag on his back. When the accused was searching the bag by keeping it on the seat of the motorcycle, one transparent polythene envelope fell from the bag. It was having some black material in the shape of balls and sticks. Thereafter, the SHO sent Const.Mukesh Kumar for the search of independent witnesses. He came back after 20 minutes and informed that no independent witnesses could be found by him as the place was deserted and secluded. The SHO associated him and HC Tain Singh as witnesses. The SHO gave his personal search and then the transparent polythene envelope was checked by the SHO, which was containing charas in the shape of balls and sticks. Thereafter, the outer pocket of the bag was also searched by the SHO, out of which, currency notes worth Rs. 20,000/- were recovered. The charas weighed 2.5 kg. The charas was put alongwith transparent polythene envelope in the bag and was made into a parcel. The parcel was sealed with seal impression “H”. The NCB form in triplicate was filled up. The currency notes and charas were made into separate parcels which were marked as A-1 and A-2. Charas was kept in parcel A-1 and thereafter, another parcel A-2 was prepared in which currency notes worth Rs. 20,000/- were kept. The parcel A-2 was sealed with 4 seals of seal impression “H”. The sample seal was taken on a separate cloth vide Ext. PW-1/B. The case property was taken into possession vide recovery memo Ext. PW-1/C. The case property was produced before the Court while recording the statement of PW-1 SI Ankur Sharma. In his cross-examination, he deposed that they stopped at two places before reaching the spot but since there was no traffic going on, so no vehicle was checked on the way to the spot. They reached on the spot at 6/6:15 AM.

7. PW-2 Constable Mukesh Kumar, deposed the manner in which the accused was apprehended at 6:30 AM on 4.12.2012. He was sent in search of independent witnesses. After about 20 minutes, he returned back as he was unable to find any independent witnesses as the place was secluded and deserted. In his cross-examination, he admitted that he left the spot in search of independent witnesses towards Kandugaad which is about 1 km. from the spot. He also admitted that Banigaad village was also situated above the road. He had gone in private vehicle alongwith rukka and also came back in private vehicle with the case file.

8. PW-3 HC Amar Singh, deposed that on 4.12.2012, SI/SHO Rohit Mrigpuri deposited with him one parcel marked as A-1 duly sealed with 6 impressions of seal “H” and one another parcel marked as A-2 sealed with 4 impressions of seal “H”. Parcel marked as A-1 was stated to be containing charas weighing 2.5 kg and parcel marked as A-2 was stated to be containing currency notes of worth Rs. 20,000/-. The entry was made in the malkhana register at Sr. No. 349. He proved the extract of the malkhana register vide Ext. PW-3/A. On 5.12.2012, vide RC No. 110/2012 and after updating the relevant column of

NCB form Ext. PW-3/B, he sent the case property to FSL Junga through Const. HHC Roshan Lal, who after depositing the same in FSL, handed over receipt on the backside of RC. On 3.1.2013, HHC Nihal Chand brought the case property from FSL Junga and deposited the same marked as A-1 with him. The seal impression "H" over the parcel were broken and not legible. The parcel mark A-1 was sealed with 6 seals of FSL, out of which, 2 seals were broken and others were intact.

9. PW-4 HHC Roshan Lal, deposed that on 5.12.2012, MHC Amar Singh handed over to him one parcel containing charas weighing 2.5 kg, duly sealed with 6 seals of seal "H" alongwith the sample of seal, NCB form in triplicate, FIR and recovery memo for depositing the same in FSL vide RC No. 110/2012, Ext. PW-3/C. He deposited the same at FSL Junga on the same day and obtained the receipt on the back of the RC vide receipt Ext. PW-3/D.

10. PW-5 HHC Nihal Chand, deposed that he brought the case property from FSL, Junga and deposited the same with MHC Amar Singh on 3.1.2013. In his cross-examination, he admitted that when the case property was handed over to him at FSL, 5 seals of "H" were broken whereas one seal was intact.

11. PW-8 HC Tain Singh, deposed the manner in which the accused was apprehended and the charas was recovered from the accused, search, seizure and sealing proceedings were completed on the spot. In his cross-examination, he deposed that Const. Mukesh Kumar went towards Kandugaad in search of independent witnesses. Village Banigaad was situated at a distance of ¾ km. from the spot towards Kandugaad.

12. PW-9 SI/SHO Rohit Mrigpuri, also deposed the manner in which the accused was apprehended and the charas was recovered from the accused, search, seizure and sealing proceedings were completed on the spot on 4.12.2012. He filled up the relevant columns of NCB form. Rukka Ext. PW-1/D was prepared and sent to the Police Station through Const. Mukesh at 8:30 AM for registration of the FIR. FIR Ext. PW-2/A was registered. He also prepared the special report Ext. PW-6/A. In his cross-examination, he deposed that before reaching the spot, they had stopped at 2 places for checking. They had checked 2-3 other vehicles before the arrival of the motorcycle. According to him, the sun had not appeared when the accused came there but it was dawn. The spot is known as Banigaad but there was no house nearby. He also admitted in his cross-examination that during completion of the codal formalities, some vehicles did cross that road. He did not know as to how Constable Mukesh went with the rukka and how he returned from the Police Station.

13. According to PW-1, SI Ankur Sharma, PW-2 Const. Mukesh Kumar was sent towards Kandugaad side to join the independent witnesses. PW-2 Const. Mukesh Kumar deposed that he went in search of independent witnesses and came back after 20 minutes. He has admitted in his cross-examination that he left the spot in search of independent witnesses towards Kandugaad which is about 1 km from the spot and village Banigaad was situated above the road. PW-8 HC Tain Singh also deposed that Constable Mukesh Kumar was sent in search of independent witnesses. He came back after 20 minutes. According to him, village Banigaad was situated at a distance of ¾ km. from the spot towards Kandugaad.

14. PW-1 SI Ankur Sharma, has deposed that no vehicle was checked on the spot, however, PW-9 SI/SHO Rohit Mrigpuri deposed that they had already checked 2-3

vehicles before the arrival of the motorcycle. He also deposed that during completion of codal formalities, some vehicles crossed from the road. It is evident from the record that village Banigaad was situated at a distance of ¾ km. from the spot and village Kandugaad was at a distance of 1 km and despite that the police has not joined any independent witnesses, though it was 6:30 AM and it was dawn. The police party could always stop the vehicles which were crossing on the road, to associate independent witnesses but have failed to do so. It cannot be said that the place was so remote and secluded that no independent witnesses could be associated at the time when the accused was apprehended, search, seizure and sealing proceedings were completed on the spot.

15. When the case property was produced while recording the statement of PW-1 before the Court, 6 seals of the FSL were intact but in the statement of PW-3 HC Amar Singh, out of the six seals of FSL, two seals were broken and others were intact. Moreover, the person who brought the case property to the Court has also not been examined by the prosecution.

16. The case property was produced while recording the statement of PW-1 SI Ankur Sharma in the trial Court. The extract of copy of the malkhana register is Ext. PW-3/A. There is entry of the deposit of the contraband on 4.12.2012 and when it was received back from the FSL Junga. There is no entry when the case property was taken out from the malkhana and produced in the Court. There is no DDR recorded when the case property was produced before the trial Court. Similarly, there is no entry when the case property after production in the trial Court was re-deposited in the malkhana register. It is necessary for the prosecution to prove that the case property was taken out from the malkhana for the production in the Court and also preparing DDR to this effect and the same process is to be undergone when the case property after its production in the Court is taken back and deposited in the malkhana. There has to be entry in the malkhana register when it is re-deposited and DDR is also prepared. The production of the case property in the Court is mandatory. There is doubt whether the case property which was produced in the Court was the same which was recovered from the accused and sent to FSL, Junga in the absence of any corresponding entries made at the time of taking it and re-deposit in the malkhana register or it was case property of some other case. It has caused serious prejudice to the accused. The nabbing of the accused, recovery and sealing proceedings in the instant case are doubtful. When the case property was produced in the Court, there is no reference as to who brought the case property to the Court from malkhana and by whom it was taken back. It is necessary to keep the case property in safe custody from the date of seizure till its production in the Court in ND & PS cases.

17. The prosecution has failed to prove that the contraband was recovered from the exclusive and conscious possession of the accused. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Section 20 of the N.D & P.S., Act.

18. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 5.7.2014, rendered by the learned Special Judge, Kinnaur Sessions Division at Rampur Bushahr, H.P., in Sessions trial No. 0100005 of 2013, is set aside. Accused is acquitted of the charges framed against him by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

Sher Mohammed ....Appellant

Versus

Himachal Road Transport Corporation and others ...Respondents.

LPA No. 232 of 2014
Judgment reserved on 26th August, 2015.
Date of decision: 4th September, 2015.

Constitution of India, 1950- Article 226- Petitioner was appointed as a driver in HRTC- he left to his native place on 28.6.1994 and did not report for duty – his absence was treated as subject matter of inquiry- he was ultimately removed- he filed a representation which was rejected- it was contended that Inquiry Officer had not held that absence of the petitioner was willful and in absence of such finding, petitioner could not have been removed from the service- held, that charge against the petitioner was of willful absence but the Inquiry Officer had nowhere recorded in the findings that absence was willful – petitioner had relied upon some documents but these were not considered by the Inquiry Officer- no finding was recorded by the Inquiry Officer that defence taken by petitioner was false or after thought- petitioner cannot be removed from the service without proving willful absence- further, Inquiry Officer had not supplied the copy of inquiry report to the petitioner which is mandatory- petition allowed- petitioner ordered to be reinstated and he is held entitled to 50% back wages. (Para-5 to 32)

Cases referred:

Krushnakant B.Parmar versus Union of India and another, (2012) 3 SCC 178
Chhel Singh versus MGB Gramin Bank, Pali and others, (2014) 13 SCC 166
Roop Singh Negi versus Punjab National Bank and others, (2009) 2 SCC 570
Union of India and others versus R.P. Singh, 2014 AIR SCW 3475
Himachal Pradesh State Electricity Board, versus Mahesh Dahiya, ILR 2015 XLV (II) H.P. 739 D.B.
Kendriya Vidyalaya Sangathan and another versus S.C. Sharma, 2005 AIR SCW 377
U.P.S.R.T.C. Ltd. Versus Sarada Prasad Misra & Anr., 2006 AIR SCW 3216
M/s Reetu Marbles versus Prabhakant Shukla 2009 AIR SCW 7614
Jasmer Singh versus State of Haryana and another, reported in 2015 AIR SCW 869

For the appellant: Mr. P.P. Chauhan, Advocate.
For the respondents: Mr. Varun Chandel, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This Letters Patent Appeal is directed against the judgment dated 13.05.2011, made by the learned Single Judge of this Court in CWP(T) No. 11554 of 2008, titled *Sher Mohammad versus Himachal Road Transport Corporation & others,* whereby the writ petition came to be dismissed, for short "the impugned judgment", on the grounds taken in the memo of appeal.

2. The writ petitioner/appellant herein who was appointed as driver in Himachal Pradesh Road Transport Corporation, hereinafter referred to as "HRTC" for short, was on his duty on 28.6.1994 to Dehra. He was to leave Dehra on the next day i.e. 29.6.1994 for Palampur. The petitioner is stated to have left Dehra for his native place on 28.6.1994 and did not report for duty on 29.6.1994 and remained absent, which was made basis to hold a departmental inquiry against him, which resulted in his removal from service vide order dated 15.1.1998, constraining him to file Original Application No. 204 of 2004. The said Original application was disposed of vide order dated 26.6.2004, with a direction to the Managing Director of HRTC to treat the Original Application as representation and to decide the same. It is apt to reproduce order dated 26.6.2004 herein:

> *"26.6.2004. Present: Sh. Madan Thakur, Advocate, for the applicant.*
>
> *Sh. S.C. Sharma, Advocate, for respondents.*
>
> *At the request of learned counsel for the applicant and in the peculiar circumstances of the case the present Original Application itself is directed to be treated as representation to the Managing Director, HRTC Shimla with a direction to decide the same within a period of two months from this order. The Managing director concerned is further directed to hear the applicant in person before deciding the representation. The learned counsel for the respondents has no objection to this proposition.*
>
> *With these aforesaid observation and directions the Original Application stands finally disposed of with no order as to costs."*

3. The said representation was rejected vide order dated 6.9.2004 by the Managing Director HRTC.

4. The petitioner, feeling aggrieved, questioned the said order and the removal order dated 15.1.1998, by the medium of Original Application No. 367 of 2004 which, on abolition of the H.P. State Administrative Tribunal came to be transferred to this Court and was registered as CWP(T) No. 11554 of 2008, which was dismissed by the learned Single Judge of this Court on 13.5.2011, subject matter of the present appeal.

5. The learned counsel for the appellant argued that the inquiry officer has not held that the absence of the writ petitioner/appellant herein was willful. As per the law occupying the field, it was the duty of the department to prove that the absence of an employee was willful and inquiry officer had to hold accordingly.

6. The learned counsel for the respondents argued that the petitioner has remained deliberately absent from duty and had gone outside the country. The learned counsel for the respondents further argued that the writ petitioner has questioned the impugned order after a considerable delay and the writ petition merits to be dismissed.

7. The argument though attractive is devoid of any force for the reasons that the petitioner had filed Original Application No. 204 of 2004 which was treated as representation. The plea of delay and laches had not weighed with the Administrative Tribunal at that time, thus stands over-ruled.

8. We have examined the record and heard the learned counsel for the parties.

9. The argument of the learned counsel for the appellant is having force for the following reasons.

10. The charge-sheet was framed against the writ petitioner/ appellant herein on 5.9.1994. It contained three charges.

(i) *Willful absence,*

(ii) *Violation of the Central Civil Service (Leave) Rules, 1972; and,*

(iii) *Misappropriation of Rs.182/- for consuming four litres more mobil oil.*

11. The inquiry officer, after examining the record held that charge No. (iii) was not proved and exonerated the petitioner from the said charge. However, it was held that charges No. (i) and (ii) have been proved against the petitioner.

12. The inquiry officer has nowhere recorded the findings that the absence of the petitioner was willful. In the inquiry report, it is recorded by the inquiry officer that the writ petitioner has submitted the documents but has not given reasons for rejecting the same. It is apt to reproduce relevant para of Annexure A3 appended with the writ petition herein:

> *".....The charged official has in his defence statement and arguments ascertained that he has availed the leave due to illness of his wife for which he refers to his postal receipts of telegrams sent to the R.M. HRTC, Dehra and Medical Certificates of his wife. In the postal receipt produced by the charged official, the address on which these have been made is not clear and even if these are taken to be true, these do not make the stated period of leave as authorized one. Out of the produced medical Certificates, one has been obtained from the Govt. Distt. Hospital, Dharamshala and the remaining from the Private Doctor. Moreover, the patient has obtained out door treatment. Had these been any seriousness in the illness, the Distt. Hospital Authority might have admitted her and treated her as in-door patient. Secondly switching over to a Private treatment from a Hospital of the Distt. Level, reasons them for are quite silent. Still further, on the Medical Certificate furnished by the Medical Officer, Distt. Hospital, Dharamsala the words "She needs one attendant to look after her" have been added at a later stage and with different ink purposely to give shelter to the charged official."*

13. There is no finding recorded in the inquiry report that the defence taken is false or afterthought and not tenable. If the employer fails to prove the willful absence on the part of the employee, he cannot be removed from the service.

14. The writ petitioner/appellant herein has explained the circumstances, which led to his absence, which fact finds place in the inquiry report and has not been rebutted but despite that, the petitioner/appellant stands removed from service.

15. The Apex Court in a case titled as ***Krushnakant B.Parmar versus Union of India and another,*** reported in ***(2012) 3 Supreme Court Cases 178***, discussed all the aspects and held that in case an employee explains that his absence was beyond his control and due to compelling circumstances, it was not possible for him to attend the duties, it cannot be said to be willful absence. It is apt to reproduce paras 16 to 24 of the judgment herein:

> *"16. In the case of appellant referring to unauthorized absence the disciplinary authority alleged that he failed to maintain devotion of duty and his behaviour was unbecoming of a government servant. The question whether "unauthorised absence from duty" amounts to failure of devotion to duty or behaviour unbecoming of a government servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances.*
>
> *17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence can not be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government servant.*
>
> *18. In a departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in the absence of such finding, the absence will not amount to misconduct.*
>
> *19. In the present case the Inquiry Officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold the absence is wilful; the disciplinary authority as also the Appellate Authority, failed to appreciate the same and wrongly held the appellant guilty.*
>
> *20. The question relating to jurisdiction of the Court in judicial review in a departmental proceeding fell for consideration before this Court in M.V. Bijlani v. Union of India and others, (2006)*
>
> *5 SCC 88, wherein this Court held: (SCC p. 95, para 25)*
>
> > *"25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings,*

however, being quasi- criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

21. In the present case, the disciplinary authority failed to prove that the absence from duty was willful, no such finding has been given by the inquiry officer or the appellate authority. Though the appellant had taken a specific defence that he as prevented from attending duty by Shri P. enkateswarlu, DCIO, Palanpur who prevented him to sign the attendance register and also brought on record 11 defence exhibits in support of his defence that he was prevented to sign the attendance register, this includes his letter dated 3rd October, 1995 addressed to Shri K.P. Jain, JD, SIB, Ahmedabad, receipts from STD/PCO office of Telephone calls dated 29th September, 1995, etc. but such defence and evidence were ignored and on the basis of irrelevant fact and surmises the Inquiry Officer held the appellant guilty.

22. Mr. P. Venkateswarlu, DCIO, Palanpur, who was the complainant and against whom appellant alleged bias refused to appear before the Inquiry Officer in spite of service of summons. Two other witnesses, Shri Jivrani and Shri L.N. Thakkar made no statement against the appellant, and one of them stated that he had no knowledge about absence of the appellant. Ignoring the aforesaid evidence, on the basis of surmises and conjectures, the Inquiry Officer held the charge proved.

23. Though the aforesaid facts noticed by the appellate authority but ignoring such facts giving reference of extraneous allegations which were not the part of the charge, dismissed the appeal with following uncalled for observation: "The appellant even avoided the basic training required for the job and asked JAD Ahmedabad to send all the training papers for his training at IB Training School, Shivpuri (Madhya Pradesh) to his residence at Ahmedabad. 'An untrained officer is of no worth to the department'."

> *24. In the result, the appeal is allowed. The impugned orders of dismissal passed by disciplinary authority, affirmed by the Appellate authority; Central Administrative Tribunal and High Court are set aside. The appellant stands reinstated."*

16. Admittedly, the writ petitioner/appellant herein has given explanation and tendered some documents as discussed hereinabove. It was for the inquiry officer to hold that the absence was willful.

17. The Apex Court in its latest judgment in a case titled as ***Chhel Singh versus MGB Gramin Bank, Pali and others,*** reported in ***(2014) 13 Supreme Court Cases 166***, held that the unauthorized absence beyond control, cannot be termed as willful absence. It is apt to reproduce paras 10 and 12 of the judgment herein:

> *"10. After giving our careful consideration to the facts and circumstances of the case and the submission made by the learned counsel for the parties, we are of the view that the Division Bench was wrong in setting aside the order of reinstatement. The Division Bench has accepted that the inquiry stood vitiated by disallowing the request of the appellant to summon the rest of the five witnesses. For the said reason, the Division Bench has not interfered with such part of the finding and order passed by the learned Single Judge whereby the impugned order of termination dated 17-10-1994 and the Appellate Authority order dated 26-12-1994 were quashed. The order of termination being quashed by the High Court, in absence of any observation and grounds to refuse the reinstatement, the appellant automatically stood reinstated. Without reinstatement in service, the question of further inquiry does not arise. There was no occasion for the Division Bench of the High Court to direct further inquiry, without reinstatement of appellant.*
>
> *11. .....*
>
> *12. From a plain reading of the charges we find that the main allegation is absence from duty from 11-12-1989 to 11-12-1989 approximately 10½ months), for which no prior permission was obtained from the competent authority. In his reply, the appellant has taken the plea that he was seriously ill between 11-12-1989 and 11-12-1989, which was beyond his control; he never intended to contravene any of the provisions of the service regulations. He submitted the copies of medical certificates issued by Doctors in support of his claim after rejoining the post. The medical reports were submitted after about 24 days. There was no allegation that the appellant's unauthorized absence from duty was willful and deliberate. The Inquiry Officer has also not held that appellant's absence from duty was willful and deliberate. It is neither case of the Disciplinary Authority nor the Inquiry Officer that the medical reports submitted by the appellant were forged or fabricated or obtained for any consideration though he was not ill during the said period. In absence of such evidence and finding, it was not open to the Inquiry Officer or the Disciplinary Authority to*

disbelieve the medical certificates issued by the Doctors without any valid reason and on the ground of 24 days delay."

18. PW1 Uttam Chand Puri, Adda Incharge, HRTC Dehra, before inquiry officer had virtually supported the case of the petitioner that he has submitted the telegram and all other documents, including Medical Certificates, was not discarded by him. Thus, how it can be said and held that absence of the petitioner was willful.

19. The Apex Court in a case titled as ***Roop Singh Negi versus Punjab National Bank and others,*** reported in ***(2009) 2 Supreme Court Cases 570***, held that it is the duty of the Inquiry Officer to scan the entire evidence in order to arrive at a finding after adjudging the case of all the parties, adhering to the principles of natural justice, otherwise, the inquiry is vitiated and the finding recorded is also not in accordance with law. It is apt to reproduce para 23 of the judgment herein:

"23. Furthermore, the order of the disciplinary authority as also the appellate authority are not supported by any reason. As the orders passed by them have severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the appellant, there was no reason as to why the order of discharge passed by the Criminal Court on the basis of self-same evidence should not have been taken into consideration. The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the Enquiry Officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the Enquiry Officer apparently were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof."

20. The inquiry officer has not supplied the copy of inquiry report to the writ petitioner/appellant. There is no evidence on the file that the same has been supplied to the writ petitioner/appellant herein.

21. The Apex Court in the case titled as ***Union of India and others versus R.P. Singh,*** reported in ***2014 AIR SCW 3475***, held that non-supply of copy of the inquiry report to the delinquent at pre-decisional stage amounts to violation of principles of natural justice. It is apt to reproduce paras 24 to 28 of the judgment herein:

"24. We will be failing in our duty if we do not refer to another passage which deals with the effect of non-supply of the enquiry report on the punishment. It reads as follows: -

"[v] The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this

question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the [pic]concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice".

25. After so stating, the larger Bench proceeded to state that the court/tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished. The courts/tribunals would apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment. It is only if the court/tribunal findsthat the furnishing of report could have made a difference to the result in the case then it should set aside the order of punishment. Where after following the said procedure the court/tribunal sets aside the order of punishment, the proper relief that should be granted to direct reinstatement of the employee with liberty to the authority/ management to proceed with the enquiry, by placing the employee under suspension and continuing the enquiry from that stage of furnishing with the report. The question whether the employee would be entitled to the back wages and other benefits from the date of dismissal to the date of reinstatement, if ultimately ordered, should invariably left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome.

26. We have referred to the aforesaid decision in extenso as we find that in the said case it has been opined by the Constitution Bench that non- supply of the enquiry report is

a breach of the principle of natural justice. Advice from the UPSC, needless to say, when utilized as a material against the delinquent officer, it should be supplied in advance. As it seems to us, Rule 32 provides for supply of copy of advice to the government servant at the time of making an order. The said stage was in prevalence before the decision of the Constitution Bench. After the said decision, in our considered opinion, the authority should have clarified the Rule regarding development in the service jurisprudence. We have been apprised by Mr. Raghavan, learned counsel for the respondent, that after the decision

in S.K. Kapoor's case (2011 AIR SCW 1814), the Government of India, Ministry of Personnel, PG & Pensions, Department of Personnel & Training vide Office Memorandum dated 06.01.2014 has issued the following directions:

"4. Accordingly, it has been decided that in all disciplinary cases where the

Commission is to be consulted, the following procedure may be adopted :-

(i) On receipt of the Inquiry Report, the

DA may examine the same and forward it to the Commission with his

observations;

(ii) On receipt of the Commission's report, the DA will examine the same and forward the same to the Charged Officer along with the Inquiry Report and his tentative reasons for disagreement with the Inquiry Report

and/or the advice of the UPSC;

(iii) The Charged Officer shall be required to submit, if he so desires, his

written representation or submission to

the Disciplinary Authority within fifteen

days, irrespective of whether the Inquiry report/advice of UPSC is in his favour or not.

(iv) The Disciplinary Authority shall consider the representation of the Charged Officer and take further action

as prescribed in sub-rules 2(A) to (4) of

Rule 15 of CCS (CCA) Rules, 1965.

27. After the said Office Memorandum, a further Office Memorandum has been issued on 5.3.2014, which pertains to supply of copy of UPSC advice to the Charged Officer. We think it appropriate to reproduce the same:

> *"The undersigned is directed to refer to this Department's O.M. of even number dated 6.1.2014 and to say that it has been decided, in partial modification of the above O.M. that a copy of the inquiry report may be given to the Government servant as provided in Rule 15(2) of Central Secretariat Services (Classification, Control and Appeal) Rules, 1965. The inquiry report together with the representation, if any, of the Government servant may be forwarded to the Commission for advice. On receipt of the Commission's advice, a copy of the advice may be provided to the Government servant who may be allowed to submit his representation, if any, on the Commission's advice within fifteen days. The Disciplinary Authority will consider the inquiry report, advice of the Commission and the representation(s) of the Government servant before arriving at a final decision".*
>
> *28. In our considered opinion, both the Office Memoranda are not only in onsonance with the S.K. Kapoor's case (2011 AIR SCW 1814) but also in accordance with the principles of natural justice which has been stated in B. Karunakar's case (AIR 1994 SC 1074)."*

22. The findings recorded by the inquiry officer nowhere disclose that what were the reasons for recording the findings.

23. Applying the test the first charge against the petitioner fails.

24. The inquiry officer has recorded that the defence taken by the petitioner was that he had applied for leave and also sent telegram. He has also produced receipt of telegram and medical certificates, the mention of which is made by the inquiry officer at internal page 2 of the inquiry report Annexure A-3 appended with the writ petition. It is apt to reproduce relevant para at page 2 of the inquiry report herein:

> *"While going to the defence side, the charged official filed his defence statement before the enquiry officer on 21.9.1995. He stated that he reached Dehra after entering Faridabad-Pathankot service on 28.6.1994 and the crew avails rest and has to go on duty on the next day evening. Accordingly he went to this quarter for rest purpose but there he came to know about his wife having fallen down and the delivery case was also due. He further states that he come to the bus stand and sought verbal permission to go to home from the Adda in charge. The Adda in charge in turn told that he has been deputed with Dehra-Palamp7ur service the next day at 5.30 p.m. He stated that he told the Adda Incharge that in case his wife is alright, he will return to duty and in case her condition will be bad, he will not be in position to come back. He also produced receipts of telegrams, sent to the R.M., HRTC, Dehra from time to time for the extension of leave and medical certificates of his wife for the period 25.6.1995 to 11.12.1994. Out of these certificates one certificate is from the Medical Officer Distt. Hospital Dharamsala and the remaining three*

certificates for the period from 26.7.1994 to 11.12. 1994 are from a Private Doctor."

25. Applying the test, it can safely be held that the petitioner has not violated the Central Civil Service (Leave) Rules. It was for the officer concerned to inform him that his request was rejected and leave was not sanctioned.

26. This Court in ***Himachal Pradesh State Electricity Board, versus Mahesh Dahiya, LPA No. 340 of 2012*** decided on 9.4.2015 has also laid down the similar principles of law.

27. Applying the test in this case, the said judgment is squarely attracted to the facts and circumstances of the present case.

28. Having said so, the impugned judgment merits to be set aside and the order of removal merits to be quashed.

29. The question is whether the petitioner is entitled to all service benefits from 28.6.1994 till today?

30. The apex Court in ***Kendriya Vidyalaya Sangathan and another versus S.C. Sharma***, reported in ***2005 AIR SCW 377, U.P.S.R.T.C. Ltd. Versus Sarada Prasad Misra & Anr.,*** reported in ***2006 AIR SCW 3216***, ***M/s Reetu Marbles versus Prabhakant Shukla*** reported in ***2009 AIR SCW 7614*** and ***Jasmer Singh versus State of Haryana and another, reported in 2015 AIR SCW 869,*** has laid down the principles how to grant back-wages while keeping in view the facts and circumstances of each case. In some cases 50% back wages were granted and in some cases 100% back-wages were granted. Applying the test in the instant case, we deem it proper to hold that the petitioner is entitled to all service benefits notionally from 28.6.1994 till filing of the Original Application No. 367 of 2004, i.e., 16.10.2004 and is entitled to 50% back wages from 16.10.2004 till today.

31. Accordingly, the impugned judgment is set aside and the order of removal from service is quashed and the petitioner is held entitled to service benefits notionally from 28.6.1994 till 16.10.2004 but shall qualify for all service benefits and held entitled to 50% back wages from 16.10.2004 till today. However, respondents are at liberty to conduct fresh inquiry if they so desire, within three months from today. If the inquiry is conducted, the said period shall remain subject to the outcome of the said inquiry.

32. The appeal is disposed of, as indicated hereinabove, alongwith pending applications, if any.

****

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

Sita Rani and others .....Appellants

Versus

The Managing Director, HRTC, and others .....Respondents

FAO No.420 of 2008
Reserved on: 28.08.2015
Pronounced on: 04.09.2015

Motor Vehicles Act, 1988- Section 166- A car being driven by the son of the deceased was hit by an HRTC bus resulting into the death of the deceased- petition was dismissed on the ground that son of the deceased was driving the vehicle in a rash and negligent manner and that risk of owner was not covered in terms of insurance policy- insurance policy covered the risk of four persons namely driver, owner and two other persons – Insurance policy, therefore, specifically covered the risk of the owner- risk was covered to the extent of Rs. 2 lacs – therefore, amount of Rs. 2 lacs awarded with interest @ 6% per annum. (Para-7 to 13)

For the appellants: Mr.Monika Shukla, Advocate, vice Mr.G.R. Palsara, Advocate.
For the respondents: Mr.Jagdish Thakur, Advocate, for respondents No.1 and 2.
Mr.Naveen K. Bhardwaj, Advocate, for respondent No.3.
Ms.Shilpa Sood, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This appeal is directed against the award, dated 21st February, 2008, passed by the Motor Accident Claims Tribunal, Mandi, H.P., (for short, the Tribunal), in Claim Petition No.45 of 2005, titled Sita Rani and others vs. The Managing Director, HRTC and others, whereby the Claim Petition filed by the claimants came to be dismissed, (for short the impugned award).

2. Facts, as pleaded in the Claim Petition, in brief, are that on 18th October, 2004, the deceased, was coming from Delhi to Bhuntar, District Kullu, H.P. in his own car bearing No.DL-8CJ-8576, being driven by claimant No.3 (son of the deceased). When the said Car reached at Gutkar, a bus bearing No.HP-33-3921, belonging to Himachal Road Transport Corporation, (for short, HRTC), being driven by its driver, namely, Jai Ram, rashly and negligently, hit the said car, resulting into injuries to the deceased, who was taken to Zonal Hospital, Mandi, where he succumbed to the said injuries. Thus, the claimants filed the claim petition claiming compensation to the tune of Rs.20.00 lacs.

3. Respondents, including the insurer of the vehicle in which the deceased was traveling (respondent No.4 in the Claim Petition), resisted the claim petition and filed the replies.

4. On the pleadings of the parties, the following issues were settled:

"1. Whether the respondent No.3 was driving the bus bearing No.HP-33-3921 at 9:30 am at place Gutkar, District Mandi, H.P. in a rash and negligent manner resulting in death of Bhushan Lal as alleged? OPP

2. If issue No.1 is proved, whether the petitioners are entitled for compensation, if so as to what amount and from whom? OPP

3. Whether the accident took place due to rash and negligent driving of the driver of the maruti car No.DL-8 CJ-8576. If so, its effect? OPR

4. Whether the petition is bad for non joinder of necessary parties, as alleged? OPR

5. Whether the petition is not legally maintainable as alleged? OPR (1 to 3).

6. Whether the driver of the maruti car was not holding a valid and effective driving licence at the time of accident as alleged? OPR (4).

7. Relief."

5. Parties led their evidence and the Tribunal dismissed the Claim Petition on the ground that that Claimant No.3, son of the deceased, was driving the Car rashly and negligently and had caused the accident.

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

7. In the Claim Petition, the claimants have averred that the driver of the bus, namely, Jai Ram (respondent No.3), was driving the bus rashly and negligently and had caused the accident. However, FIR was lodged against Claimant No.3, who was driving the car at the relevant point of time and it was prima facie proved that the driver of the bus had not driven the bus rashly and negligently. On the contrary, it was prima facie proved that the accident was the outcome of rash and negligent driving of Claimant No.3. The Tribunal after going through the insurance policy of the offending Car has held that since the deceased was traveling in the offending Car, therefore, in terms of the insurance policy, his risk was not covered.

8. The aim and object of the provisions contained in Chapters X to XII of the Motor Vehicles Act, 1988, (for short, the Act), is that, while granting compensation under the Act to the victims of a vehicular accident, strict proof is not required. Even vague pleadings cannot be made a ground for dismissing a claim petition.

9. The Act has gone a sea change and sub section (6) to Section 158 and sub section (4) to Section 166 have been added. Section 158(6) provides that the Incharge of the Police Station concerned has to submit a report about the traffic accident to the Tribunal having the jurisdiction and that report has to be treated as Claim Petition by the Tribunal in terms of Section 166(4) of the Act. Thus, even filing of claim petition is not mandatory for grant of compensation in terms of the said amendment.

10. It is proved that the deceased, namely, Bhushan Lal, became victim of the vehicular accident, which was caused by claimant No.3, while driving the car in question, in which the insured (deceased) was traveling alongwith his family. Thus, claimants No.1 and 2, being the widow and the daughter, are entitled to compensation because they have lost source of dependency. However, it can be held that the son of the deceased i.e. Claimant No.3, who caused the accident, may not be entitled to compensation, but that will not deprive the widow and the daughter from reaping the fruits of the social legislation, which is aimed at to provide relief to the victims of the vehicular accidents, enabling them to receive the compensation.

11. The insurance policy of the Car in question was not on the file. Ms.Shilpa Sood, learned counsel for the insurer, produced a copy of the insurance policy, a perusal of which shows that the offending car was having the sitting capacity of four persons. The risk of third party and four persons i.e. driver, owner and other two persons was covered. The insured was traveling in the vehicle at the time of accident and the driver was his son. Thus, the risk of both was covered in terms of the insurance policy, in which it is recorded that the risk of owner-driver is covered. Even, as per the insurance policy, the sitting capacity of the vehicle has been mentioned as four, meaning thereby that the driver and three other occupants were covered in terms of the policy. Thus, how it can be held and said that the claimants, at least Claimants No.1 and 2, are not entitled to compensation.

12. Keeping in view the discussion made by the Tribunal in the impugned award read with the discussion made hereinabove, it is held that the deceased became the victim of the vehicular accident, which was caused by the driver, namely, Tarun Rana, while driving the Car rashly and negligently. The claimants have pleaded in the Claim Petition that the deceased was earning Rs.17,000/- per month and was the only source of income, at least for claimants No.1 and 2 i.e. the widow and the daughter.

13. However, as per the policy, the risk of the owner and driver is covered for Rs.2.00 lacs. Thus, I deem it proper to award Rs.2.00 lacs, with interest at the rate of 6% from the date of the impugned award i.e. from 21st February, 2008, till final realization, in favour of Claimants No.1 and 2 and saddle the insurer i.e. respondent No.4 with the liability. The insurer is directed to deposit the entire amount within a period of six weeks from today and on deposit, the same be released in favour of Claimants No.1 and 2 in equal shares.

14. The impugned award is set aside and the claim petition is granted, as indicated above.

****

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

United India Insurance Company Ltd. .....Appellant

Versus

Rekha Devi and others .....Respondents

FAO No.235 of 2009
Decided on: 04.09.2015

Motor Vehicles Act, 1988- Section 166- Documents disclosed that deceased remained on leave for a long period immediately after the accident- Medical Officer stated that death could have been caused by the injury sustained in the accident- held that the plea that death was not caused by the accident cannot be accepted - appeal dismissed. (Para-8 to 10)

Cases referred:

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

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

For the appellant: Mr.Lalit Kumar Sharma, Advocate.

For the respondents: Mr.Jagdish Thakur, Advocate, for respondents No.1 to 4.
Mr.Romesh Verma, Advocate, for respondents No.5 and 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 18th March, 2009, passed by the Motor Accident Claims Tribunal, Una, H.P., (for short, the Tribunal), in Claim Petition No.3 of 2004, titled Rekha Devi vs. M/s HIM Cylinders Ltd. and others, whereby compensation to the tune of Rs.4,62,000/- with interest at the rate of 7% per annum from the date of filing of the Claim Petition till realization, came to the awarded in favour of the

claimants and the insurer/appellant was saddled with the liability, (for short the impugned award).

2. The owner, the driver and the claimants have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

3. The insurer/appellant has questioned the impugned award on the grounds taken in the memo of appeal.

4. The appellant/insurer has challenged the impugned award on two grounds. The first ground was that the accident had taken place on 1st August, 2003 and the injured, namely, Chaman Lal Dubey, died on 3rd July, 2005, thus, there was no nexus between the injuries and the cause of death and that the death was natural and the Tribunal has fallen in error in holding that the death was the outcome of the vehicular accident. The next ground urged was that the driving licence of the driver of the offending vehicle was fake.

5. Thus, in the present appeal, only above two points are to be determined, which relate to issues No.1, 5 and 6.

6. Before I deal with the plea of fake licence, I deem it proper to decide whether there is nexus between the cause of death and the accident which occurred on 1st August, 2003, in which the deceased sustained injuries.

7. I have gone through the record of the case.

8. FIR bearing No.476 was registered at Police Station, Una, which has been proved on record as Ext.PW-1/A and the chargesheet was presented before the Judicial Magistrate. Exts.PW-3/C, PW-3/D, PW-3/E and PW-3/F do disclose that the deceased remained on leave from office for a considerable long period immediately after the accident.

9. The medical certificate regarding the cause of death has been proved on record as Ext.PX. The Claimants examined PW-7 Dr.Manoj Kapoor, who treated the deceased on 1st August, 2003, immediately after the accident. This witness has stated that the cause of death, as mentioned in the certificate Ext.PX, is possible due to the injuries mentioned in the MLC. The Tribunal has rightly discussed the evidence in paragraph 15 of the impugned award, which is reproduced hereunder:

> *"15. In order to prove the fact that the injured died due to these injuries, the claimants have produced Dr. Manoj Kapoor as PW7. This witness on 1.8.2003 medically examined Chaman Lal Dubey and found four injuries on his person. Perusal of the injuries as explained by this witness in his examination-in-chief shows that the deceased suffered crush injuries. Document Ext.PX has been shown to the doctor by the ld. Counsel for the claimants in order to seek his opinion regarding the cause of death, and this witness has stated that the cause of death as mentioned in the death certificate Ext.PX could be possible with the injuries given in the MLC and he further stated that although the death has happened after two years, but according to him it is possible for the patient to proceed to the state of affairs as shown in Ext.PX. Although, this document Et.PX was objected to by the ld.counsel for the respondents, but it is settled law that the proceedings under the Motor Vehicles Act, are summary in nature and the strict rules of evidence are not applicable. No doubt, there is no post-mortem report on the file nor the same was conducted by the doctors at PGI, Chandigarh. However, this fact is not fatal for the case of the claimants. Keeping in view the injuries mentioned by the Dr.Manoj Kumar in MLC Ext. PW7/A the deceased suffered crush injuries and in document Ext.PX, the immediate cause has been*

mentioned as Cardio Respiratory Arrest with septic shock raised intracranial tension. In the said document, it has been further mentioned that the antecedent cause for the death was type II diabetes Mellitvs Essential Hypertension. According to this document, the manner of death has been mentioned as natural, but merely mentioning this fact that the manner of death is natural is not sufficient especially when the immediate cause of death has been shown as cardio respiratory arrest due to septic shock raised intracranial tension. It is a kind of septicemia and in crush injuries such complications could be possible. There is direct nexus between the death and injuries suffered by Chaman Lal Dubey in a roadside accident. It is not the case of the respondents that after this accident, the deceased suffered injuries in any other manner. Ld.counsel appearing for the respondent Nos.1 and 2 drew the attention of this Tribunal towards the deposition of PW7 as in his cross-examination this witness has deposed that death cannot be a sequel to the injuries suffered by the injured once cured, but at the same time, he voluntarily stated that there is no possibility about the fact that the injuries were fully cured. The statement of the widow of the deceased in the present case inspires confidence and it cannot be disbelieve in the absence of other evidence to suggest death for any other reason. No doubt in Ext.PX the manner of death has been mentioned as natural, but keeping in view the immediate cause as given in Ext.PX, the deceased died due to cardio respiratory arrest septic shock raised intracranial tension which is the shock caused due to the crush injury suffered by the victim on 1.8.2003. The testimony of PW-7 Dr. Manoj Kapoor qua his opinion as mentioned in the death certificate Ext.PX cannot be brushed aside merely on the ground that the document Ext.PX has not been proved. Moreover, in the present case PW-3 proved documents Ext.PW3/C to PW3/F. The perusal of the same shows that Chaman Lal Dubey remained on medical leave as well as on special disability leave. This fact also falsify the stand taken by the respondents 1 and 2 in the present case that the deceased has not died due to the injuries suffered by him in the accident. Judging the facts and circumstances of the present case in the light of the decision of the Hon'ble Rajasthan High Court reported as 2007 ACJ 1329 titled as Habibnur Khan and Ors. vs. Govind Singh & Anr, an inescapable conclusion can be drawn in the present case is that the deceased died due to the injuries sustained by him on 1.8.2003 in an road side accident."

10. While going through the documents on record, one comes to inescapable conclusion that the findings recorded by the Tribunal are well founded and need no interference. Thus, the first point urged by the learned counsel for the appellant is rejected being not tenable.

11. The second point urged by the learned counsel for the appellant relates to the fake licence of the driver of the offending vehicle. There is nothing on the file which could be made basis for holding that the driving licence was fake. However, the Tribunal has recorded findings on issue No.5, which, unfortunately, have not been challenged by the other side.

12. It was for the insurer to plead and prove that the owner has committed willful breach, which he has not done in terms of the decisions of the Apex Court in **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531** and **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217.**

13. Having said so, no interference is required in the findings recorded by the Tribunal and the insurer was rightly saddled with the liability. Accordingly, there is no merit in the appeal filed by the appellant and the same is dismissed.

****

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

FAO No. 184 of 2009
a/w FAO No. 216 of 2009,
CO No. 404 & 426 of 2009
Decided on: 04.09.2015

FAO No. 184 of 2009

United India Insurance Company Ltd. ...Appellant.

Versus

Sh. Sham Lal and others ...Respondents.

.....

FAO No. 216 of 2009

Sham Lal and another ...Appellants.

Versus

Sh. Ravi Kumar and others ...Respondents.

Motor Vehicles Act, 1988- Section 149- Insurance Company contended that the driver had not attained age of 18 years, when the driving licence was issued to him and the driving licence issued to him was not valid- held that accident had taken place on 3.8.2006 on which date driver was aged 20 years- licence was renewed from time to time- therefore, plea of the Insurance Company that driver did not possess a valid driving licence cannot be accepted. (Para-6 to 8)

FAO No. 184 of 2009

For the appellant: Mr. Ashwani K. Sharma, Senior Advocate, with Ms. Monika Shukla, Advocate.

For the respondents: Mr. Ajay Sharma, Advocate, for respondents No. 1 and 2.
Mr. Mukul Sood, Advocate, vice Mr. Sanjeev Sood, Advocate, for respondents No. 3 and4.

.....

FAO No. 216 of 2009

For the appellants: Mr. Ajay Sharma, Advocate.

For the respondents: Mr. Mukul Sood, Advocate, vice Mr. Sanjeev Sood, Advocate, for respondents No. 1 and 2.
Mr. Ashwani K. Sharma, Senior Advocate, with Ms. Monika Shukla, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of both these appeals is the judgment and award, dated 05.02.2009, made by the Motor Accident Claims Tribunal, Una, Himachal Pradesh (for short "the Tribunal") in M.A.C. Petition No. 42 of 2006, titled as Sham Lal and another

versus Ravi Kumar and others, whereby compensation to the tune of Rs. 1,71,000/- with interest @ 7% per annum from the date of the claim petition till its realization came to be awarded in favour of the claimants, against the respondents and the insurer was directed to satisfy the award (for short "the impugned award").

2. The insurer has questioned the impugned award by the medium of FAO No. 184 of 2009 on the ground that the Tribunal has fallen in an error in saddling it with liability.

3. The claimants have questioned the impugned award by the medium of FAO No. 216 of 2009 on the ground of adequacy of compensation.

4. The owner and driver of the offending vehicle have filed cross objections in both the appeals on the ground that the Tribunal has fallen in an error in recording findings of rash and negligent driving against them.

FAO No. 184 of 2009

5. The only question to be determined in this appeal is - whether the Tribunal has rightly saddled the insurer with liability? The answer is in affirmative for the following reasons:

6. Learned Senior Counsel appearing on behalf of the insurer argued that the driving licence was issued on 12.02.2001 and on that date, the driver was not eighteen years of age, thus, the driving licence issued was not a valid and effective driving licence in terms of the mandate of the Motor Vehicles Act, 1988 (for short "MV Act").

7. The argument, though attractive, is devoid of any force for the following reasons:

8. The accident has taken place on 03.08.2006. On the said date, the driver was more than eighteen years of age, rather was twenty years of age and the driving licence was renewed from time to time, which is evident from the record. Thus, the Tribunal has rightly returned the findings in paras 20 and 21 of the impugned judgment.

9. It was for the insurer to plead and prove that the owner-insured of the offending vehicle has committed any willful breach. No such evidence has been led.

10. Having said so, the impugned award is well reasoned and legal one, needs no interference.

11. Accordingly, the impugned award is upheld and the appeal is dismissed.

FAO No. 216 of 2009

12. The claimants have filed this appeal for enhancement of the awarded amount.

13. I have gone through the record read with the impugned judgment and of the considered view that no case for enhancement is made out. Accordingly, this appeal is also dismissed.

Cross Objections No. 404 and 426 of 2009

14. The cross-objections filed by the owner-insured and the driver are misconceived. Hence, dismissed.

15. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification.

16. Send down the record after placing copy of the judgment on Tribunal's file.

17. Copy of this judgment be placed on each of the connected files.

****

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

Veena Sood ...Petitioner
Vs.
Ramesh Kumar Sood & anr ...Respondents.

CMPMO No.317 of 2015
Decided on: 4.9.2015

Code of Civil Procedure, 1908- Order 17 Rule 1- Petitioner filed an application for adjournment which was dismissed- order-sheet showed that petitioner was unable to complete evidence despite the lapse of 6 years- held, that only three adjournments can be granted in a suit - more than three adjournments should be granted only in the exceptional cases and not in routine- petition dismissed. (Para-2 to 7)

For the Petitioner : Mr. Naresh Sharma, Advocate
For the Respondents : Mr. Y.P.Sood, Advocate

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge:

This petition under Article 227 of the Constitution of India is directed against the order dated 24.6.2015, passed by the learned Civil Judge (Sr. Division), Shimla, whereby the application of the petitioner under order 17 Rule 1 of CPC for adjournment of the case came to be dismissed.

2. Evidently, it was with the view to avoid the closure of opportunity to lead evidence that the application for adjournment had been moved. This opinion is being formed on the basis of zimni orders passed by the court below, copies whereof have been placed on record by the respondents.

3. It is further evident from the perusal of the order sheet that the issues were framed on 1.7.2009 and despite a passage of six years, petitioner has not been able to complete his evidence inspite of having been afforded more than ample opportunities.

4. A Division Bench of the Delhi HighCourt in **Jasbir Sobti** Vs. **Surinder Singh (FAO No.70/20008 (OS)** when confronted with a similar proposition held as follows.

> *6. The question that arises for consideration is as to whether another opportunity is to be given to the plaintiffs under the cloak of 'in the interest of justice'. Answer to this question would lie in replying to the related question,*

namely, whether interest of justice demands that case is to be decided on merits even when there are lapses galore on the part of the plaintiffs in not prosecuting the case diligently thereby delaying the process endlessly. We are afraid, in the name of justice no such licence can be given to the plaintiffs. No doubt, if there is a minor procedural lapse, that can be condoned and the main purpose of the Court is to see that such cases are decided on merits. However, that would not mean that the plaintiffs or the defendants are allowed to drag on the proceedings unnecessarily by taking adjournments continuously. Again that does not mean that the parties do not take steps in further progress of the case, namely, fail to file the documents, conduct admission/denial and even fail to appear repeatedly. We have to keep in mind the interest of opposing party as well. If the matter are dragged like this and the opposing party is made to appear on each date and asked to come on the next date only because nobody is appearing on behalf of the plaintiffs, it causes unnecessary harassment to the opposite party as well. Therefore, in all such matters the Court is under duty to weigh the interest of both the parties and maintain balance in so far as these conflicting interests are concerned.

7. The problem of arrears in the Indian courts is well known. We have 30 million cases pending in the various District Courts and in the High Courts. Many attempts are being made to clear these arrears and to ensure that the cases are decided speedily and there is no unnecessary delay in the disposal of these cases. If the proceedings in a particular case linger on and the judgment is delivered and case decided after number of years, the adverse effects of this are well known. No doubt, if we have dictum 'Justice hurried is justice buried' on the one hand, we cannot gloss over another equally forceful maxim 'Justice delayed is justice denied'. In a situation like this, callousness, indifference and laxity on the part of the plaintiffs in pursuing the suit cannot be tolerated. It cannot be the privilege of the plaintiffs to file a suit and not to prosecute it or enter appearance or keep the matter pending indefinitely. A Division Bench of this Court of which one of us (A.K. Sikri, J) was party had the occasion to deal with precisely this very aspect in greater detail in the case of Naresh Chand Gupta v. Braham Prakash & Anr., (2007) 97 DRJ 193. Our purpose would be served in extracting following portion therefrom:-

"11.In The Executive Engineer and Ors. v. Machinery Parts Corporation - 129 (2006) DLT 629, this Court had an occasion to deal with almost similar situation and the Court was of the view that adjournments cannot be granted on mere asking of the parties for the purpose of evidence. This judgment was also affirmed by the Division Bench of this Court in Supreme Telecommunication Ltd. v. RPG Transmission Ltd. - 2006 (6) AD (Delhi 375. Following extract from this judgment, wherein judgments of other High Courts are also taken note of and discussed, is worth to quote:

"The conduct of the defendants before the Court was of such a nature that the order passed by the learned Trial Court would not call for any interference. Furthermore, the court cannot keep on adjourning the case for evidence of the parties indefinitely and grant adjournments at the mere asking of the parties, without any plausible cause or reason. Reference in this regard can be made to the judgments in the cases of Chander Singh v. Chottulal AIR 1994 Raj 186 and Sarjeet Kaur v. Gurmail Singh and Anr. 1999 (3) PLR 402 (Vol.123). In the case of Sarjeet Kaur (supra), the Court held as under:

Language of the impugned order clearly shows that the plaintiff had exhausted all limits for seeking adjournment on every score, whatsoever. The very purpose of granting last opportunity stood frustrated by grant of six subsequent adjournments, but even then the plaintiff neither summoned witnesses nor examined any. Wonder there was any other choice left before the learned trial court but to pass the impugned order. This court had the occasion to discuss the scope of such power of the court and consequence of persistent default on the part of the party in the trial Court, in the case of Joginder Singh and Ors. v. Smt. Manjit Kaur Civil Revision No. 5885 of 1998, decided on 14.1.1999, held as under:

The cumulative effect of the provisions of Order 18 Rule 2 read with Rules 1 and 2 of Order 17 of Code of Civil Procedure and inherent powers of the Civil Court vested in it under Section 151 of the Code, placed an implied obligation on the Court not to adjourn the case unless sufficient cause was shown. The cause by itself cannot always be treated as a ground for repeated adjournments. Un-necessary and avoidable adjournments must be denied by the Courts. On the one hand, trial Courts are expected to dispose of suits and other proceedings expeditiously, and on the other, if parties to a lis are permitted to get the suits adjourned on the mere asking and that too for the indefinite times, it would frustrate the very spirit behind the provisions of the Code of Civil Procedure.

Obligation on a Court cannot be read as construed in isolation. It must find its reasoning from the basic concept of genuine attitude of the litigant. A litigant must help the Court by effective participation for expeditious disposal of the suit. Having taken more than six opportunities after the last opportunity was granted by the Court, the plaintiff can hardly challenge the correctness of the impugned order and more particularly on the ground that the learned trial Court has failed to exercise jurisdiction vested in it or the trial court has wrongly exercised jurisdiction.

The Rajasthan High Court in the case of Chander Singh v. Chottulal AIR 1994 Raj 186, while commenting upon the afore-said provisions of the Code, held as under:

It is clear from the order-sheet of the case that the learned trial Court repeatedly adjourned the case in utter disregard of the provisions of Order 17, Rule 1, C.P.C. Its provisos (b) and (c) run as under:

(b) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party.

(c)the fact that the pleader of a party is engaged in another Court shall not be a ground for adjournment.

Such liberal attitude of the trial Courts is mainly responsible for the huge arrears of cases and inordinate delay in their disposal. The learned trial Court should have closed the defendant's evidence much earlier. It had acted illegally in granting said adjournments to the defendant. It has not acted illegally or with material irregularity in the exercise of its jurisdiction in any manner in passing the impugned order.

The conduct of the plaintiff-petitioner no way demands exercise of judicial discretion in the Court in his favour on the grounds of equity or legal maxims. Prudent reasoning leads one to no other conclusion but to one that the learned

trial Court was fully justified and in fact was left with no alternative other than closing the evidence of the petitioner."

12. Again, in Uttar Pradesh State Bridge Cor. v. Overseas Water Proofing Corpn. - 2006 (130) DLT 182, the Court expressed its anguish and concern over the tendency of the parties to drag the proceedings in the following terms:

"8. Lately, it has been noticed by this Court that there is a great tendency to drag proceedings by filing frivolous applications and/or seeking adjournment on grounds of non-availability of counsel as also misusing the courtesy extended to counsel by courts of passing-over matters when called out. Another ground ordinarily pressed into service is that counsel is busy in a higher court. The sum total is that cases drag on from year to year and each adjournment adds to arrears. The back-log increases to the extent that the daily board becomes unmanageable. Even in this Court six to seven cases every day are filed for condoning defaults. Each time a petition for condoning default is brought before the High Court it takes on an average six hearings for it to be disposed of while the case in the trial court comes to a standstill. All this is done in the name of justice to the litigant in spite of default of lawyers.

9. In the present case, instead of proceeding with the matter after default was condoned on costs imposed, an application was moved for waiving of costs, obviously, only to delay proceedings. Having carefully considered the facts of this case, this Court is of the opinion that ends of justice demand a speedy trial which cannot be allowed to be defeated by the so- called tricks of trade. Courts must firmly put down the practice of frivolous adjournments and move ahead with cases so that the same are disposed of as quickly as possible. This of course does not mean that no adjournment will be granted but adjournments should be granted only in exceptional cases by adopting a more rational approach. This is the only method of managing workload and disposing of cases in shorter duration."

13. Order 17 of the Code of Civil Procedure in its unamended form was commented upon by the Apex Court in Bashir Ahmed v. Mehmood Hussain Shah - AIR 1995 SC 1857, in the following words:

"The Rule thus indicates that protraction of trial of the suit should not be encouraged and the court shall try the suit as expeditiously as possible. It the adjournment has occasioned on any sufficient ground, then it may, in an appropriate case, adjourn to a shorter date asking the party seeking adjournment to pay costs incurred by the party who got the witnesses produced and was ready to proceed with trial."

14. Delay which occurs due to unnecessary adjournments on the part of one or the other party has been a matter of concern by the judiciary and legislature alike. Sweeping and important amendments were made in the Code of Civil Procedure with a purpose to ensure speedy disposal of cases. In the process, Order 17 of the Code of Civil Procedure was also amended. Though there was no provision for granting adjournments for recording the evidence earlier, amendment now provides that a party shall not be granted adjournment more than three times during hearing of the suit. Purpose obviously is to put a cap on the number of adjournments which the parties take in adducing the evidence. In Salem Advocate Bar Association, Tamil Nadu v. Union of India -

AIR 2005 SC 3353, the Supreme Court commented upon these amendments in Order 17 Code of Civil Procedure in the following words:

29. Order XVII of the Code relates to grant of adjournments. Two amendments have been made therein. One that adjournment shall not be granted to a party more than three times during hearing of the suit. The other relates to cost of adjournment. The awarding of cost has been made mandatory. Costs that can be awarded are of two types. First, cost occasioned by the adjournment and second such higher cost as the court deems fit.

30. While examining the scope of proviso to Order XVII Rule 1 that more than three adjournments shall not be granted, it is to be kept in view that proviso to Order XVII Rule 2 incorporating Clauses (a) to (e) by Act 104 of 1976 has been retained. Clause (b) stipulates that no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party. The proviso to Order XVII Rule 1 and Order XVII Rule 2 have to be read together. So read, Order XVII does not forbid grant of adjournment where the circumstances are beyond the control of the party. In such a case, there is no restriction on number of adjournments to be granted. It cannot be said that even if the circumstances are beyond the control of a party, after having obtained third adjournment, no further adjournment would be granted. There may be cases beyond the control of a party despite the party having obtained three adjournments. For instance, a party may be suddenly hospitalized on account of some serious ailment or there may be serious accident or some act of God leading to devastation. It cannot be said that though circumstances may be beyond the control of a party, further adjournment cannot be granted because of restriction of three adjournments as provided in proviso to Order XVII Rule 1.

31. In some extreme cases, it may become necessary to grant adjournment despite the fact that three adjournments have already been granted (Take the example of Bhopal Gas Tragedy, Gujarat earthquake and riots, devastation on account of Tsunami). Ultimately, it would depend upon the facts and circumstances of each case, on the basis whereof the Court would decide to grant or refuse adjournment. The provision for costs and higher costs has been made because of practice having been developed to award only a nominal cost even when adjournment on payment of costs is granted. Ordinarily, where the costs or higher costs are awarded, the same should be realistic and as far as possible actual cost that had to be incurred by the other party shall be awarded where the adjournment is found to be avoidable but is being granted on account of either negligence or casual approach of a party or is being sought to delay the progress of the case or on any such reason. Further, to save proviso to Order XVII Rule 1 from the vice of article 14 of the Constitution of India, it is necessary to read it down so as not to take away the discretion of the Court in the extreme hard cases noted above. The limitation of three adjournments would not apply where adjournment is to foe granted on account of circumstances which are beyond the control of a party. Even in cases which may not strictly come within the category of circumstances beyond the control of a party, the Court by resorting to the provision of higher cost which can also include punitive cost in the discretion of the Court, adjournment beyond three can be granted having regard to the injustice that may result on refusal thereof, with reference to peculiar facts of a case. (Emphasis added We may,

however, add that grant of any adjournment let alone first, second or third adjournment is not a right of a party.

The grant of adjournment by a court has to be on a party showing special and extraordinary circumstances. It cannot be in routine. While considering prayer for grant of adjournment, it is necessary to keep in mind the legislative intent to restrict grant of adjournments.") Guided by these considerations as well, we are of the opinion that the learned trial court was right in refusing to grant further adjournment and rightly closed evidence of the appellant.

15.Learned counsel for the appellant had referred to the judgment of the Division Bench of this Court in Malhan Builders & Ors. v. Durkhanie Jadran & Ors. - 2006 (91) DRJ 106 (DB). However, we are of the opinion that this judgment would not come to the rescue of the appellant. In that case also the evidence of the plaintiff was closed. The Division Bench held that Court was entitled to proceed with the case and to give decisions on merits. The plaintiff was, however, given one opportunity to lead evidence only because of the reason that witness had appeared three times on earlier occasion but it was the defendant who had avoided to cross-examine him and further on the particular day when evidence was closed witness was disabled due to illness of his mother. In the present case, the defendant has not taken any undue advantage or adjournment by avoiding to cross- examine the witness. It is the witness who did not appear on most of the hearings. He had not appeared before 3.10.2001 which led to adjournments. Even when he appeared on one or two occasions, request was made by the plaintiff for adjournment either on the ground that counsel was not available or the witness was not in a position to give the evidence because of his so-called illness. Even on 3.10.2001, when the examination-in-chief of PW1 was recorded and the defendant partly cross-examined the said witness, further cross- examination had to be deferred because of non- availability of the plaintiff's counsel. Further, as already noted above, even on the particular day i.e. 1.3.2002, when the evidence was closed, the trial court found that false plea regarding illness of witness was taken."

5. The reasoning as assigned in Sobti's case (supra), is applicable in all force to the facts and circumstances of the instant case and adopting the same reasoning, I find no justifiable reason to grant any further opportunity to the plaintiff to lead her evidence.

6. The learned trial court has committed no error in not only dismissing the application for adjournment, but also closing the evidence of the plaintiff by the order of the court.

7. The learned counsel for the petitioner would then contend that last opportunity be granted subject to heavy cost. This request is not only opposed by the respondent but even otherwise it is more than settled that *'cost'* is not the panacea for all the ills.

8. Having said so, there is no merit in the petition, the same is dismissed, leaving the parties to bear the cost.

****

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

Kewal Ram (dead through LRs. Jeet Ram & ors.) .....Appellants.
Versus
Singh Ram & ors. .....Respondents.

RFA No. 28 of 2002.
Reserved on: 11.8.2015.
Decided on: 07.9.2015.

Hindu Succession Act, 1956- Section 14- 'D' was owner of the suit property- he died prior to 1948 leaving behind three widows J, S and S- J and S re-married and third widow became limited owner of the property – she gifted the suit property on 21.4.1948 to 'P'- 'P' sold the suit property- alienation was challenged and the suit was decreed on 26.4.1954- plaintiffs being class-II heirs of 'D' claimed that they are entitled to succeed to the suit property- plaintiffs had duly proved that they were successors of 'D' – 'S' had life interest in the suit property- plaintiffs being reversioners had a legal right to challenge the alienation – improvement made after the decree will not benefit the defendants – widow had alienated the property prior to the commencement of the Hindu Succession Act and the reversioners had a right to file the suit. (Para- 7 to 19)

Cases referred:
Shakuntala vrs. Smt. Kamla, 1998(1) Sim. L.C. 162.
Sohan Lal vrs. Nihali Devi, 1988 S.L.J. 485
Amar Singh and others vrs. Sewa Ram and ors. AIR 1960 Punjab 530,
Radha Rani Bhargava vrs. Hanuman Prasad Bhargava & ors., AIR 1966 SC 216
Lachhman vrs. Thunia, AIR 1972 HP 69
Radhey Krishan Singh and ors. vrs. Shiva Shankar Singh & ors., AIR 1973 SC 2405
Daya Singh (dead) through Lrs. vrs. Dhan Kaur, AIR 1974 SC 665,
Mst. Anjanbai and ors. vrs. Ramprasad, AIR 1994 MP 91
Naresh Kumari (dead) by LRs and another vrs. Shakshi Lal (dead) by LRs and anr. (1999) 2 SCC 656

For the appellant(s): Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Neeraj Gupta, Advocate.
For the respondents: Mr. K.D.Sood, Sr. Advocate, with Mr. Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular first appeal is directed against the judgment and decree of the learned Addl. District Judge, Shimla, H.P. dated 03.10.2001, passed in Civil Suit No.52-S/I of 95/88.

2. "Key facts" necessary for the adjudication of this regular first appeal are that the respondents-plaintiffs (hereinafter referred to as the plaintiffs) have instituted Civil Suit bearing No. 52-S/I of 95/88, against the appellants-defendants (hereinafter referred to as the defendants) for possession and declaration. The Civil Suit bearing No. 124-S/1 of

95/93, titled as Sita Ram & ors. vrs. Singh Ram and others, was also filed. Both these suits were instituted in this Court. These suits were transferred to the Court of learned District Judge, Shimla, vide order dated 25.5.1995. Since the subject matter of dispute in both the suits was same and the main controversy *inter se* the parties pertains to the various alienations made by one Smt. Suni, widow of Sh. Daut, hence, these suits were consolidated by order dated 10.3.1999. Now, as far as suit No. 52-S/I of 95/88 is concerned one Daut son of Karmu was owner of the suit property as per the details given in the plaint. He died prior to 1948, leaving behind three widows, namely, Smt. Jamni, Smt. Sadho and Smt. Suno. The first two widows, namely, Smt. Jamni and Smt. Sadho, remarried and third widow Suno had become limited owner of the property left behind by Sh. Daut. Smt. Suno gifted the suit property vide a registered gift deed dated 21.4.1948 to Sh. Paras Ram, son of Sh. Parma. Later on, Paras Ram donee of the suit property situated in Chak Roni sold the same to one Sh. Singh Ram, son of Sh. Nanku. Sh. Singh Ram further sold 11-03 bighas, part of the suit property, in Chak Chamrot to Sh. Daulat Ram. These alienations were challenged by Sh. Nanku and others, claiming themselves to be the reversioners under the Hindu Law in respect of estate of Sh. Daut son of Karmu in the Court of learned Sr. Sub Judge, Mahasu, vide civil suit titled as Nanku and others vrs. Rati Ram and ors. The same was decreed on 26.4.1954 by the learned Sr. Sub Judge, Mahasu, vide judgment Ext. PW-1/1 and decree sheet Ext. PW-1/2. The defendants preferred an appeal against the judgment and decree dated 26.4.1954 before the Judicial Commissioner, H.P. vide RFA No. 4 of 1954. The appeal was dismissed by the learned Judicial Commissioner on 31.8.1957 by upholding the judgment and decree dated 26.4.1954. Smt. Suno died on 16.5.1987 issueless. The parties in the suit are Hindus. The plaintiffs, being class-II heirs of Sh. Daut at the time when succession opened on the death of Smt. Suno on 16.5.1987, are entitled to succession of the suit property. The defendants No. 22 to 34 as arrayed in the original suit, got illegal entries in respect of Kh. Nos. 337, 361, 368, 382, 383, 384, 385, 391, 396, 397, 398, 417, 405, 418, 439, 441, 443, 444, 445 kitas 19 measuring 78-03 bighas, situated in Chak Roni, Tehsil Theog, Distt. Shimla, as per the jamabandi for the year 1984-85 in their favour. The defendant No. 30, namely, Sh. Kewal Ram, son of Basia was wrongly shown in possession of the suit land in the revenue record. The entries made in faour of defendant No. 30 were wrong, illegal and collusive. The possession of defendants No. 22 to 34, as per the cause title of the original suit over the suit land measuring 78-03 bighas was also illegal.

3. The suit was contested by the defendants No. 1 to 10, 22 to 24, 26 to 31, 33, 34 and 57 to 61 by filing different written statements. the defendants, on merits alleged that the plaintiffs have included some of the properties in the suit, which never formed part of the holding of Sh. Daut, particularly, part of the land mentioned in para 10 of the plaint. The defendants have admitted that Sh. Daut had three widows and civil suit regarding the alienations made by the donees was also filed in the Civil Court. However, the judgment was not binding upon the defendants. Some of the tenants were already in occupation of the property prior to the gift were also not impleaded as parties to the earlier suit. It was also denied that the plaintiffs were not legal heirs of Sh. Daut and locus standi of the plaintiffs to take the benefit of the decree was also challenged. Defendant No. 30 had become owner under the provisions of H.P. Tenancy and Land Reforms Act. Defendants No. 1 to 10, 22 to 24, 26 to 31, 33, 34 and 57 to 61 filed additional separate written statement in pursuance to order of this Court dated 30.4.1991. Defendants No. 11, 40, 63 to 66 filed separate written statement. They have admitted that Smt. Suno died on 16.5.1987 and Sh. Daut died issueless.

4. The replication was filed by the plaintiffs to the written statement filed by defendants No. 1 to 4, 5, 6 to 10, 22 to 24, 26 to 31, 33, 34, 57 to 61, 11, 40 to 63, 64, 65

and 67 by reaffirming all the allegations made in the plaint. In Civil suit bearing No. 52-S/I of 95/88, issues were framed on 16.7.1991. The issues in civil suit No. 124-S/1 of 95/93 were framed on 10.3.1999. The common evidence was led in both the civil suits. The civil suit bearing No. 52-S/I of 95/88 was partly decreed by the learned Addl. District Judge, Shimla and civil Suit No. 124-S/1 of 95/93 was dismissed by the learned Addl. District Judge, Shimla on 3.10.2001 by a common judgment. The defendants have assailed the judgment dated 3.10.2001 rendered by the learned Addl. District Judge, Shimla in civil suit No. 52-S/I of 95/88.

5. Mr. Bhupinder Gupta, Sr. Advocate, has vehemently argued that the proprietary rights were conferred upon Sh. Kewal Ram defendant No. 30 in accordance with law and there was no evidence available on record to connect respondents-plaintiffs with the estate of Sh. Daut. The learned Addl. District Judge has misread the provisions of Hindu Succession Act. The suit was bad on account of multifariousness. The issues No. 7, 16 & 17 have wrongly been decided. On the other hand, Mr. K.D.Sood, Sr. Advocate, has supported the judgment and decree dated 3.10.2001 rendered by the learned Addl. District Judge, Shimla.

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

7. It is settled law by now that tenancy is creature of bilateral agreement. In order to ascertain whether the tenancy has come into existence, the rent column in jamabandi is relevant. Defendant No. 30 Kewal Ram has admitted specifically that he was not paying any rent. The non-payment of rent would negate the existence of relationship of landlord and tenant. Smt. Suno was limited owner of suit property as held by Sr. Sub Judge, Mahasu vide judgment dated 26.4.1954 Ext. PW-1/1. This judgment was upheld in RFA No. 4 of 1954 by the learned Judicial Commissioner on 31.8.1957. Since the entries were changed abruptly without any legal basis and that too in violation of principles of natural justice, the Civil Court had the necessary jurisdiction.

8. According to the plaintiffs, they are Class-II heirs of Sh. Daut and were entitled to the suit property under the provisions of Hindu Succession Act. Smt. Suno died on 16.5.1987. The plaintiff No. 1 is son of Smt. Sadho and plaintiffs No. 2 to 4 are her daughters. Similarly, defendant No. 11, 63 to 66 are successor-in-interests of Smt. Jamni. The defendant No. 62 was the brother of plaintiff No. 1 and a son of Smt. Sadhu. Late Sh. Daut has not left behind any male heir behind him. The plaintiffs have duly proved that they were successors-in-interest of late Sh. Daut. Smt. Suno, widow of late Sh. Daut had only life interest in the suit property. The plaintiffs are reversioners of late Sh. Daut. They had legal right to challenge the alienation i.e. the gift deed dated 21.4.1948 made by Smt. Suno in favour of Sh. Paras Ram. The learned Sr. Sub Judge, Mahasu, while recording the findings in judgment Ext. PW-1/1, has categorically held while deciding issue No. 2 that subsequent alienation by way of sale deed were of no legal value and would not affect the reversioners' rights. The judgment dated 26.4.1954 has attained finality. The Hindu Succession Act, has come into force on 17.6.1956. Smt. Suno was not in possession of the suit property on 17.6.1956 after making gift and further sale of the property.

9. The learned Addl. District Judge, Shimla has rightly distinguished the judgment relied upon by the defendants titled as ***Smt. Shakuntala vrs. Smt. Kamla***, ***1998(1) Sim. L.C. 162.*** The suit property, after the death of Smt. Suno was to revert back to nearest reversioners, being legal heirs of late Sh. Daut, when the succession opened on 16.5.1987. The benefit of judgment and decree passed by the Sr. Sub Judge, Mahasu vide

Ext. PW-1/1 and PW-1/2 would go to the nearest legal heirs and the remote legal heirs would be excluded while considering the question of succession of the suit property.

10. Now, as far as the plea raised by Mr. Bhupinder Gupta, Sr. Advocate, qua multifariousness is concerned, the plaintiffs have based their claim on the basis of previous judgment rendered by the Civil Court vide Ext. PW-1/1. The plaintiffs have arrayed affected persons as parties. The alleged tenancy was also created after the year 1961-62. In case, different civil suits had been filed, it would have created legal obligation for both the parties. The issue No. 7 has correctly been decided by the learned Addl. District Judge, Shimla, relying upon judgment rendered in the case of ***Sohan Lal vrs. Nihali Devi,*** reported in ***1988 S.L.J. 485.*** Mr. Bhupinder Gupta, Sr. Advocate, has also argued that Sh. Daulat Ram was adopted by late Sh. Daut. In his cross-examination, DW-6 Daulat Ram has admitted that no adoption deed was prepared at the time of adoption. He also admitted that even, no ceremonies were performed. The defendants in their pleadings have not specifically pleaded any custom regarding adoption. There is nothing on record to establish that by whom, defendant No. 11 Daulat Ram was given in adoption and who was the Pandit to perform the ceremonies. Since tenancy created in favour of defendants was illegal, the defendants No. 1 to 5 and their predecessor-in-interest had no legal right to encumber the property in any manner. Thus, the tenancy created by defendant No. 61 or any other defendants would not be binding or affect the legal rights of the plaintiffs.

11. Now, as far as the plea of making vital improvements over the suit land is concerned, suffice to observe that these were made after the judgment and decree rendered by the Sr. Sub Judge, Mahasu vide Ext. PW-1/1 and by the learned Judicial Commissioner, H.P. dated 31.8.1957 vide Ext. PW-1/4.

12. In the case of ***Amar Singh and others vrs. Sewa Ram and ors.*** reported in ***AIR 1960 Punjab 530,*** the Full Bench of the Punjab and Haryana High Court has held that Section 14 can have no application to a case in which a female Hindu had sold the property before the Act came into force and parted with its possession at the time of the sale. It has been further held that the collaterals (reversioners) of the last Hindu male-holder are entitled to file, or, if filed already, to continue, a suit, after the enforcement of the Hindu Succession Act, challenging an alienation effected, prior to the enforcement of the Act, by an intervening female heir, who at the time of the alienation held only widow's estate. It has been held as follows:

> "[7] On behalf of the appellants it was urged that in view of the provisions of the Hindu Succession Act, Sewa Ram is not entitled to the decree granted to him by the Court below, and inter alia it was urged as follows:
>
> (1) That though at the time of the alienation Mst. Rajo was a limited owner and, therefore, could convey only a limited title, she has since become a full owner by virtue of Section 14 of the Hindu Succession Act, and consequently the vendees' title has become perfect, and neither Mst. Rajo nor any of her heirs can successfully challenge the aforesaid alienations;
>
> (2) that even if by virtue of Section 14, the daughter cannot be said to have become an absolute owner of the property in dispute because she cannot be said to be in possession of the same on the date the Act came into force, yet taking into consideration all the provisions of the Hindu Succession Act, the reversioners have ceased to exist as a class and the alienations cannot be challenged.
>
> The first point is concluded by a Division Bench judgment of this Court reported as Hari Kishen v. Hira, (1957) 59 Pun. LR 56: ((S) AIR 1957 Punj 89). Bishan

Narain and Chopra JJ. held that Section 14 of the Act could have no applicability to a case in which a female Hindu had sold the property before the Act came into force and parted with its possession at the time of the sale. The other High Courts in India also have taken a similar view and the contrary view taken by the Patna High Court in Ram Ayodhya Missir v. Raghunath (S) AIR 1957 Pat. 480 and Mt. Janki Kuer v. Chhathu Prasad, (S) AIR 1957 at. 674, and Baijnath v. Ramautar, AIR 1958 Pat. 227, has since been overruled by a later Full Bench case of the same High Court reported as Harak Singh v. Kailash Singh, AIR 1958 Pat. 581."

13. In the case of ***Radha Rani Bhargava vrs. Hanuman Prasad Bhargava & ors.,*** reported in ***AIR 1966 SC 216,*** their lordships of the Hon'ble Supreme Court have held that when the alienation was prior to coming into force of Hindu Succession Act, 1956, reversioners filing declaratory suit that alienation was without legal necessity and not binding on them was maintainable. It has been held as follows:

"[2] On the merits, the respondents have very little to say. The High Court took the view that the effect of Ss. 14, 15 and 16 of the Hindu Succession Act, 1956 was that after the coming into force of the Act, there are no reversioners and no reversionary rights. The Patna High Court in some of its earlier decisions took the same view, but other High Courts took the view that S. 14 did not apply to properties in the possession of alienees under an alienation made by the Hindu female before the Act came into force, and in respect of such properties, as 14, 15 and 16 of the Act did not abolish the reversioners and reversionary rights. In Gummalapura Taggina Matada Kotturuswami v. Setra Veeravva, 1959 Supp (1) SCR 968 at pp. 975-976: (AIR 1959 SC 577 at p. 581), this Court approved of the latter view, and this opinion was followed by this Court in Brahmadeo Singh and another v. Deomani Missir. Civil Appeal No. 130 of 1960. D/- 15-10-1962 (SC). In the last case the trial Court had decreed a suit by the reversioners for a declaration that two sale deeds executed by a Hindu widow were without legal necessity and not binding upon them. The Patna High Court allowed an appeal by the alienees and dismissed the suit holding that by reason of the provisions of S. 14 of the Hindu Succession Act, a suit by a reversioner for a declaration that an alienation made by a Hindu female is not binding on the reversioner is not maintainable. From the decision of the Patna High Court the reversioners preferred an appeal to this Court. This Court held that the view taken by the Patna High Court following its earlier decision in Ramsaroop Singh v. Hiralall Singh, AIR 1958 Pat 319, and of the Allahabad High Court in Hanuman Prasad. v. Indrawati, AIR 1958 All 304, (the decision under appeal in this case) was incorrect, and S. 14 of the Hindu Succession Act, 1956 did not extend to property already alienated by a Hindu female. This Court accordingly allowed the appeal, and reversed the decree of the Patna High Court. The effect of this decision is that it is open to a reversioner to maintain a suit for a declaration that an alienation made by a Hindu female limited owner before the coming into force of the Hindu Succession Act, 1956 was without legal necessity and was not binding upon the reversioners. It follows that the High Court was in error in holding that the present suit was not maintainable since the coming into force of the Hindu Succession Act, 1956."

14. In the case of ***Lachhman vrs. Thunia,*** reported in ***AIR 1972 HP 69,*** the Full Bench of this Court has held that where a Hindu widow makes a gift of the property belonging to her deceased husband before the passing of the Hindu Succession Act and the

reversioners obtain a declaratory decree that their rights are intact despite the alienation by the widow, the declaratory decree does recognize the rights of the reversionsers to the property after the death of the limited owner though the right to enjoy for a limited period remains in the donee. The Full Bench has further held that Section 14(1) of the Act had no application to the property which was not in the possession of the widow at the time when the Act came into force and the property which was gifted by the widow was not such property as could be held to be in her constructive possession. It has been held as follows:

> [7] Learned counsel for the defendant-appellant has urged that a declaratory decree in favour of the reversioners creates no right or title and relies upon : Jagdish v. Brahma, 1971 Him LR 16 and Gokal v. Haria, AIR 1949 EP 414. In Jagdish's case (supra) it was held :--
>
> > "It is well settled that till succession opens out no reversioner can claim any right to or interest in the property in the possession of the limited owner. Till succession opens out, the reversionary interest is merely in the nature of spessuccessionis and it cannot be postulated with regard to any particular person whether at the time the estate falls into possession he would be entitled to the property. When the presumptive reversioner brings a suit for a declaration that an alienation by a limited owner should not affect his reversionary rights as the time of the succession opening out and the suit is decreed, the only effect of the decree is to declare the alienation to be invalid except for the life of the alienor. The declaratory decree does not pass any title to the presumptive reversioner and does not create any right in him in the property alienated. The title still remains in the alienee."
>
> The passage cited above enunciated a well settled principle. It is pointed out there that the decree in favour of a reversioner enures for the benefit of the whole body of reversioners. It only removes a common apprehended injury to the interests of the reversioners. The fact that the right to enjoy for a limited period remains in the alienee, does not, however, mean that the right of the reversioners to the property after the death of the limited owner is not recognised by the declaratory decree. If such could be the position, the declaratory decree would be worthless. We are unable to accept such a contention.
>
> [12] Now, the above mentioned case relates to the position which emerged from the declaration of an adoption as invalid. In the case before us, the gift by Smt. Karju was not held to be void. It was quite valid and binding upon her so long as she was alive. She had parted with the possession of it for her life-time. It cannot, in our opinion, be held that the donee was in possession on behalf of the widow. If the widow had tried to dispossess him, he could claim an Injunction against her. If she were to dispossess him he could sue her for possession and get back the property. The donee's possession is not on behalf of the donor, but in his own right. This, in our opinion, is the position even where the donation Is valid only for a limited period. On the other hand, the position of a person whose adoption is invalid is, as stated in Mulla's Hindu Law (13 Edn. 1966), that:
>
> > "as a general Rule the adopted son does not acquire any rights in the adopted family nor does he forfeit his rights in his natural family".
>
> Hence, a person who is in possession of a property by reason of invalid ad- option can be a licensee or in permissive and constructive possession, but a donee would

be in possession in his own right. Therefore, we do not think that the donee of Smt. Karju can benefit from Section 14 of the Act which enlarges the estate of the widow in possession but not of her donee.

[19] After having surveyed all the authorities cited before us on the question that Section 14 (1) of the Act had no application to the property which was not in the possession of the widow at the time when the Act came into force and that the property which had, been donated by her was not such property as could be held to be in her constructive possession."

15. In the case of ***Radhey Krishan Singh and ors. vrs. Shiva Shankar Singh & ors.,*** reported in ***AIR 1973 SC 2405,*** their lordships of the Supreme Court have again reiterated that reversioner is entitled to file a suit for declaration that an ailination made by a Hindu female limited owner before coming into force of the Hindu Succession Act. It has been held as under:

"[8] Our courts have recognized that a reversionary heir, although having only those contingent interests which are differentiated little, if at all, from a spes successionis, has a right to demand that the estate in the hands of a limited owner be kept free from waste and free from danger, during its enjoyment by the limited owner. Courts have also recognized that the reversionary heir is entitled to a declaration that an alienation made by the widow is not binding on the body of the reversioners, the object of the suit being to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent. See Venkatanarayana Pillai v. Subbammal, 42 Ind App 125 = (AIR 1915 PC 124). A reversionary heir thus appealing to the court truly for the conservation and just administration of the property does so in a representative capacity so that the corpus of the estate may pass unimpaired to those entitled to the reversion. That being the object for which the courts have permitted the next reversioner to file a suit even though the right is no more than a spes successionis, such a right to a remedy of a very substantial character cannot be taken away except by specific legislation. So far as the Hindu Succession Act, 1956 is concerned, there is nothing in it which has taken away such a right. In fact this court has held in Radha Rani Bhargava v. Hanuman Prasad Bhargava, (1966) 1 SCR 1=(AIR 1966 SC 216) that a reversioner is entitled to file a suit for a declaration that an alienation made by a Hindu female limited owner before the coming into force of the Hindu Succession Act, 1956, was without legal necessity and was not binding upon the reversioners. In the present case the Hindu Succession Act came into force in 1956 and the settlements challenged were much prior to that date. Therefore, the reversioners could not be precluded from maintaining the suit for setting aside the alienation.

[9] As regards the other ground on which the High Court dismissed the suit, namely, Section 6 of the Bihar Land Reforms Act, it is sufficient to point out that no such plea was raised in the written statement nor was any issue framed. It does not also appear that any argument was advanced on that basis before the Trial Court. The point seems to have been taken for the first time during the course of the argument before the High Court, and we are satisfied that the High Court was in error in entertaining that submission for the first time. It would be difficult to say if, on the alienation being set aside, defendants 1 to 3 would be still entitled to claim an interest in the property sufficient to warrant the State to settle those lands on them as occupants. We do not want to express any opinion on the point. The widow is living and the plaintiffs have not asked for possession of the

land. What would be the nature of the right to the property of a reversioner after the death of defendant no. 4 would depend upon future events and it will not be right to speculate on it. The High Court was, therefore, in error in invoking the provisions of the Bihar Land Reforms Act at the present stage."

16. In the case of ***Daya Singh (dead) through Lrs. vrs. Dhan Kaur,*** reported in ***AIR 1974 SC 665,*** their lordships of the Hon'ble Supreme Court have held that the accepted position under the Hindu Law is that where a limited owner succeeds to an estate the succession to the estate on her death will have to be decided on the basis that the last full owner died on that day. The inevitable corollary is that it is only the law in force at the time of the death of the limited owner and not the law in force at the time of the last full owner's death that would govern the case. It has been held as follows:

"[6] Now if this proposition is correct as we hold it is, that, where a female heir succeeds to an estate, the person entitled to succeed on the basis as if the last male holder had lived up to and died at the death of the limited owner, succession to Wadhawa Singh's estate in the present case opened when his widow died and it would have to be decided on the basis that Wadhawa Singh had died in 1963 when his widow died. In that case the succession to his estate would have to be decided on the basis of Sec. 8 of the Hindu Succession Act. The various High Courts which have held otherwise seem to have been oppressed by the feeling that this amounted to giving retrospective effect to Section 8 of the Hindu Succession Act whereas it is only prospective. As the Privy Council pointed out it means no such thing. The accepted position under the Hindu Law is that where a limited owner succeeds to an estate the succession to the estate on her death will have to be decided on the basis that the last full owner died on that day. It would be reasonable to hold that in such a circumstance the law as it existed at the time when the last male holder actually died should be given effect to. If the person who is likely to succeed at the time of the limited owner's death is not, as happens very often, likely to be the person who would have succeeded if the limited owner had not intervened, there is nothing unreasonable in holding that the law as to the person who is entitled to succeed on the limited owner's death should be the law then in force and not the law in force at the time of the last full owner's death.

[7] The Madras High Court thought that the decision of the Privy Council in AIR 1946 PC 173 (supra) was based upon a legal fiction and that fiction cannot be given effect to except for a limited purpose. The Mysore High Court also thought that the death referred to in section is actual death and not fictional death. In East End Dwellings Co. Ltd. v. Finsbury Borough Council, 1952 AC 109 at p. 132, Lord Asquith of Bishopstone observed:

> "if you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of those in this case is emanicipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

The observation was cited with approval by this Court in Venkatachallam v. Bombay Dyeing Mfg. Co. Ltd., 1959 SCR 703 =(AIR 1958 SC 875). If, therefore, succession opens and is to be decided on the basis of the last full owner dying on

the date of death of the limited owner the inevitable corollary is that it is only the law in force at the time of the death of the limited owner that should govern the case. To hold that the old Hindu Law applies to such a case is to allow your imagination to boggle. In the case decided by the Privy Council in AIR 1946 PC 173 (supra) if this principle had been applied the new heirs introduced by the Hindu Law of Inheritance (Amendment) Act, 1929 could not have been come in. We are not impressed with the reasoning of the Patna High Court that because the change brought about by that Act is different from the change brought about by the Hindu Succession Act a different conclusion follows. We should consider that if even the limited change in the area of succession effected by the Hindu Law of Inheritance (Amendment) Act, 1929 is to be given effect to as the law applicable on the date of the death of the limited owner, it is all the more reason why the Hindu Succession Act which makes a much more radical change in the Hindu Law should have similar application. The Mysore High Court thought that the Hindu Succession Act not being a mere declaratory Act, retrospective effect should not be given to it so as to impair existing rights and obligations. But the reversioners right being a mere spes successions there is no question of impairing existing rights by adopting the interpretation we place on Section 8 apart from the fact that, as earlier pointed out, the interpretation does not amount to giving retrospective effect to Section 8. Of course, if the property had already vested in a person under the old Hindu Law it cannot be divested."

17. In the case of ***Mst. Anjanbai and ors. vrs. Ramprasad,*** reported in ***AIR 1994 MP 91,*** the learned Single Judge has held that on the death of widow only nearest reversioner can challenge transfer. It has been held as follows:

"[5] The powers of a widow in respect of the property inherited by her from her husband can be classified as powers of (i) enjoyment, (ii) management, (iii) representation; and (iv) alienation. A widow is not a tenant for life, but is owner of the property inherited by her with certain restriction on alienation and subject to its devolving upon the next heir of the last full owner on her death. The widow being owner of the life estate can transfer all her life interest in the property to anyone she likes. To confer absolute right in the property transferred by limited owner in the properties held as limited owner; it has to be demonstrated that such transfer was effected on account of religious or charitable purposes or other purposes amounting to legal necessity. Interest in the widow's estate vests in reversioner, the heir of the last full owner who would be entitled to succeed to the estate of such owner, and therefore, the heir of the last full owner is entitled to challenge alienation made by the limited owner i.e. widow. Everyone who may have a possibility of succeeding on the death of the widow is not competent to challenge alienation made by the widow. Right to challenge alienation by suit, rests in the first instance with the next reversioner only unless it is shown that next reversioner refuses without sufficient cause to take legal course or concurred with the act alleged or colluded with the widow in the impugned act of transfer or is being precluded by his own conduct to challenge such transfer or because of his poverty is not in a position to challenge the transfer made by the widow. (Mulla Hindu Law, Sixteenth Edition, Article 207). The transfer made by a Hindu widow, a limited holder, in excess of her power is not void but only voidable at the instance of the next reversioner, in Section Shan-mugam Pillai v. K. Shanmugam Pillai, AIR 1972 SC 2069, the Supreme Court has approved the observations made

by the Madras High Court in a case reported in (Makineni Virayyav. MadamanchiBapayya, (1946) 1 Mad LJ 276, as under (at pp. 2074-75) :--

> "These decisions will be found on examination to proceed on the principle that an alienation by a Hindu widow without justifying necessity is not void but only voidable at the instance of the reversionary heir who may either affirm or avoid it, but will be precluded from questioning it if he does something which amounts to an affirmation of the transaction."

[6] The transaction made by Satyabhama widow of Nanki, on 24-2-1955 is in the capacity of a limited owner and, therefore, no, doubt, the right in the property transferred, is a limited estate or widow's estate, which had reverted back to the reversioner on the death of Satyabhama on 30-12-1979. It is only the reversioner who can challenge the transaction made by Satyabhama in favour of the plaintiffs, and the plaintiffs have right to defend the transfer on the grounds of the legal necessity or for the purpose charitable or religious. Transaction of sale is not void ab mitio but only voidable at the instance of the nearest reversioner. The question is whether the respondent Ramprasad is nearest reversioner of Nanki when his brother's widow is alive according to the statement of Ram Prasad. The question of nearest relation, of Nanki, husband of Satyabhama, will be adjudicated in accordance with law as it stands at the time of death of Satyabhama on 30-12-1979. When Satyabhama died on 30th December, 1979, the Hindu Succession Act, 1956, had come into force, and as per Section 8 of the said Act brother's widow is heir of Nanki, falling under Class II, Entry VI of the Schedule. Brother's widow is Class II heir; whereas uncle's son is not a heir under Class I or Class II of the Schedule. Atmaram's widow being Class II heir under Section 8 of the Hindu Succession Act, she will exclude Ramprasad defendant/respondent, and as such, so long as Atmaram's widow is alive Ramprasad is not reversioner of Nanki, consequently he has no light to challenge the transfer made by Satyabhama in favour of the plaintiffs. As Ramprasad is not nearest reversioner of Nanki he does not get any right to remain in possession of the suit property. Further, Ramprasad being uncle's son does not get the right to challenge the transfer by institution of the suit as nearest reversioner. In any case, transfer made by Satyabhama in favour of the plaintiffs, has not been challenged by defendant Ramprasad in the present proceedings. The plaintiffs having purchased the suit property by registered sale deed dated 24-2-1955, they have right to be in possession of the suit property. Plaintiffs' dispossession by Ramprasad defendant by using force is contrary to law. Consequent thereof, the plaintiffs are entitled for a decree of possession against defendant Ramprasad, being purchaser of the suit house from Satyabhama."

18. In the case of ***Naresh Kumari (dead) by LRs and another vrs. Shakshi Lal (dead) by LRs and anr. r***eported in ***(1999) 2 SCC 656,*** their lordships of the Hon'ble Supreme Court have held that if alienation is without any legal necessity or is contrary to the law, the alienee would only get a transitory limited right to enjoy the property during the lifetime of the widow which is the only residuary right she possessed which could be deemed to have been transferred. Thus, after the death of the widow, such property even from the alienee would revert back to the reversioners of her husband. It has been held as follows:

> "[11] Within the sphere of this legal principle, now we revert to the facts of the present case. It is not in dispute that in the first leg of litigation between the parties, when Smt. Kesri, widow of Radhakishan was alive and was a party, the

respondents, reversioners of Radhakishan, succeeded in their suit by getting declaration of this disputed house, that the sale deed by Smt. Kesri to Smt. Naresh Kumari was without legal necessity hence void. The appeal filed by the appellants was dismissed which became final. The present issue has arisen when the respondents reversioners filed their second suit for possession over the same property about which they got the decree as aforesaid. The question on these facts is, whether still appellants can claim to fall under sub-section (1) of Section 14? There could be no doubt before a benefit of sub-section (1) of Section 14, even by the widow (Smt. Kesri), could be conferred, she has to show that she is possessed of this property in dispute in lieu of her limited right of maintenance. The question is whether she was possessed of this property, to claim full right under sub-section (1) which she acquired before the 1956 Act came into force? The admitted fact is, she transferred all her right to the appellants through the said sale deed before the 1956 Act came into force. Thus, she could not be said to be possessed of this property. Thus, by her own conduct she herself relinquished all her right and even lost possession in it through the said transfer. Thus, she would not be said to be possessed of this property before coming into force the 1956 Act. Then how can she get benefit of sub-section (1) of Section 14? It may be examined from another angle. It is not in dispute that any female Hindu could only alienate her limited right in an estate prior to coming into force of the 1956 Act, which is in her possession, only for a legal necessity. If alienation is without any legal necessity or is contrary to law the alienee would only get a transitory limited right to enjoy the property, during the life-time of the widow which is the only residuary right she possessed which could be deemed to have been transferred. Thus, after the widow's death such property even from alienee would revert back to the reversioners of her husband. In Kalawatibai v. Soiryabai, (1991) 3 SCC 410:

> "A Hindu widow prior to 1956 held the property fully with right to enjoy or even destroy or dispose it of or alienate it but such destruction or alienation should have been impressed with legal necessity or for religious or charitable purposes or for spiritual welfare of the husband. Necessary consequences that flowed from an alienation for legal necessity was that the property vested in the transferee or alienee, and the reversioners were produced from assailing its validity.
>
> But if prior to 1956 any alienation was made by a Hindu widow of widow's estate prohibited by law or being beyond permissible limits, it stripped the widow of her rights and she could not acquire any rights under Section 14. And so far as alienees were concerned it could utmost create temporary and transitory ownership precarious in nature and vulnerable in character open to challenge if any attempt was made to cloud reversioner's interest. The alienee's possession may be good against the world, his right in property may not be impeachable by the widow but his interest qua the reversioner was to continue in possession at the maximum till the lifetime of his donor or transferor. It was life interest, loosely, as the duration of interest created under invalid transfer came to an end not on death of donee or transferee but donor or transferor."

[13] In the present case, this does not arise, as transfer already held to be void in the earlier suit. A possible argument, though not argued, that in case the transfer

was bad as void, the property would be deeemd to have reverted back to Smt. Kesari and on coming into force of the 1956 Act she became full owner. Even if that be, alienee could only succeed if there be any transfer to her after this date. There is more in the present case, her claim is only through the sale deed executed when she had only limited right. On the contrary, we find that the order and decree in the first suit results into giving an alienee a restricted right. Thus, the said transfer would be circumscribed and restricted by the order passed in the first suit. Thus, even on this ground it could not be said that the alienee-appellants had unrestricted right. It is also not in dispute that the appellants received the property not in lieu of her any pre-existing right, but received right in the property for the first time through the sale deed. In view of this, the appellants' case would fall under sub-section (2). Thus, the appellants' right in the said property could not be upheld."

19. In the present case also, the widow has alienated the property by way of gift deed before coming into force of the Hindu Succession Act, 1956. Thus, the reversioners had the right to file a suit.

20. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

****

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

Prithvi Chand and others. ...Appellants.

Versus

Tej Singh and others. ...Respondents.

RSA No. 116 of 2003
Reserved on: 18.8.2015
Decided on: 7.9.2015

Code of Civil Procedure, 1908 - Section 100 - Plaintiffs filed a suit for possession alleging therein that they are the owners of the suit land to the extent of ½ share and the defendants also had ½ share in the same - further, alleging that during settlement operation in 1890-91, revenue entries were inadvertently changed reducing the share of the plaintiffs to 1/4th and increasing the share of the defendants to the extent of 2/3rd – claimed that this mistake did not come to the notice till 1986 and during consolidation proceedings in 1985-86, possession of 2/3rd share was wrongly delivered to the defendants - trial Court decreed the suit and First Appellate Court while accepting the appeal, dismissed the suit- held, that there is nothing on record to suggest that revenue entries were inadvertently changed - long standing revenue entries since 1890-91 showing plaintiffs entitled to 1/4th share in the suit land and the same are not rebutted by the plaintiffs during trial - suit filed after 100 years is time barred as various consolidation proceedings took place in between and it cannot be believed that plaintiffs were not aware of the revenue entries- appeal rightly accepted and suit dismissed by the First Appellate Court- the findings of the First Appellate Court well reasoned and need no interference- appeal dismissed. (Para-7 to 18)

For the Appellants : Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.
For the Respondents : Mr. K.D. Sood, Sr. Advocate with Ms. Ranjana Chauhan, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 28.9.2002 rendered by the District Judge, Hamirpur in Civil Appeal No. 77 of 1993.

2. "Key facts" necessary for the adjudication of this appeal are that the appellants-plaintiffs (herein after referred to as 'plaintiffs' for convenience sake) instituted a suit for possession against the respondents-defendants (hereinafter referred to as the "defendants" for convenience sake). It is submitted that the land entered in Khata No.67, Khatauni Nos. 194 to 199, Khasra Nos.2, 27, 43, 50, 68, 21, 79, 80, 49, 25, 26, 24, 3, 4, 5 and 39 kitas 16 measuring 123K-16M is entered in Jamabandi for the year 1978-79 in Tikka Amroh, Tappa Mewa, Tehsil Bhoranj, District Hamirpur as owned jointly by the parties, plaintiffs and their predecessors-in-interest 1/3rd share and defendants and their predecessors-in-interest 2/3rd share. The consolidation took place in the area in the year 1985-86. New khatas were carved out of the land owned by the parties measuring 123 K-16 M. The suit land was given Khata No.62, khatauni Nos. 72 and 73, Khasra Nos. 27, 32, 37, 47, 51, 63, 64, 68, 70, 77, 81, 87, 199, 316, 334, 339, 345, 402, 404, 405, 413, 611, 888, 1220, 1294, 1313, 1480, 1481, 1788, 1262, 1263, 1266 and 1678 Kitas 33, as per the list attached, measuring 75K-3M. The settlement has also taken place in village Amroh during the year 1868-1869 and at that time, suit land denoted by Khasra Nos. 760, 763, 781, 782, 783, 784, 794, 295, 800, 801 and 802 measuring 122K-13M was shown in two shares, i.e. Smt. Jhato alias Chandnoo widow of Salahi – one share, Mana son of Bahadur one share, Bhuri Singh son of Hukmi one share, Dhari son of Biru one share, i.e. ½ share in all denoted by khata No.10 of 1868-69 and Kundan and Bahadur alias Dalia sons of Baju one share and Jai Singh son of Ghethal one share in the remaining half share, denoted by khata No. 13 of 1868-69, meaning thereby that the predecessor-in-interest of defendants had one share in the entire land, i.e. half of it, whereas the branch of the plaintiffs, another half share each in the suit land in khata No. 13 of that year. Both branches i.e. Kesroo of plaintiffs and Khushla of defendants, were recorded joint owners in possession of the suit land till consolidation took place in the year 1985-86. In the year 1890-91 settlement operation took place in the Tikka. It was only a summary settlement. No demarcation was carried out on the spot. However, while preparing the record i.e. Jamabandi Istemal Tikka Amroh khariff 46 to 47 equivalent to 1889 to 1892 due to inadvertent mistake the branch of Smt. Chandnoo @ Jhato, Mana, Narain and Mutsaddi, Dhari son of Biru, having 1/4th Share each being owners of khata No. 17 were entered as co-sharers to the extent of 2/3rd instead of half, whereas the branch of Kundan, Dalia sons of Baju half share, Jai Singh son of Ghethal half share of khata No. 20, i.e. 1/3rd instead of half share, as was being reflected in the revenue record prior to it. As a matter of fact, both the branches of Khushala and Kesroo had half share in the suit land. The same mistake was repeated in the year 1892-1893. The mistake could not come to the notice of anyone irrespective of both the branches came in possession of the suit land in equal shares each and the khata remained joint. In the subsequent jamabandis and also in the settlement having taken place during the year 1910-11, 1913-14, the khata of the land in the year 1868 till 1892-93 came to be recorded measuring 123 K-16 M instead of 122 K -13 M in joint possession of the parties. The parties were not aware of such change by way of mistake as 2/3rd and 1/3rd. Hence such position continued to be reflected in the Jamabandis from 1922-23 till 1979-80. The plaintiffs came to know during the consolidation pertaining to the year 1985-86, i.e. in November-December 1986 that less land was going to be given to them, i.e. equal to 1/3rd share irrespective of the

fact that they were in possession of half share. Defendants were given the land to the extent of 2/3rd share irrespective of the fact that they were entitled to half share.

3. Suit was contested by the defendants. According to the defendants, the entries of the suit land in the revenue record were admitted to be correct. The suit land has rightly been shown in the possession of the plaintiffs to the extent of 1/3rd share whereas that of the defendants to the extent of 2/3rd share. It is denied that the settlement, which took place in the year 1892-93, was summary and not a regular settlement. The suit land was in possession of the defendants in the beginning and was also rightly recorded in the revenue record.

4. Replication was filed by the plaintiffs. Issues were framed by the learned Sub Judge 1st Class (2), Hamirpur on 17.5.1991. He decreed the suit on 13.5.1993 and decree of possession was passed in favour of the plaintiffs. Defendants filed an appeal against the judgment and decree dated 13.5.1993 before the District Judge, Hamirpur. He allowed the same on 28.9.2002. Hence the present Regular Second Appeal. It was admitted on 1.4.2003 on the following substantial questions of law:

> **"(1). Whether the findings recorded by the learned District Judge are vitiated on account of misreading of pleadings of the parties as well as oral and documentary evidence on record?**
>
> **(2). Whether the presumption of correctness as attached to revenue record i.e. Shajra Nasab Ext. P-9 and Ext. P-11 for the year 1913-14 and 1868-69 has been ignored unlawfully by the learned District Judge on the basis of which the parties have ½ share each in the suit land and this fact is further supported by payment and this fact is further supported by payment of land revenue by the parties to the extent of ½ share each?**

5. Mr. G.D. Verma, learned Senior Advocate has supported the judgment and decree dated 13.5.1993. He has also contended that the 1st Appellate Court has not correctly appreciated the revenue record. Mr. K.D. Sood, learned Senior Advocate has supported the judgment and decree dated 28.9.2002.

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

7. Since both the substantial questions of law are interlinked and interconnected the same are taken up together for determination to avoid repetition of discussion of evidence. PW-1 Bakshi Ram has supported the case set out in the plaint. PW-2 Bansi Ram has deposed that plaintiffs were given less land as compared to their shares in the settlement which took place in the year 1986. However, he has admitted that defendants were having more land as compared to the plaintiffs in the joint khata. PW-3 Nathu Ram, Patwari has deposed that during his posting in the Copying Agency, Deputy Commissioner, Hamirpur, he has prepared the copy of khewat for the year 1968-69 Ext. P-2. Ex.P-2 and Ext. D-3 are same and similar. He has also admitted that the land which has been entered into khewat finds mention in Ext. D-3. However, voluntarily stated that he has given the full details of the land in Ext. P-2. He has also admitted that whatever entries were there in the khewat, the copy thereof has to be prepared, as per the same.

8. DW-1 Kamaljeet Singh inspection Moharrar, DC Office, Hamirpur has produced the record. DW-2 Shakti Chand has deposed that out of the suit land, two shares were with the defendants whereas one share was with the plaintiffs. The defendants were

cutting grass from the portion of the suit land since the day when he attained the age of senses. He has stated in his cross-examination that whatever land was in possession of the plaintiffs in the year 1868, even today also, the same was in their possession. The khata, however, was stated to be joint.

9. DW-3 Shankar Dass has also stated that out of the suit land, one share was with the plaintiffs, whereas two shares were with the defendants. DW-4 Jaishi Ram Kanoongo has produced the record pertaining to khata No. 18 and the copy thereof is Ext. P-2 produced by the plaintiffs. According to him, Ext. P-2 was not as per the record as the copy of khata Nos. 10 and 13. Ext. Ex. P-2 and Ex. P-3 were stated to be correct. As per his further version in khata No. 13, Kundan and Bahadur sons of Mana and Jai Singh son of Ghethal have been shown co-sharers whereas Jai Singh one share and Mana Ram also one share and in Ext. D-2, one share of Mishru and Bagu was not recorded.

10. According to the evidence discussed hereinabove, there were two branches, i.e. Kesaroo and Khushala since 1868. The main dispute revolves around the entries in the revenue record qua the suit land, i.e. allegedly changed from the ratio of ½: ½ to 1/3:2/3 during the summary settlement having taken place in the year 1890-91. The plaintiffs have not produced any tangible evidence to prove that the settlement during 1890-91 was summary settlement and not regular. No person from the revenue department has been examined to prove that the settlement which took place during 1890-91 was summary. According to the plaintiffs, a mistake was committed in the year 1890 but the present suit was filed in the year 1989, i.e. after a lapse of more than 100 years. It cannot be believed that the plaintiffs were not aware of the revenue entries till 1989. The earlier settlements have taken place in the years 1910-11, 1913-14, 1922-23, 1934-35 and 1978-79. The entries were also recorded in the subsequent jamabandis.

11. The plaintiffs are the successors of Kesroo and the defendants are the successors of Khushala. Learned First Appellate Court has rightly come to the conclusion after appraisal of the revenue record that the area in possession of the defendants was 102 K- 12 M and plaintiffs 76 K-3 M even in the year 1868.

12. PW-3 Nathu Ram has failed to explain that the parties were in possession of the land in equal shares and that the entries were changed in the year 1890-91. He has admitted in his cross-examination that the entries in Ext.D-3 are similar as in Ext. D-2. He has also admitted that whatever the entries were in Ext.P-2 the same finds mention in Ext. D-3. Ext. D-3 as a matter of fact was the Jamabandi for the year 1868 pertaining to the suit land in which defendants' predecessor-in-interest Jhato etc. have been shown as owner in possession of one share and one share of the land entered in Khasra No. 10 whereas that of the plaintiffs one share, i.e. with respect to the land entered in Khasra No. 13. Thus, defendants and their predecessor-in- interest were in possession of two shares and the plaintiffs were in possession of one share. The plaintiffs have not brought on record any evidence to prove that they were in possession of half share in the year 1868-69 in Jamabandi for the year 1890-91, Ext P-3, Missal Hakiyat for the year 1892-93 Ext. P-4, Missal Hakiyat Bandobast jadid for the year 1910-11, Ext. P-6, jamabandies for the year 1913-14, Ext. P-14 for the year 1918-19, Ext. P-15, Misal Hakiyat Bandobast jadid for the year 1913-14, Ext. P-16, Jamabandis for the year 1922-23 Ext. P-7, 1934-35 Ex.P-8, 1978-79 Ex.P-17, 1968-69 to 1972-73 Ex.P-18 and as per the entries in Ex.P-13 jamabandi for the year 1890-92, share of the predecessor-in-interest of the defendants has been shown two shares whereas the predecessor-in-interest of plaintiffs one share. DW-4 Jaisi Ram, Kanungo has deposed that the entry Ex.P-2 were not correct, as per the original record. There exist longstanding entries in favour of the defendants and their predecessor-in-

interest. They are in possession of land to the extent of 2/3rd share. Presumption of truth is attached to the Jamabandi though rebuttable. Longstanding entries since 1890-91 have not been rebutted by bringing on record any tangible evidence by the plaintiffs.

13. Now, so far as Ex.P-9 and P-10 are concerned, nothing can be made out from the perusal of these entries that the suit land to the extent of half share was recorded in the share of plaintiffs. However, Sajra Nasab Ex.D-4 produced by the defendants revealed that it was not only Khushala, predecessor-in-interest of the defendants and Kesroo, predecessor-in-interest of the plaintiffs, but one Achhru was also having one share in the land alongwith S/Sh. Khushala and Kesroo. Thus, it cannot be said that there were only two shares of the suit land and out of which one share was with the plaintiffs and their predecessor-in-interest whereas another share with the defendants and their predecessor-in-interest.

14. Plaintiffs have based their suit on the basis of entry in the Jamabandi for the year 1868-69 and the suit was barred by limitation. It cannot be believed that they did not know about the entries pertaining to year 1890-91 till 1985-86.

15. The first appellate court has correctly appreciated the oral as well as documentary evidence, including Ex.P-9 and P-10 and there is no need to interfere with the well reasoned judgment and decree passed by the first appellate court.

16. Both the substantial questions of law are answered accordingly.

17. In view of the analysis and discussion made hereinabove, there is no merit in the present appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE P.S. RANA, J.

Simrata Devi widow of Sh. Bhupinder Dutt and another ....Appellants

Versus

Financial Commissioner Revenue (Appeals) State of H.P. Shimla and others ......Respondents

LPA No. 170 of 2010
Judgment reserved on 27th August, 2015
Date of Judgment 07, September, 2015

H.P. Land Revenue Act, 1954- Section 123- An application for partition of the property was filed- Assistant Collector Second Grade framed mode of partition and the file was sent to Assistant Collector 1st Grade for further proceedings- Assistant Collector 1st Grade affirmed the mode of partition- application was filed by the co-sharers claiming that some portion of the land touched the road and all the co-sharers have equal right in the same- Assistant Collector 1st Grade passed an order that reference sent to the Field Agency was not in accordance with the mode of partition – appeal and revision preferred against this order were dismissed - a writ petition was filed which was also dismissed- record shows that no question of title was raised at the time of preparation of mode of partition- it was not mentioned in the reference that land located adjacent to the road be also partitioned and, therefore, Assistant Collector 1st Grade had rightly modified the reference order- appeal dismissed. (Para-10 to 18)

Cases referred:
Lala Ram vs. Financial Commissioner Haryana & others, AIR 1992 P&H 62
Chander Bhan vs. Hari Ram and others, 1996(1) S.L.J. 696
Darbara Singh and another vs. Gurdial Singh and another, 1994(1) S.L.J. 433
Khem Dutt and another vs. Palkia and another, AIR 1983 H.P. page 28

For the Appellants:	Mr. Neeraj Maniktala, Advocate.
For Respondent No.1:	Mr. Shrawan Dogra, Advocate General with Mr.Romesh Verma and Mr.Anoop Rattan, Additional Advocate Generals.
For Respondents Nos. 2 and 4 to 6:	Mr.Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present Letters Patent Appeal is filed against the order passed by learned Single Judge of this Court in CWP No. 1141 of 2006 decided on 22.4.2010 titled Simarata Devi and another vs. Financial Commissioner Revenue and others.

Brief facts of the case

2. Shri Suchinder and others had filed application for partition of immovable land under Section 123 of H.P. Land Revenue Act 1953 relating to immovable land comprised in Khata No. 46, Khatauni No. 118 to 122, Khasra Nos. 420, 427, 867, 935, 936, 937, 877, 883, 888, 889, 895, 896, 934, 876, 878, 879, 880, 881, 882, 887, 894, 940, 419 measuring 3-47-57 Hect. situated in village Daroh Tehsil Palampur District Kangra (H.P.) as per jamabandi for the year 1994-95. On 12.12.2001 Assistant Collector 2nd Grade framed mode of partition and thereafter file was sent to the Assistant Collector 1st Grade for further proceedings. On 22.02.2002 the Assistant Collector 1st Grade Palampur affirmed the mode of partition passed by the Assistant Collector 2nd Grade. Thereafter on 2.6.2003 Suchinder and others had filed petition before the Assistant Collector pleading therein that front portion of Khasra Nos. 888 and 889 measuring 0-21-88 Hect. is touching road side 69 metres in length and all co-sharers have equal rights relating to road side land as per their shares. In petition it is pleaded that value of immovable land comprised in Khasra Nos. 888 and 889 is fifty times more as compared to other immovable land. It is pleaded that although it was mentioned in mode of partition that Khasra Nos. 888 and 889 would be partitioned but executing reference relating to mode of partition sent to field agency did not mention about partition of Khasra Nos. 888 and 889. It is pleaded that in case Khasra Nos. 888 and 889 are not partitioned then applicants would suffer irreparable loss. On 20.6.2003 the Assistant Collector 1st Grade passed the order that executing reference sent to field agency was not sent in consonance with original order of mode of partition dated 12.12.2001. The Assistant Collector 1st Grade on 20.6.2003 directed that amended executing reference to field agency be sent strictly in accordance with the original order of mode of partition dated 12.12.2001.

3. Feeling aggrieved against the order dated 20.6.2003 passed by the Assistant Collector 1st Grade Smt. Simrata Devi and others filed appeal before the Collector Sub Division Palampur and the Collector Sub Division Palampur dismissed the appeal with the observations that original order of mode of partition dated 12.12.2001 was passed by the Assistant Collector in presence of Samrita Devi. The Collector Palampur further held that in

original order of mode of partition dated 12.12.2001 at Sr. No. 5 it was ordered that Khasra Nos. 888 and 889 would be partitioned inter se the parties as per their shares. The Collector further held that order dated 20.6.2003 was not passed in violation of original order of mode of partition but passed only to correct the clerical errors in executory order. The Collector held that order was only executory in nature without modification of original order of mode of partition. The Collector further held that there was no need to obtain prior sanction of the Collector as impugned order was not review of original order of mode of partition dated 12.12.2001.

4. Thereafter, feeling aggrieved against the order of the Collector Smt. Samrita Devi and others had filed revision petition No. 73 of 2004 titled Simrata Devi and another vs. Suchinder Dutt and others under Section 17 of H.P. Land Revenue Act 1954 (hereinafter referred to as "the Act") before the Financial Commissioner (Appeals). The Financial Commissioner dismissed the revision petition on 17.5.2006 and upheld the order passed by Collector.

5. Thereafter, feeling aggrieved against order of the Financial Commissioner Simrata Devi and others had filed CWP No. 1141 of 2006 titled Simrata Devi and another vs. Financial Commissioner Revenue (Appeal) and others before this Court. This Court vide order dated 22.4.2010 dismissed the writ petition. Thereafter Simrata Devi and others filed present Letters Patent Appeal.

6. We have heard learned Advocate appearing on behalf of the appellants and the respondents and we have also perused the entire record carefully.

7. Learned Advocate appearing on behalf of the appellants has questioned the judgment of learned Single Judge on the following grounds:-

(1) That the learned Single Judge has failed to apply his mind to relevant provision of Section 16 of H.P. Land Revenue Act 1954, which deals with review of order.

(2) That the record was tampered with by revenue authority.

(3) That the mode of partition was sanctioned on 12.12.2001 and petition was filed on 2.6.2003 beyond period of limitation.

(4) That the learned Single Judge of this Court in writ petition has not considered the question of title.

(5) That private partition was made inter se the parties.

8. The submissions of learned Advocate appearing on behalf of the appellants, being devoid of any force, are rejected for the reasons mentioned hereinafter:-

9. It is true that procedure to review the order passed by revenue officer is prescribed under Section 16 of the Act.

10. We have carefully perused the entire record of revenue Courts. On 12.12.2001 Assistant Collector 2nd Grade prepared following mode of partition in presence of the appellants:-

"(1) That total land measuring 3-47-57 Hect. would be partitioned.

(2) That partition would be effected keeping in view the possession of parties over immovable land.

(3) That khata of Suchinder, Varinder, Simro, Kushma and Pushpa would be kept joint.

(4) That khata of Simrata and Bhupinder would be kept joint.

(5) That khata of Rakesh Kumar and Mahesh Kumar would be kept joint.

(6) That cattle shed, path, water pond would be kept into consideration.

(7) That Khasra Nos. 888 and 889 measuring 0-13-35 Hect., which is touching road side would be allotted to parties according to their shares.

(8) That trees would be allotted as per share over the allotted immovable land.

(9) That partition would be conducted as per classification of land and deficiency of 0-00-19 Hect. would not be considered.

(10) That Halqua Patwari would conduct the partition proceedings directly under the supervision of Field Kanungo.

(11) That provision of Consolidation Act would be kept in mind in partiition proceedings.

(12) That entire expenses of partition proceedings would be paid by applicants and thereafter subsequently would be distributed among co-sharers."

11. Mode of partition quoted supra was prepared by revenue officer as per Section 130 of the Act in presence of the appellants namely Simrata Devi and Upender Dutt. No question of title was raised by the appellants before the revenue officer when he had prepared mode of partition. Even the appellants did not file any appeal against original mode of partition prepared by the revenue officer as required under Section 130 (2) of the Act. It is held that mode of partition prepared on 12.12.2001 by the revenue officer has attained the stage of finality. It is true that subsequently Suchinder and others filed application before the revenue officer on 2.6.2003 placed on record. We have perused the entire contents of application carefully. There is recital in application that Khasra Nos. 888 and 889 is situated adjoining the road side 69 metres in length and all co-sharers have equal interest in Khasra Nos. 888 and 889. There is recital in application that value of Khasra Nos. 888 and 889 is fifty times more as compared to other land. There is further recital in application that revenue field agency despite mentioning of partition of Khasra Nos. 888 and 889 in original mode of partition is not allotting Khasra Nos. 888 and 889 to the parties as per their shares in partition proceedings. Relief sought in application was that Khasra Nos. 888 and 889 be allotted in partition proceedings amongst the co-sharers as per original mode of partition dated 12.12.2001.

12. It is well settled law that while coming to conclusion entire contents of application and relief clause should be read as whole and isolated word should not be used. After perusal of entire contents of application carefully we are of the opinion that Suchinder and others have not sought review of original order of mode of partition dated 12.12.2001 but have sought only alteration of executory order sent to field agency for compliance. We have also perused the order of the Assistant Collector 1st Grade dated 20.6.2003 carefully. There is recital in the order of the Assistant Collector 1st Grade dated 20.6.2003 that original order of mode of partition was prepared on 12.12.2001. There is further recital in order dated 20.6.2003 that in executory order of mode of partition sent to Field Kanungo it

was not mentioned that Khasra Nos. 888 and 889 measuring 0-13-35 Hect. would be partitioned inter se co-sharers as per their shares in partition proceedings.

13. We are of the opinion that order passed by the Assistant Collector 1st Grade dated 20.6.2003 is simply modification of executory order. The Assistant Collector 1st Grade did not review its original order of mode of partition dated 12.12.2001 but only modified the executory order which was sent to Field Kanungo for execution. It is well settled law that executory order means consequential order passed only to implement the earlier original order. It is well settled law that executory order is only a step in execution of earlier original order. ***(See AIR 1992 P&H 62 titled Lala Ram vs. Financial Commissioner Haryana & others)*** In view of above stated facts it is held that the Assistant Collector 1st Grade did not modify the original order of mode of partition dated 12.12.2001 but only modified the executory order sent to Field Kanungo. It is held that sanction of revenue officer to whom Assistant Collector was immediately subordinate was not required in the present case as mentioned under Section 16 of the Act for modification of simply executory order sent to field agency for execution.

14. We have carefully perused Annexures P-10 and P14 placed on record. Contents of Annexures P-10 and P-14 are similar in nature and contents of Annexures P-10 and P-14 are not dis-similar in nature. We are agree with the observations of learned Single Judge of this Court that there is no evidence on record to substantiate these allegations.

15. We have minutely gone through the application filed on 2.6.2003. The application was simply for modification of executory order sent to Field Kanungo relating to mode of partition. Original mode of partition was prepared on 12.12.2001 and there is positive recital in Sr. No. 5 of mode of partition dated 12.12.2001 that Khasra Nos. 888 and 889 would be allotted to parties strictly as per their shares in partition proceedings. It is held that no review of original order of mode of partition dated 12.12.2001 was sought but only review of executory order sent to Field Kanungo was sought. It is held that there is no limitation for altering the executory order sent to field agency for compliance as per H.P. Land Revenue Act relating to pending partition proceedings. It is held that limitation will apply only when revenue officer will modify its original order in partition proceedings. There is wide difference between modification of original order in parititon proceedings and modification of executory orders sent to field agency for compliance in partition proceedings. It is held that there are two different concepts:-

(1) Modification of original orders in partition proceedings.

(2) Modification of executory orders sent to field agency in compliance to original order of partition proceedings.

16. It is held that when revenue officer modify executory order only and sent to field agency for compliance then prior sanction of superior revenue officer as mentioned under Section 16 of the Act is not required. It is held that when revenue officer modify original orders in partition proceedings then prior sanction of superior officer as mentioned under Section 16 of the Act is required. Point of limitation is decided against appellants.

17. In the present case appellants did not raise question of title before revenue officer in partition proceedings as required under Section 129 of the Act when mode of partition was prepared by revenue officer on 12.12.2001.

18. Appellants did not place on record any documents of private partition signed by parties. Even no instrument of private partition is placed on record in the present case. No rapat of private partition is placed on record and even private partition is not affirmed by

revenue officer as required under Section 135 of the Act. Even no instrument of private partition is placed on record in the present case. It was held in case reported in ***1996(1) S.L.J. 696 titled Chander Bhan vs. Hari Ram and others*** that if family partition is not sanctioned by revenue officer then same would not be considered as final partition. ***(See 1994(1) S.L.J. 433 titled Darbara Singh and another vs. Gurdial Singh and another. Also see AIR 1983 H.P. page 28 titled Khem Dutt and another vs. Palkia and another)***

19. In view of above stated facts and case law cited supra Letters Patent Appeal is dismissed. Order of the learned Single Judge of this Court passed in CWP No. 1141 of 2006 titled Simrata Devi vs. Financial Commissioner Revenue (Appeal) dated 22.4.2010 is affirmed. All pending miscellaneous application(s) if any also stands disposed of. No order as to costs.

****

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

Vijay Kumar .....Petitioner.
Versus
Rakesh Kumar ....Respondent.

Cr.MMO No. 177 of 2015.
Reserved on : 31st August, 2015.
Decided on: 7th September, 2015.

Negotiable Instruments Act, 1881- Section 138- Accused was authorized signatory of M/s Century Vision Organic Farm Pvt. Ltd.- he had issued a cheque for a sum of Rs.78,000/- which was dishonoured on presentation- the complainant had not arrayed the Company as an accused – held, that impleading of the Company was mandatory- accused can only be held vicariously liable for the offence committed by the Company - in absence of the Company, accused cannot be held liable. (Para-2 to 6)

Case referred:
Aneeta Hada versus Godfather Travels and Tours Private Limited, (2012)5 SCC 661

For the Petitioner: Mr. Vijay Chaudhary, Advocate.
Respondent proceeded against ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The petitioner herein in his capacity as authorized signatory of M/s Century Vision Organic Farm Pvt. Ltd., Village Tadoli, Post Office Saru, Tehsil and District Chamba, H.P., issued a negotiable instrument in the sum of Rs.78,000/- to the complainant/respondent herein. The negotiable instrument of 30.12.2012 drawn on State Bank of Patiala, Chamba stands comprised in Ex.CW1/B. It was presented by the respondent herein/complainant for payment to State Bank of Patiala, Chamba on 21.03.2013 hence within six months from the date of its issuance. However, on its

presentation by him to his banker aforesaid, it was returned to him with an edorsement comprised in Ex.CW1/E of there being insufficient funds in the account of M/s Century Vision Organic Farm Pvt. Ltd for purported defrayment of whose liability towards the respondent herein, the petitioner herein issued it to the respondent herein being its authorised signatory. In other words, the negotiable instrument Ex.CW1/B on its presentation before the State Bank of Patiala, Chamba, by the respondent herein stood dishonoured by the latter. The dishonour of negotiable instrument, Ex.CW1/B by the bankers of the respondent led the respondent herein to, within 30 days from the date of intimation purveyed to him by his bankers comprised in Ex.CW1/E qua for insufficient funds existing in the account of M/s Century Vision Organic Farm Pvt. Ltd., having entailed the sequel of its being dishonoured, serve upon the petitioner a notice comprised in Ex.CW1/C, as he in his capacity as an authorised signatory of M/S Century Vision Organic Farms Pvt. Ltd., had issued to him Ex.CW1/B. Since the serving of notice Ex.CW1/C upon the petitioner herein by the complainant/respondent did not within 15 days of its receipt by the former sequel the eventuality of the petitioner herein defraying to the respondent/complainant the liability constituted in Ex.CW1/B, led the complainant/respondent herein to before the learned Judicial Magistrate 1st Class, Chamba institute a complaint against the petitioner herein under Section 138 of the Negotiable Instruments Act. On the learned Judicial Magistrate 1st Class, Chamba receiving the complaint took cognizance thereon and issued summons upon the petitioner herein constituted in Annexure P-4 warranting his appearance before it on 15.11.2013. However, Annexure P-4 as issued by the learned Judicial Magistrate 1st Class, Chamba calling upon the petitioner herein to appear before it on 15.11.2013 did not come to be served upon the petitioner herein. The learned Judicial Magistrate 1st Class, Chamba issued subsequent to the issuance of Annexure P-4, fresh summons for procuring the presence before it of the petitioner herein on 28.10.2014, which too did not come to be served upon the petitioner herein. However, the summons issued by the learned Judicial Magistrate 1st Class, Chamba for procuring the presence before it of the petitioner herein on 18.12.2014 came to be served upon the petitioner herein. In consequence to the summons aforesaid as issued by the Court of the learned Judicial Magistrate 1st Class, Chamba having come to be served upon the petitioner, the latter put in through his counsel his appearance before the Court aforesaid on 18.12.2014. With the petitioner on 18.12.2014 appearing through his counsel before the Court of the learned Judicial Magistrate 1st Class, Chamba, the latter Court on the complaint instituted against him by the respondent herein under Section 138 of the Negotiable Instruments Act commenced proceedings against the petitioner herein. With the Court of the learned Judicial Magistrate 1st Class, Chamba having initiated proceedings against the petitioner herein upon the complaint of the respondent/complainant instituted before it under Section 138 of the Negotiable Instruments Act, led the petitioner herein to institute before this Court the instant petition under Section 482 of the Code of Criminal Procedure with a prayer therein that the complaint instituted by the respondent herein before the Court of the learned Judicial Magistrate 1st Class, Chamba be quashed and set aside.

2. The Negotiable instrument comprised in Annexure P-1 exhibited before the Court of learned Judicial Magistrate 1st Class, Chamba as Ex.CW1/B on whose presentation by the respondent herein before his bankers sequelled an endorsment from the latter comprised in Ex.CW1/E of there being insufficient funds in the account of M/s Century Vision Organic Farm Pvt. Ltd., on whose behalf the petitioner herein as its authorised signatory had issued Ex.CW1/B. The petitioner herein while donning the capacity of his being the authorised signatory of M/s Century Vision Organic Farms Pvt. Ltd., and in that

capacity having issued Ex.CW1/B which stood dishonoured rendered him to stand encompassed within the domain, ambit and gamut of the provisions of Section 141 of the Negotiable Instruments Act, whose provisions are extracted hereinafter, especially with a contemplation existing therein of every person who at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, besides also rendered him amenable to, as also, attracting its penal provisions to himself arising from dishonour of Ex.CW1/B which he while his being the authorised signatory of the aforesaid Pvt. Ltd. Company signatured it and issued it on its behalf to the respondent herein. Indubitably, further when the petitioner herein, signatured and issued the negotiable instrument constituted in Ex.CW1/B for withdrawal of the amount mentioned therein from the account maintained by M/s Century Vision Organic Farm Pvt. Ltd., with State Bank of Patiala, Chamba for purported discharge of the former's liability towards the respondent herein, in his capacity as its authorised signatory, which however for insufficiency of funds in the account of M/s Century Vision Organic Farm Pvt. Ltd., on whose behalf he issued it, as its authorized signatory stood dishonoured, as imminent from an endorsement of his bankers comprised in Ex.CW1/E and with the petitioner herein despite his having been served by the respondent herein with notice EX.CW1/C not having within the stipulated period therein defrayed to the respondent herein the amount comprised in Ex.CW1/B rendered himself amenable to besides, attracted to himself the penal provisions engrafted in Section 138 of the Negotiable Instruments Act. However, the inculpatory besides the criminal liability of the petitioner herein arising from the dishonour of the negotiable instrument while his having signatured it, in his capacity as the authorised signatory of M/s Century Vision Organic Farms Pvt. Ltd., was not his sole liability rather was a vicarious criminal liability along with M/s Century Vision Organic Farms Pvt. Ltd. Company for discharging whose liability towards the respondent herein, he being its authorised signatory issued Ex. CW1/B for withdrawal by the respondent from the account of M/s Century Vision Organic Farm Pvt. Ltd., maintained in the State Bank of Patiala, Chamba, the sum comprised in Ex.CW1/B. The provisions of Section 141 of the Negotiable Instruments Act read as under:-

> **"141. Offences by companies**.- (1) if the person committing an offence under Section 138 is a company, every person, who at the time of offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly."

3. A circumspect study, besides a close perusal of the provisions of Section 141 of the Negotiable Instruments Act unveils the fact of besides the petitioner herein while in his capacity as an authorised signatory of M/s Century Vision Organic Farms Pvt. Ltd. Company having issued the negotiable instrument which stood dishonoured for inadequacy or insufficiency of funds in the account of aforesaid company hence having rendered himself to operability qua him the afore referred provisions, he hence rendered also M/s Century Vision Organic Farms Pvt. Ltd., which had authorised him to issue the dishonoured negotiable instrument comprised in Ex.CW1/B to be legally susceptible to attraction to it or amenability qua operability qua it, the criminal liability constituted under Section 138 of the Negotiable Instruments Act arising from the dishonour of the negotiable instrument. The signification and import of the occurrence of the phrase "as well as the Company" in Section 141 of the Negotiable Instruments Act is of its peremptorily fastening criminal liability upon a corporate body besides attracting to a juristic legal entity, the penal provisions embedded in Section 138 of the Negotiable Instruments Act arising from the dishonour of a

negotiable instrument sprouting from inadequacy or insufficiency of funds in its account maintained in the bank concerned for withdrawal wherefrom for discharge of its outstanding liability towards the respondent herein, the petitioner as its authorized signatory issued Ex.CW1/B. For reiteration, the phrase "as well as the company" occurring in Section 141 of the Negotiable Instruments Act indubitably manifest that M/s Century Vision Organic Farm Pvt. Ltd., hence rendered itself amenable to, along with the petitioner herein on whose behalf he as its authorised signatory issued cheque Ex.CW1/B to the respondent herein, the penal liability constituted in Section 138 of the Negotiable Instruments Act. The peremptory mandate of Section 141 of the Negotiable Instrument Act rendering the authorised signatory of the negotiable instrument "as well as the company", for discharge of whose liability towards the respondent herein, he issued cheque Ex. CW1/B to the respondent for withdrawal from the account maintained by M/s Century Vision Organic Farm Pvt. Ltd., in the bank concerned, the sum displayed in it, to be both amenable to operability qua both the penal provisions engrafted therein, obviously made it incumbent upon the respondent herein to, in the complaint instituted by him before the learned Judicial Magistrate 1st Class, Chamba array besides the petitioner herein while his being the authorised signatory of M/s Century Vision Organic Farms Pvt. Ltd. Company, the latter company as well as an accused therein. Since the arraying of M/s Century Vision Organic Farms Pvt. Ltd. Company as an accused by the respondent herein in his complaint instituted by the respondent herein before the learned Judicial Magistrate 1st Class, Chamba arising from the dishonour of negotiable instrument comprised in Ex.CW1/B was a mandatory obligation cast upon him to render the complaint to be legally constituted, especially when the amenability to prosecution of the petitioner herein arising from his having issued negotiable instrument comprised in Ex.CW1/B to the respondent herein in his capacity as the authorised signatory of M/s Century Vision Organic Farms Pvt. Ltd., was legally permissible only when the prosecution of the company on whose behalf he issued it, was also facilitated by the complainant/respondent herein by his arraying it as an accused in the complaint instituted by him, before the learned Judicial Magistrate 1st Class, Chamba. Besides when the prosecution of M/s Century Vision Organic Farms Pvt. Ltd., for the offence arising from the dishonour of negotiable instrument Ex.CW1/B issued by the petitioner to the respondent herein while his being its authorised signatory was peremptory, especially when the withdrawal of Ex.CW1/B would have borne fruition only with the occurrence of sufficient funds in the account maintained in the bank concerned by M/s Century Vision Organic Farm Pvt. Ltd., besides when it was enjoined upon M/s Century Vision Organic Farm Pvt. Ltd., to ensure sufficiency of funds occurring therein to facilitate encashment of Ex.CW1/B, necessarily then when hence its prosecution was mandatory for its having not maintained sufficient funds in its account in the bank concerned entailing the dishonour of the negotiable instrument, the non arraying of M/s Century Vision Organic Farms Pvt. Ltd., by the respondent in his complaint as an accused has defacilitated its mandatory prosecution. In sequel, when hence the prosecution of the company as evident from the phrase "as well as company" occurring in Section 141 of the Negotiable Instrument Act was imperative along with the prosecution of the petitioner herein, hence, the non arraying of M/s Century Vision Organic Farms Pvt. Ltd., by the respondent in his complaint as an accused, for reiteration, has precluded, besides stalled the legally enjoined obligation of prosecution of the company aforesaid. Besides, the learned trial Court also appears to have overlooked and slighted the fact that Ex. CW1/B was issued by the petitioner herein as an authorised signatory of M/s Century Vision Organic Farms Pvt. Ltd., even, when Ex. CW1/B stood dishonoured, though hence the petitioner herein was liable, nonetheless, M/s Century Vision Organic Farms Pvt. Ltd., on whose behalf the petitioner herein being its authorised signatory issued the dishonoured negotiable instrument comprised in EX.CW1/B

was rather the principal offender as it was from its account that the amount comprised in Ex. CW1/B was to be honoured or encashed whereas the petitioner herein was only vicariously liable along with it. Obviously when the principal offender has remained unarrayed as an accused, the vicarious liability fastened upon the petitioner herein could not have arisen or taken birth. The vicarious liability of the petitioner herein could take birth or could sprout only when the principal offender with which it shared a vicarious criminal liability stood arrayed as an accused in the array of accused in the complaint instituted by the respondent/complainant before the learned Judicial Magistrate 1st Class, Chamba.

4. In aftermath, the non impleadment of M/s Century Vision Organic Farm Pvt. Ltd as an accused by the respondent herein in his complaint has rendered the complaint to be not maintainable nor hence its non impleadment could attract the vicarious criminal liability of the petitioner herein with that of the company, the principal offender on whose behalf he as its authorised signatory, issued to the respondent Ex.CW1/B. More so, when it was the duty of the company, the holder of the account wherefrom the withdrawal of the amount comprised in Ex.CW1/B was to occur to ensure that its account held or maintained in the bank concerned carried funds sufficient and adequate for necessitating the honouring of Ex.CW1/B. In other words, it having derelicted from its enjoined duty to ensure the occurrence of adequate and sufficient funds in its account has constituted itself to be the principal offender whereas with the petitioner herein while his being its authorised signatory, besides not the holder of the account wherefrom the amount comprised in Ex.CW1/B was to be withdrawn was only vicariously criminally liable along with it. In coming to the above conclusion, I am supported by a judgment of the Hon'ble Apex Court reported in **Aneeta Hada versus Godfather Travels and Tours Private Limited, (2012)5 SCC 661,** the relevant paragraphs No.58 whereof reads as under:-

> "58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words :as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own repsectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected with a Director is indicated."

5. True it is that the company nomenclatured as M/s Century Vision Organic Farm Pvt. Ltd., is a legal entity or a juristic person would not, in case its prosecution was facilitated by the respondent herein by arraying it as an accused in the complaint along with the petitioner herein and its prosecution succeeding face imprisonment as imposed upon it, rather the Managing Director of the Company aforesaid through whom the company acts would on the prosecution against the company succeeding, face the consequence of conviction and sentence imposed upon the company. However, the complaint does not manifest that the petitioner herein while his being its authorised signatory was in that capacity also acting as the Managing Director of the company aforesaid. For inabundancy or scanty material displaying the fact of the petitioner herein while his being the authorised signatory of the company aforesaid his being also the Managing Director of M/s Century

Vision Organic Farm Pvt. Ltd., whereas, in the event of the aforesaid material emanating on record, yet too it was legally imperative for the respondent herein to have arrayed in the complaint M/s Century Vision Organic Farm Pvt. Ltd., through the petitioner herein being its Managing Director along with the petitioner herein in his capacity of his being its authorised signatory as an accused for facilitating as well as paving way for prosecution of the aforesaid juristic person, besides on prosecution against both the petitioner herein as well as of the company succeeding, then the petitioner suffering the consequence of conviction and sentence both in his capacity of his being vicariously criminally liable along with the juristic person aforesaid, as also suffering the consequence of conviction and sentence imposed upon M/s Century Vision Organic Farm Pvt. Ltd., while his being its Managing Director. Necessarily then, when the petitioner herein has not been divulged by any material on record to be the Managing Director of M/s Century Vision Organic Farm Pvt. Ltd., rather when in the memo of parties in the complaint he has been arrayed therein as an accused while his only being its authorised signatory and not its Managing Director, nor when M/S Century Vision Organic Farm Pvt. Ltd., peremptorily enjoined to be impleaded as an accused along with the petitioner herein in the complaint arising from the dishonour of negotiable instrument has remained unimpleaded through its Managing Director, in sequel, the singular impleadment of the petitioner herein dehors the impleadment of M/s Century Vision Organic Farm Pvt. Ltd., through its Managing Director, cannot constitute satiation of the enjoined mandatory legal obligation of M/s Century Vision Organic Farm Pvt. Ltd., through its Managing Director being arrayed by the respondent as an accused in his complaint.

6. The summom bonum of the above discussion is that not only the complaint was not properly constituted, besides it was not maintainable. Moreover, it was jurisdictionally not open for the learned Judicial Magistrate 1st Class, Chamba, in the absence of the complaint not disclosing the arraying therein of M/s Century Vision Organic Farm Pvt. Ltd., through its Managing Director as an accused to have entertained it, besides to have served summons upon the petitioner herein calling upon him to appear before it and face proceedings arising from a legally mis-constituted complaint instituted before it by the respondent herein. Consequently, the instant petition is allowed and complaint instituted before the learned trial Court is quashed and set aside. In sequel, further proceedings are also quashed and set aside. All pending applications also stand disposed of. Records be sent back forthwith.

****

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

Dharam Dass alias Dharam Singh. ...Appellant.

Versus

Puran Dass and others. ...Respondents.

RSA No. 418 of 2003
Reserved on: 31.8.2015
Decided on: 8.9.2015

Hindu Succession Act, 1956- Section 14- Plaintiff claimed that he is co-owners in possession of the suit land – earlier 'P' was the tenant who had re-married and her tenancy rights reverted to 'S', the predecessor of the plaintiff- defendant claimed that 'P' became the absolute owner of the property under Section 14 of the Act and proprietary rights were conferred upon the legal heirs of 'P' in the year 1975- land was divided between 'S' and 'P'-

limited tenancy rights would mature under Section 14- 'P' was in possession of the property and would become the owner- 'P' was consistently shown in possession of the suit property in the revenue record- suit was filed after 25 years of the attestation of the mutation and is barred by limitation. (Para-17 to 27)

Cases referred:

Gummalapura Taggina Matada Kotturuswami v. Setra Veeravva and ors AIR 1959 SC 577

Mangal Singh and others v. Smt. Rattno (dead) by her legal representatives and another AIR 1967 SC 1786

Bai Vajia (dead) by LRs vs. Thakorbhai Chelabhai and others AIR 1979 SC 993

Bishwanath v. Badami Kaur AIR 1980 SC 1329

Vijay Pal Singh v. Deputy Director of Consolidation and others AIR 1996 SC 146

For the Appellant : Mr. Bhupender Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate.

For the Respondents : Respondents No.1 to 3, 5, 7 to 11 and 13 ex parte. Respondents No. 6 and 12 deleted.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 11.7.2003 rendered by the District Judge, Kinnaur Civil Division at Rampur Bushahr in Civil Appeal No. 15 of 2003.

2. "Key facts" necessary for the adjudication of this appeal are that the appellant-plaintiff and proforma respondent (herein after referred to as 'plaintiffs' for convenience sake) instituted a suit for declaration to the effect that the plaintiffs were co-owners to the extent of their shares specified in the plaint and the revenue entries to the contrary were wrong and illegal and also for declaration that the plaintiffs were in possession as co-owners and also sought injunction restraining all or any of the respondents-defendants (hereinafter referred to as 'defendants' for convenience sake) from interfering with the possession of the plaintiffs. Maju died in the year 1959. He was survived by his son Sami and daughter-in-law Poshi, who was the widow of his pre-deceased son Sohju. Maju was tenant to the extent of half share in respect of land as entered in Khata Khatauni No. 3/18 to 3/20 Kitas 32 total measuring 5 Bighas and 5 biswas, situated in Mauja Ghat Tehsil Rampur, District Shimla as per Jamabandi for the year 1956-57. The other half share of the land was entered in the name of Dalku and Tirlu, who were tenants to the extent of remaining half share in equal shares and they were now succeeded by defendants No.5 and 6 namely Kodu and Lathu. Similarly, late Shri Maju was tenant in respect of half share of land as entered against khata Khatauni No. 3/23, Khasra No. 120 measuring 9 biswas situated in village Ghat, Tehsil Rampur, District Shimla/ Mahasu, as per Jamabandi for the year 1956-57. The state of things continued till 1964-65 as reflected in the Jamabandi for the year 1964-65. The land described was recorded against Khata Khatauni No. 7/7 to 7/11 kitas 34 measuring 58 bighas 14 biswas in the Jamabandi for the year 1969-70. The tenancy rights of the said persons matured into ownership rights and the same were duly recorded in mutation Nos. 2210 and 2213 of Mauza Ghat. The land mentioned and entered against Khata Khatauni No.11/22, Khasra No.167/1 measuring 9 bighas and 8 biswas situated in Mauza Ghat, as per Jamabandi for the year 1969-70 was

recorded in the tenancy of Sami and Poshi to the extent of half share and the other half share was recorded under the tenancy of Dalku and Tirlu. In the year 1960, Poshi widow of late Sh. Sohju son of Maju remarried one Lathu. She begot from the loins of Lathu 4 children, namely, Silu, Fuli, Lumi and Puran Dass. On the remarriage of Poshi, under the provisions of law, she ceased to be a tenant or to have any sort of right, title or interest in the land. In the alternative, it was stated that after the death of Poshi, all her rights in the suit land reverted back to Sami under the provisions of Hindu Succession Act. Sami died in the year 1968 leaving behind Magi, Dharam Das, Fariku, Nairu and Fedru. According to the plaintiffs, Poshi widow of Sohju predeceased son of Maju, remarried when she had tenancy rights in the suit land, therefore, Sami predecessor-in-interest of the plaintiffs and proforma defendants became the tenants over the entire land and the entries to the contrary are wrong and illegal. In the alternative, plaintiffs on the death of Poshi, became owner of the land of Poshi, which she inherited from her father-in-law as the widow of predeceased son.

3. Suit was contested by the defendants. Defendants have taken the preliminary objection with regard to limitation. Defendants denied the claim of the plaintiffs and alleged that Poshi was never lawfully married to Lathu. Defendants have further denied that Poshi ceased to have any interest on the suit land or that the suit land reverted back to the plaintiffs or their predecessor-in-interest, under the provisions of the Hindu Succession Act. According to the defendants, Poshi became absolute owner of the suit property under Section 14 of the Hindu Succession Act.

4. Plaintiffs also moved an application under Order 6 Rule 17 of the Code of Civil Procedure for amendment of the plaint. It was allowed by the District Judge, Rampur and amended plaint was filed. Amended written statement was also filed. Defendants have denied the remarriage of Poshi with Lathu and the estate of Maju was not to be governed by Section 67 of the HP Abolition of Big Landed Estates and Land Reforms Act, 1953.

5. Issues were framed by the trial Court on 12.3.1996 and additional issues were framed on 25.4.2000. Learned Sub Judge, 1st Class dismissed the suit on 27.12.2002. Plaintiffs preferred an appeal before the District Judge against the judgment and decree dated 27.12.2002. The District Judge dismissed the appeal on 11.7.2003. Hence, one of the plaintiffs, Shri Dharam Dass preferred an appeal against the judgment and decree dated 11.7.2003. Santu was arrayed as plaintiff-proforma respondent. The Regular Second Appeal was admitted on the following substantial questions of law:

> **"1. When both the courts below have wrongly invoked the provisions of Hindu Succession Act in holding Smt. Poshi to be absolute owner of the suit land, by ignoring that the dispute between the parties was with respect to the right of tenancy of the suit land? Were not the rights of the parties governed by provisions of HP Abolition of Big Landed Estate and Land Reforms At, 1953?**
>
> **2. Whether the widow in preference of male lined descendant have held the tenancy right as owner when it was proved that such widow ceased to have any right on the tenancy land on account of her remarriage. Have not both the courts below presumed the ownership in favour of Smt. Poshi and misapplied the provision of Section 14 of the Hindu Succession Act, 1956 rejecting the claim of the plaintiffs-appellant to have acquired the valid right of tenancy exclusively after the death of Shri Maju?**

3. Whether both the Courts below have wrongly held the suit of the plaintiffs-appellant to be barred by limitation when the land was still joint and the plaintiffs were claiming the joint ownership and possession of the suit land with respect to the land which was earlier held as tenancy land?"

6. Mr. Bhupender Gupta, learned Senior Advocate has vehemently argued that both the courts below have wrongly invoked the provisions of Section 14 of the Hindu Succession Act, 1956. He has also contended that the tenancy rights after the remarriage of Poshi ceased. He has further contended that the suit was filed within limitation.

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

8. Since all the substantial questions of law are interlinked and interconnected the same are taken up together for determination to avoid repetition of discussion of evidence.

9. PW-1 Mohan Lal Patwari has testified that he was posted as Patwari in Patwar Circle Majholi since 9.8.1995. According to him, Ext. PA Jamabandi for the year 1956-57 was correct as per original. He has also proved copy of Jamabandi Ext. PB for the year 1960-61 and Ext. PC for the year 1969-70. According to him, Jamabandi for the year 1974-75 Ext. PF and PG, for the year 1979-80 Ext. PH and Ex.PI and for the year 1984-85 Ext. PJ and PK were correct. He has proved Missal Hakiyat Bandobast Jadid Ext. PL and Ex.PM and copy of Shajra Nasab Ext. PN. He has admitted that the entries of tenancy could not be recorded without order of the superior officer. He has also admitted that whenever there is entry in the revenue record, a Rapat is recorded in Rojnamcha Wakiyati.

10. PW-2 Rikhu has deposed that plaintiff Dharam Dass was resident of his village. Defendants were known to him. Poshi was also known to him. Poshi was married to Sohju. No issue was borne from the loins of Sohju and Poshi. Poshi lived in the house of Lathu as his wife and defendants No. 1 to 4 were borne from the loins of Poshi and Lathu. Lathu had brought Poshi in his house and she resided with Lathu as his wife. The marriage ceremony was not performed between Poshi and Lathu. Poshi died when she was about 35-40 years old. Poshi died about 59 years ago. She resided with Sohju only for one and half years and thereafter Sohju died. Thereafter, Poshi resided in the house of Lathu. Maju was also known to him and Poshi married Sohju according to the customs of the area. Statement of PW-2 Rikhu was again recorded on 8.12.2000. He has reiterated the earlier statement. According to him, Sami used to reside in a separate house. The widow of Sohju used to reside with Maju. He has admitted that Sami did not take possession of land allotted to Poshi by Maju. Maju became owner of the property during his life time.

11. PW-3 Dharam Dass has deposed that Maju was non occupancy tenant. Maju died in the year 1959. Sami and Sohju were sons of Maju and Sohju died in the year 1955. When Maju died his property devolved upon Sami and Poshi, who was widow of Sohju. No child was born out of loins of Sohju and Poshi. Marriage between Poshi and Lathu was performed in his presence and four children were born from the loins of the Lathu and Poshi. He has proved legal heir certificate of Lathu Ext. PW-3/A. According to him, the proprietory rights were conferred in the year 1972. The legal heirs of Lathu have been shown as owners of the suit property illegally. Statement of PW-3 Dharam Dass was again recorded on 18.12.2000. According to him, the property was illegally devolved upon Poshi after the death of Maju and proprietary rights were performed in the presence of plaintiffs. He has

admitted that Maju died on 29.8.1959 and Sohju died in the year 1955. Maju and Sohju used to reside jointly and after the death of Sohju, Maju and his daughter-in-law resided jointly. He has also admitted that after the death of Maju on 14.2.1957, property was devolved upon Maju and Sami in equal shares and mutation was also sanctioned.

12. PW-4 Chandu Lal has deposed that the parties were known to him. Maju had two sons, namely, Sami and Sohju. Sami had four sons, namely, Fariku, Nieru, Fedru and Dharam Dass. Fariku had died and his son Sant Ram and widow were alive. Sohju was issueless. Sohju died prior to Maju and Poshi remarried with Lathu. He has further admitted that defendants No.1 to 4 were born from the loins of Poshi and Lathu. Maju was tenant under Ayodhya Nath Temple and thereafter, proprietary rights were conferred. When Maju died his age was 5-6 years.

13. DW-1 Puran Dass has deposed that Poshi was owner of the suit property qua her share. He has admitted that four sons were born from the loins of Poshi and Lathu.

14. DW-2 Lawda has deposed that Sami, Maju, Poshi and Sohju were known to him. Sohju died prior to the death of Maju. Poshi was daughter in law of Maju and widow of Sohju. The land was in possession of Maju which was owned by Ayodhya Nath Temple.

15. DW-3 Kodu has deposed that the parties were known to him. Maju had two sons, namely, Sami and Sohju. Sami used to reside separately from Maju. When Sohju died, Sami had already separated from Maju. After the death of Sohju, Maju used to reside with Poshi.

16. DW-1 Puran Dass was cross-examined on 11.6.2002. He has deposed that Poshi was his mother. She died 30-31 years ago. The plaintiffs have no legal right over the suit property. Statement of DW-2 Lawda was again recorded on 11.6.2002. He has reiterated that Maju had two sons, namely, Sami and Sohju. Maju divided his land during his life time. Sohju died prior to Maju and the name of widow of Sohju was Poshi. Poshi used to cultivate the land after the death of Sohju. Statement of DW-3 Kodu was again recorded on 11.6.2002. He has also reiterated that Maju, Dalku and Tilu were three brothers. Maju had two sons, namely, Sami and Sohju. Sohju died prior to Maju and the widow of Sohju was Poshi. Sami used to reside separate from Maju during his life time. After the death of Poshi, share of Poshi was devolved upon her children, defendants No.1 to 4. Defendants No.1 to 4 were in possession of the suit land.

17. Mr. Bhupender Gupta, learned Senior Advocate has vehemently argued that after the remarriage of Poshi, she has ceased to be tenant of the suit land and had no right, title or interest. The suit land had devolved upon Sami and Poshi in equal shares vide mutation No. 2190. It was attested on 14.2.1956. It has come in the evidence, as discussed herein above, that Sami had separated from Maju during his life time. He used to reside separately. Sohju used to reside with Maju prior to his death and thereafter Maju and Poshi used to reside jointly. Poshi was shown to be widow of Sohju at the time of attestation of mutation in 1956 vide mutation No. 2156. Poshi died somewhere in the year 1971. The property devolved upon her legal heirs and the mutation was attested in favour of Puran Dass, Shilu, Fuli and Lumbi on 10.6.1971 vide mutation No. 2224. According to the Jamabandis for the year 1956-57, 1960-61, 1964-65 and 1969-70, Poshi was recorded in possession of the suit land qua her share.

18. Mr. Bhupender Gupta, learned Senior Advocate has also argued that after the death of Maju, suit land was to be devolved upon his sons under Section 67 of the H.P. Abolition of Big Landed Estates and Land Reforms Act, 1953. In the revenue record, from

the year 1956-57, in the column of cultivation, name of Poshi was recorded. After the death of Poshi, her legal heirs Puran Dass, Shilu, Fuli and Lumbi were recorded. The plaintiffs have not led any evidence to show that they remained in possession of the suit land at any given point of time. The proprietary rights were conferred upon legal heirs of Poshi in the year 1975. Mutations were also attested. The plaintiffs have neither examined Patwari nor Tehsildar who have conferred the proprietary rights in favour of legal heirs of Poshi. It has come on record that Sami used to reside separately from Sohju. The land was divided between Sami and Poshi. The possession was also handed over to Sami and Poshi. The possession of defendants is proved as per deposition of DW-1 Puran Dass, DW-2 Lawda and DW-3 Kodu.

19. Case of the plaintiffs was that Maju was inducted as tenant and limited tenancy rights were inherited by Poshi as per Section 67 of the H.P. Abolition of Big Landed Estates and Land Reforms Act, 1953. Case projected by the defendants in written statement was that Maju was owner of the suit land from the very beginning and they have inherited the property from Poshi after her death. Even if it is assumed hypothetically that Maju was tenant, even then the limited tenancy inherited by Poshi has to be matured as per section 14 of the Hindu Succession Act.

20. Their lordships of the Hon'ble Supreme Court in **Gummalapura Taggina Matada Kotturuswami v. Setra Veeravva and others** reported in AIR 1959 SC 577, have held that the words "possessed" in Section 14 of the Hindu Succession Act, 1956 is used in a broad sense and in the context means the state of owning or having in once hand or power. Their lordships have held as under:

> "11. In the case before us, the essential question for consideration is as to how the words "any property possessed by a female Hindu, whether acquired before or after the commencement of this Act" in S. 14 of the Act should be interpreted. Section 14 refers to property which was either acquired before or after the commencement of the Act and that such property should be possessed by a female Hindu. Reference to property acquired before the commencement of the Act certainly makes the provisions of the section retrospective, but even in such a care the property must be possessed by a female Hindu at the time the Act came into force in order to make the provisions of the section applicable. There is no question in the present case that Veeravva acquired the property of her deceased husband before the commencement of the Act. In order that the provisions of S. 14 may apply to the present case it will have to be further established that the property was possessed by her at the time the Act came into force. It was the case of the appellant that the estate of Veerappa was in actual possession of the second defendant and not Veeravva at the relevant time. On behalf of the respondent it was urged that the words "possessed by" had a wider meaning than actual physical possession, although physical possession may be included in the expression. In the case of Venkayamma v. Veerayya (S) AIR 1957 Andh-Pra 280; Viswanatha Sastri J, with whom Satyanarayana Raju J. agreed, expressed the opinion that "the word possessed" in S. 14 refers to possession on the date when the Act came into force. Of course, possession referred to in S. 14 need not be actual physical possession or personal occupation of the property by the Hindu female but may be possession in law. The possession of a licensee, lessee or a mortgagee from the female owner or the possession of a guardian or a trustee or an agent of the female owner would be her possession for the purpose of S. 14. The word "possessed" is used in S. 14 in

a broad sense and in the context possession means the state of owning or having in one's hands or power. It includes possession by receipt of rents and profits". The learned Judges expressed the view that even if a trespasser were in possession of the land belonging to a female owner, it might conceivably be regarded as being in possession of the female owner, provided the trespasser had not perfected his title. We do not think that it is necessary, in the present case to go to the extent to which the learned Judges went. It is sufficient to say that "possessed" in S. 14 is used in a broad sense and in the context means the state of owning or having in one's hand or power. In the case of Gostha Behari v. Haridas Samanta, (S) AIR 1957 Cal 557 at p. 559, P. N. Mookherjee J, expressed his opinion as to the meaning of the words "any property possessed by a female Hindu" in the following words :-

"The opening words "property possessed by a female Hindu" obviously mean that to come within the purview of the section the property must be in possession of the female concerned at the date of the commencement of the Act. They clearly contemplate the female's possession when the Act came into force. That possession might have been either actual or constructive or in any form recognized by law, but unless the female Hindu, whose limited estate in the disputed, property is claimed to have been transformed into absolute estate under this particular section, was at least in such possession, taking the word "possession" in its widest connotation, when the Act came into force, the section would not apply."

In our opinion, the view expressed above is the correct view as to how the words "any property possessed by a female Hindu" should be interpreted. In the present case if the adoption was invalid, the full owner of veerappa's estate was his widow Veeravva and even if it be assumed that the second defendant was in actual possession of the estate his possession was merely permissive and Veeravva must be regarded as being in constructive possession of it through the second defendant in this situation, at the time when the Act came into force, the property of Veerappa must be regarded in law as being possessed by Veeravva."

21. Their lordships of the Hon'ble Supreme Court in **Mangal Singh and others v. Smt. Rattno (dead) by her legal representatives and another** reported in AIR 1967 SC 1786, have held that expression "possession by a female Hindu" is intended to cover not only actual or constructive possession but also possession in law i.e. property owned by Hindu female, even though she is not in actual possession. Their lordships have held as under:

"6. Section 14 (l) of the Act is as follows:-

"14. (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.-In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription,

or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act."

The dispute in the case has arisen, because this section confers the right of full ownership on a Hindu female only in respect of property possessed by her, whether acquired before or after the commencement of the Act; and, in the present case, admittedly, the plaintiff had been dispossessed in the year 1954 and was not able to recover possession from the defendants-appellants until her death in the year 1958: It was urged on behalf of the appellants that, in order to attract the provisions of S. 14 (1) of the Act, it must be shown that the female Hindu was either in actual physical possession, or constructive possession of the disputed property. On the other side, it was urged that even if a female Hindu be in fact, out of actual possession, the property must be held to be possessed by her, if her ownership rights in that property still exist and, in exercise of those ownership rights, she is capable of obtaining actual possession of it. It appears to us that, on the language used In S. 14 (1) of the Act, the latter interpretation must be accepted.

[7] It is significant that the Legislature begins S. 14 (1) with the words "any property possessed by a female Hindu" and not any property in possession of a female Hindu." If the expression used had been "in possession of' instead of "possessed by", the proper interpretation would probably have been to hold that, in order to apply this provision, the property must be such as is either in actual possession of the female Hindu or in her constructive possession. The constructive possession may be through a lessee, mortgagee, licensee, etc. The use of the expression "possessed by" instead of the expression "in possession of", in our opinion, was intended to enlarge the meaning of this expression. It is commonly known in English language that a property is said to be possessed by a person, if he is its owner, even though he may, for the time being, be out of actual possession or even constructive possession. The expression "possessed by" is quite frequently used in testamentary documents, where the method of expressing the property, which is to pass to the legatee, often adopted is to say that "all property I dispossessed (Sic) of shall pass to....." In such documents, wills, etc., where this language is used, it is clear that whatever rights the testator had in the property would pass to the legatee, even though, at the time when the will is executed or when the will becomes effective, the testator might not be in actual, physical or constructive possession of it. The legatee will, in such a case, succeed to the right to recover possession of that property in the same manner in which the testator could have done. Stroud in his Judicial Dictionary of Words and Phrases Vol. 3, at p. 2238, has brought out this aspect when defining the scope of the words "possess" and "possessed." When dealing with the meaning of the word "possession Stroud defines "possession" as being in two ways, either actual possession or possession in law. He goes on to say that "actual possession is when a man enters in deed into lands or tenements to him descended, or otherwise. Possession in law is when lands or tenements are descended to a man, and he has not as yet really, actually, and in deed, entered into them." In Wharton's Law Lexicon, 14th Edn., at p. 777, the word "possession" is defined as being equivalent to "the state of owning or having a thing in one's

own hands or power." Thus, three different meanings are given; one is the state of owning, the second is having a thing in one's own hands, and the third is having a thing in one's own power. In case where property is in actual physical possession, obviously it would be in one's own hands. If it is in constructive possession, it would be in one's own power. Then, there is the third case where there may not be actual, physical or constructive possession and, yet, the person still possesses the right to recover actual physical possession or constructive possession; that would be a case covered by the expression "the state of owning". In fact, elaborating further the meaning of the word "possession", Wharton goes on to say that

"it is either actual, where a person enters into lands or tenements descended or conveyed to him; apparent, which is a species of presumptive title where land descended to the heir of an abator, intruder, or disseisor, who died seised; in law, when lands, etc., have descended to a man, and he has not actually entered into them; or naked, that is, mere possession, without colour of right."

It appears to us that the expression used in S. 14 (1) of the Act was intended to cover cases of possession in law also, where lands may have descended to a female Hindu and she has not actually entered into them. It would, of course, cover the other cases of actual or constructive possession. On the language of S. 14 (1), therefore, we hold that this provision will become applicable to any property which is owned by a female Hindu, even though she is not in actual, physical or constructive possession of that property."

22. In the instant case, when the Act came into force, widow was in possession of the suit property after the death of her husband Sohju.

23. Their lordships of the Hon'ble Supreme Court in **Bai Vajia (dead) by LRs vs. Thakorbhai Chelabhai and others** reported in AIR 1979 SC 993, have explained the term 'limited ownership' as under:

"4. Mr. S. T. Desai, learned counsel for the plaintiffs-respondents, and Mr. U. R. Lalit who very ably assisted the Court at its request, contended that for a Hindu female to be given the benefit of sub-sec. (1) of sec. 14 of the Act she must first be an owner, albeit a limited owner, of the property in question and that Tulasamma not being an owner at all, the Bench presided over by Bhagwati, J. did not reach a correct decision in folding that the sub-section aforesaid covered her case. We find that only that part of this argument which is interpretative of sub-sec. (1) is correct, namely, that it is only some kind of "limited ownership" that would get enlarged into full ownership and that where no ownership at all vested in the concerned Hindu female, no question of the applicability of the sub-section would arise. We may hers reproduce in extenso sec. 14 of the Act with advantage :

"14 (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation : In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance,

or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as "Stridhana' immediately before the commencement of this Act.

"(2) Nothing contained in sub-sec. (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a Civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribed a restricted estate in such property."

A plain reading of sub-sec. (1) makes it clear that the concerned Hindu female must have limited ownership in property which limited ownership would get enlarged by the operation of that sub-section. If it was intended to enlarge any sort of a right which could in no sense be described as ownership, the expression "and not as a limited owner" would not have been used at all and becomes redundant, which is against the well-recognised principle of interpretation of statutes that the Legislature does not employ meaningless language. Reference may also be made in this connection to Eramma v. Verrupanna, (1966) 2 SCR 626 : (AIR 1966 SC 1879) wherein Ramaswami J., speaking on behalf of himself, Gajendragadkar, C. J., and Hidayatullah, J., interpreted the sub-section thus :

"The property possessed by a female Hindu, as contemplated in the section, is clearly property to which she has acquired some kind of title whether before or after the commencement of the Act. It may be noticed that the Explanation to sec. 14(1) sets out the various modes of acquisition of the property by a female Hindu and indicates that the section applies only to property to which the female Hindu has acquired some kind of title, however restricted the nature of her interest may be. The words "as full owner thereof and not as a limited owner" as given in the last portion of sub-sec. (1) of sec. 14 clearly suggest that the legislature intended that the limited ownership of a Hindu female should be changed into full ownership. In other words, sec. 14(1) of the Act contemplates that a Hindu female who, in the absence of this provision, would have been limited owner of the property, will now become full owner of the same by virtue of this section. The object of the section is to extinguish the estate called 'limited estate' or 'widow's estate' in Hindu Law and to make a Hindu woman, who under the old law would have been only a limited owner, a full owner of the property with all powers of disposition and to make the estate heritable by her own heirs and not revertible to the heirs of the last male holder.....

It does not in any way confer a title on the female Hindu where she did not in fact possess any vestiges of title. It follows, therefore, that the section cannot be interpreted so as to validate the illegal possession of a female Hindu and it does not confer any title on a mere trespasser. In other words, the provisions of sec. 14 (1) of the Act cannot be attracted in the case of a Hindu female who is in possession of the property of the last male holder on the date of the commencement of the Act when she is only a trespasser without any right to property".

This interpretation of sub-sec. (1) was cited with approval in Manga Singh v. Rattno (1967) 3 SCR 454 : (AIR 1967 SC 1786) by Bhargava, J., who delivered the judgment of the Court and observed :

"This case also, thus, clarifies that the expression "possessed by" is not intended to apply to a case of mere possession without title, and that the legislature intended this provision for cases where the Hindu female possesses the right of ownership of the property in question. Even mere physical possession of the property without the right of ownership will not attract the provisions of this section. This case also, thus, supports our view that the expression "possessed by" was used in the sense of connoting State of ownership and, while the Hindu female possesses the rights of ownership she would become full owner if the other conditions mentioned in the section are fulfilled. The section will, however, not apply at all to cases where the Hindu female may have parted with her rights so as to place herself in a position where she could, in no manner, exercise her rights of ownership in that property any longer".

[12] Limited ownership in the concerned Hindu female is thus a sine qua non for the applicability of sub-sec. () of sec. 14 of the Act but then this condition was fully satisfied in the case of Tulasamma to whom the property was made over in lieu of maintenance with full rights of enjoyment thereof minus the power of alienation. These are precisely the incidents of limited ownership. In such a case the Hindu female represents the estate completely and the reversioners of her husband have only a spes successions, i.e. a mere chance of succession, which is not a vested interest and a transfer of which is a nullity. The widow is competent to protect the property from all kinds of trespass and to sue and be sued for all purposes in relation thereto so long as she is alive. Ownership in the fullest sense is a sum-total of all the rights which may possibly flow from title to property, while limited ownership in its very nature must be a bundle of rights constituting in their totality not full ownership but something less. When a widow holds the property for her enjoyment as long as she lives, nobody is entitled to deprive her of it or to deal with the property in any manner to her detriment. The property is for the time being beneficially vested in her and she has the occupation, control and usufruct of it to the exclusion of all others. Such a relationship to property in our opinion falls squarely within the meaning of the expression "limited owner" as used in sub-sec. (1) of sec. 14 of the Act. In this view of the matter the argument that the said sub-section did not apply to Tulasamma 's case (AIR 1977 SC 1944) (supra) for the reason that she did not fulfil the condition precedent of being a limited owner is repelled..

[13] The next contention raised by Mr. Desai and Mr. Laiit also challenged the correctness of the decision in Tulasamma's case. They argued that in any case the only right which Tulasamma had prior to the compromise dated July 30,1949 was a right to maintenance simpliciter and not at all a right to or in property. For the reasons which weighed with Bhagwati and Fazal Ali, JJ., in rejecting this argument we find no substance in it as we are in full agreement with those reasons and the same may not be reiterated here. However we may emphasize one aspect of the matter which flows from a scrutiny of sub-sec. (1) of sec. 14 of the Act and the

Explanation appended thereto. For the applicability of sub-sec. (1) two conditions must co-exist, namely :

(1) the concerned female Hindu must be possessed of property, and

(2) such property must be possessed by her as a limited owner.

[14] If these two conditions are fulfilled, the sub-section gives her the right to hold the property as a full owner irrespective of the fact whether she acquired it before or after the commencement of this Act.

[15] The Explanation declares that the property mentioned in sub-sec. (1) includes both movable and immovable property and then proceeds to enumerate the modes of acquisition of various kinds of property which the sub-section would embrace. Such modes of acquisition are :

(a) by inheritance,

(b) by devise,

(c) at a partition,

(d) in lieu of maintenance or arrears of maintenance,

(e) by gift from any person, whether a relative or not, before, at or after her marriage,

(f) by her own skill or exertion.

(g) by purchase, (h) by prescription,

(i) in any other manner whatsoever, and

(j) any such property held by her as "Stridhana" immediately before the com mencement of this Act.

[16] A reference to the Hindu law as it prevailed immediately before the commencement of the Act would lead one to the conclusion that the object of the Explanation was to make it clear beyond doubt that all kinds of property which fell within the ambit of the term ' 'Stridhana" would be held by the owner thereof as full owner and not as a limited owner. Reference may in this connection be made to the following enumeration of "Stridhana" in para. 125 of Mulla's Hindu Law :

(1) Gifts and bequests from relations.

(2) Gifts and bequests from strangers.

(3) Property obtained on partition.

(4) Property given in lieu of maintenance.

(5) Property acquired by inheritance.

(6) Property acquired by mechanical arts.

(7) Property obtained by compromise.

(8) Property acquired by adverse possession.

(9) Property purchased with Stridhana, or with savings of income of Stridhana.

(10) Property acquired from source other than those mentioned above. These heads of property are then dealt with at length by Mulla in paras, 126 to 135 of his treatise. Prior to the commencement of the Act, the Hindu female did not enjoy full ownership in respect of all kinds of "Stridhana" and her powers to deal with it further varied from school to school. There was a sharp differed; in this behalf between Mitakshara and Dayabhaga. And then the Bombay, Benares, Madras and Mithila schools also differed from each other on the point. Succession to different kinds of "Stridhana" did not follow a uniform pattern. The rights of the Hindu female over "Stridhana" varied according to her status as a maiden, a married woman and a widow. The source and nature of the property acquired also placed limitations on her ownership and made a difference to the mode of succession thereto. A comparison of the contents of the Explanation with those of para. 125 of Mulla's Hindu Law would show that (he two are practically identical. It follows that the Legislature in its wisdom took pains to enumerate specifically all kinds of "Stridhana" in the Explanation and declared that the same would forrd "property" Within the meaning of that word as used in sub-sec. (1). This was done, in the words of Bhagwati, J., "to achieve a social purpose by bringing about change in the social and economic position of women in Hindu Society". It was a step in the direction of practical recognition of equality of the sexes and was meant to elevate women from a subservient position in the economic field to a pedestal where they could exercise full powers of enjoyment and disposal of the property held by them as owners, untrammelled by artificial limitations placed on their right of ownership by a society in which the will of the dominant male prevailed to bring about a subjugation of the opposite sex. It was also a step calculated to ensure uniformity in the law relating to the nature of ownership of 'Stri-dhana'. This dual purpose underlying the Explanation must be borne in mind and given effect to when the section is subjected to analysis and interpretation, and sub-sec. (2) is not to be given a meaning which would defeat that purpose and negative the legislative intent, if the language used so warrants. A combined reading of the two sub-sections and the Explanation leaves no doubt in our minds that sub-sec. (2) does not operate to take property acquired by a Hindu female ii lieu of maintenance or arrears of maintenance (which is property specifically included in the enumeration contained in the Explanation) out of the purview of sub-sec.(1).

24. Their lordships of the Hon'ble Supreme Court in **Bishwanath v. Badami Kaur** reported in AIR 1980 SC 1329, have held that widow of the last proprietor of land in dispute was recorded as such and at that time neither the U.P. Act was passed nor Succession Act came into force and, as such, after passing of both the Acts, the widow would become absolute owner of the property and the interest of collaterals ceased to exist. Their lordships have held as under:

"1.....It was pleaded by the reversioners that the mutation was only by way of consolation without any rights in the properties which were to go to her collaterals; namely the respondents. This statement was made at a time when neither the U. P. Zamindari Abolition and Land Reforms Act was passed nor the Hindu Succession Act came into force. At the time when the matter was decided by the Deputy Director of Consolidation both the Acts had been passed which conferred

absolute proprietary rights on Smt. Badami Kaur who is still alive. Once Smt. Badami Kaur became an absolute owner of the property, the respondents' interest as collaterals ceased to exist and they had therefore no locus standi to challenge the status of Smt. Badami Kaur. The Deputy Director of Consolidation therefore proceeded on a totally erroneous view of law in holding that Smt. Badami Kaur had merely a life interest and the property should go to the respondents who were the collaterals……."

25. Their lordships of the Hon'ble Supreme Court in **Vijay Pal Singh v. Deputy Director of Consolidation and others** reported in AIR 1996 SC 146, have held that where it was established that husband of the widow was separated from his brothers and was in possession of his share of property and after his death, his widow's name was mutated and continued in the record of rights, her limited estate would be enlarged into absolute right by operation of Section 14 (1) of Hindu Succession Act as she was in possession when the Act came into force and when she died intestate, her only daughter would become as absolute owner as class I heir and would be entitled to the extent of share of property which her father held. Their lordships have further held that widow's tenancy rights would be enlarged into ownership rights and Section 4 (2) of Hindu Succession Act was not applicable to deny her absolute right. Their lordships have held as under:

> "4. The question is whether Smt. Champi, daughter of Shiv Devi, has 1/3rd share in the properties left by the father Bhanwar Singh. it would appear from the record that after the demise of Devia the names of three sons were mutated in the revenue record and the finding of the Settlement Officer is that, though they were in separate possession and enjoyment of the properties in their respective share, since there was no partition by metes and bounds, Shiv Devi did not acquire any right. It is not in dispute that Shiv Devi's name continued in the revenue record to the extent of 1/3rd share held by Bhanwar Singh. This fact establishes that prior to 1910 Bhanwar Singh obviously separated from his brothers and was in possession of his 1/3rd share to which he was entitled. Obviously, by family arrangement between the brothers, on demise of their father Devia, it was mutated and on demise of her husband, Shiv Devi's name was mutated. Even assuming that the contention of the respondents should be accepted, she remained in possession towards her maintenance, by operation of Section 11 of the U. P. Zamindari and Land Reforms Act, 1950, which recognises the right of Shiv Devi as window of Bhanwar Singh. Section 11 is in recognition of the per-existing personal law.
>
> [5] It is settled law that widow is entitled only to limited estate for maintenance. By operation of sub-section (1) of Section 14 of the Hindu Succession Act, her limited estate enlarged into absolute right as she was in possession when the Act came into force. Thereby she becomes the absolute owner of the property. When she died intestate, her daughter Champi became absolute owner as Class-I heir, since she was in possession and enjoyment of the land in her own right. The entries in the revenue record corroborate the same. Thereby she became the absolute owner."

26. Mutation was attested in favour of Poshi on 14.2.1956 vide mutation No. 2190. The mutation was sanctioned in favour of legal heirs of Poshi, namely, Puran Dass, Shilu, Fuli and Lumbi on 10.6.1971 vide mutation No. 2224. Poshi has succeeded to the

property before her marriage with Lathu even as per the statement of PW-3 Dharam Dass. He has also admitted that Sami used to live separately from Maju during his life time and the land was divided in the year 1956 by Maju between Sami and Poshi. Maju had partitioned the land during his life time. In all the revenue records, Poshi has been shown in possession of suit property and after her death; entries were changed in the name of her legal heirs. These entries have remained unchallenged and no steps were ever taken by the plaintiffs to get the revenue entries corrected.

27. Case of the plaintiff was also that Poshi married Lathu in the year 1958. However, by that time, she had succeeded to the property of her husband Sohju. In the Jamabandi Ext. PB for the year 1960-61, Ext. PC for the year 1964-65, Ext. PD and PE for the years 1975-76, suit land has been shown in possession of defendant Nos. 1 to 4 and other co-sharers. Poshi has died in the year 1971 and the present suit has been filed after a lapse of 25 years after the attestation of mutation. Thus, it cannot be said that the suit was filed within the period of limitation.

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

29. In view of the analysis and discussion made hereinabove, there is no merit in the present appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

****

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

Cr. Appeal No. 334 of 2014 alongwith
Cr. Appeal No. 322 of 2014
Judgment reserved on: 03.09.2015
Date of Decision: September 8, 2015

1. Cr.Appeal No. 334 of 2014

Sunil Kumar ...Appellant.

Versus

State of H.P. ...Respondent.

2. Cr. Appeal No. 322 of 2014

Sanjiv Kumar ....Appellant.

Versus

State of H.P. ....Respondent

Indian Penal Code, 1860- Sections 353, 332 and 333- Complainant was posted as Driver on the bus owned by HRTC- he was plying bus on Kullu-Ani route - when the bus reached at Mangrot, he found the road blocked due to the cutting being carried out by labourers- complainant requested the contractor and his labourers to clear the road- accused gave beatings to the complainant due to which he sustained injuries and his clothes were also torn- he was rescued by PW-2 and the contractor- Medical Officer admitted that injury could have been caused by way of fall- record shows that 'S' was driver of the bus – there was no evidence on record to show that complainant was driving the bus- log book was not produced- name of the complainant was over written in the register- prosecution witnesses were working in HRTC and are interested witnesses- independent witnesses had not supported the prosecution version and had turned hostile- no test identification was conducted- the contractor was not examined to prove that accused was employed as labourer by him- initial version was that four labourers had given beatings to the

complainant but only two persons were arrayed as accused – version of the complainant that he had recognized the accused after seven years in the Court, does not inspire confidence – the circumstances are not proved to form unbroken chain- guilt of the accused is not proved to the hilt- accused acquitted. (Para-8 to 25)

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

For the Appellant:	Mr. Anoop Chitkara, Advocate, for the appellant in Cr. Appeal No. 334 of 2014 and Mr. N.S. Chandel, Advocate, for the appellant in Cr. Appeal No.322 of 2014.
For the Respondent:	Mr. R.S. Verma, Additional Advocate General for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In these appeals filed under Section 374 Cr.P.C., convicts Sunil Kumar and Sanjiv Kumar have assailed the judgment dated 16.09.2014, passed by Sessions Judge, Bilaspur, H.P., in Sessions trial No.16/7 of 2010, titled as *State of Himachal Pradesh Versus Sunil Kumar & another*, whereby they stand convicted for having committed offences punishable under the provisions of Section 353 of the Indian Penal Code and sentenced them to undergo simple imprisonment for a period of one year and to pay fine of Rs.1000/- each and in default thereof, further undergo simple imprisonment for a period of one month. Also they are convicted of having committed an offence punishable under the provisions of Section 332 IPC and sentenced to undergo simple imprisonment for a period of one year and pay fine of Rs.1000/- each and in default thereof, further undergo simple imprisonment for a period of one month. Convicts are also convicted of having committed an offence punishable under the provisions of Section 333 IPC and sentenced to undergo simple imprisonment for a period of four years and pay fine of Rs.5000/- each and in default thereof, further undergo simple imprisonment for a period of six months.

2. It is the case of prosecution that on 04.07.2006, Dayal Singh (PW.1) while posted as a driver on bus No.HP-34A-1017 owned by the HRTC (a Government undertaking) was plying the bus on Kullu-Anni route. Puran Chand (PW.3) was posted as a conductor. En-route at Mangrot, the road was blocked on account of cutting carried out by labourers. Dayal Singh requested the contractor Ravinder Kumar (not examined) and his labourers to clear the road. Without any provocation, accused who were working as labourers, abused and gave beatings to Dayal Singh, as a result of which, he sustained injuries and his clothes torn. Bhajju Ram (PW.2) also an employee of HRTC, and Puran Chand intervened and saved Dayal Singh from the clutches of the accused. Information with regard to the same was furnished to the police and entry in Rojnamcha (Ex.PW.13/A) recorded. Dayal Singh got his statement (Ex.PW.1/A) under the provisions of Section 154 Cr.P.C. recorded, on the basis of which FIR No.247/2006 dated 04.07.2006 (Ex.PW.12/A) registered against the accused under the provisions of Sections 253, 332, 504/34 IPC, at Police Station, Sadar, Bilaspur, H.P. SI Krishan Singh (PW.15) conducted the investigation. Dayal Singh was got medically examined from Dr.Rajnish Sharma (PW.4). MLC (Ex.PW.4/A) and report of the radiologist (Ex.PW.5/C) issued by Dr.D. Bhangal (PW.5) were taken on record. PW.4 opined the injuries sustained by Dayal Singh (PW.1) to be grievous in nature. With the

completion of investigation, which revealed complicity of the accused to the alleged crime, challan was presented in the Court for trial.

3. The accused were charged for having committed offences punishable under the provisions of Sections 353, 332, 333 and 504 read with Section 34 of the Indian Penal Code, to which they did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as fifteen witnesses. Statements of the accused under Section 313 of the Code of Criminal Procedure were also recorded, in which they took defence of innocence and also examined three witnesses in their defence to establish their plea of alibi.

5. Finding the defence taken by the accused not to have been probablized by the defence witness and relying upon the testimonies of Dayal Singh (PW.1), Bhajju Ram (PW.2) and Puran Chand (PW.3), despite witnesses Roshan Lal (PW.6), Uttam Chand (PW.8) and Jagat Ram (PW.9) turning hostile, Trial Court convicted both the accused for having committed offences punishable under the provisions of Sections 353, 332 and 333 IPC and sentenced as aforesaid. Hence the present appeal by the convicts.

6. Having heard M/s Anoop Chitkara and N.S. Chandel, learned counsel, on behalf of the appellants as also Mr. R.S. Verma, learned Additional Advocate General, on behalf of the State, as also minutely examined the testimonies of the witnesses and other documentary evidence, so placed on record by the prosecution, Court is of the considered view that trial Court committed great illegality in convicting the accused, for the reasons discussed hereinafter. Contradictions and improbabilities which are glaring, rendering the prosecution case to be extremely doubtful, if not true, stand ignored.

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 the accused.

8. Medical evidence through the testimonies of Dr.Rajnish Sharma (PW.4), Dr. D. Bhangal (PW.5) and Ram Tirath (PW.7) reveal that Dayal Singh (PW.1) received the following injuries:-

> "1. There was swelling with tenderness over the nasal pyramid near the root of the nose with abrasion on the left side of nasal pyramid about 1.5 x 0.5 mm.
>
> 2. Abrasion irregular about 2 mm on the left mastoid region.
>
> 3. Abrasion left side chest linear in shape 2.5 cm x 0.5 mm with pain and tenderness left side of chest.
>
> 4. Abrasion irregular in shape on the back of left forearm."

9. There is fracture of the nasal bone, which is evident from MLC (Ex.PW.4/A). However, doctors have opined that such injuries could have been caused even by way of a fall.

10. Through the testimonies of Magani Ram (DW.2) and Pawan Kumar (DW.3) accused made an attempt to *prima facie* establish not being present on the spot at the time of the incident. In fact, Pawan Kumar (DW.3) states that the driver of the bus had indulged in some scuffle with the labourers, who were from Bihar. The accused are not from Bihar or

Biharis. They are natives and permanent residents, falling within the territorial jurisdiction of Police Station, Barmana.

11. Be that as it may, prosecution has to stand on its own legs and establish, beyond reasonable doubt, the charged offences. Having considered the case in entirety genesis of the prosecution case, reflecting involvement of the accused, cannot be said to have been established on record even through the testimony of prosecution witnesses.

12. From the testimony of Hem Singh (PW.14), who has proved extract of duty roster (Ex.PW.14/A), it is evident that the bus belonging to Kullu Depot was to ply on Kullu-Anni route. It was to leave Kullu at 5.15 AM. Record reveals that Gurdas Ram was the driver, who was to drive the bus from Kullu. Hem Singh states that Dayal Singh was to replace Gurdas Ram at Ghagas. Now no record of Bus Depot falling within the jurisdiction of Ghagas has been placed or proved on record. It is not the case of prosecution that Dayal Singh travelled in the very same bus from Kullu to replace Gurdas Ram at Ghagas. Gurdas Ram has also not been examined in Court to establish that the bus was handed over to Dayal Singh at Ghagas. Duty roster (Ex.PW.14/A) is not signed by this witness. Log book is not on record. Further reference of Dayal Singh in the register is not in the hand of this witness. It is in different ink. Witness states that entry pertaining to Dayal Singh was made by Tulsi Ram, Assistant Adda Incharge, who remains unexamined why this person was not examined in Court remains unexplained. It acquires significance in view of the fact that there is overwriting at the place where name of Dayal Singh is mentioned. First Dayal Chand was written. Later on 'Chand' is scored off and replaced with word 'Singh'. There are no signatures on the cutting. Also Dayal Singh has not produced the log book in Court. This renders the prosecution version of the bus being plied by Dayal Singh to be doubtful. That Dayal Singh examined as PW.1 was the driver who would have replaced Gurdas Ram also remains unproven on record, for there can be more than one person by the name of Dayal Singh who could have been employed by HRTC.

13. Prosecution heavily relies upon the testimonies of Dayal Singh (PW.1), Bhajju Ram (PW.2) and Puran Chand (PW.3) to establish occurrence of the incident. In addition to the statement of driver, prosecution heavily relies upon the statement of Bhajju Ram an employee of the HRTC and Puran Chand conductor posted on the bus. All these witnesses are employees of the HRTC and as such are interested witnesses. At this juncture, it be only observed that prosecution examined three more witnesses Roshan lal (PW.6), Uttam Chand (PW.8) and Jagat Ram (PW.9) to testify occurrence of the incident. Significantly all these witnesses have not supported the prosecution case at all and despite extensive cross-examination, nothing fruitful could be elicited from their testimonies, establishing presence of the accused or any scuffle having taken place between them and Dayal Singh. Jagat Ram is known to Dayal Singh from before and there is no reason for all these witnesses to have deposed falsely or helped the accused. From their testimonies no involvement of the accused, in the alleged incident, can be inferred much less proved.

14. Be that as it may, even otherwise, testimonies of relevant witnesses to the occurrence of the incident cannot be said to be inspiring in confidence. There are glaring contradictions and improbabilities, which remain unexplained on record.

15. Dayal Singh (PW.1) states that after taking over charge of the bus at Ghagas he proceeded to the destination. There is no proof of the same. He further states that when he reached at a place known as Mangrot, he saw cutting work of the road in progress. He stopped the bus as the road was partly blocked and requested the workers of the contractor Ravinder Kumar to remove the boulders lying on the road. "2/4 persons" came and started

abusing and directed him to take the bus back. "These two persons" pulled him down the bus and tore his shirt. He was also given beatings with fist blows on face and chest. He was saved by Bhajju Ram (PW.2), Puran Chand (PW.3), Uttam Chand (PW.8) and Jagat Ram (PW.9). The matter was reported to the police and subsequently he got his statement (Ex.PW.1/A) recorded. In Court, he identified the two persons to be "Sunil Kumar" and "Sanjeev". Significantly he did not know the accused from before but could only recognize them by face. This cannot be true. It is not the case of the prosecution that accused were immediately taken into custody or their particulars made known either to him by the contractor or independent persons present on the spot. Significantly no test identification parade was carried out by the police at any point in time. The incident took place on 04.07.2006 and accused were identified for the first time in the Court on 16.09.2013. How is that police reached out to the accused. Identity of the accused itself being in doubt, stands amplified from the fact that in the FIR he disclosed names of four persons i.e. Sunil, Sanju, Devi Ram and Ram Pal. In the FIR, it is no where recorded that accused Sanjeev Kumar is also known as Sanju. Also record does not reveal it to be so. He also does not reveal, who is this Sunil. Also why is it that no action was taken against the remaining persons so named in the FIR. Also in Court he does not state as to which of these persons pulled him from the collar and which of them gave him a blow as a result of which he sustained injuries on his face. He further admits that "it is correct that in such type of condition we have to talk with road supervisor or the contractor. It is correct that where such type of repair and construction work is going on, there is road inspector and supervisor from the P.W.D. department. It is correct that I did not approach either road inspector or supervisor". Why so he does not explain.

16. Incidentally contractor Ravinder Kumar has not been examined in Court. Why so? has not been explained by the prosecution. Whether accused were employed as labourers by Ravinder Kumar and were deployed to carry out the work on the site at the relevant time or not remains unestablished on record. He was the best person to have proven such fact.

17. Testimony of Dayal Singh (PW.1) also cannot be said to be inspiring in confidence for the reason so disclosed by Krishan Chand (PW.15), according to whom, initially accused disclosed names of four persons and later on by way of supplementary statement named only two persons i.e. the present accused.

18. I find that name of one of the accused is recorded as Rajeev and not Sanjiv. Bhajju Ram (PW.2) admits that Rajiv is not the name of the accused present in Court and name of Sunil was disclosed to him by certain persons, whose names also he does not remember. Presence of this witness itself is in doubt. There is nothing on record to establish his purpose of travelling in the bus at the relevant time. Thus, even this witness does not establish identity of the assailants or occurrence of the incident.

19. Puran Chand (PW.3) states that accused Sunil Kumar and Sanjeev gave beatings to Dayal Singh (PW.1). This witness was posted as a conductor on the bus. However, even he admits that names of the accused were given by people, who had gathered on the spot, whose names also he does not remember. He has identified the accused for the first time in the Court. In the given circumstances it is difficult to fathom that he would even remember the faces much less names of the assailants after a period of more than seven years. In this view of the matter, I do not find the prosecution to have established, beyond reasonable doubt, identity of the accused or them to be present on the spot. Contradictions in the testimonies of Dayal Singh (PW.1), Bhajju Ram (PW.2) and Puran

Chand (PW.3) with regard to identity of the accused is glaring, material and cannot be ignored.

20. Investigating Officer Krishan Chand (PW.15) admits that he did not record statement of the contractor Ravinder Kumar for establishing identity or their employment with him. Initial version given to him was that four labourers of contractor Ravinder Kumar had given him beatings. Who were those four persons was not disclosed and why is it that initial version was changed has also not been explained. This acquires significance in view of the uncontroverted version of Puran Chand (PW.3), according to whom, labourers present on the spot, who gave beatings were Biharis.

21. As already discussed, there is no evidence that Sanju is also known as Sanjeev. Also none has come forward to disclose the parentage or address of Sunil Kumar. Then how is it that Investigating Officer was able to reach out to accused Sunil Kumar and array him as an accused remains unexplained. Also no statement of either the contractor, Junior Engineer or Supervisor was recorded by the police or such persons examined in Court. They were the best persons to have established presence of the accused on the spot.

22. Version of Dayal Singh of having recognized the accused that too after a period of seven years and first time in Court, does not inspire confidence, for the accused were not known to him from before and in any event stands contradicted by independent witnesses. All these aspects remain unexamined by the Court below.

23. It be also observed that at about 10.30 AM information about the occurrence of the incident was brought to the notice of the police, which fact is evident from Rojnamcha (Ex.PW.13/A). Significantly there is no reference or name of any of the accused persons in the said document. The FIR was registered at 01.35 PM even by that time Dayal Singh (PW.1) had not ascertained exact particulars of the assailants, for FIR is conspicuously silent on this aspect. It is not the case of prosecution that accused were immediately apprehended, detained or arrested on the spot. This acquires significance in view of admissions made by Investigating Officer Krishan Chand (PW.15) of not having made any enquiries from the contractor with regard to identity or deployment of the accused on the spot at the time of occurrence of the alleged incident.

24. From the material placed on record, prosecution has failed to establish that accused are guilty of having committed the offence, they have been charged with. The circumstances cannot be said to have been proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused does not stand proved beyond reasonable doubt to the hilt. The chain of events does not stand conclusively established, leading only to one conclusion, i.e. guilt of the accused. Circumstances when cumulatively considered do not fully establish completion of chain of events, indicating to the guilt of the accused and no other hypothesis other than the same.

25. 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.

26. Hence, for all the aforesaid reasons, appeals are allowed and the judgment of conviction and sentence, dated 16.09.2014, passed by Sessions Judge, Bilaspur, H.P., in Sessions trial No.16/7 of 2010, titled as *State of Himachal Pradesh Versus Sunil Kumar &*

another, is set aside and convicts Sunil Kumar and Sanjiv Kumar are acquitted of the charged offences. Convict Sunil Kumar, who is in jail be released forthwith, if not required under any other process of law. Release warrants be prepared accordingly. Amount of fine, if deposited by the convicts, be refunded to them. Bail bonds furnished by convict Sanjiv Kumar who se sentence stands suspended are discharged. Appeals stand disposed of, so also pending application(s), if any.

****

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

Anil Kumar Sood. …Petitioner.

Versus

Union of India and another. …Respondents.

CMPMO No. 12 of 2014
Reserved on: 25.8.2015
Decided on: 9.9.2015

Public Premises (Eviction of Unauthorized Occupants) Act, 1971- Section 4- Petitioner was directed to vacate the public premises and to pay damages of Rs.3,01,500/- within one month, failing which 9% interest was to be charged up to three months and 12% after four months- petitioner contended that he was general power of attorney of 'R' and 'R' was in possession of the same – record shows that 'R' was never appointed as Manager and he had no occasion to give general power of attorney in favour of the petitioner – petitioner was collecting rent from the tenants and, therefore, he was in unauthorized possession of the same - petition dismissed. (Para-8 to 17)

Cases referred:
Tilak Raj vs. The Chandigarh Administration and others, AIR 1976 P&H 238
Ashoka Marketing Ltd. and another vs. Punjab National Banka and ors, AIR 1991 SC 855
Komalam Vardarajan vs. The Union of India and another, AIR 1997 Bombay 57
Ishar Singh vs District and Sessions Judge and another, AIR 1999 SC 1425
New India Assurance Co. Ltd. Vs. Nusli Neville Wadia and another, AIR 2008 SC 876

For the Petitioner : Mr. Ashok Sood, Advocate.
For the Respondent : Mr. Ashok Sharma, Asstt. Solicitor General of India.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This petition is instituted against the judgment dated 23.12.2013 rendered by the District Judge, Chamba in Civil Misc. Appeal No. 3 of 2012

2. "Key facts" necessary for the adjudication of this petition are that notice was issued to the petitioner under section 4 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as the "Act" for brevity sake). Petitioner filed reply vide Annexures P-2 and P-3. Estate Officer passed order Annexure P-4 on 30.8.2012 whereby petitioner was directed to vacate the public premises known as "***Sylwan Hall***" at

Dalhousie within 15 days and handover the peaceful vacant possession to the authorized representatives of the DEO Pathankot. He was directed to make the payment of damage charges of Rs. 3,01,500/- within one month, failing which 9% interest was to be charged on the remaining amount upto 3 months and 12% after 4 months. Petitioner feeling aggrieved by the order dated 30.8.2012 preferred an appeal before the District Judge. He dismissed the same on 23.12.2013. Hence, the present petition.

3. Mr. Ashok Sood, leared counsel for the petitioner has vehemently argued that the petitioner was not in possession of the premises in question. According to him, it was Ravi Khanna who was in possession of the premises. He then contended that there was violation of principles of natural justice. His client was only holding general power of attorney on behalf of Ravi Khanna. He has also contended that the Estate Officer was biased. He has lastly contended that Section 7 of the Act has not been complied with.

4. Mr. Ashok Sharma, learned Assistant Solicitor General of India has supported the judgment dated 23.12.2012.

5. Notice was issued to the petitioner on 22.2.2012. He has filed two replies dated 6.3.2012 and 18.4.2012. Case of the petitioner, precisely, in both the replies was that he was not in unauthorized occupation of the premises. He was holding general power of attorney on behalf of Ravi Khanna.

6. The occupancy rights of the property were granted in favour of Lahore Diocesan Church Association for a period of 30 years w.e.f. 1.4.1941 to 31.3.1971 for running a cinema hall at a nominal rent of Rs. 53 per annum. Shri D.C. Khanna was the Manager of the property till 31.3.1971. It was learnt during the course of inspection by Surinder Paul that Shri Mahinder Bahadur son of Dal Bahadur, Bainsu son of Jello and Shri Rahul Kumar were living in the said property and the petitioner was collecting the rent from them. The suit property was also used by the petitioner for storing the shuttering material.

7. Sh. Surinder Pal has produced the Government property record, i.e. extract from the General Land Register showing the area of survey 0.109 measuring 10530 Square feet under the management of Military Estates Officers and Holder of Occupancy Rights as Lahore Diocesan Church Association. The general power of attorney dated 23.7.2007 registered with Sub-Registrar, Dalhousie on 25.7.2007 was also placed on record.

8. Petitioner has led evidence by filing affidavit dated 26.4.2012. He has also rebutted the calculation of damages vide letter dated 2.8.2012. It is duly proved from the record that lease was valid with effect from 1.4.1941 to 31.3.1971. There was no renewal clause in the lease deed. Sh. D.C. Khanna was the Manager of the property. Sh. Ravi Khanna was never appointed as Manager. Thus, there was no occasion for Ravi Khanna to give general power of attorney dated 23.7.2007 in favour of the petitioner. Sh. Ravi Khanna himself was in unauthorized occupation after the expiry of lease deed. There is no question of inheritance of property by Sh. Ravi Khanna from Dhian Chand Khanna. It has come on record that it is the petitioner, who was collecting rent from the tenants. The property belongs to Government of India. Petitioner was in unauthorized occupation of the same and was liable to pay damages for the use and unauthorized occupation of the premises. Moreover, the general power of attorney executed by Ravi Khanna in favour of the petitioner was irrevocable during or after his death.

9. The calculations have been made by Sh. Surinder Pal on the basis of average rent of property prevalent in the vicinity of property. The copy giving details of damages was

also handed over to the petitioner. He has rebutted the same vide letter dated 2.8.2012. Thus, there is no violation of section 7 of the Act.

10. Provisions of section 4 of the Act have been scrupulously followed. Petitioner has been given ample opportunity to lead his evidence in his defence. The property in question was leased in favour of Lahore Diocesan Church Association for a period of 30 years. It has expired, as noticed hereinabove. Since the petitioner was in illegal occupation of the premises w.e.f. 23.7.2007 to 31.7.2012, he was liable to pay the damages as per the order of Estate Officer dated 30.8.2012 upheld by the District Judge vide judgment dated 23.12.2013.

11. Division Bench of Punjab and Haryana High Court in ***Tilak Raj*** vs. ***The Chandigarh Administration and others***, AIR 1976 P&H 238 has held that the Estate Officer in the case in question was not personally interested in the matter and so there was no question of his acting as a Judge in his own cause when he tries to administer the various provisions of the Act. Division Bench has held as under:

> "[22] Contention No. (2), which has been pressed with some vehemence, is that notice served upon the petitioner by the Estate Officer, respondent No. 3, was in violation of the principles of natural justice inasmuch as he was biased against the petitioner, for prior to the issuance of the impugned notice he had participated in the official meeting in which it had been decided that the eviction notice under Section 4 of the Central Act be served upon the petitioner. While elaborating his submission the learned counsel for the petitioner urged that inasmuch as the Estate Officer was a party to the dispute with the petitioner, so if he was to serve notice and decide as to whether the petitioner was to be evicted from the premises in question or not, he became judge of his own cause, which act was violative of the principles of natural justice. For this proposition, the learned counsel drew sustenance from the Allahabad High Court judgment reported in Ram Gopal Gupta v. Assistant Housing Commr., AIR 1969 All 278 (FB)."
>
> "[25] The same does not apply to an authority which is empowered by an Act to see whether the statutory provision has been complied with or not by those to whom it is applied. The Estate Officer in the present case is not personally interested in the matter and so there is no question of his acting as a judge in his own cause when he tries to administer the various provisions of the Act. The matter is not res integra. In fact, a Full Bench of this Court, which was confronted with such a question in a case under the Punjab Act held as follows; (see Northern India Caterers (P) Ltd. v. State of Punjab, AIR 1963 Punj 290 (FB)):
>
> "The argument raised on imputation of bias on the part of the Collector when he is acting in his official capacity under Section 4, Punjab Act (31 of 1959) is not sustainable. In the absence of proof showing bias, a decision cannot be called in question simply because an officer has acted in his official capacity or occupies important position in Government hierarchy. A presumption cannot be raised that persons required to perform statutory functions will not be able to bring to bear their impartial mind to the consideration of the various matters in dispute: H. C. Narayanappa v. State of Mysore, AIR 1960 SC 1073, Ref."

TO the same effect is the ratio of M.S. Oberoi v. Union of India, AIR 1970 Punj 407 and M.L. Joshi v. Director of Estates, Govt. of India, New Delhi, AIR 1967 Delhi 86. ”

12. Their Lordships of the Hon’ble Supreme Court in ***Ashoka Marketing Ltd. and another*** vs. ***Punjab National Banka and others***, AIR 1991 SC 855 have held that the definition of unauthorized occupation contained in section 2 (g) of the Public Premises Act covers a case where a person has entered into occupation of the public premises legally as a tenant under a lease but whose tenancy has expired or has been determined in accordance with law. Their Lordships have held as under:

“[30] The definition of the expression 'unauthorised occupation' contained in Section 2(g) of the Public Premises Act is in two parts. In the first part the said expression has been defined to mean the occupation by any person of the public premises without authority for such occupation. It implies occupation by a person who has entered into occupation of any public premises without lawful authority as well as occupation which was permissive at the inception but has ceased to be so. The second part of the definition is inclusive in nature and it expressly covers continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever. This part covers a case where a person had entered into occupation legally under valid authority but who conti nues in occupation after the authority under which he was put in occupation has expired or has been determined. The words "whether by way of grant or any other mode of transfer" in this part of the definition are wide in amplitude and would cover a lease because lease is a mode of transfer under the Transfer of Property Act. The definition of unauthorised occupation contained in Section 2 (g) of the Public Premises ct would, therefore, cover a case where a person has entered into occupation of the public premises legally as a tenant under a lease but whose tenancy has expired or has been determined in accordance with law.

[33] Another submission that has been urged by Shri Ganguli is that the question whether a lease has been determined or not involves complicated questions of law and the estate officer, who is not required to be an officer well versed in law, cannot be expected to decide such questions and, therefore, it must be held that the provisions of the Public Premises Act have no application to a case when the person sought to be evicted had obtained possession of the premises as a lessee. It is true that there is no requirement in the Public Premises Act that the estate officer must be a person well versed in law. But, that, by itself, cannot be a ground for excluding from the ambit of the said Act premises in unauthorised occupation of persons who obtained possession of the said premises under a lease: Section 4 of the Public Premises Act requires issuing of a notice to the person in unauthorised occupation of any public premises requiring him to show cause why an order of eviction should not be made. Section 5 makes provisions for production of evidence in support of the cause shown by the person who has been served with a notice under Section 4 and giving of a personal hearing by the estate officer. Section 8 provides that an estate officer, shall, for the purpose of holding any enquiry under the said Act have

the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the matters specified therein namely:

(a) summoning and enforcing the attendance of any person and examining him on oath:

(b) requiring discovery and production ofdocuments; and

(c)any other matters which may be prescribed.

[34] Rule 5(2) of the Public Premises (Eviction of Unauthorised Occupants) Rules, 1971, requires the estate officer to record the summary of evidence tendered before him. Moreover Section, 9 confers a right of appeal against an order of the estate officer and the said appeal has to be heard either by the district judge of the district in which the public premises are situate or such other judicial officer in that district of not less than ten years' standing as the district judge may designate in that behalf. It shows that the final order that is passed is by a judicial officer in the rank of a district judge."

13. In the instant case, lease deed was for a period of 30 years. Lease has expired on 31.3.1971. Thereafter, the possession of the petitioner became unauthorized.

14. Division Bench of Bombay High Court in ***Mrs. Komalam Vardarajan*** vs. ***The Union of India and another***, AIR 1997 Bombay 57 has held that the eviction order has to be a speaking order. However, it need not be a lengthy or elaborate one. Division Bench has held as under:

"[6] Mrs. Purohit next submitted that sections 4 and 5 of the said Eviction Act are required to be read together and therefore, it was not enough that the occupant was declared an unauthorised occupant. It was her submission that it was also obligatory to clearly demonstrate the reasons for asking the unauthorised occupant to vacate. Mrs. Purohit in support of her submission relied on a decision of the Division Bench of this Court in the matter of (Minoo Framroze Balsara v. Union of India and others)7, reported in A.I.R. 1992 Bom. 375, wherein the Division Bench inter alia held that provisions of sections 4 and 5 of the Eviction Act deal with the procedure for eviction of an unauthorised occupant and must be read together and that prima facie satisfaction of the Estate Officer is a sine qua non of the issuance of the Show Cause Notice. The prima facie satisfaction must be two-fold, firstly, that the addressee is in unauthorised occupation of public premises, and, secondly, that he should be evicted. We have no quarrel with the said decision. The quarrel we have is qua the submission made by Mrs. Purohit to the effect that although in the instant case it may appear that the Impugned Order discloses the first satisfaction viz. about the unauthorised nature of occupation, as regards the second satisfaction viz., as regards the necessity to evict the petitioner there is no such finding arrived at. In the instant case, however, we are satisfied that both the aspects are gone into by the Estate Officer while passing the Impugned Order. Mr. Rana drew our attention to the Show Cause Notice dated 10th December, 1991 issued on the petitioner in which it was clearly mentioned that the premises in question were meant only for serving soldiers and the same was required for allotment to them. Not only that but the Impugned Order after discussing the facts and after discussing various submissions made by both the parties viz., the

> Administrative Commandment and the petitioner ultimately says that taking into consideration all the aspects brought out before the Estate Officer, he came to the conclusion that the petitioner and other legal heirs continuously staying in the suit premises were unauthorised occupants of the Government hired premises. The submission which were made on behalf of the Government by the Administrative Commandant was that the said premises be made available to the Station Headquarters, Bombay for allotment to the other bona fide defence personnel who are posted at Bombay for 2-3 years tenure and who are on waiting list for accommodation. Thus there was sufficient material before the Estate Officer to be satisfied that the petitioner was required to be evicted and after referring to the material and after taking into consideration all the aspects of the matter the Impugned Order was passed. Mr. Rana is also right in his submission that the order which is required in law to be a speaking order need not be a lengthy or an elaborate one. According to him an order in question must show that there has been an application of mind. We see considerable force in Mr. Rana's submission. In our opinion, the Impugned Order records the two-fold satisfaction of the Estate Officer. The underlying reason for an order to be a speaking order is to demonstrate that there is a proper application of mind, that the order is neither the result of caprice or arbitrariness nor the result of consideration of any non-germane or extraneous considerations. In these circumstances, we cannot accede to Mrs. Purohit's submission. ”

15. In the instant case, the orders passed by the Estate Officer are speaking and detailed one. All the contentions raised by the petitioner has been taken into consideration by the Estate Officer.

16. Their Lordships of the Hon’ble Supreme Court in ***Ishar Singh*** vs ***District and Sessions Judge and another***, AIR 1999 SC 1425 have held that when the lease has been cancelled, the possession of allottees becomes unauthorized.

17. Their Lordships of the Hon’ble Supreme Court in ***New India Assurance Co. Ltd.*** Vs. ***Nusli Neville Wadia and another***, AIR 2008 SC 876 have held that the Estate Officer with a view to determine the lis between the parties must record summary of the evidence and the summary of the evidence and the documents shall also form part of the record of the proceedings. Their Lordships have further held that under the Act, the occasion would arise for multi-level inquiry, firstly primary inquiry will be to arrive at a conclusion on “unauthorized occupant”, and intermediate inquiry would be as to the eviction of “unauthorized occupant. Their Lordships have held as under:

> “[33] The Estate Officer with a view to determine the lis between the parties must record summary of the evidence. Summary of the evidence and the documents shall also form part of the record of the proceedings.
>
> [36] Thus under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 the occasion would arise for multi-level inquiry: Primary inquiry will be to arrive at a conclusion on "unauthorized occupant"; and intermediate inquiry would be as to the eviction of "unauthorized occupant".”

18. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed so also the pending applications, if any. No costs.

****

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

C.S. No. 27 of 2008 a/w C.S. No. 116 of 2009 and CR No. 19 of 2011.
Judgment reserved on: 6.8.2015
Date of Decision: September 9, 2015

1. C.S. No. 27 of 2008	
Arjan Singh	....Plaintiff
Versus	
Dr. S.R. Bawa and others	...Defendants
For the Plaintiff :	Mr. J.S. Bhogal, Senior Advocate, with Mr. B.C.Rajput, Advocate.
For the Defendants :	Defendant No.1 *ex-parte*. Mr. Suneet Goel, Advocate, for defendant No.2. Mr. Bhupender Gupta, Senior Advocate, with Mr. Neeraj Gupta, Advocate, for defendant No.3.
2. **C.S. No.116 of 2009:**	
Sanjeev Sharma	....Plaintiff.
Versus	
Dr. S.R. Bawa and others	....Defendants.
For the Plaintiff :	Mr. Suneet Goel, Advocate, for the plaintiff.
For the Defendants :	Defendant No.1 *ex-parte*. Mr. J.S. Bhogal, Senior Advocate, with Mr. B.C.Rajput, Advocate, for defendant No.2. Mr. Bhupender Gupta, Senior Advocate, with Mr. Neeraj Gupta, Advocate, for defendant No.3.
3. **C.R.No. 19 of 2011:**	
Arjan Singh	...Petitioner
Versus	
Punit Ahluwalia and another	....Respondents
For the petitioner:	Mr. J.S.Bhogal, Senior Advocate, with Mr. B.C. Rajput, Advocate.
For the respondents:	

Specific Relief Act, 1963- Section 20- Plaintiff claimed that he had entered into a contract with defendant No. 1- it is the duty of the Court to construe correspondence to determine, whether there was any meeting of mind between the parties, which would create a binding contract between them- however, Court is not empowered to create a contract for the parties- burden of proving that there was a valid binding contract between the parties is on the plaintiff- even if, contract was not signed by the parties and it can be inferred from the agreement- plaintiff never talked with the defendant No. 1, although he was an intending purchaser and was hearing the conversation on the parallel line when the alleged deal was struck- there was no meeting of mind between the plaintiff and defendant No. 1- there was no privity of contract between the plaintiff and defendant No. 1- defendant No. 1 had returned the earnest money to PW-2 and not PW-1 which shows that there was no concluded contract between the parties- telephonic transcript and conversation were not legally proved- suit dismissed. (Para-33 to 55)

Cases referred:
Vidhya Dhar vs. Manikrao, (1999) 3 SCC 573
Janki vs. IndusInd Bank (2005) 2 SCC 217
Man Kaur vs. Hartar Singh Sangha, (2010) 10 SCC 512
Mayawanti vs. Kaushalya Devi (1990) 3 SCC 1
Rickmers Verwaltung GMBH vs. Indian Oil Corporation Ltd. (1999) 1 SCC 1
Bhagwandas Goverdhandas Kedia vs. M/s Girdharlal Parshottamdas and Co., and others, AIR 1966 SC 543,
Ram Singh vs. Col. Ram Singh 1985 Supp SCC 611
I.S. Sikandar (dead) by LRs vs. K. Subramani and others (2013) 15 SCC 27

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The plaintiff has filed the instant suit for possession of property bearing No. 169, Sector 11-A, Chandigarh by way of specific performance of agreement to sell dated 20th June, 1995 and in the alternative for recovery of Rs.10,00,000/- (Rupees Ten Lacs) as damages and refund of Rs. 3,20,000/- (Rupees Three Lacs and Twenty Thousand) deposited as earnest money and for special costs.

2. The suit was initially filed at Chandigarh but was transferred to this Court by the orders of the Hon'ble Supreme Court.

The facts of the case of the plaintiff as set out in the plaint may be noticed:

A. The plaintiff is a resident of Chandigarh and had in the first week of June, 1995 appointed Sh. Amarjit S. Sethi, Property Dealer, SCO No. 345-46, Sector 35-B, Chandigarh as his broker and agent for the purchase of property in Chandigarh.

B. The plaintiff was informed by Sh. Amarjit Singh Sethi that property bearing House No. 169, Sector 11-A, Chandigarh under the ownership of defendant No.1, who is a non-resident Indian and has permanently settled in USA and in which property, the ground floor along with annexe are in the possession of a tenant, had been advertised for sale. The plaintiff directed his agent and broker Sh. Amarjit Singh Sethi to contact defendant No.1 and negotiate the sale of the suit property to the plaintiff. The plaintiff was a member of the Punjab University Faculty from 1967-1972 and knew of defendant No.1, who was Professor and Head of Department of Bio-Physics in the said University till 1993.

C. Sh. Amarjit Singh Sethi contacted defendant No.1 and commenced negotiations with him and finally on June 20, 1995 an agreement was concluded between the plaintiff and defendant No.1 through telephone call from Chandigarh in the presence of the plaintiff. Sh. Sethi communicated the plaintiff's offer of Rs.30,00,000/-, but the defendant No.1 made a counter offer of Rs.32,00,000/-. This conversation was heard by the plaintiff on the extension and he authorized his broker to accept the offer which was communicated and accepted by defendant No.1 in absolute and unqualified terms.

D. It was further agreed between the plaintiff and defendant No.1 during the same telephone call that the plaintiff shall deposit a sum of Rs.3,20,000/- which is 10% of the sale price as earnest money liable to forfeiture in case the agreement failed on account of the plaintiff's default. Defendant No.1 conveyed his saving bank account number and the

name of the bank. It was also agreed that the plaintiff would pay the cost of stamp duty and registration charges and the defendant No.1 in turn shall obtain income tax clearance certificate and permission to sell from the Estate Officer, Chandigarh and then deliver actual possession of the first floor and annexe to the plaintiff upon execution of the sale deed and that the sale shall be completed within 15 days of the arrival of defendant No.1 in India, but in any case not later than August 31, 1995. Both the parties agreed to pay 2% commission to the broker i.e. Sh. Sethi. It was also agreed and clearly understood that the agreement shall become binding and enforceable from the very outset and that subsequently a more formal agreement would be prepared which would incorporate all the terms and conditions agreed upon.

E. On June 21, 1995 the plaintiff obtained a banker's cheque for a sum of Rs.3,20,000/- and wanted to deposit the same in the defendant No.1 account, which account number appeared to be wrong, constraining the broker to call defendant No.1, who asked him to call later and thereafter gave him the correct account number.

F. On June 22, 1995 the plaintiff deposited a draft of Rs. 3,20,000/- in the said defendant's account and thereafter the broker Sh. Amarjit Singh Sethi vide letter dated June 26, 1995 sent to the defendant enclosing therewith agreement to sell (in duplicate) bearing the plaintiff's signatures, the original deposit receipt, a photocopy of the draft, an application for the permission of the Estate Officer, U.T. Chandigarh.

G. On July 21, 1995 Sh. Amarjit Singh Sethi contacted the defendant No.1, who confirmed the receipt of the papers and informed that he would finalise his programme to visit India to complete the sale formalities in the end of July 1995 and would bring alongwith all the papers.

H. On July 29, 1995 Sh. Amarjit Singh Sethi again contacted defendant No.1, who informed him that his programme had not been finalised and that he would call him on August 16, 1995. The defendant No.1 was accordingly contacted on telephone on August 16, 1995 but was informed by defendant's wife that the defendant No.1 was away and Sh. Amarjit Singh Sethi should call him on August 20, 1995. On 20th August, 1995 Sh. Amarjit Singh Sethi called defendant No.1, who confirmed that he had received the earnest money alongwith the papers but regretted that he could not come to India as he was unable to obtain leave. Shri Sethi informed defendant No.1 that the plaintiff had balance amount of sale consideration ready with him and plaintiff was ready and willing to deposit more money in the defendant's account as the money was lying idle with the plaintiff. The defendant No.1 replied that the plaintiff may use the money as he would still take 2-3 months to come to India. When Sh. Sethi asked the defendant No.1 to send written receipt of earnest money, the defendant No.1 said his word was enough.

I. The plaintiff thereafter sent a letter dated September 5, 1995 to the defendant to confirm that he was in a position to complete the sale formalities within a week of the said defendant's arrival in India and alongwith the letter, a covering letter of Sh. Sethi also dated September 5, 1995 was enclosed and posted under registered cover on September 19, 1995. Sh. Sethi again contacted defendant No.1 on October 7, 1995 over telephone but he was not available and a message to this effect was left on the defendant's answering machine. Thereafter, one more call was placed at the said defendant's residential telephone number but there was response only from the answering machine.

J. On October 17, 1995 Sh. Sethi received a letter from defendant No.1 dated September 18, 1995 purporting to be written from Schenectady, U.S.A. to the effect that the

earnest money of Rs.3,20,000/- had been deposited without the defendant's authorization and without the execution of any agreement. Defendant No.1 also enclosed a cheque of Rs.3,20,000/- in favour of Sh. Sethi.

K. On October 20, 1995 Sh. Sethi replied to the defendant's letter and sent a copy of the same to the plaintiff alongwith defendant's letter dated September 18, 1995. In reply, Sh. Sethi stated that an amount of Rs.3,20,000/- had been deposited in the defendant's account as per his express instructions and its receipt had also been acknowledged by defendant No.1. Defendant No.1 was again informed that the sale would be completed within a week of his arrival in India and he should intimate his programme in advance. Defendant No.1 was further informed that the cheque was not being presented to the banker's for collection and was being kept in safe custody. This letter was returned with remarks "refused".

L. On October 29, 1995, the plaintiff came to know from his broker that defendant No.1 had arrived in India and was negotiating the sale of his house with some parties in Chandigarh. The plaintiff and his broker tried to meet defendant No.1 on October 30, 1995, but without success.

M. On October 31, 1995, the plaintiff and his broker again went to the defendant's residence at about 8.25 a.m. and met him. The plaintiff called upon defendant No.1 to perform his part of the contract, but he flatly refused to do so and stated that he was not interested in selling the house. It is pleaded that defendant No.1 had however, during the course of any conversation, affirmed the agreement to sell and receipt of earnest money. The conversation between the plaintiff and defendant No.1 and the broker was tape recorded.

N. It is alleged that the plaintiff has at all times been continuously ready and willing to perform his part of the agreement to sell and is possessed of funds to pay the balance of the purchase price to defendant No.1 and is still ready and willing to perform his part of the agreement.

O. On November 5, 1995 the defendant No.1 left India without completing his part of the contract and the plaintiff had come to know that the defendant No.1 was negotiating the sale of the property with some other party which clearly proved that the defendant No.1 did not intend to perform the agreement to sell by completing his part of the contract.

3. During the pendency of the suit, defendant No.2 filed an application stating therein that defendant No.1 had also agreed to sell his house to him and had accepted the earnest money. Defendnt No.2 was impleaded as a party defendant. It was pleaded that defendant No.2 had no right to get specific performance and it appeared that he was hand in glove with defendant No.1 and filed a separate suit in order to defeat the claim of the plaintiff in collusion with defendant No.1. In the meanwhile the defendant No.1 sold his property to defendant No.3 and the sale deed between defendant No.1 and defendant No.3 dated 25.3.2003 was illegal, null and void and did not affect the rights of the plaintiff. This sale deed was illegal and non est in the eyes of law and plaintiff was entitled to the possession of the property by way of specific performance of agreement to sell dated 20.6.1995 and it was accordingly prayed that a decree be passed in favour of plaintiff as had been prayed for.

4. The defendant No.1 filed written statement wherein preliminary objections regarding maintainability, privity of contract between the parties, absence of cause of action,

suit being an abuse of process of law, suit having rendered infructuous with passage of time and estoppel amongst other objections were raised. On merits, the defendant No.1 denied that he wanted to sell the house in question. It was further pleaded that no contract was concluded between the plaintiff and the defendant on 20.6.1995. No talk took place between the plaintiff and the defendant on the said date, therefore, the question of any contract or settlement did not arise. It was also denied that any terms and conditions were settled for sale of the house with Amarjit Singh Sethi. The broker was trying to prevail upon the defendant to sell the house but no final decision and terms were settled at any point of time. The defendant never accepted any offer nor there was any occasion for the same which was clear from the conduct of the defendant that he did not sign the agreement which was sent to him in USA. It was alleged that the broker Amarjit Singh Sethi and the plaintiff in connivance with each other tried to trap the defendant for the sale of the house while he was sitting abroad and know anything about the prevalent conditions in India. The defendant also denied having supplied or instructed the plaintiff to deposit the amount in his account and has levelled allegation of connivance between the broker and the plaintiff whereby they connived to locate the account number of the defendant and deposited the amount without any authority with a view to trap him. It was specifically mentioned that the plaintiff was not even aware of the correct name of the father of the defendant, therefore, he had mentioned wrong parentage of the defendant in the suit as well as in the documents which further proved that no talk with regard to the sale of the house took place between the parties. The defendant for the first time came to know about the deposit of the amount when he received draft agreement to sell for signatures. The defendant was astonished by the conduct of the broker as well as the plaintiff. The defendant never confirmed the deal nor at any point of time was having any intention to execute the deal with the plaintiff and for this reason the defendant neither sent the receipt nor accepted the alleged earnest money. The defendant No.1 did not deny the letter dated 18.9.1995 written by him to the broker wherein the cheque was also returned on the pretext that there was no concluded contract between the parties. The defendant further did not deny the fact that the broker Sh. Amarjit Singh Sethi had though come to his house in the morning of 31.10.1995 but with a malafide intention and wanted to get commitment and confirmation of offer of purchase and it was with this background that he had tape recorded the version so that the defendant would be trapped but to the contrary, the defendant had nowhere committed to sell the house to the plaintiff. It was further claimed that the tape recorded version was not correct version.

5. Insofar as the amended paras of the plaint are concerned, the defendant No.1 admitted that the property in question was sold by him on 25.3.2003 as per the orders of the Court and therefore, he denied the sale deed or decree being null and void. It is alleged that the plaintiff was aware of the passing of the decree as he was party to the proceedings and plaintiff had never objected or challenged the decree till date. On these pleadings, the defendant No.1 prayed for dismissal of the suit.

6. The defendant No.2 filed a separate written statement wherein preliminary objection had been taken to the effect that the suit was required to be stayed on the allegation that prior to entering into an agreement to sell dated 20.6.1995, the defendant No.1 had agreed to sell the house in question to this defendant for a sum of Rs.2,7,50,000/- and towards the part performance of the agreement, he had even deposited a sum of Rs.2,75,000/- as earnest money on 21.6.1995 and 22.6.1995, respectively and since the defendant No.1 had failed to get the sale deed executed, therefore, the defendant No.2 had filed a separate suit for specific performance against defendant No.1 which was pending adjudication in the Court of Sub Judge 1st Class, Chandigarh. It was further contended that

since the suit filed by defendant No.2 for specific performance had already been decreed on 19.2.2003, the suit was no longer maintainable and rendered infructuous.

7. On merits, it was averred that defendant No.1 had agreed to sell the house in question to defendant No.2 and had also received the earnest money much prior to the claim sought to be put forth by the plaintiff. He accordingly prayed for dismissal of the suit.

8. The defendant No.3 filed separate written statement wherein apart from raising number of preliminary objections, the suit was also contested on merits. Since the defence of defendant No.3 has been curtailed by the judgment of the Hon'ble Supreme Court only the relevant portions of the written statement are being taken note of.

9. The defendant No.3 in his preliminary objection averred that there was no privity of contract between the plaintiff and defendant No.1, so on this ground alone, the suit deserved to be dismissed as not only the suit was not maintainable but even the plaintiff had no locus standi to file the same and was therefore, not entitled to the relief against the defendant. It was claimed that the plaintiff has no cause of action and that his conduct was totally malicious and dishonest as he wanted to usurp and grab the property of defendant No.1 for someone else. It is claimed that the plaintiff had filed the suit at the instance of Sh. K.S. Grewal and his wife Dr. Gurjeewan Grewal, who wanted to grab the property by hook and crook. The plaintiff had been put up by the above mentioned two persons and totally false, fabricated and concocted allegations had been made by the plaintiff in the suit which was liable to be dismissed on this ground alone. It was further claimed that the suit filed by the plaintiff was without any basis and the same did not disclose any cause of action. It is further claimed that even the banker cheque dated 21.6.1995 for a sum of Rs.3,20,000/- was issued by Punjab and Sind Bank, Sector-11, Chandigarh in favour of defendant No.1 after this amount had been transferred from the saving bank account No. 10142 (HUF) of Sh. K.S. Grewal which proved that he was the real plaintiff in this case. This amount according to the defendant was sought to be deposited by Sh. K.S.Grewal in the account of defendant No.1 without the consent or his knowledge and by putting a fake and fictitious person (Arjan Singh), who was a close associate and friend of Sh. K.S. Grewal. On the same grounds, the plea of benami transaction was also taken. It was claimed that Smt. and Sh. K. S. Grewal are already tenants in the premises and therefore, were aware of the bank account of the defendant No.1 and so the amount of Rs.3,20,000/- was deposited by them in the account of defendant No.1 to show that the earnest money was being deposited which was without the consent and knowledge of the defendant No.1. It was not denied that this defendant had purchased the house in question being the nominee of Sh. Sanjeev Sharma i.e. defendant No.2 and claimed that the sale in his favour was perfectly legal and valid.

10. The plaintiff filed replication to the written statement filed by defendants No. 1 and 2 and controverted the allegations levelled in the written statement and reiterated the averments made in the plaint. Insofar as the replication to the written statement of defendant No.3 is concerned, it was for the first time that the plaintiff admitted that banker's cheque for a sum of Rs. 3,20,000/- dated 21.6.1995 had been prepared after transferring the amount from the account of Sh. K.S. Grewal, but denied that the amount was sought to be deposited in the account of defendant No.1 by Sh. K.S. Grewal without the consent of defendant No.1 or that the plaintiff was a fake and fictitious person.

11. On 10.12.2005 the following issues came to be framed:

(1) *Whether the defendant No.1 had entered into agreement to sell house in question with the plaintiff, as alleged? If so, when and to what effect? OPP*

(2) *Whether the plaintiff had deposited an amount of Rs.3,20,000/- in pursuance of the agreement to sell with the defendant No.1 with the specific permission, consent and authority of Dr. S.R. Bawa, defendant No.1? If so, to what effect? OPP*

(3) *Whether in alternative the plaintiff is entitled to recover the sum of Rs.10 lacs as damages and the sum of Rs.3,20,000/- allegedly deposited by him in the account of defendant No.1 alongwith interest @ 12% P.A. as prayed for? OPP*

(4) *Whether the plaintiff was ready and willing to perform his part of the said agreement to sell? If so, to what effect? OPP*

(5) *Whether the defendant No.1 S.R. Bawa was not competent to repudiate the agreement to sell, as alleged? OPP*

(6) *Whether the defendant No.1 had already agreed to sell the house in question to defendant No.2 prior to the said agreement in favour of plaintiff, as alleged? If so, to what effect? OPD-2.*

(7) *Whether the defendant No.2 had obtained the decree for specific performance of the agreement to sell in his favour against the defendant No.1 on 19.2.2003? If so, to what effect? OPD-2.*

(8) *Whether the plaintiff has no cause of action? OPD*

(9) *Whether the plaintiff is estopped by his own acts and conduct from challenging the validity and legality of the decree passed in civil suit titled as Sanjeev Sharma vs. S.R. Bawa on 19.2.2003, as alleged? OPD*

(10) *Whether the plaintiff has no locus standi to file the present suit? OPD*

(11) *Whether the present suit is barred by the principle of resjudicata? OPD-3.*

(12) *Whether the defendant No.3 is bonafide purchaser for consideration and without notice of the oral agreement to sell between defendant No.1 and plaintiff? OPD-3.*

(13) *Whether the plaintiff has entered into Benami transaction, as alleged? OPD-3*

(14) *Whether the suit is liable to be dismissed with specific cost? OPD-3.*

(15) *Relief.*

12. However, before proceeding further, it may be relevant to observe that at one stage the proceedings were carried out to the Hon'ble Supreme Court and in light of the decision rendered by it only issues Nos. 1, 2, 3, 4, 5, 8, 13, 14 and 15 alone as per the joint representation of the parties survive for adjudication.

Issues No. 1, 2, 3, 4 & 5:

13. These issues are being clubbed as they are not only interconnected but are otherwise closely related and would otherwise dispose of the suit in terms of mandate of Order 20 Rule 5 CPC.

14. The plaintiff appeared as PW-1 and has in his statement virtually reiterated the contents of the plaint and the same is not being reproduced in order to avoid repetition and duplication. In addition, the plaintiff exhibited the following documents in his statement:

(i) Carbon copy of the letter dated 23.6.1995 Ex.P-1 (objected to).

(ii) Photocopy of the agreement Ex.P-2 (objected to).

(iii) Courier receipt Ex.P-3.

(iv) Carbon copy of the letter written by Mr. Sethi to defendant No.1 Ex.P-4(objected to).

(v) Postal receipt Ex.P-5 (objected to) and accompanying his letter written to defendant No.1 Ex.P-6(objected to).

(vi) Reply received from defendant No.1 vide letter Ex.P-7.

(vii) Cheque accompanying Ex.P-7 for an amount of Rs. 3,20,000/- Ex.P-8.

(viii) Letter sent by the plaintiff through Mr. Sethi Ex.P-9 (objected to).

(ix) Letter alleged to be refused by defendant No.1 Ex.P-10 (objected to).

(x) Alleged original of Ex.P-9 as Ex.P-11 (objected to).

(xi) Sealed envelope containing the cassette Ex.P-12.

(xii) Transcript of the tape recorded conversation as Ex.P-13 (objected to).14.

15. Before proceeding any further, it would be worthwhile to notice that while the plaintiff was being examined as PW-1, the letter alleged to have been sent by him vide Ex.P-9 to the defendant No.1, which he refused and was alleged to be contained in the envelope containing the endorsement of refusal was Ex.P-10, was infact found to be opened and the learned counsel representing the defendant at that time had objected to the same and had pointed out that the original letter had been taken out without tearing the envelope.

16. Now, certain facts which have come out in the cross-examination of PW-1 may be noticed. The plaintiff in the opening Line of his cross-examination has admitted that he had never met the defendant No.1 during the period he had been working in the Punjab University and saw him for the first time about 20-25 years back. He did not recollect whether he had any talk with him at that time. He stated that he for the first time had a talk with defendant No.1 on 30.10.1995 at his residence in Sector-11, Chandigarh. Thereafter, he had no meeting or sitting with defendant No.1. He further stated that he did not remember when for the first time he had asked Mr. Sethi to find a house for him in Chandigarh. He further stated that it was few weeks prior to 20.6.1995 that he got in touch with Mr. Sethi regarding the house in dispute and did not know as to whether Mr. Sethi had already talked to Bawa when he informed him that the negotiations could be done for the house in question. He has further stated that defendant No.1 was to execute the sale deed by August, 1995 on his coming to India for the purpose and during that period the other formalities were to be completed by him. He, however, states that it was not decided at that time whether the said formalities for the execution of the sale deed in August, 1995 were to be completed by him or by appointing some attorney. He volunteered that the defendant No.1 had committed to come to India. He also stated that Mr. Grewal was already known to Mr. Sethi and the calls as mentioned in the plaint and in examination in chief were made from the house of Mr. Grewal.

17. He however made a very vital admission to the effect that the interest of Mr. Grewal in the deal was that since he himself could not arrive at an agreement with defendant No.1 for purchasing the house so he asked the plaintiff to arrive at an agreement with him. He further states that his agreement with Mr. Grewal was that in case he succeeds in purchasing the house, then the plaintiff would be entitled to the top storey and he (Grewal) would purchase the ground floor. This agreement with Mr. Grewal had taken place few days prior to the telephonic conversation with defendant No.1 on 20.6.1995. He further states that the settlement between him and Mr. Grewal of the respective portions

was in the ratio of 60: 40. Mr. Grewal was to contribute 60% of the sale price. He further goes on to state that Mr. Grewal had in fact tried to purchase the house from the defendant No.1 but failed and he did not know as to what was the offer given by him. He further states that no limit was fixed between PW-1 and Mr. Grewal for the purchase of the said house, but it was to be a reasonable extent.

18. When PW-1 was called for his further cross-examination on 4.5.2002, he stated that after the settlement on 20.6.1995 the agreement in writing was to be prepared which till date had not been written and finalised. Though, he volunteered to state that he had signed the same and sent it to defendant No.1, who did not return the same. He clearly stated that he had never talked to defendant No.1 regarding the execution of the documents and the whole conversation was with the broker Sh. Sethi (PW-2).

19. In his further cross-examination on 31.5.2002, the plaintiff admitted that as soon as the defendant No.1 came to know that the amount had been deposited, he thereafter returned the money by issuing a cheque of Rs.3,20,000/- in the name of broker Sh. Amarjeet Singh Sethi (PW-2) and volunteered to state that the cheque was sent after four months. He further claimed to be alone in the investment of the property and claimed that PW-2 Mr. Sethi had no interest in this regard. He also goes on to state that when defendant No.1 did not come for the execution of the sale deed upto 31.8.1995 he did not try to write any letter to him and volunteered to state that the broker might have written some letter.

20. The plaintiff after the impleadment of defendant No.3 was called for further cross-examination on 10.11.2010 wherein he admitted that Mr. Grewal was residing in the ground floor of the property and he did not know as to whether his wife was the tenant of the suit property. He however, clearly admitted that banker's cheque of Rs.3,20,000/-had been given by Mr. Grewal. He clearly admits that defendant No.1 had declined the request of Mr. and Dr.(Mrs.) Grewal to sell the property to them. He further goes to state that he of his own decided to record the conversation between himself and the defendant No.1.

21. Now, coming to the evidence of Mr. Sethi, he appeared as PW-2 and in his evidence by way of affidavit has reiterated the contents of the plaint insofar as they relate to him and, therefore, the same need not be referred to in view of the pleadings of the parties extracted in extenso above. However, certain facts which have now come out in the cross-examination of PW-2 may also be noticed.

22. PW-2 has clearly stated that he is no longer doing the business of property dealer after November, 1995 and has joined the legal profession. He worked as a property dealer from 1979 to 1995 and used to receive the clients, who intended to purchase and sell properties. He used to maintain the register/ diary for the said prospective purchasers and sellers. Arjan Singh, PW-1 had contacted him in the first week of June, 1995 for the purchase of the property, but then states that he did not know whether he made an entry of his being an intending purchaser of the said property. Further he goes to state that in March/April, 1995 there was an advertisement in the newspaper for the sale of the suit property wherein there was a reference of the contact person. There was a reference of friend of defendant No.1 who used to reside in Sector 16 Chandigarh whose name or address he did not remember though he met the said contact person in March/April 1995 just after the advertisement. He further states that he did not keep any record of the same. In June, 1995 when PW-1contacted him and also told him that the house in question was for sale, he in turn told him that he already knew about this fact. The contact man according to PW-2 informed him that the demand of defendant No.1 was of Rs. 30,00,000/-. The ground floor

was on rent while the first floor was in occupation of defendant No.1. He did not show this house to any other person. He admitted that he had staff in his office at that time. His employee B.D. Sharma, who was working at the relevant time, has since died. He admitted that he could not produce any record of the said advertisement. He further admitted that he knew Mr. K.S. Grewal prior to the meeting held on 20.6.2015. According to this witness, the plaintiff had intimated in the first week of June, 1995 that he has surplus funds and therefore, he wanted to invest the same in some property. Neither he nor the plaintiff checked the rate of rent of the ground floor portion of the house in question which was under the occupation of the tenant. He did not check either from the owner or from the tenant whether any litigation is going on between them. He also did not check what was the rate of rent of the tenant on the ground floor.

23. In the cross-examination conducted subsequently on 3.1.2003, PW-2 has clearly stated that he was not able to recollect the name of the contact person whom he had contacted after the advertisement of the sale of the house nor could he recollect the house number. He further admitted that he had made no entry regarding the telephone calls made to defendant No.1 and remembered the same orally. He volunteered to state that the written record may have been maintained by the plaintiff PW-1 but he did not check this with the plaintiff. He specifically stated that he had never called the defendant No.1 from his office phone. He specifically states that though he knew Mr. Grewal since long but he did not remember when for the first time he had met him, but states that he knew him prior to 1995, though he had not visited his house prior to 20.6.1995. He further states that he did not know what interest Mr. Grewal had in the deal in question. He goes on to state that neither the plaintiff nor Mr. Grewal, informed him about the same. With respect to the agreement, he had claimed that though he had signed the copy of the agreement and copy thereof but admits that agreement Ex.P-2 does not bear his signatures. He admits that he has no proof of delivery of letter dated 5.2.1995 to defendant No.1 and further states that he did not even try to seek confirmation regarding the delivery of this letter.

24. In his further cross-examination conducted on 11.1.2003, it is specifically stated that the plaintiff neither tried to contact the defendant No.1 in person individually nor wrote any letter to him. He further states that he did not know for how long the recording on the tape recorder was conducted. Further states that the translation of the conversation was done by PW-1 but not in his presence. He has specifically stated that he did not compare the translation filed in the Court with the conversation in the tape recorder. He admits that the parties to the transaction i.e. plaintiff and defendant No.1 came face to face for the first time only on 31.10.1995 and no talk ever took place between the parties before 31.10.1995. He further states that he did not submit the audio tape in the Court nor could he say whether it was the same tape which was alleged to have been recorded on 31.10.1995. He thereafter specifically states that no agreement was finalized between the parties on 31.10.1995 and on the said date he had gone to defendant No.1 to tell him to get NOC for the sale of the house but the defendant No.1 neither gave anything in writing nor confirmed his intention to sell the house.

25. This witness was thereafter cross-examined by defendant No.3 on 10.11.2010 wherein he states that he visited the suit property only after the issuance of advertisement. He further stated that he did not inquire as to in what capacity Mr. Grewal was occupying the part of the suit property. He further states that plaintiff had brought the pay order and deposited the same on 22.6.1995, but today he knows that pay order was in fact prepared from the account of Mr. Grewal. He feigned ignorance regarding the offer made by Mr. Grewal having been turned down by defendant No.1 and also feigned ignorance

regarding another banker's cheque amounting to Rs.3,70,000/-having been prepared by Mr. Grewal from the same bank on the same date. He further states that he did not make any inquiry from the market as to whether the property was free from encumbrances or whether any negotiations for sale of the property were going on earlier or not.

This is the entire evidence led on behalf of the plaintiff.

26. Insofar as the case of defendant No.3 is concerned, he would only succeed if the plaintiff fails to establish his claim. This observation is made on the basis of the decision rendered in this case by the Hon'ble Supreme Court whereby it not only set aside the compromise entered between the defendants herein but further held that defendant No.3 would also not be entitled to the plea of bonafide purchaser for consideration.

27. At this stage, it may be noticed that defendant No.1 has though filed his written statement and has also allegedly filed an amended written statement to the amended plaint, but the same is only signed by the Advocate. However, the defendant No.1 has failed to step into the witness box and subject himself to cross-examination and having been failed to do so, I am left with no other option but to draw an adverse inference against him because it is more than settled that where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross-examined by other side, a presumption would arise that the case set up by him is not correct. (Refer: **Vidhya Dhar** vs**. Manikrao, (1999) 3 SCC 573, Janki** vs. **IndusInd Bank (2005) 2 SCC 217, Man Kaur** vs**. Hartar Singh Sangha, (2010) 10 SCC 512**).

28. Despite an adverse inference having been drawn against defendant No.1, the plaintiff will still have to prove his case and cannot otherwise rely upon the weakness of the defendants. It is more than settled that the plaintiff is bound to prove his case to the satisfaction of the Court and his burden is not lightened merely because the defendant is either absent or does not step into the witness box for stating his case on oath and thereafter affording himself for cross-examination.

29. Here, I may also observe that the onus of proof is on the plaintiff to prove that there was an oral agreement between the plaintiff and the first defendant, which fact cannot be lost sight of while scrutinizing the evidence on record.

30. Mr. Bhogal, learned Senior Counsel assisted by Mr. B.C. Rajput, Advocate, has vehemently argued that the plaintiff has been able to establish on record that there was a concluded contract between the plaintiff and defendant No.1 which was concluded on 20.6.1995 through telephonic (oral) agreement between the broker PW-2 who was acting on behalf of PW-1 and defendant No.1 to accept the plaintiff's offer of Rs.32,00,000/-. This agreement was settled between the parties and in furtherance thereto the terms of the agreement were duly recorded in the written agreement to sell. The earnest money of Rs.3,20,000/- (10%) was deposited in the account of defendant No.1, the number whereof was given over the telephone.

31. According to learned counsel for the plaintiff, the provisions of Sections 3 to 8 of the Indian Contract Act, 1872 establish that the contract was complete on 20.6.1995 when the defendant No.1 accepted the offer/proposal of the plaintiff which was communicated by his agent PW-2 during the telephonic conversation and thereafter the terms as stated above were settled and all these facts have been duly proved not only in the statements of PW-1 and PW-2 but are duly established by a perusal of the letter dated 23.6.1995 Ex.P-1, agreement to sell dated 23.6.1995 Ex.P-2, tape recoding dated

31.10.1995 Ex.P-12, transcript of tape recording Ex. P-13 and admissions made by defendant No.2 in his replication dated 28.5.1998 Ex.PG.

32. At this juncture, it is worthwhile to observe that in order to constitute a valid agreement there should be consensus ad-idem so to say meeting of mind between the contracting parties – plaintiff and the first defendant herein. The core question, therefore, arise as to whether oral agreement between the plaintiff and the first defendant is established by the so called correspondence and telephonic conversation, as canvassed by the plaintiff in this case.

33. In this connection, the cardinal principle to be remembered is that it is the duty of the Court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which would create a binding contract between them. But, the Court is not empowered to create a contract for the parties, unless from the correspondence it unequivocally and clearly emerges that the parties were ad idem to bring into existence a mutually binding contract. The intention of the parties is to be gathered from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence or the telephonic conversation.

34. In ***Mayawanti vs. Kaushalya Devi (1990) 3 SCC 1*** the Hon'ble Supreme Court observed that the burden of proof was on the plaintiff seeking specific performance of the contract that there was a valid and binding contract between the parties in respect of which the party should be consensus ad idem and the opposite party may take any defence available under the law. It is apt to reproduce paras 8 and 19 of the judgment, which reads thus:

> "8. *In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a con- tract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The con- tract being the foundation of the obligation the order of specific performance is to enforce that obligation.*
>
> *19. The jurisdiction of the court in specific performance is discretionary. Fry in his Specific Performance, 6th Edn. P. 19, said:*
>
> > *"There is an observation often made with regard to the jurisdiction in specific performance which remains to be noticed. It is said to be in the discretion of the Court. The meaning of this proposition is not that the Court may arbitrarily or capriciously perform one contract and refuse to perform another, but that the Court has regard to the conduct of the plaintiff and to circumstances outside the contract itself, and that the*

mere fact of the existence of a valid contract is not conclusive in the plaintiff's favour. 'If the defendant', said Plumer V.C., can show any circum- stances dehors, independent of the writing, making it ineq- uitable to interpose for the purpose of a specific perform- ance, a Court of Equity, having satisfactory information upon that subject, will not interpose."

The author goes on to say that of 'the circumstances calling for the exercise of this discretion, "the Court judges by settled and fixed rules; hence the discretion is said to be not arbitrary or capricious but judicial; hence, also, if the contract has been entered into by a competent party, and is unobjectionable in its nature and circumstances, specific performance is as much a matter of course, and therefore of right, as are damages. The mere hardship of the results will not affect the discretion of the court."

35. Similarly, in ***Rickmers Verwaltung GMBH vs. Indian Oil Corporation Ltd. (1999) 1 SCC 1*** the Hon'ble Supreme Court held that even if an agreement was not signed by the parties, but the consensus ad idem could be spelt out from contemporaneous correspondence exchanged between the parties, the Court can construe the correspondence to gather the intention of the parties that emerged unequivocally and clearly from the expressions used therein, meaning the expressions conveyed and how the parties acted. But the Court cannot make out a contract by going beyond the clear language used in the correspondence. It is apt to reproduce paras 13 and 14 of the judgment, which reads thus:

"13. *In this connection the cardinal principle to remember is that it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence.*

14. From a careful perusal of the entire correspondence on the record, we are of the opinion that no concluded bargain had been reached between the parties as the terms of the standby letter of credit and performance guarantee were not accepted by the respective parties. In the absence of acceptance of the standby letter of credit and performance guarantee by the parties, no enforceable agreement could be said to have come into existence. The correspondence exchanged between the parties shows that there is nothing expressly agreed between the parties shows that there is nothing expressly agreed between them and no concluded enforceable and binding agreement come into existence between them. Apart from the correspondence relied upon by the learned single Judge of the High Court, the fax messages exchanged between the parties, referred to above go to show that the parties were only negotiating and had not arrived at any agreement. There is a vast difference

between negotiating a bargain and entering into a binding contract. After negotiation of bargain in the present case, the stage never reached when the negotiations were completed giving rise to a binding contract. The learned single Judge of the High Court was, therefore, perfectly justified in holding that Clause 53 of the Charter Party relating to Arbitration had no existence in the eye of law, because no concluded and binding contract ever came into existence between the parties. The finding recorded by the learned single Judge is based on a proper appreciation of evidence on the record and a correct application of the legal principles. We find no merit in this appeal. It fails and is dismissed with costs."

36. From the evidence available on record, it is clearly established that insofar as the plaintiff is concerned, he never ever even had a talk with defendant No.1 over the telephone despite the fact that he was supposedly the intending purchaser and was also hearing the conversation on the parallel line when the alleged deal was struck.

37. Further, it has come in evidence that the so called earnest money was in fact paid from the account of Mr. Grewal, who in fact was interested in the transaction. The entire evidence goes to show that there was no privity of contract either oral or documentary because even the documentary evidence by way of agreement retained by PW-1 and PW-2, which is alleged to be the photocopy of the agreement sent to defendant No.1 for signatures does not bear any signature of PW-2 though he had claimed to have signed the same.

38. It is also clear that the plaintiff never even talked to defendant No.1 over the telephone prior to 31.10.1995 and, therefore, there was no such meeting of mind between the plaintiff and first defendant at any point of time relating to any oral agreement to sell. The incontrovertible and indubitable fact is that there was no concluded contract of oral agreement to sell between the plaintiff and the first defendant.

39. Another intriguing fact which cannot be ignored is that in case there was a privity of contract between the plaintiff and defendant No.1, then why the defendant No.1 did not appoint a power of attorney to execute the sale deed. That apart, what prevented the plaintiff from contacting the defendant No.1 directly is also not forthcoming.

40. Learned counsel for the plaintiff, at this stage, would seek to invoke the provisions of Section 15 (2) of the Specific Relief Act, to claim that even if Mr. Grewal was interested in the deal, the suit in his absence was still maintainable under Section 15 (2) of the Specific Relief Act, which reads thus:

***"15. Who may obtain specific performance**.—Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by—*

(a) any party thereto;

(b) the representative in interest or the principal, of any party thereto: Provided that where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party;

(c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder;

(d) where the contract has been entered into by a tenant for life in due exercise of a power, the reminderman;

(e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant;

(f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;

(g) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(h) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company:

Provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract."

I am afraid that this contention of the plaintiff cannot be accepted for the simple reason that there is no pleading whatsoever to this effect and moreover Mr. Grewal was perforce introduced in this lis after the defendant No. 3 filed his written statement giving details and mentioning in detail his role in the entire deal.

41. It has also come in evidence that defendant No.1 had returned the so called earnest money to PW-2 and not PW-1. This fact in itself is a clear indicator that there was no concluded contract between the plaintiff and defendant No.1 or else there was no occasion for defendant No.1 to have returned the money, that too, to PW-2.

42. That apart, there are major contradictions in the statements of PW-1 and PW-2 insofar as they relate to their conversation regarding the defendant No.1 coming to India. PW-1 states that he went to PW-2 to enquire when defendant No.1 would be coming to India, whereas PW-2 states that he went to contact PW-1 in order to ascertain when defendant No.1 would be coming to India.

43. At this stage, I may take notice of a very important fact which goes to the root of the case and casts a serious doubt on the plaintiff's case and the same is regarding the letter alleged to have been sent by PW-1 vide Ex.P-9 to defendant No.1 and the envelope containing the endorsement of refusal Ex.P-10, was found to be opened. In such circumstances, I have no doubt in my mind that the letter inside the envelope had been tampered with only to create evidence in support of the plaintiff's case.

44. Once from the correspondence exchanged between the parties, it can be concluded that there was no meeting of mind between them so as to create a binding contract between them, the plaintiff then on the basis of the telephonic conversation is required to establish his case as per the parameters laid down by the Hon'ble Supreme Court in ***Bhagwandas Goverdhandas Kedia vs. M/s Girdharlal Parshottamdas and Co., and others,* AIR 1966 SC 543**, wherein it was held as under:

"5. By a long and uniform course of decisions the rule is well- settled that mere making of an offer does not form part of the cause of action for damages for breach of contract which has resulted from acceptance of the offer: see Baroda Oil Cakes Traders v. Purshottam Narayandas Bagulia and Anr(1). The view to the contrary expressed by a single Judge of the Madras High Court in Sepulchre Brothers v. Sait Khushal Das Jagjivan Das Mehta (2) cannot be accepted as correct.

14. Obviously the draftsman of the Indian Contract Act did not envisage use of the telephone as a means of personal conversation between parties separated in space, and could not have :intended to make any rule in that behalf. The question then is -whether the ordinary rule which regards a contract as completed ,only when acceptance is intimated should apply, or whether the exception engrafted upon the rule in respect of offers and acceptances by post and by telegrams is to be accepted. If regard be had to the essential nature of conversation by telephone, it would be reasonable to hold that the parties being in a sense in the presence of each other, and negotiations are concluded by instantaneous communication of speech, communication of acceptance is a necessary part of the formation of contract, and the exception to the rule imposed on grounds of commercial expediency is inapplicable.

31. It will be seen from the above discussion that there are four -classes of cases which may occur when contracts are made by telephone : (1) where the acceptance is fully heard and understood; (2) where the telephone fails as a machine and the proposer does not hear the acceptor and the acceptor knows that his acceptance has not been transmitted; (3) where owing to some fault at the proposer's end the acceptance is not heard by him and he does not ask the acceptor to repeat his acceptance and the acceptor believes that the acceptance has been communicated; and (4) where the acceptance has not been heard by the proposer and he informs the acceptor about this and asks him to repeat his words. I shall take them one by one.

32. Where the speech is fully heard and understood there is a binding contract and in such a case the only question is as to the place where the contract can be said to be completed. Ours is that kind of a case. When the communication fails and the -acceptance is not heard, and the acceptor knows about it, there (1) (1787) 102 E.R. 1192. (2) G.F. (2nd) 109 C.C.A. 8. (3) 275 S.W. 70 (Tex Civ. App.) 6 7 9 is no contract between the parties at all because communication means an effective communication or a communication reasonable in the circumstances, Parties are not ad idem at all. If a man shouts his acceptance from such a long distance that it cannot possibly be heard by the proposer he cannot claim that he accepted the offer and communicated it to the proposer as required by s. 3 oil our Contract Act. In the third case, the acceptor transmits his acceptance but the same does not reach the, proposer and the proposer does not ask the acceptor to repeat his message. According to Lord Denning the proposer is bound because of his default. As there is no reception at the proposer's end, logically the contract must be held to be complete at the proposer's end. Bringing in considerations of estopped do not solve the problem for us. Under the terms of s. 3 of our Act such communication is good because the acceptor intends to communicate his acceptance and follows a usual and reasonable manner and puts his

acceptance in the course of transmission to the proposer. He does not know that it has not reached. The contract then results in much the same way as in the case of acceptance by letter when the letter is lost and in the place where the acceptance was put in course of transmission. In the fourth case if the acceptor is told by the offeror that his speech cannot be heard there will be no contract because communication must be effective communication and the act of acceptor has not the effect of communication it -and he cannot claim that he acted reasonably.

33. We are really not concerned with the case of a defective machine because the facts here are that the contract was made with the machine working perfectly between the two parties. As it is the proposer who is claimigi that the was complete hi.-, end, s. 4 of our Act must be read because it creates t special rule. It is "a rather peculiar modification of the rule applicable to acceptance by post under the English Comnion law Fortunately the language of s. 4 covers acceptance telephone wireless etc. The section may be quoted at this stage:

> *"4. Communication when complete. The communication of a proposal is complete when it comes to ,he knowledge of the person to whom it is made.*
>
> *The communication of an acceptance is complete, -*
>
> *as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;*
>
> *as against the acceptor, when it comes to the knowledge of the proposer.*
>
> ** ** ** ** **

It will be seen that the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made but a different rule is made about acceptance. Communication of an acceptance is complete in two ways- (1) against the proposer when it is put in the course of transmission to him so as to be out of the Power of the acceptor; and (2) as against the acceptor when it comes to the knowledge of the proposer. The theory of expedition which was explained above has been accepted. Section 5 of the Contract Act next lays down that a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards and an acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards. In the third case in my above analysis this section is bound to furnish difficulties, if we were to accept that the contract Is only complete at the proposer's end.

34. The present is a case in which the proposer is claiming the benefit of the completion of the contract at Ahmedabad. To him the acceptor may say that the communication of the acceptance in so far as he was concerned was complete when he (the acceptor) put his acceptance in the course of transmission to (the proposer) so as to be out of his (the acceptor's) power to recall. It is obvious that the, word of acceptance was spoken at Khamgaon and the moment the acceptor spoke his acceptance hi, put it in course of transmission to the proposer beyond his recall. He could not revoke his acceptance thereafter. It may be that the gap of time was so short that one can say that the speech was heard instantaneously, but if we are to put new

inventions into the frame of our statutory law we are bound to say that the acceptor by speaking into the telephone put his acceptance in the course of transmission to the proposer, however quick the transmission. What may be said in the English Common law, which is capable of being moulded by judicial dicta, we cannot always say under our statutory law because we have to guide ourselves by the language of the statute. It is contended that the communication of an acceptance is complete as against the acceptor when it comes to the knowledge of the proposer but that clause governs cases of acceptance lost through the fault of the acceptor. For example, the acceptor cannot be allowed to say that he shouted his acceptance and communication was complete where noise from an aircraft overhead drowned his words. As against him the communication can only be complete when it comes to the knowledge of the proposer. He must communicate his acceptance reasonably. Such is not the case here. Both sides admit that the acceptance was clearly heard at Ahmedabad. The acceptance was put in the course of transmission at Khamgaon and under the words of our statute I find it difficult to say that the contract was made at Ahmedabad where the acceptance was heard and not at Khamgaon where it was spoken. It is plain that the law was framed at a time when telephones, wireless, Telstar and Early Bird were not contemplated. If time has marched and inventions have made it easy to communicate instantaneously over long distance and the language of our law does not fit the new conditions it can be modified to reject the old principles. But we cannot go against the language by accepting an interpretation given without considering the language of our Act."

45. As observed earlier, the plaintiff himself had never talked to defendant No.1 and till that stage even the earnest money had been paid by Mr. Grewal and not the plaintiff. Furthermore, there is no document to prove on record that PW-2 was in fact the broker acting on behalf of the plaintiff. That apart, even the telephonic conversations no where establishes that there was a meeting of mind between the parties so as to create a binding contract between them. As observed by the Hon'ble Supreme Court, this Court cannot create a contract when none-exist.

46. Now, adverting to the conversation recorded and its transcript, it may be observed that insofar as the transcript of the conversation is concerned, there is no legal proof of the same. PW-1 in his cross-examination has clearly stated that all the documents which he had placed on record as Ex.P-1 to Ex.P-13 were in the file of PW-2 which he had obtained prior to filing of the suit. Insofar as the transcript Ex.P-13 is concerned, none of the witnesses has proved the same. PW-1 claims to have obtained the same from PW-2, whereas PW-2 categorically states in his cross-examination that the translation appearing in Ex.P-13 was done by Arjan Singh but not in his presence.

47. Now, coming to the tape recorded conversation, the same can be discarded on the sole ground that there is no sample recording of the voice of defendant No.1 and in absence thereof, this Court cannot presume that the voice of the so called seller in this case is that of defendant No.1.

48. That apart, the conversation itself leads nowhere as the same does not establish that there was a meeting of mind whereby the parties were ad idem to bring into existence a mutually binding contract.

49. In ***Ram Singh*** vs. ***Col. Ram Singh 1985 Supp SCC 611,*** the Hon'ble Supreme Court laid down that a tape-recorded statement would be admissible in evidence subject to the following conditions:

> *"(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognize his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.*
>
> *(2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence – direct or circumstantial.*
>
> *(3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.*
>
> *(4) The statement must be relevant according to the rules of the Evidence Act.*
>
> *(5) The recorded cassette must be carefully sealed and kept in a safe or official custody.*
>
> *(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances."*

Judged in light of the aforesaid principles, it would be seen that the so called tape-recordings and the transcripts have not been duly proved as per the conditions laid down in the aforesaid case and can therefore be safely discarded.

50. In addition to the aforesaid, once the defendant No.1 has returned the cheque, the contract, if any, would stand repudiated and in such circumstances, the suit seeking specific performance would not be maintainable and it was incumbent upon the plaintiff to have sought declaration to this effect as per the judgment passed by the Hon'ble Supreme Court in ***I.S. Sikandar (dead) by LRs vs. K. Subramani and others (2013) 15 SCC 27*** wherein it was held as under:

> "17. *The said legal contention was seriously contested on behalf of the 5th defendant justifying the finding and reasons recorded by the trial court on the above contentious issue No.3 contending that the trial court on proper appreciation of pleadings and evidence on record has rightly answered in his favour and against the plaintiff. He has further contended that the reply notice dated 16.03.1985 which was issued by the plaintiff shows the delay and inconvenience caused by the plaintiff to the vendors of the 5th defendant. The vendors waited patiently by extending time for registration of the sale deed in respect of the suit schedule property and the plaintiff was called upon by them to get the sale deed executed in his favour by paying the balance sale consideration, but he had avoided the same on one pretext or the other leading to the conclusion that he was not ready and willing to perform his part of contract and therefore they rescinded the contract and executed the sale deed dated 30.05.1985 in favour of the 5th defendant in respect of the suit schedule property.*
>
> *28. In another decision in A. Maria Angelena v. A.G. Balkis Bee (2002) 9 SCC 597, this Court has made observations with reference to the plea that for*

grant of a decree for specific performance would result in serious hardship to the vendor or the subsequent purchaser and that the plaintiff should be compensated in terms of money must be taken at the earliest stage."

Since there is no concluded contract between the plaintiff and defendant No.1, therefore, he cannot be held entitled to recover a sum of Rs.10,00,000/- as damages as claimed. Moreover, a sum of Rs.3,20,000/- has already been returned to him, therefore, he cannot claim any interest on the same. Accordingly, issues No. 1, 2, 3, 4 and 5 are decided against the plaintiff.

Issue No. 8:

51. In view of the discussion on the aforesaid issues i.e. issues No. 1, 2, 3, 4 and 5, it can conveniently be held that since there was no concluded contract between the plaintiff and defendant No.1, the plaintiff has no locus standi to file the present suit. Accordingly, this issue is answered in favour of the defendants and against the plaintiff.

Issue No. 13:

52. There is no evidence led by defendant No.3 to prove that the plaintiff had entered into a benami transaction as alleged. Accordingly, this issue is decided against defendant No.3.

Issue No.14:

53. The defendant No.3 has not been able to establish that the instant was a case where special costs ought to be imposed. The mere fact that there is no merit in the claim as set out by the plaintiff would not ipso-facto attract the imposition of special costs as envisaged under Sections 35 and 35-A of the Code of Civil Procedure. Therefore, this issue is answered against defendant No.3.

In view of the issue-wise findings recorded hereinabove, the suit of the plaintiff is dismissed leaving the parties to bear their own costs. Decree sheet be prepared accordingly.

C.S. No. 116 of 2009

54. It is fairly submitted by learned counsel for the plaintiff that he has no subsisting interest in the property and, therefore, in light of the aforesaid submission, the suit is dismissed as not pressed, leaving the parties to bear their own costs. Decree sheet be prepared accordingly.

Civil Revision No. 19 of 2011

55. This revision is directed against the order dated 10.1.2011 passed by the learned Appellate Authority, Shimla under Section 15 (5) of the East Punjab Urban Rent Restriction Act. As the suit filed by the plaintiff being Civil Suit No. 27 of 2008 has been dismissed by the order of the even date, the instant revision petition at his instance is therefore, not maintainable and is accordingly dismissed, leaving the parties to bear their own costs.

****

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

Bhag Singh & anr. .....Appellants.
Versus
Bachni Devi & ors. .....Respondents.

RSA No. 390 of 2003.
Reserved on: 8.9.2015.
Decided on: 9.9.2015.

Indian Succession Act, 1925- Section 63- Plaintiff claimed that he is co-owner in possession of the suit land and the mutation entered on the basis of the Will was incorrect- defendants pleaded that deceased had executed a Will in their favour when deceased was in a sound disposing state of mind - record shows that deceased was aged 97 years at the time of execution of the Will- Will was prepared earlier and was produced before Sub Registrar who refused to register the same- deceased was hard of hearing and his eye sight was weak- Will was registered at Amb- DW-2 was deed writer at Amb and the age of the deceased was mentioned as 78 years in the Will - it was not explained as to why the Will was got registered at Amb instead of at Bangana- no evidence was led to show that beneficiaries were looking after the deceased- beneficiary had actively participated in the execution of the Will- mere registration of the Will does not give rise to presumption that Will was valid- held, that in these circumstances, Will was rightly rejected by the trial Court. (Para-16 to 29)

Cases referred:
Ajit Kumar Maulik vrs. Mukunda Lal Maulik and ors., AIR 1988 Calcutta 196
Bherulal vrs. Ramkunwarbai and others, AIR 1994 M.P. 5
Bhagyawati vs. General Public and others, 1994-2 PLR 649
Khanda Singh and another vrs. Natha Singh and ors., (1994-2) PLR 742,
Vattakam Purath Parambil Ananda Bhai and another vrs. Kanaka Bhai and others, AIR 1995 Kerala 208
Gurdial Kaur and others vrs. Kartar Kaur and others, (1998) 4 SCC 384
Virupakshappa Malleshappa and ors. vrs. Smt. Akkamahadevi and others, AIR 2002 Karnataka 83
Raja Ram Singh vrs. Arjun Singh and another, AIR 2002 Delhi 338,
Gopal Swaroop vrs. Krishna Murari Mangal and others, (2010) 14 SCC 266
Rabindra Nath Mukherjee and another vrs. Panchanan Banerjee (dead) by LRs and others, (1995) 4 SCC 459

For the appellant(s): Mr. Sanjeev Kuthiala, Advocate.
For the respondents: Mr. R.K.Gautam Sr. Advocate, with Mr. Mehar Chand Thakur, Advocate for respondents No. 1 to 4, 6 to 10 & 12.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Additional District Judge, Una, H.P. dated 20.6.2001, passed in Civil Appeal RBT No. 117/2000/95.

2. Key facts, necessary for the adjudication of this regular second appeal are that the predecessor-in-interest of the respondents-plaintiffs, namely, Milkhi Ram (hereinafter referred to as the plaintiffs), had instituted a suit for declaration to the effect that the land measuring 39 kanals 6 marlas, as detailed in the head note of the plaint, entered in Jamabandi for the year 1980-81, situated in Village Behilan, Tika Takoli, Teh. Bangana, Distt. Una, was owned and possessed by him and proforma defendants No. 3 & 4, namely Sh. Nasib Singh and Rattan Chand in equal shares and the appellants-defendants, namely, Bhag Singh and Suram Singh (hereinafter referred to as the defendants), had no right, title or interest in it and mutation entered on the basis of Will dated 18.8.1984 was wrong, baseless, void and ineffective. Palu was the owner of the suit land. He died leaving behind plaintiff and defendants No. 3 & 4, namely, Nasib Singh and Rattan Chand. Palu was an old man, aged about 85 years and was mentally unsound. He never executed any Will in favour of the defendants.

3. The suit was contested by the defendants. According to them, the Will was executed in their favour on 18.8.1984. No fraud or undue influence was ever exercised upon deceased Palu. Defendant No. 3 Nasib Singh also filed the written statement. He has denied the claim of the plaintiffs. Defendant No. 4 Sh. Rattan Chand has supported the claim of the plaintiffs.

4. The replication was filed by the plaintiffs. The learned trial Court framed the issues on 19.6.1989. The suit was decreed vide judgment dated 2.2.1995. The defendants, feeling aggrieved, preferred an appeal against the judgment and decree dated 2.2.1995. The learned Additional District Judge, Una, dismissed the appeal on 20.6.2001. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial question of law on 26.9.2003:

> "Whether the exclusion of some of the natural heirs in the Will and the active participation of the beneficiaries as also the witnesses being residents of another village would be suspicious circumstances to non suit a registered will and deny the beneficiary the right of property accrued on basis of the registered Will made by the testator in favour of the beneficiary?"

6. Mr. Sanjeev Kuthiala, Advocate, for the appellants, on the basis of the substantial question of law framed, has vehemently argued that the Will dated 18.8.1984 was legal and valid. The Will was duly registered. The Will was executed by late Palu in favour of his clients out of love and affection. On the other hand, Mr. R.K.Gautam, Sr. Advocate has supported the judgments and decrees passed by the Courts below.

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

8. The plaintiff Milkhi Ram has appeared as PW-1. He deposed that his father has died. His age was between 85-90 years. Neither he could see nor hear. He was not in sound state of mind. The land was jointly owned by *'Mushtarka'* by three brothers. Palu was residing with them. They were serving him. The land was in their possession.

9. PW-2 Piara Singh has also corroborated the statement of PW-1 Milkhi Ram.

10. PW-3 Rattan Chand deposed that the age of Palu was between 85-90 years. He used to lie on the cot. His eye-sight was weak. He was hard of hearing. He was not in sound state of mind. He was not in a position to execute the Will.

11. PW-5/6/7 Subhash Chand deposed that he was working as document writer, at Bangana. He proved Will Ext. PW-7/A. The marginal witness was Sh. Sudu Ram. He has entered the age of Palu Ram as 97 years. Palu Ram has signed the register. He has read over the contents of the Will to Palu Ram. He after understanding the contents to be true and correct put his thumb impression. It was entered at Sr. No. 114 dated 10.8.1984. Sh. Sudu Ram has deposed that Will dated 10.8.1984 was scribed by Sh. Subhash Chand, document writer. He has put his signatures as marginal witness. The Will was produced before the Tehsildar. The Tehsildar did not register it since Palu Ram was not capable of executing the Will.

12. Defendant Suram Singh has appeared as DW-1. According to him, Will was scribed by the document writer. Palu Ram was in his senses. The contents of the Will were read over and explained to Palu Ram. Thereafter, he after understanding the same to be correct put his thumb impression. It was witnessed by Om Parkash and Kamal Nath. In his cross-examination, he has admitted that he was present at the time of execution of the Will.

13. DW-2 Tara Chand deposed that he has scribed the Will on 18.3.1979. He has read over the contents to Palu Ram. Palu Ram after admitting the contents to be correct put his thumb impression. Palu Ram was in senses. Om Parkash and Kamal Nath have appeared as marginal witnesses. In his cross-examination, he deposed that his grandson was also with him at the time of execution of the Will. He also asked him why Will was not executed at Bangana.

14. DW-3 Om Parkash is the marginal witness. According to him, the Will was executed by Palu Ram in favour of Suram Singh and Bhag Singh. He was in his senses. The contents of the Will were read over to him. He, thereafter put his thumb impression. Thereafter, he and Kamal Nath put their signatures. The Will was produced before the Sub Registrar. He is resident of village Satothar.

15. DW-4 Kamal Nath is also the marginal witness of the Will Ext. D-1. The contents of the Will were read over by the deed writer to Palu Ram. Thereafter, he put his thumb impression over the same. It was registered on 21st.

16. It has come on record that the age of Palu Ram at the time of execution of the Will on 18.8.1984 was 97 years. Earlier also, the Will was prepared on 10.8.1984. It was produced before the Sub Registrar at Bangana. He refused to register the same. Thereafter, Will was got registered at Amb. Palu Ram was hard of hearing. His eye-sight was also weak. DW-2 Tara Chand was deed writer at Amb. DW-3 Om Parkash has admitted that he belongs to village Satothar.

17. PW-5 Subhash Chand has categorically testified that earlier attempt was made to get the Will dated 10.8.1984 registered. However, the Sub Registrar had refused to register the Will. In earlier Will Ext. PW-7/A, the age of Palu Ram was 97 years, however, in Ext. D-1, the age was reduced to 78 years. The defendants have not explained why the Will was got registered at Amb instead of Bangana.

18. Mr. Sanjeev Kuthiala, Advocate, has argued that there is no illegality whereby the land has been bequeathed in favour of the grandsons. The fact of the matter is that in the Will Ext. D-1, three sons of Palu Ram have been excluded. The reason assigned for bequeathing the property in favour of grandsons was that they were looking after him. However, the Courts below have rightly come to the conclusion that no tangible evidence was led by the defendants to prove that they were looking after the deceased Palu Ram. There is no evidence that Palu Ram was residing with them. PW-1 Milkhi Ram has

categorically deposed that Palu Ram was residing with them. It has also come on record that Palu Ram used to stay with granddaughter but he used to come back to his ancestral house. DW-1 Suram Singh has actively participated in the execution of the Will. He has categorically admitted, as noticed hereinabove, that he was present at the time of execution of the Will. He has taken his grandfather to Tehsil Amb and remained there up to 4:00 PM. The presence of Suram Singh was also admitted by Om Parkash and Kamal Nath at the time of execution of Will.

19. The Will Ext. PW-7/A was scribed in favour of sons of Bhag Singh and Suram Singh and later on it was scribed in favour of Bhag Singh and Suram Singh. Palu has died in the house of Naseeb Singh. Bhag Singh and Suram Singh were residing separately at Village Bhelian. In view of what has been stated hereinabove, is that natural heirs i.e. three sons of Palu Ram could not be excluded. The mere registration of the Will does not make it valid when the other suspicious circumstances have not been removed by the propounders of the Will. The attesting witnesses of Will Ext. D-1 were not from the same village. This circumstance will go against the defendants for the simple reason that earlier attempt was made to get the Will registered at Bangana but the same was returned and thereafter, it was presented before the Registrar at Amb.

20. The Division Bench of the Calcutta High Court in the case of ***Ajit Kumar Maulik vrs. Mukunda Lal Maulik and ors.,*** reported in ***AIR 1988 Calcutta 196,*** has held that onus of proving a Will is on the propounder and where there are suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the Will could be accepted as genuine. It has been held as follows:

> "7. The learned Additional District Judge has properly discussed the principles to be followed for proving a Will. The onus of proving a will is on the propounder. In the absence of suspicious circumstances surrounding the execution of the Will, the proof of testamentary capacity and the signature of the testator, as required by law, are sufficient to discharge the onus. As stated by the learned Additional District Judge, where there are suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court before the Will could be accepted as genuine. The meaning of the term, "onusprobandi", is that if no evidence is given by the party on whom burden is cast, the issue must be found against him, Onus as a determining factor of a case can only arise if the evidence pro and, con is so evenly balanced that no conclusion' can be derived therefrom. In such a case, onus will determine the matter. But if a tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it and need not be further considered (Harmes v. Hinkson, AIR 1946 PC 156). The "onus probandi is generally discharged by proof of capacity and the factum of execution, from which knowledge and assent to its contents by the testator will be assumed. Once it is proved that a Will has been executed with due solemnity by a person of competent understanding and apparently a free agent, the onus probandi is to be taken to be discharged (Gomtibai v. Kanchhedilal AIR 1949 PC 272). In the present case, there is no dispute about the testamentary capacity of the testatrix, who that on 5-6-59 after executing the Will on 24-4-50 and herself presenting it for registration on 13-2-52. It is no doubt true that the mere fact that the will is registered will not by itself be sufficient to displace any suspicion regarding it, without submitting the evidence of registration to a close scrutiny. In the present case, the endorsement on the back of the will in the office of the

> Registrar does not show that the contents of the document, of which the testatrix was admitting execution, were brought home to the testatrix. In the circumstances, on the basis of mere registration of the Will, the Will cannot be pronounced as valid Purnima Debi v. Khagendra Narayan, ; Anath Nath Das v. Bijali Bala, . The mere ability to sign one's name does not also necessarily imply the validity of a Will. The testator must have a disposing mind. He must be able to dispose of his property with understanding and reason. He must be able to appreciate his property and to form a judgment with respect to the parties whom he chose to benefit by it after death Surendra Krishna Mondal v. Smt. Ranee Dassi 24 Cal WN 860 : (AIR 1921 Cal 677)]. We have already shown the various provisions of the Will. The evidences of P.W. 1 and D.W. 1 show that D.W. 1, the respondent 1, served if a Military Audit Department and retired in 1962 and is still now drawing pension. D .W. 1 has stated that the respondent 2, Provat, retired about 10 years ago from service. He admits that his brother, Sailen, is unemployed and that his youngest brother, the plaintiff, suffered from glandular T.B. It is in the evidence of P.W. 1 that Sailen was unemployed and was totally dependent on them and their mother. It is in his evidence that in 1939 Sailen married and that in 1947 a daughter was born to Sailen. The evidence of P.W. 1 further shows that though he is a graduate, he suffered from glandular T.B. for 12 years, and that it was detected in 1939. In these circumstances, the Will is not at all unnatural or unreasonable or unfair, having regard to the claims of affection on each son of the mother and their respective positions in life when the Will was executed. By making the Will, the testatrix was only making the "provision for future maintenance of the appellant and Sailen, both of whom had to be maintained by her husband and thereafter by her and had no other means for maintenance after her death. As the Will is to be presumed to be duly executed and attested, on the basis of the presumption under Section 90 of the Evidence Act and has been proved to have been duly executed and attested on the basis of the evidence of P.W. 2, the onus probandi has been sufficiently discharged by the appellant, specially when D.W. 1 has no knowledge about the execution of any Will by his mother. These glaring facts were overlooked by the learned Judge in the court below."

21. The learned Single Judge of the M.P. High Court in the case of ***Bherulal vrs. Ramkunwarbai and others,*** reported in ***AIR 1994 M.P. 5,*** has held that the registration is not proof of due execution of Will. The propounder is required to show that Will was signed by testator and he at that time was in a sound disposing state of mind. It has been held as follows:

> "14. As seen, one of the factors to be proved is that the testator at the relevant time was in a sound and disposing state of mind. On this aspect, I find that no proof is offered. It is apt to remember that mere registration is no proof that the will was duly executed as non-registration itself would not ipso facto tell against its genuineness. Is is thus clear that the trial Court has gone wrong in assuming and presuming merely by registration that "Motilal must have executed it". This is how vitiation begins. And again it was totally overlooked that how DW 2 Ramsahai could depose about so-called pesonal acknowledge ment after such a long lapse of time when such a fact is not endorsed on the document itself. The time factor is to be borne in

mind. This may easily consign one to the state of paramnesia. It is hazardous to place implicit faith on such a witness whose version, to say the least, appeared to be apocryphal.

19. As noted, the propounder is required to show by satisfactory and sufficient evidence that the will was signed by the testator, that at that time he was in a sound and disposing mind and that he understood the nature and effect of the disposition and put signature of his own free will. The case on hand contains no evidence except cryptic portion of so-called personal acknowledgment deposed to by a chance witness. His evidence is found to be untrustworthy and undependable.

24. In the circumstances, differing from the findings recorded by the trial Court, I hold that the propounder has failed to prove the execution and authenticity by sufficient and legal evidence and reverse the findings on issues No. 4(a) and (b). In this view of the matter, I consider it unnecessary to allow I.A. No. 2619/91 moved under Order 41, Rule 27 of the Code, and accordingly I reject the same. The question of adoption was not pressed before me. Hence, I leave the findings on issue Nos. 1(a), (b) and 2 undisturbed. The finding on issue No. 2 ipso facto perished on invalidity of the will. It is also unnecessary to deal with other points when the will itself is held to be null and void. Rights are regulated by natural succession as per personal law. The authorities relied upon by respondents are not applicable here."

22. The Division Bench of Punjab and Haryana High Court in ***Smt. Bhagyawati*** vs. ***General Public and others,*** 1994-2 PLR 649 has laid down the principles of holding proper execution of the "will" as under:

"19. From the judicial verdicts noted in this judgment and various other pronouncements relied upon by the counsel for the parties, the position which emerges for holding proper execution of the Will is that :--(a) the testator must have a disposing mind free from all extraneous influences with sound mental mind; (b) the testator is presumed to be sane having a mental capacity to make a valid Will until contrary is proved; (c) the Will should be executed in accordance with the provisions of the Act as incorporated in Section 63 of the Act read with Sections 67 and 68 of the Evidence Act. In other words, the testator should have signed or affixed his mark to the Will in the presence of the two witnesses who are required to see the testator signing or affixing his mark on the Will and each of the witnesses should sign the Will in the presence of the testator; (d) the onus of proof of the Will is on the propounder or beneficiary of the Will; (e) the existence of suspicious circumstances make the onus of proof very heavy and such circumstances are required to be removed by the propounder before the document is accepted as a last Will of the testator; (f) the mode of proving the Will does not ordinarily differ from that of proving any other document except the special circumstances as incorporated in Section 63 of the Act; and in order to ascertain the free disposing mind free from extraneous considerations, the whole of the attending circumstances in a particular case are required to be taken note of."

23. The learned Single Judge of the Punjab and Haryana High Court in the case of ***Khanda Singh and another vrs. Natha Singh and ors.,*** reported in ***(1994-2) PLR 742,*** has held that registration of Will itself is not sufficient to prove the sound disposing mind of the testator. The learned Single Judge has further held that it is for the propounder to bring

on record that testator had no love and affection for the plaintiff. It has been held as follows:

> "7. Exh. D-l is the Will on the basis of which defendants No. 2 and 3 claim that they have become absolute owners of the property of Jaswant Singh, owner. The WilMl alleged to have from executed on 4.10.1978. Tes tator died on 5.10.1978, ie within few hours of the execution of the Will. Will is in favour of Makhan Singh and Darshan sons of Khanda Singh who is the real nephew of testator, Jaswant Singh. Plaintiffs are the nephews of Jaswant Singh, being the sons of Kundha Singh. In the absence of Will, plaintiffs would have succeeded to the property of Jaswant Singh, along with Kundha Singh. It was for the propounders to bring on record that Jaswant Singh had no love and affection for the plaintiffs. No evidence to that effect has been brought on record by the propounders. No reasons find mention in the Will for excluding the plaintiffs. Apart from this, propounders have failed to dispel the other suspicious circumstances surrounding the execution of the Will. According to Gurdev Singh, D.W. 2, Jaswant Singh was lying admitted in the clinic of one Dr. Nagpal two-three days prior to the execution of the Will. Further, according to him, he took Jaswant Singh from clinic to Bhatinda in his own car and dropped him back after the execution of the Will, whereas Jangir Singh, DW-3, has not corroborated the statement of DW-2, Gurdev Singh. According to Jangir Singh (DW-3), Jaswant Singh, testator, and Gurdev Singh had gone to Bhatinda enroute his house, where they left for Bhatinda by train. Both of them in their statements have stated that Jaswant Singh died two-three days after the execution of the Will, whereas it now stands admitted that Jaswant Singh died a few hours after the execution of the Will. Gurdev Singh, DW-2, has also stated that Dr. Nagpal had declared Jas want Singh's case to be hopeless one and, for that matter, he was removed to the village where he died. This part of the statement is indicative of the fact that condition of Jaswant Singh, a day prior to his death was very critical and the doctor had lost all hopes of his recovery. It was for this reason that he was sent back to his village where he died in the early hours of the morning. Dr. Nagpal who treated him during his illness before his death was not examined. In the facts and circumstances of this case, it was clearly incumbent upon the present appellants to prove that at the time of execution of the Will, the testator was in a sound mental health and thus, knew, understood and approved the contents of the Will. Appellants in this case have failed to discharge the burden and satisfy the conscience of the Court by proving that the testator had a sound disposing mind at the time of execution of the Will. Registration of a Will itself is not sufficient to prover the sound disposing mind of the testator. The mere fact that the Will is registered one, is not enough to hold that the Will was duly executed. It is not unknown that registration may take place without executant really knowing what he was registering. Before the document could be accepted as the last Will of the testator, the propounders were required to dispel each and every suspicious circumstances surrounding the execution of the Will. In the present case. I am satisfied that the Courts below have rightly concluded that the Will, Exh. D-1, is not proved to be a genuine Will executed by Jaswant Singh in favour of defendants No. 2 and 3 with a free disposing mind."

24. The learned Single Judge of the Kerala High Court in the case of ***Vattakam Purath Parambil Ananda Bhai and another vrs. Kanaka Bhai and others,*** reported in ***AIR 1995 Kerala 208,*** has held that mere registration of Will does not give rise to presumption of its genuineness. It has been held as follows:

> "4. Merely because a Will is registered its genuineness cannot be presumed. Registration of a Will does not change the onus of proof from its propounder to the challenger. Whether a Will is registered or not, it is for the propounder to establish by reliable evidence that the Will was signed by the testator, that he at the relevant time was in a sound and disposing state of mind and that he fully realised the nature and effect of the disposition and signed it on his own free will. As the burden is heavily upon the propounder to prove the Will he cannot adopt the stand that the registration of the Will itself is a circumstance to dispel any suspicious circumstance. When the genuineness of the Will is challenged the propounder has necessarily to substantiate his case regarding its genuineness even in a case where it is registered. At best registration of a Will though not required by law is only a piece of evidence of the execution. But it cannot have greater sanctity.
>
> Both the courts below, on appraisal of evidence, held that Ext. B1 Will is not genuine. That being a finding of fact this Court cannot interfere in the Second Appeal. The appeal is dismissed. No costs."

25. Their lordships of the Hon'ble Supreme Court in the case of ***Gurdial Kaur and others vrs. Kartar Kaur and others,*** reported in ***(1998) 4 SCC 384,*** have held that the conscience of the Court must be satisfied that the Will in question was not only executed and attested in the manner required under the Indian Succession Act, 1925 but it should also be found that the said Will was the product of the free volition of the executant who had voluntarily executed the same after knowing and understanding the contents of the Will. Their lordships have further held that whenever there is any suspicious circumstance, the obligation is cast on the propounder of the Will to dispel suspicious circumstance. It has been held as follows:

> "4. The law is well settled that the conscience of the Court must be satisfied that the will in question was not only executed and attested in the manner required under the Indian Succession Act, 1925 but it should also be found that the said will was the product of the free volition of the executant who had voluntarily executed the same after knowing and understanding the contents of the will. Therefore, whenever there is any suspicious circumstance, the obligation is cast on the propounder of the will to dispel suspicous circumstance. As in the facts and circumstances of the case, the Court of Appeal below did not accept the valid execution of the will by indicating reasons and coming to a specific finding that suspicion had not been dispelled to the satisfaction of the Court and such finding of the Court of Appeal below has also has been upheld by the High Court by the impugned judgement, we do not find any reason to interfere with such decision. This appeal, therefore, fails and is dismissed without any order as to costs."

26. The Division Bench of the Karnataka High Court in the case of ***Virupakshappa Malleshappa and ors. vrs. Smt. Akkamahadevi and others,*** reported in ***AIR 2002 Karnataka 83,*** has held that when the testator had excluded his wife and children from inheritance and preferred his brother and there was no evidence to show that

brother and his children had shown greater love and affection to testator as against his wife and children, the Will would be surrounded by suspicious circumstances. It has been held as follows:

> "9. The Trial Court has assigned mainly three reasons to hold that the first defendant has not proved the Will. Firstly, on a careful consideration and appreciation of the evidence of D.W. 2, who was the attesting witness to the Will, it has taken the view that his evidence cannot be accepted to prove the Will. Secondly, the Trial Court has taken into consideration the suspicious circumstances manifest in the Will. Thirdly, the Trial Court has taken the view that since D.W. 2 in his evidence, has not stated that the attesting witnesses had signed the Will in the presence of the testator of the Will, the requirement of law that the attesting witnesses must sign in the presence of the testator having not been satisfied, it must be held that the Will is not proved. On careful reappraisal of the evidence on record by us, we have no reason to differ from the first of the two reasons assigned by the Trial Court referred to above, to take the view that the first defendant has failed to prove the Will. But we are unable to accept the third reason assigned by the Trial Court as a valid ground to reject the Will in the light of the evidence of D.W. 2. However, merely because the third reason referred to above assigned by the Trial Court, is not a valid reason, by that itself it is not possible to take the view that the finding recorded by the Trial Court that the first defendant had failed to prove the Will requires to be nullified. As noticed by us earlier, the Trial Court, on close examination and scrutiny of the evidence of D.W. 2, has taken the view that his evidence cannot be accepted to come to the conclusion that deceased Siddaramappa had executed Will, Exhibit D. 11 as claimed by him. In paragraph 15 of the judgment, the Trial Court has carefully analysed the evidence of D.W. 2. We are in total agreement with the reasons assigned by the Trial Court to reject the evidence of D.W. 2. As rightly pointed out by the Trial Court, D.W. 2 has admitted in his evidence that on the date of the execution of the Will, he was about 46 years younger in age to the testator of the Will, late Siddaramappa. Further, even according to D.W. 2, at no point of time, Siddaramappa had asked him to act as an elder either in the affairs of his family or business; and it is only for the first time on the date of the execution of the Will, casually he met D.W. 2 who was standing in front of his shop and asked him to come to his mill at 2.00 p.m. D.W. 2 does not even state that they had any discussion at that time about the intention of Siddaramappa executing the Will and D.W. 2 being required to sign the Will as an attesting witness to the Will. D.W. 2 has further admitted in his evidence that there are other elderly persons who are more closely connected with the said Siddaramappa; D.W. 2 was not his close friend; and D.W. 2 was known to Siddaramappa since he was also a businessman like Siddaramappa, and was also related to him. In the chief examination, D.W. 2 has stated that "when he went to oil mill, the Will was being written", and after the Will was written, "Siddaramappa went through the Will"; and after going through the Will, "Siddaramappa affixed his signature to the Will". However, in the cross-examination, D.W. 2 has stated that "the writing of the Will started after he "went to the oil mill"; and after he went to the mill, Siddaramappa started narrating the contents of the Will and the same was reduced into writing by Thotappa. This inconsistency, in our view, is sufficient to reject the evidence of D.W. 1. The timing of the

writing of the Will; the signing of the Will by the testator and the attesting witnesses signing the Will are very crucial factors. Normally, if the attesting witness is a truthful witness, there cannot be any inconsistency with regard to these facts. Further, the evidence of D.W. 2 also would clearly indicate that he would not have been the natural choice of deceased Siddaramappa to pick him up as the attesting witness and take him into confidence for the purpose of executing the Will, especially when he is excluding his wife and children from inheriting his properties. The consequence of disclosure of such a Will to his wife and children by D.W. 2 would be serious and it would have driven Siddaramappa of incurring displeasure of his wife and children also or alienating their affection and warmth. Admittedly, late Siddaramappa and his wife and children had mutual affection for each other. D.W. 2 has admitted in his evidence that he and the 4th defendant-Basavaraj were friends. D.W. 2 has also admitted that Siddaramappa had friends of his own age and he had acquaintance with many people. When Siddaramappa intended that his properties should go to the first defendant, who is admittedly having half share in the joint family properties along with him excluding his wife and children who are the natural heirs to succeed to his properties, in our view, he would have taken care to take the assistance of his close associates who could be taken into confidence. Though there is no bar that an youngster like D.W. 2, who is not closely associated with the said Siddaramappa to be an attesting witness to the Will, as rightly pointed out by the Trial Court, the normal conduct of a person would be to take the assistance of a confident of the testator of the Wilt as the assisting witness. Further, as noticed by us earlier, the inconsistency in the evidence of D.W. 2 with regard to the crucial facts relating to the time of the writing of the Will makes the version of D.W. 2 highly doubtful and unreliable. In our view, if D.W. 2 was actually present at the time of preparation of the Will, there cannot be two versions, at one stage saying that when he went to the oil mill, the Will was being written; and at another saying, that the writing of the Will started after he went to the mill. No doubt, the other attesting witness Sangappa Pampanashettar, according to D.W. 2, had expired 15 days prior to the date of his giving evidence i.e., 17-6-1994. D.W. 1 was examined on 3rd December, 1993. It is not known why steps were not taken to examine Sangappa Pampanashettar immediately after the completion of the evidence of D.W. 1. Further, the scribe of the Will one Thotappa has not been examined. No explanation has been offered for his non-examination. Neither D.W. 1 nor D.W. 2, in their evidence, explained as to why the said Thotappa was not examined. In our view, examination of Thotappa was very important for reasons more than one. The execution of the Will was seriously disputed by the plaintiff. The Will, prima facie, is surrounded by suspicious circumstances. It had not seen the light of the day till the date of filing of the suit. It excludes the wife and children of the testator of the Will from inheriting his properties though they are Class 1 heirs and he had all love and affection for them. The other attesting witness was not available to be examined as he had died before the conclusion of the trial of the suit. In Exhibit D. 4, the age of Sid-daramappa was mentioned as '34' but it is admitted by both D.W. 1 and D.W. 2 that he was more than 70 years on the date of the execution of the Will. The scribe of the Will would have been the best person to explain the discrepancy in the age of Siddaramappa referred

to in Will, Exhibit D. 11. We are of the view that in a matter like this, having regard to the facts and circumstances of the case, the non- examination of the scribe of the Will the aforesaid Thotappa casts a serious doubt with regard to the case set up by the first defendant about the execution of the Will by late Siddaramappa. We are of the view that Thotappa, who is stated to have written the Will, was not examined by the first defendant either for the fear of contradictions in the evidence of the said Thotappa and the evidence of D.W. 1 being placed before the Court and on the ground that the falsity of the case as set up by the first defendant being exposed, or on the ground that the said Thotappa was not ready and willing to give a false evidence before the Court. Further, if the evidence of D.W. 1 is also appreciated along with the suspicious circumstances shrouding the Will, we have no hesitation to take the view that the version of D.W. 2 that Siddaramappa had executed the Will in his presence, cannot be accepted as true. Both D.W. 1 and D.W. 2, in their evidence, have admitted that late Siddaramappa had lot of love and affection for his wife and children. P.W. 1 also has stated that her father had lot of love and affection for his children and he intended to give properties to them. Admittedly, the 6th defendant, who is one other daughter of Siddaramappa and who is deserted by her husband, was living in the joint family along with Siddaramappa, her mother and defendants 1 to 3 with her young children. This indicates that Siddaramappa was taking care of his daughter and her children, who were not looked after well by her husband. The wife of Siddaramappa was comparatively old in age. Under these circumstances, it is not the normal human conduct for any husband, father or grandfather to exclude his wife who is of advanced age and the daughter and her children, who are not taken care of by her husband, to leave them to the mercy of his younger brother and his son-in-law who is appointed as the executor of the Will. Further, we cannot overlook the fact that the son-in-law of the first defendant, was not only appointed as the executor of the Will, but was also given the right to manage the properties along with the first defendant. There is no explanation offered as to what prompted Siddaramappa to execute the Will, Exhibit D. 11 ignoring his wife and children. It is not as if the first defendant and his children are in financial need and they have shown greater love and affection to Siddaramappa as against his wife and children. When the first defendant and his children have half share in the joint family properties, it is not possible to believe that late Siddaramappa would have given his share also to the first defendant by making a provision for payment of only Rs. 20,000/- to the second plaintiff and at the rate of Rs. 2,000/- per month to his wife with the right of residence on the southern half portion of the house to her and with further instructions to the first defendant to educate the children of the 6th defendant and get them married. There is no charge created on the property to protect the interest of his wife and also the 6th defendant and her children who are required to be educated and married. According to the contents of the Will, the first plaintiff was given agricultural lands at Daroji Village. P.W. 2, in her evidence, has stated that no agricultural property situated at Daroji was given to her. The defendants have not placed any evidence to show that the first plaintiff was given any agricultural properties situated at Daroji Village. If, as a matter of fact, some agricultural property was given as recited in the Will, it would not have been

difficult for the first defendant to place documentary evidence before the Court. Therefore, we will have to proceed on the basis that the recital in Will, Exhibit D. 11 that agricultural land situated at Daroji Village were given to the first plaintiff, is false. Can it be expected that a father who had not given any property to the first plaintiff, would recite in the Will stating that he has given some properties to her, especially when he had all the love and affection to his daughter, to give scope to his daughter to develop a feeling that her father has lied. Therefore, we have every reason to think that the recital in the Will that some agricultural properties of Daroji Village were given to the first plaintiff was deliberately made to explain as to why she was being excluded from giving any property by late Siddaramappa. Further, it is also necessary to state that when there is no dispute between Siddaramappa and his children and two of his sons-in-law i.e., the husbands of the plaintiffs, we are also not able to understand as to why he would prefer the 4th defendant to appoint him as the executor of the Will and give him the right to manage the joint family properties along with his brother, the first defendant. The recitals in the Will that the 4th defendant was entitled to manage the properties along with the first defendant is indicative of the fact that he is the brain behind in getting the Will prepared as a defence to the suit filed seeking partition and in that effort, he has taken the assistance of D.W. 2, who is his friend. We also find that there is no merit in the submission of the learned Counsel for the appellants made relying upon the judgment of the Supreme Court in the case of Beni Chand, supra, to the effect that the exclusion of the wife and children from the Will does not create any doubt about the genuineness of the Will. The decision of the Hon'ble Supreme Court in the case of Beni Chand, supra, purely based on the facts of that case where there was serious difference of opinion between the mother and the son and in those circumstances, the Hon'ble Supreme Court took the view that merely because the son was excluded by the mother, is not a ground to cast suspicion on the genuineness of the Will. In this connection, it is useful to refer to the observation made by the Supreme Court in the said decision, which reads as follows:

> "Son is excluded by mother as his behaviour was far too unfilial and remorseless, for him, to find a place in the affections of his mother".

In our view, the principle laid down by the Hon'ble Supreme Court in the decision relied upon by the learned Counsel for the appellants is of no assistance to her. Therefore, on careful consideration of the evidence of D.W. 2 and the suspicious circumstances surrounding the Wilt, we are fully satisfied that Will, Exhibit D. 11 is a got up document and it is not the last Will of late Siddaramappa. Therefore, the Trial Court did not rightly act upon the Will put forward by the defendants."

27. The Division Bench of the Delhi High Court in the case of ***Raja Ram Singh vrs. Arjun Singh and another,*** reported in ***AIR 2002 Delhi 338,*** has held that when the plaintiff was only beneficiary and has undertaken active part in execution of Will as he himself had called attesting witnesses and was himself present when they attested the Will, it will amount to suspicious circumstance. It has been held as follows:

> "15. For the reasons stated above the only conclusion which can be arrived at is that the Will allegedly executed by late Ram Richhpal Ex. P11 is not a

genuine Will. It could not have been executed by Ram Richhpal on 24th March, 1963 nor he could have bequeathed the entire house in favor of appellant."

28. Their lordships of the Hon'ble Supreme Court in the case of ***Gopal Swaroop vrs. Krishna Murari Mangal and others,*** reported in ***(2010) 14 SCC 266,*** have held that careful analysis of provisions of Section 63 of the Succession Act, 1925 would show that the proof of execution of Will would require the following aspects to be proved:

> " 17. A careful analysis of the provisions of Section 63 would show that proof of execution of a Will would require the following aspects to be proved:
>
> (1) That the Testator has signed or affixed his mark to the Will or the Will has been signed by some other person in the presence and under the direction of the Testator. (2) The signature or mark of the Testator or the signature of the persons signing for him is so placed has to appear that the same was intended thereby to give effect to the writing as a Will.
>
> (3) That the Will has been attested by two or more witnesses each one of whom has signed or affixed his mark to the Will or has been seen by some other person signing the Will in the presence and by the direction of the Testator or has received from Testator a personal acknowledgement of the signature or mark or the signature of each other person.
>
> (4) That each of the witnesses has singed the Will in the presence of the Testator.
>
> 18. The decisions of this Court in Bhagwan Kaur W/o Bachan Singh v. Kartar Kaur W/o Bachan Singh & Ors. 1994 (5) SCC 135, Seth Beni Chand (since dead) now by L.Rs. v. Smt. Kamla Kunwar and Ors. 1976 (4) SCC 554, Janki Narayan Bhoir v. Narayan Namdeo Kadam 2003 (2) SCC 91,Gurdev Kaur and Ors. v. Kaki and Ors. 2007 (1) SCC 546, Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and Ors., 2009 (4) SCC 780, Rur Singh (dead) Through LRs. and Ors. v.Bachan Kaur, 2009 (11) SCC 1 and Anil Kak v. Kumari Sharada Raje and Ors. 2008 (7) SCC 695 recognize and reiterate the requirements enumerated above to be essential for the proof of execution of an unprivileged Will like the one at hand. It is, therefore, not necessary to burden this judgment by a detailed reference of the facts relevant to each one of these pronouncements and the precise contention that was urged and determined in those cases. All that needs to be examined is whether the requirements stipulated in Section 63 and distinctively enumerated above have been satisfied in the instant case by the appellant propounder of the Will."

29. Mr. Sanjeev Kuthiala, Advocate, has relied upon the judgment of the Hon'ble Supreme Court in the case of ***Rabindra Nath Mukherjee and another vrs. Panchanan Banerjee (dead) by LRs and others,*** reported in ***(1995) 4 SCC 459.*** In the instant case, the natural heirs have been excluded and the Will has also not been proved in accordance with law. The marginal witnesses have not stated that the testator had put his thumb impression and thereafter they have signed the Will as marginal witnesses. The substantial question of law is answered accordingly.

30. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any. The judgments and decrees passed by both the Courts below are affirmed.

****

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

Bhavak Parasher .....Petitioner.

Versus

State of H.P. & ors. .....Respondent.

CWP No. 2718 of 2015.
Reserved on: 2.9.2015
Decided on: 9.9.2015.

Constitution of India, 1950- Article 226- Petitioner filed an application seeking licence of revolver- nothing adverse was found against him by the police or local pardhan- subsequently, 'S' sent a report stating that a case was registered against the petitioner under Section 325/34 of IPC- the application of the petitioner was rejected- earlier police had no objection for issuance of the licence and it was specifically stated that petitioner had good moral character- son of the petitioner was murdered and FIR was registered regarding the same- petitioner was not prohibited by the Act or by any other law from acquiring any arms or ammunition – there was no issue of public peace or public safety involved in the case- ADM had taken the guidance from the State Government and had abdicated his power to the State- there is a property dispute between the petitioner and his brother-in-law- therefore, it can be safely said that there was threat to his life - authorities cannot refuse to issue the licence on the ground of registration of a case against the petitioner - where a person has committed heinous crime, licence can be refused to him- writ petition allowed and respondent No. 5 directed to issue the licence in favour of the petitioner. (Para-4 to 32)

Cases referred:

State of U.P. through Secy. Home Dept. Lucknow and ors. Vrs. Jaswant Singh Sarna, AIR 1968 Allahabad 383

K.S.Abdulla vrs. District Collector and ors., AIR 1972 Kerala 202

Nripendra Narayan Roy vrs. The State of Bihar and ors., 1975 Cri. L.J. 572

Raj Prakash Varshney vrs. Addl. District Magistrate, New Delhi and ors,. AIR 1978 Delhi 17

Bharti Singh vrs. State of Bihar and ors., AIR 1982 Patna 111,

Amrik Chand Saluja vrs. State of M.P. and ors, 1991 Cri. L.J. 1314

C. Sam Joseph Raj vrs. District Revenue Officer and Addl. Distt. Magistrate, Nagercoil and another 1998 Cri.L.J. 3152

B. Ganesh Prasad vrs. Board of Revenue (LR), Thiruvananthapuram and another, 2005 Cri.L.J. 3178

Commissioner of Police, Bombay vrs. Gordhandas Bhanji, AIR (39) 1952 SC 16,

State of Punjab and another vrs. Suraj Parkash Kapur etc., AIR 1963 SC 507,

The State of Punjab and another vrs. Hari Kishan Sharma AIR 1966 SC 1081,

Chandrika Jha vrs. State of Bihar and ors., AIR 1984 SC 322

For the petitioner: Mr. Ranjan Lakhanpal, Advocate.
For the respondents: Mr. P.M.Negi, Dy. AG for the State.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner filed an application before the Addl. District Magistrate, Una, seeking licence of revolver vide Annexure P-2 on 20.10.2014. The Superintendent of Police, Una, sent the report to the Addl. District Magistrate, Una on 11.11.2014. According to the contents of the report, there was nothing adverse against the petitioner in the police report and there was no specific threat to him. According to the report of the Pradhan, Gram Panchayat Ambota, the petitioner bore a good moral character. It was also specifically stated therein that local police had no objection if arms licence is issued to the petitioner, as per the rules and instructions. Thereafter, the Superintendent of Police, Una, sent the second report to Addl. District Magistrate, Una on 8.12.2014 stating therein that a case has been registered against the petitioner vide FIR No. 273/14 dated 19.9.2014 under Section 325/34 IPC. The matter was under investigation. There was no specific threat to him. According to the report of the Pradhan, Gram Panchayat, Ambota, the petitioner was residing at Khel Saddan, Indira Ground, Una. Thereafter, the Addl. District Magistrate, Una, sought the guidance from Secretary (Home), to the Government of Himachal Pradesh, vide communication dated 29.12.2014. The case of the petitioner was rejected vide Annexure P-3 dated 4.2.2015. The petitioner was informed by the Addl. District Magistrate, Una, on 3.3.2015 that his case stood rejected in view of FIR registered against him under Section 325/34 IPC.

2. Section 2(d) of the Arms Act, 1959 (hereinafter referred to as the Act), defines “District Magistrate” as under:

> “2(d). "district magistrate", in relation to any area for which a Commissioner of Police has been appointed, means the Commissioner of Police thereof and includes any such Deputy Commissioner of Police, exercising jurisdiction over the whole or any part of such area, as may be specified by the State Government in this behalf in relation to such area or parts;”

3. Section 2(f) of the Act, defines “licensing authority” as under:

> “2 (f) "licensing authority" means an officer or authority empowered to grant or renew licences under rules made under this Act, and includes the Government;”

4. The grant of licences is governed under Section 13 and the refusal of licences is governed under Section 14 of the Act. There is a reference to the communication dated 31.3.2010 sent by the Ministry of Home Affairs to all the Secretaries (Home Department), of all the States/UTs, under the subject; “Grant of Arms Licences for acquisition/possession of arms”. Sub para (ii) of the same reads as under:

> “ii) **Grant of Arms Licence for Non-Prohibited Bore (NPB) weapons.**
>
> The Arms Licences for acquisition of NPB weapons are considered by the State Government/DM concerned. At present, there are no norms for grant of NPB weapons and some State Governments may be issuing arms licences liberally. It has been decided that:-

a) Application for grant of NPB arms licences may be considered from persons who may face or perceive grave and imminent threat to their lives, for which the licensing authority will obtain an assessment of the threat faced by the persons from the police authorities.

b) No licence may be granted without police verification, which will include report on i) antecedents of the applicant, ii) assessment of the threat, iii) capability of the applicant to handle arms, and iv) any other information which the police authority might consider relevant for the grant or refusal of licence. Further that the steps are being taken by Ministry of Home Affairs to delete the proviso to Sec. 13 (2A) of the Arms Act, 1959.

c) The Police authorities may be advised to send the Police report within 45 days positively falling which the Police officials concerned may be liable for action.

d) The licensing authority may call for any information/documents such as Voter ID card, ration card or any other document which it may consider necessary to verify the bonafides of the applicant and to ensure that the applicant resides within its jurisdiction.

e) The licensing authority shall be obliged to take into account the report of police authorities called for under section 13(2) before granting arms licenses and no arms licence may be issued without police verification."

5. The petitioner's son aged 21 years was murdered and FIR No. 260 of 2014, dated 3.9.2014 was registered under Section 302, 341/34 IPC at Police Station Sadar, Una, against one Ram Parkash Singh alias Moni. Cross-FIR was also registered against the petitioner on 19.9.2014 under Section 325/34 IPC at PS Sadar, Una.

6. It is evident from communication dated 11.11.2014 that the police had no objection if arms licence was issued to the petitioner, as per rules and instructions. FIR against the petitioner was registered on 19.9.2014 and communication was addressed by Superintendent of Police to Addl. District Magistrate, Una, on 11.11.2014. It was also specifically stated in the report dated 11.11.2014 that the petitioner had good moral character. However, in communication dated 8.12.2014, there is reference to FIR dated 19.9.2014 bearing No. 273 of 2014 registered against the petitioner under Section 325/34 IPC. The Addl. District Magistrate, Una, has sought the guidance from Secretary (Home), to the Govt. of H.P. vide communication dated 29.12.2014, wherein it is specifically stated that the case of the petitioner could not prima-facie be ignored in view of contention of the petitioner and it requires due consideration. The matter was typical and intricate as apprehension of threat to the life of the petitioner could not be ignored and also the authorities could not ignore the fact that a case was pending against the petitioner under Section 325/34 IPC. There is a reference to communication dated 31st March, 2010. The fact of the matter is that the case of the petitioner was rejected only on the ground that FIR under Section 325/34 IPC was registered against him on 19.9.2014.

7. The petitioner has applied for licence of 32 bore revolver. It is non-prohibited bore. It has also come in the reply filed by respondents No. 1 to 4 that threat assessment had been got done through local police and CID Unit, Una and no specific threat was assessed to the life of the petitioner and threat perception was to be evaluated regularly and

particularly when the court hearings are fixed in the case. The challan was put up in FIR No. 260 of 2014 and the evidence of the prosecution was to be recorded w.e.f. 6.8.2015 to 14.8.2015.

8. The licence is to be issued by the District Magistrate. The licencing authority, as per Section 13, is required to call for the report of the officer in charge of the nearest Police Station on that application, and such officer shall send his report within the prescribed time. The licening authority, after the receipt of such report, subject to other provisions of Chapter III, by order in writing either grant the licence or refuse to grant the same.

9. The grounds on which the licence can be refused are contained in Section 14 of the Act. Section 14 of the Act, reads as under:

> "**14. Refusal of licences**.-(1) Notwithstanding anything in section 13, the licensing authority shall refuse to grant—
>
> (a) a licence under section 3, section 4 or section 5 where such licence is required in respect of any prohibited arms or prohibited ammunition;
>
> (b) a licence in any other case under Chapter II,--
>
> (i) where such licence is required by a person whom the licensing authority has reason to believe—
>
> (1) to be prohibited by this Act or by any other law for the time being in force from acquiring, having in his possession or carrying any arms or ammunition, or
>
> (2) to be of unsound mind, or
>
> (3) to be for any reason unfit for a licence under this Act; or
>
> (ii) where the licensing authority deems it necessary for the security of the public peace or for public safety to refuse to grant such licence.
>
> (2) The licensing authority shall not refuse to grant any licence to any person merely on the ground that such person does not own or possess sufficient property.
>
> (3) Where the licensing authority refuses to grant a licence to any person it shall record in writing the reasons for such refusal and furnish to that person on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement."

10. It is not the case of the respondents that the petitioner was prohibited by the Act or by any other law from acquiring, having in his possession or carrying any arms or ammunition. The petitioner is not of unsound mind. It is not the case of the respondents also that there was issue of public peace or public safety involved in this case. The only ground to refuse the licence to the petitioner is registration of FIR No. 273/2014 dated 19.9.2014 against the petitioner. The police had no-objection to grant the licence to the petitioner on 11.11.2014 but on this date, FIR already stood lodged against the petitioner, however, U-turn was taken by the Superintendent of Police on 8.12.2014 by referring to registration of case against the petitioner under Section 325/34 IPC. The Addl. District Magistrate, Una, has found the case of the petitioner genuine as per the contents of the communication dated 29.12.2014.

11. The Addl. District Magistrate, Una, has committed illegality by seeking guidance from the State Government. He has to take the decision himself. He has abdicated his powers to the State by seeking its guidance. The decision ought to be taken by the District Magistrate, i.e. the licensing authority itself, instead of being guided by the Secretary (Home) to the Govt. of Himachal Pradesh.

12. According to the instructions issued by the Ministry of Home Affairs on 31.3.2010, the application for grant of non-prohibited bore weapon can be considered from persons who may face or perceive grave and imminent threat to their lives for which the licensing authority will obtain an assessment of the threat faced by the persons from the police authorities. The licensing authority may also call for any information/documents, such as voter ID card, ration card or any other document which it may consider necessary to verify the bonafides of the applicant and to ensure that the applicant resides within its jurisdiction. The licensing authority is required to take into consideration the report of the police authorities called for under Section 13(2) of the Act, before granting arms licenses and no arms license has to be issued without police verification. The police has supported the case of the petitioner, as per communication dated 11.11.2014 and even in communication dated 8.12.2014, it has not been said anything against the petitioner except that the case was registered against him.

13. The petitioner has lost his 21 years old son. The challan has already been put up in this case. The petitioner apprehends threat to his life from accused Ram Parkash and his associates, who are the petitioner's brothers-in-law. There is a property dispute between the petitioner and his brothers-in-law. Thus, it can safely be said that there was threat to his life and he has right to protect his life and property. The discretion vested in the licensing authority has to be exercised judiciously and not according to the humour. The power must be exercised bonafide and not in arbitrary and rigid manner. The grounds to refusal, as contained in Section 14 of the Act, are not at all attracted in the present case.

14. The Division Bench of the Allahabad High Court in the case of ***State of U.P. through Secy. Home Dept. Lucknow and ors. Vrs. Jaswant Singh Sarna,*** reported in ***AIR 1968 Allahabad 383,*** has held that licensing authority acts in quasi judicial manner and not in an administrative capacity. It has been held as follows:

> "10. The renewal of a licence can be refused only upon the grounds mentioned in Section 14. It is apparent that there is no express requirement in section 14 requiring the licensing authority to afford a hearing to the applicant before renewal of his licence is refused. The obligation to hear, however, is a necessary concomitant of the power to refuse if the power is quasi-judicial in nature and must he imported in the exercise of the power. It is now generally recognised that while the duty to act judicially may not always be expressly stated in the statute, yet there may be considerations embodied in the statute which give rise to that duty The principle was expounded by the Supreme Court in Board of High School and Intermediate Education U P. v. Ghanshyam Das Gupta, AIR 1962 SC 1110 where it was pointed out:
>
> > 'No one circumstance alone will be determinative of the question whether the authority set up by the statute has the duty to act judicially or not The inference whether the authority acting under a statute where it is silent has the duty to act judicially will depend on the express provisions of the statute read along with the nature of the rights affected, the manner of the disposal provided the effect of

> the decision on the person affected and other in dicta afforded by the statute "
>
> This statement of the law has held the field ever since and has been repeatedly followed by the Courts in India."

15. The learned Single Judge of the Kerala High Court in the case of ***K.S.Abdulla vrs. District Collector and ors.,*** reported in ***AIR 1972 Kerala 202,*** has held that the statutory requirement under Section 14(3) is that the licensing authority shall record in writing the reasons for refusal and this is obligatory. Having regard to the nature of the power entrusted, it is also necessary that the licensing authority should apply its mind and satisfy itself on the question as to whether the security of public peace or public safety demanded a refusal of licence. It has been held as follows:

> "4. The statutory requirement under Section 14 (3) is that the licensing authority shall record in writing the reasons for such refusal. The further requirement that the applicant should be furnished on demand with a brief statement of the reasons unless the authority is of opinion that it is not in public interest to furnish such statement, may well be left out as there is neither allegation nor proof of the demand. The re-cording of reasons is obligatory; and what is more, having regard to the nature of the power entrusted, it is also necessary that the licensing authority should apply its mind and satisfy itself on the question as to whether the security of public peace or public safety demanded a refusal of the licence. From these points of view, the counter-affidavit is unenlightening as to whether, and if so how, the licensing authority satisfied himself on these aspects, and as to whether the reasons were recorded in writing for the refusal. Counsel who appeared for the respondent made available the files with him. I shall merely place it on record, that it is seen that certain reports were called for and after the receipt of these reports and communications exchanged, there is nothing in the files produced to indicate that the licensing authority applied its mind to the contents of the reports and satisfied itself as to whether the security of the public peace or public safety required a refusal of the licence. On the other hand the files would show a report at a certain page and immediately thereafter, the draft of an order, which eventually materialised in the form of Ex. P-2. On this state of the record, I am satisfied that there has not been an application of the mind of the licensing authority to the requirement of Section 14 (11 (b) (ii) of the Act. Nor was there any proper compliance with the requirement of Section 14 (3).
>
> 5. On these grounds, I allow this writ petition and quash Ext. P-2 and direct the 2nd Respondent to dispose of Ex. P-1 application in accordance with law. There will be no order as to costs."

16. The license has to be granted by the licensing authority and expression "and includes the Government" was added to the definition to remove the doubt and make it clear that even the Government, i.e. the Central Government or any State Government could be the licensing authority if they are so empowered under the Rules made under the Act. In this case, there is nothing to suggest that the State Government was authorized to issue license to the category claimed by the petitioner.

17. The Division Bench of the Patna High Court in the case of ***Nripendra Narayan Roy vrs. The State of Bihar and ors.,*** reported in ***1975 Cri. L.J. 572,*** has held

that when the District Magistrate grants a license but seeks to get informal approval of Commissioner, such direction is illegal. He has to exercise his own discretion and once satisfied of the fitness to grant the license, he ought not to have been influenced by the Commissioner's view. It has been held as follows:

> "4. Section 3 of the Arms Act (No. 54 of 1959) hereinafter referred to as 'the Act' lays down that no person shall acquire, have in his possession, or carry any fire arm or ammunition unless he holds in this behalf a license issued in accordance with the provisions of this Act and the rules made thereunder. Section 13 (1) of the Act provides that an application for the grant of a licence under Chapter II has to be made to the licensing authority in prescribed form giving necessary particulars and accompanied by such fee, if any, as may be prescribed.
>
> Section 13 (2) empowers the licensing authority, after making such inquiry, if any, as it may consider necessary and subject to other provisions of Chapter III of the Act either to grant the licence or, refuse to grant the same by an order in writing. According to Section 13 (3)(a) a licence under Section 3 is to be granted by the licensing authority to a citizen of India in respect of a smoothbore gun having a barrel of not less than twenty inches in length or in respect of a muzzle-loading gun or in respect of a .22 bore rifle or an air-rifle for certain purposes mentioned therein.
>
> Section 13 (3)(b) lays down that a licence under Section 3 in a case not covered by Sub-section (3)(a) or a licence under other sections of Chapter II may be granted by the licensing authority if it is satisfied that the person by whom the licence is required has a good reason for obtaining the same. Section 14 (1) of the Act deals with cases in which the licensing authority shall refuse to grant a licence. Section 14(2) provides that the licensing authority shall not refuse to grant any licence to any person merely on the ground that such person does not possess or own sufficient property. Section 14 (3) requires the licensing authority to record in writing the reasons for refusal to grant a licence and to furnish the person who applies for the licence on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such satement.
>
> Section 17 of the Act provides for variation, suspension and revocation of licences by the licensing authority. The grounds on which a licence may be suspended or revoked are mentioned in Sub-section (3) of the Section. Sub-section (5) of that section is similar to subsection (3) of Section 14. Sub-section (6) of Section 17 lays down that the authority to whom the licensing authority is subordinate may, by order in writing, suspend or revoke a licence on any ground on which it may be suspended or revoked by the licensing authority.
>
> The licensing authority is defined in Section 2(1)(f) to mean an officer or authority empowered to grant or renew licences under rules made under this Act, and includes the Government. R. 4 of the Arms Rules, 19i62 (hereinafter referred to as 'the Rules') says that licences under Chapter II of the Act may be granted or renewed for such purposes, by such authorities, in such Forms and to be valid for such period and in such areas as are specified in Schedule II and subject to such conditions as are specified in that Schedule and in the licence. Rule 3 lays down that for the purposes of the Act and the

Rules, arms or ammunition shall be of the categories specified in columns 2 and 3 respectively of Schedule I and references to any category of arms or ammunition in these rules shall be construed accordingly.

In Schedule I to the Rules, revolvers constituted category III (a). Under Item 3 of Schedule II, the District Magistrate is the licensing authority for granting licences in respect of arms of category III (a) for whole of India or any specified area. It would thus appear that the District Magistrate was the licensing authority in this case.J Learned counsel appearing on behalf of the State was not able to place before us any rule according to which the District Magistrate who is the licensing authority in the case could grant licence of a non-prohibited bore revolver only after obtaining approval of the Commissioner."

18. The Division Bench of the Delhi High Court in the case of ***Raj Prakash Varshney vrs. Addl. District Magistrate, New Delhi and ors,.*** reported in ***AIR 1978 Delhi 17,*** has held that a body entrusted with a statutory discretion must address itself independently to the matter for consideration. It cannot lawfully accept instructions from, or mechanically adopt the view of another body as to manner of exercising its discretion in a particular case. It has been held as follows:

"26. Regarding the sufficiency of the material we will make our observations hereafter. For the time being we will confine ourselves only to the submission that the impugned order and the previous two orders were made under dictate and if so with what effect. We may here reiterate the law regarding "acting under dictation" and will quote from Halsbury's Laws of England (Fourth Edition) Volume 1, para 31:-

"A body entrusted with a statutory discretion must address itself independently to the matter for consideration. It cannot lawfully accept instructions from or mechanically adopt the view of, another body as to manner of exercising its discretion in a particular case, unless that other body has been expressly empowered to issue such directions or unless the deciding body or officer is a subordinate element in an administrative hierarchy within which instructions from above may properly be given on the question at issue"."

19. The Division Bench of the Patna High Court in the case of ***Smt. Bharti Singh vrs. State of Bihar and ors.,*** reported in ***AIR 1982 Patna 111,*** has held that under the guise 'control of the State Government' as used in Sub-section (2) of Section 5 of the Bihar Cinemas Regulations Act, 1954, the State Government could not usurp the power of the licensing authority which had the exclusive jurisdiction. It has been held as follows:

"10. The arguments of Mr. Prasad is thus well founded and has to be accepted. The interpretation put in the judgment of the Supreme Court in Section 5 (2) of the aforesaid Punjab Act will fully apply to Section 5 (2) of the present Act, as there is no difference in the language used in the two Acts; rather it appears from the decision of the Supreme Court where the provisions of the Punjab Cinemas (Regulation) Act, 1952 have been briefly indicated that the provisions of the Bihar Cinemas Regulation Act, 1954 are also similar. Therefore, in my view under the guise 'control of the State Government' as used in Sub-section (2) of Section 5 of the Act the State Government could not usurp the power of the licensing authority which had the exclusive jurisdiction to deal with the original application for grant

and/or renewal of a cinema licence and dispose of the same in accordance with law. I may state here that other points were canvassed at the Bar, but in my opinion, it is neither necessary nor appropriate to refer and discuss other points raised at the Bar as the licensing authority has yet to apply its mind and dispose of the original application of the petitioner for renewal of the licence in her name. In the circumstances it would be open to the parties to raise such points as may be available to them before the licensing authority. I do not wish to prejudice the licensing authority by referring and answering those points at this stage."

20. The Division Bench of the M.P. High Court in the case of ***Amrik Chand Saluja vrs. State of M.P. and ors,*** reported in ***1991 Cri. L.J. 1314,*** has held that refusal of renewal of licence on remote and extraneous grounds is not proper. It has been held as follows:

" 3. The position that emerges from the aforesaid provisions of the Arms Act is that a person cannot hold any arms or ammunition without a licence. This licence is granted for certain duration and under certain conditions. It shall be refused under any of the circumstances mentioned in Section 14. One of such circumstances mentioned Under Section 14(1)-(b)(ii) is where the licensing authority deems it necessary for the security of the public peace or for the public safety to refuse to grant such licence. Ordinarily, a licence shall be renewable. If, however, the, licensing authority decides not to renew the licence, it has to record its reasons in writing for so doing. As the provisions of Sections 13 and 14 have been made applicable to an application for renewal of a licence in the same manner as they apply for grant of a licence, the licensing authority is required to obtain a report of the officer-in-charge of the nearest Police Station and is also required to make such enquiry as may be considered necessary before refusing to renew the licence. One has, therefore, to see in the present case, if, while refusing renewal of licence vide Annexure R-I, the licensing authority has adhered to these provisions."

21. The learned Single Judge of the M.P. High Court in the case of ***C. Sam Joseph Raj vrs. District Revenue Officer and Addl. Distt. Magistrate, Nagercoil and another,*** reported in ***1998 Cri.L.J. 3152,*** has held that the authorities have to see only whether there is violation of any law, while refusing to grant licence to possess gun. It has been held as follows:

"11. Another significant aspect in this matter is that from the very beginning, it is the case of the writ petitioner herein that Section 9(2) of the Wild Life Protection Act, 1972 reads that licence can be issued for hunting 'Vermin' as found in Schedule V of the Act. That being so, even though both the respondents have so far passed a number of orders in this regard, they not at all discussed about this provision of the Act or at least that the petitioner is not entitled to invoke the said provisions of the Act. At this stage it is pertinent to note that it has been brought before the authorities on behalf of the writ petitioner that hunting of bats was not prohibited under Section 9 of the Wild Life (Protection) Ac,U 1972 and the fruit bats, which the petitioner herein needs had been categorised as "Vermin" in Schedule V of the Act. Further it is significant to state herein that Section 13 of the Arms Act recognises a right of a citizen of India to have a licence and a gun, being a

movable property, a citizen has the right under Article 19(1)(f) of the Constitution of India, to acquire and hold a licence subject to reasonable restrictions. Further as could be seen from the counter it is stated as follows:

> "If the writ petitioner is very much particular in eating fruit bat and sempooth, he could get them through other means from thennarket or otherwise. It is not as though that they are not available in market. There is no guarantee that he will not shoot other birds and hence it is not possible to grant gun licence to catch only a particular bird by hunting."

I have already observed that it is not open to the respondents to dictate the petitioner to choose a certain kind of treatment or medicine and that it depends purely on his own will, pleasure and choice. The authorities should confine themselves only with the legal aspects. It is not denied anywhere by any of those respondents that there is no provision in the Act to grant a licence to catch only a particular bird by hunting. It is also not the case of the respondents that the fruit bat heeded by the petitioner herein is not coming under the category of the "Vermin" found in Schedule V of the Act. Further the contention of the petitioner herein that under Section 9(2) of the Wild Life Protection Act, 1972, licence can be issued for hunting 'Vermin' has also not at all been disputed by any of these respondents at any point of time."

22. The learned Single Judge of the Kerala High Court in the case of ***B. Ganesh Prasad vrs. Board of Revenue (LR), Thiruvananthapuram and another,*** reported in ***2005 Cri.L.J. 3178,*** has held that when the Collector rejects application only on the basis of report by Superintendent of Police not recommending licence, it amounts to non-application of mind and each application has to be treated on its own merits. It has been held as follows:

> "7. Coming to the facts of this case, this is a case where undoubtedly the Tahsildar has recommended the grant of licence. The authority has proceeded, however, to refuse the licence only on the ground that the Superintendent of Police has not recommended the issue of licence. It is apparently for the reason that the Superintendent of Police has found that there are already a lot of licensed weapons in the area and the misuse of the arms should not be ruled out. The Appellate Authority has confirmed the rejection by stating that all relevant reasons and aspects have been considered. It is not understood as to what is meant by the Appellate Authority when it said that all relevant aspects have been considered, when a perusal of the order passed by the Dist. Collector would show that the only reason for rejection of the application filed by the petitioner is that the Superintendent of Police has not recommended the issue of licence. Each application for the licence has necessarily to be considered on its own individual merits. He must bear in mind the relevant facts and must refuse to be guided by irrelevant facts. He has to act bona fide. He cannot abuse his discretionary power, no doubt. It is essential that he applies his mind when any application comes up before him to the individual facts presented by the applicant before he takes a decision as to whether the application should be granted or refused. In this context, I draw support from what is stated in Wade on Administrative Law.

> "The proper authority may share its power with some one else, or may allow some one else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void".
>
> If one peruses the order of the District Collector, it can be seen that the only reason stated is that the Superintendent of Police had not recommended issue of licence. I would take the view that this is a case where the authority has virtually declined to act without the consent of the Superintendent of Police and it amounts to the exercise of discretion by the wrong authority. The said order has been upheld by Ext.P2 order. As I have already stated it is stated that the decision has been arrived at after due consideration of all relevant aspects which is itself incorrect."

23. The authorities are required to look into complete facts and not mechanically refuse the licence merely on the pretext that a case has been registered against the applicant. It is only in those cases where heinous crime is committed, the authorities may refuse to issue the licence. There should be very strong reasoning for disqualifying/debarring the candidate from holding a licence. The authorities, in the instant case, could not overlook the murder of the petitioner's son and that too on a broad day light and registration of the cross-FIR against him in the same incident.

24. The second amendment to the American Constitution reads as under:

> "A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."

However, in India, the citizens/persons do not have a fundamental right to keep and bear arms but definitely have a legal right and not merely a privilege to protect their life and property.

25. In the case of ***Commissioner of Police, Bombay vrs. Gordhandas Bhanji,*** reported in ***AIR (39) 1952 SC 16,*** their lordships of the Hon'ble Supreme Court have held that under the rules framed under S. 22, City of Bombay Police Act, the only person vested with authority to grant or refuse a license for the erection of a building to be used for purposes of public amusement was the Commissioner of Police. The order of cancellation was not an order by the Commissioner but merely intimation by him of an order passed by another authority, namely the Government of Bombay. It has been held by their lordships as under:

> "17. It is clear to us from a perusal of these rules that the only person vested with authority to grant or refuse a license for the erection of a building to be used for purposes of public amusement is the Commissioner of Police. It is also clear that under Rule 250 he has been vested with the absolute discretion at any time to cancel or suspend any license which has been granted under the rules. But the power to do so is vested in him and not in the State Government and can only be exercised by him at his discretion. No other person or authority can do it.
>
> 24. Taking the second. first, it is evident from the rules that there is no specific law which requires the Commissioner to grant a license on the fulfillment by the petitioner of certain conditions. He is vested with a discretion to grant or to refuse a license and all that the law requires is that

> he should exercise that discretion in good faith. But that he has done. In the exercise of that discretion he granted a license and that license still holds good because, on the view we have taken, there has been no valid order of cancellation. Accordingly, this relief cannot be granted."

26. In the present case, the Addl. District Magistrate, Una, has sought the guidance from the State Government and the State Government itself has rejected the application of the petitioner.

27. In the case of ***State of Punjab and another vrs. Suraj Parkash Kapur etc.,*** reported in ***AIR 1963 SC 507,*** their lordships of the Hon'ble Supreme Court have held that there was no provision under the Act empowering the State Government to give any such instructions to the Consolidation Officer; nor does any provision of the Act confer on the State Government any power to make rules or issue notifications to deprive owners of land or any part thereof or to direct the Consolidation Officer as to how he should exercise his statutory duties under the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948. It has been held as follows:

> "7. Re (2). The second point has absolutely no legs to stand upon. The East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, was enacted, in the words of the long title annexed to the Act, to, provide for compulsory consolidation of' agricultural holdings and for the. prevention of fragmentation of agricultural holdings in the State of Punjab. Under s. 15 of the said Act, the scheme prepared by the Consolidation Officer shall provide for the payment of compensation to any owner who is allotted a holding of less market value than that of his original holding and for the recovery of compensation from any owner who is allotted a holding of greater market value than that of his original holding. There is no provision in the Act empowering the Consolidation Officer to deprive a person of any part of his property without allotting to him property of equal value or paying him compensation if he is allotted a holding of less market value than that of his original holding. In the present case it is not disputed that while the respondents were allotted 123 kanals and 18 marlas of 'A' Grade land on a quasi permanent basis by the Custodian and later confirmed by the Central Government, the consolidation proceedings gave him only 50 kanal 8 and 7 marlas of 'A' Grade land, and 34 kanals and 1 marla of 'B' Grade land. The area given under the consolidation proceedings is admittedly of less value than that of the holding allotted to the respondents by the Custodian, and the Consolidation Officer has not paid any compensation for the deficiency. This unjust situation in which the respondents have been placed is sought to be supported by learned counsel for the State on the basis of the instructions given to the Consolidation Officer by the State Government. There is no provision in the Act empowering the State Government to give any such instructions to the Consolidation Officer; nor does any provision of the Act confer on the State Government any power to make rules or issue notifications to deprive owners of land of any part thereof or to direct the Consolidation Officer as to how he should exercise his statutory duties. Any such rule would be repugnant to the provisions of the Act. That apart, no such statutory rule empowering the State Government to issue such instructions has been placed before us. Both here as well as in the High Court, learned counsel appearing for the State has not been able to sustain the validity of such instructions on any legal basis. The order of the

appropriate officers confirming the 'scheme on the basis of the said instructions was obviously illegal and, therefore, was rightly set aside by the High Court."

28. Their lordships of the Hon'ble Supreme Court in the case of ***The State of Punjab and another vrs. Hari Kishan Sharma,*** reported in ***AIR 1966 SC 1081,*** have held that the State Government is not justified in assuming jurisdiction which has been conferred on the licensing authority by S. 5(1) and (2) of the Punjab Cinemas (Regulation) Act, 1952. It has been held as follows:

> "12. The question which we have to decide in the present appeal lies within a very narrow compass. What appellant No. 1 has done is to require the licensing authority to forward to it all applications received for grant of licences, and it has assumed power and authority to deal with the said applications on the merits for itself in the, first instance, Is appellant No. 1 justified in assuming jurisdiction which has been conferred on the licensing authority by s. 5(1) and (2) of the Act ? It is plain that s. 5(1) and (2) have conferred jurisdiction on the licensing authority to deal with applications for licences, and either grant them or reject them. In other words, the scheme of the statute is that when an application for licence is made, it has to be considered by the licensing authority and dealt with under s. 5(1) and (2) of the Act. Section 5(3) provides for an appeal to appellant No. 1 where the licensing authority has refused to grant a licence; and this provision clearly shows that appellant No. 1 is constituted into an appellate authority in cases where an application for licence is rejected by the licensing authority. The course adopted by appellant No. 1 in requiring all applications for licences to be forwarded to it for disposal, has really converted the appellate authority into the original authority itself, because s. 5(3) clearly allows an appeal to be preferred by a person who is aggrieved by the rejection of his application for a licence by the licensing authority."

29. Their lordships of the Hon'ble Supreme Court in the case of ***Chandrika Jha vrs. State of Bihar and ors.,*** reported in ***AIR 1984 SC 322,*** have held that the Chief Minister of the State could not usurp the powers of Registrar under the Bihar and Orissa Co-operative Societies Act, 1935. It has been held as follows:

> "11. We fail to appreciate the propriety of the Chief Minister passing orders for extending the term of the first Board of Directors. Under the Cabinet system of Government, the Chief Minister occupies a position of pre-eminence and he virtually carries on the governance of the State. The Chief Minister may call for any information which is available to the Minister-in charge of any department and may issue necessary directions for carrying on the general administration of the State Government. Presumably, the Chief Minister dealt with the question as if it were an executive function of the State Government and thereby clearly exceeded his powers in usurping the statutory functions of the Registrar under bye-law 29 in extending the term of the first Board of Directors from time to time. The executive power of the State vested in the Governor under Art. 154 (1) connotes the residual or governmental functions that remain after the legislative and judicial functions are taken away. The executive power includes acts necessary for the carrying on or supervision of the general administration of the State including both a decision as to action and the carrying out of the decision.

Some of the functions exercised under "executive powers" may include powers such as the supervisory jurisdiction of the State Government under s.65A of the Act. The Executive cannot, however, go against the provisions of the Constitution or of any law."

30. Mr. Ranjan Lakhanpal, Advocate, for the petitioner has relied upon the judgment of the Delhi High Court, in the case of ***Sahil Kohli vrs. Additional Commissioner of Police,*** decided on 20.9.2013. The learned Single Judge has gone into the entire gamut of Section 13 and 14 of the Arms Act, 1959, and has held as under:

"4. Since the grant of an arm licence is regulated by a statute in certain situations, the statute prohibits grant of such a licence and there is no challenge to the constitutional validity of the Arms Act. No citizen has a fundamental right to obtain a fire arm licence and/or ammunition and, therefore, a fire arm licence cannot be claimed as a matter of right. The citizens are entitled to safeguard their life and liberty taking all such measures as are bound to them in law, but, possession and carrying of a fire arm is a privilege regulated by the provisions of the Arms Act, 1959. Section 13(3)(a) stipulates the cases in which it is obligatory for the Licensing Authority to grant such a licence. The grant of the licence is also mandated in a case where the Licensing Authority is satisfied that the applicant has a good reason to obtain the same. But, the provisions contained inSection 13 being subject to the provisions of Section 14 of the Act, no licence even in a case covered under sub-section (3) of Section 13 can be granted, if a situation contemplated in sub- section (1) of Section 14 exists. In such a case, the Licensing Authority would have no option, but to decline a licence. Section 13(3) contemplates the situations in which it is obligatory for the Licensing Authority to grant licence, whereasSection 14(1) contemplates the situation, existence of which mandates refusal of the licence even if the case of the applicant is covered under sub-section (3) of Section 13 of the Act.

5. On a cumulative and harmonious construction of Section 13 and 14 of the Act, it becomes obvious that, except in the cases covered by Section 13(3)(a), which do not fall under Section 14(1), though the Licensing Authority has a discretion whether to grant licence or not, such a discretion is not absolute nor can it be exercised on subjective considerations. It has to be a decision guided by reasons which are cogent, objective, transparent and logical. The licence can neither be granted nor refused on the whims and fences of the Licensing Authority and the decision taken by him must necessarily be based on good reasons which are discernible from the order passed by him. The need to become objective, fair and reasonable becomes greater in case the Licensing Authority seeks to refuse the licence since sub-section (3) of Section 14 mandates him to record reasons for such refusal and supply a brief statement of such reasons to the applicant who has a right to challenge the decision of the Licensing Authority, before the prescribed Appellate Authority. An order refusing to grant licence is subject to judicial review if challenged on the ground that it suffers from the vice of arbitrariness, non-application of mind, mala fides or application of irrelevant considerations.

7. The next question which arises for consideration is as to whether the licence could be refused to the petitioner on the ground that there was no

specific threat to his life or property and the law and order situation in the locality in which he was residing was satisfactory. In my opinion, the fire arm licence cannot be denied to a person, in whose case a situation contemplated by sub-section (1) of Section 14 does not exist, solely on the ground that there is no specific threat to him or his family members. A situation requiring safety in the form of a fire arm cannot always be foreseen and may develop all of a sudden. For instance, there may be an attempted burglary, dacoity, house breaking or robbery in the house of a citizen in the dead of the night or he may be subjected to robbery, snatching, etc, while on the move. It is not possible for a police official to be present everywhere and every time to protect the citizens and in fact it happens quite often that the police arrives at the scene only after the crime is already committed. Though it is an undisputed responsibility of the State to protect the lives and property of the citizens, the harsh reality is that the State does not have an impressive record in this regard. In fact, no person can predict when, where and at what time and in which form, he may face a threat to his life or property. Therefore, as a prudent citizen, he would be justified in taking adequate steps to protect himself and his property and such steps would include acquiring a licensed weapon so as to avoid any crime against his body and property. It is the applicant's own perception of threat to his life and property which needs to be considered by the Licensing Authority in the light of law and order situation, prevailing in the locality and various other factors."

31. In the instant case, the petitioner has sought fire arm licence to protect his life and property, as per the details given in the petition.

32. Accordingly, the Writ Petition is allowed. Annexure P-3 dated 4.2.2015 and communication dated 3.3.2015 are quashed and set aside. The respondent No. 5 is directed to issue licence to the petitioner within a period of three weeks after the receipt of the certified copy of this judgment. Pending application(s), if any, shall stand disposed of.

****

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

ITA No.55 of 2009 with ITA No.38 of 2010.
Judgment reserved on : 25.08.2015.
Date of decision: September 09, 2015.

1. ITA No.55 of 2009.

Commissioner of Income Tax .....Appellant.

Versus

Rakesh Mahajan .....Respondent.

2. ITA No.38 of 2010.

Commissioner of Income Tax .....Appellant.

Versus

Rakesh Mahajan .....Respondent.

Income Tax Act, 1961- Sections 44AE and 145(3)- Assessee filed a return declaring income from the contract as well as running trucks on hire- the gross receipts were declared at

Rs.12.09 crores on which net income of Rs. 62,66,030/- was shown- income from the trucks was declared on estimate basis- Assessing Officer held that accounts were incorrect and incomplete- he rejected the books of accounts and estimated net profit at 8%- appeal was filed by the assessee which was allowed by the Income Tax Appellate Tribunal- Department preferred an appeal before the High Court- record shows that no separate accounts were maintained in respect of gross hiring receipts, diesel expenses and salaries of drivers and helpers- assessee had failed to give any explanation except that his accounts were previously accepted by the Assessing Officer which is not a valid explanation- there is no presumption in Law about the correctness of continuing Income Tax Returns- assessment of each year has to be made separately – in case a true picture of the profits and gains is made in the account books, same should not be ordinarily disturbed but when the true picture cannot be obtained, the Assessing Officer has a right to reject the books of accounts- Assessing Officer had rightly passed the order- appeal allowed and order of Income Tax Appellate Tribunal set aside while order of Assessing Officer upheld. (Para-17 to 34)

Cases referred:

Commissioner of Income Tax versus M/s. Mcmillan and Co., AIR 1958 SC 207

Commissioner of Income Tax versus British Paints India Ltd. (1991) 188 ITR 44,

Dhondiram Dalichand versus Commissioner of Income Tax, Poona (1971) 81 ITR 609

For the Appellant(s) : Mr.Vinay Kuthiala, Senior Advocate with Mr.Diwan Singh Negi, Advocate.

For the Respondent(s) : Mr.Vishal Mohan, and Mr.Aditya Sood, Advocates.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Since common questions of law arise for determination, therefore, both the appeals were taken up together for disposal.

ITA No.55 of 2009.

The facts, in brief, may be noticed.

2. The assessee is a Civil Contractor, who filed his return for Assessment Year 2005-06 declaring income from Govt. contracts as well as from running trucks on hire. In respect of the contract work, gross receipts were declared at Rs.12.09 crores on which net income was shown at Rs.62,66,030/- which came to just about 5% of the gross receipts. The expenses debited against the contract receipts included expenses on freight and carriage amounted to Rs.1,18,82,601/-.

3. Whereas, in respect of the truck hire business, the assessee declared estimated receipts of Rs.15,03, 466/- which were stated to be net of expenses on diesel and salaries to drivers and conductors. Against these estimated net receipts, the assessee claimed expenses on tyres and spares, interest and deprecation etc. and finally declared net income of Rs.5,95,813/-. It was stated in the return that the assessee owned 15 trucks out of which 9 trucks were run on hire and the income therefrom had been declared on estimate basis under Section 44AE of the Income Tax Act (for short the 'Act'). The remaining 6 trucks were used in the contract business and expenditure incurred on the same was included in the freight expenses of Rs.1,18,82,601/-.

4. As against the returned income of Rs.68,75,230/-, the Assessing Officer (in short 'A.O.') completed the assessment on 31.12.2007 assessing total income at Rs.98,30,115/-. In the course of assessment proceedings, the A.O. noted that no expenses on diesel and fuel had been shown in respect of the trucks run on hire on the ground that net receipts from the trucks were declared on estimate basis under Section 44AE. On the other hand, huge expenses of Rs.1,18,82,601/- were debited against the contract income on account of freight and carriage and no details could be furnished by the assessee to show the break-up of these expenses in respect of each of the six trucks stated to be used in the contract business. The A.O. observed that the freight expenses debited in the contract account were apparently excessive considering that they were stated to be incurred only on six trucks and was of the view that since the assessee was unable to provide truck-wise details of such expenses, it was entirely possible that these expenses of `1.18 crores included expenses incurred on the trucks run one hire. Since it was not possible to verify the actual expenses on freight incurred in the contract business, the A.O. held that the accounts were incorrect and incomplete and that the net income from contracts had been suppressed by inflating the expenses on freight. The A.O., therefore, rejected the books of accounts under Section 145(3) and estimated net profit from contract at 8% of gross receipts which came to Rs.96.73/- lacs. After giving credit for income already declared from contract as well as from running of trucks, the A.O. made an addition of Rs.28,10,914/- to the contract income declared and further found that depreciation on trucks stated to be run on hire had been claimed at 40% and since the assessee was unable to specify the trucks that were actually used in the hiring business, he held that the enhanced rate of depreciation was not allowable and that depreciation should be allowed on all trucks at the normal rate of 25%. Accordingly, further addition of Rs.1,43,971/- was made on account of depreciation on trucks.

5. The assessee filed an appeal against the assessment order before the Commissioner of Income Tax (Appeals) ('CIT (A)') who vide order dated 11.11.2008 passed in appeal No.IT/358/07-08/SML dismissed the same and held that the freight expenses of Rs.1.18 crores debited in respect of the six trucks used in the contract business were clearly excessive and since there was no evidence to show that such expenses were only in respect of these six trucks to the exclusion of the other nine trucks run on hire, the accounts had been correctly rejected and net profit had been rightly estimated by the A.O. The disallowance on account of depreciation was also confirmed by the CIT (A).

6. The assessee filed further appeal before the Income Tax Appellate Tribunal ('ITAT'), who vide impugned order dated 15.05.2009 passed in ITA No.1076/Chandi/2008 has allowed the same in its entirety and observed that books of account in respect of the contract business had been found by the A.O. to be properly maintained and that no instance had been brought out to show that any expenses on trucks used in the hiring business had been debited in the accounts of the contract business. It was further observed that details of expenses of Rs.1.18 crores had been furnished by the assessee and these included payment of hire charges for which partywise details were furnished and on which tax had been deducted at source. Thus, the freight expenses could not be considered to be excessive or incorrect and no specific reason had been brought out by the A.O. which could lead to the rejection of the books of account and it was held that the A.O. was not justified in rejecting the accounts and in estimating the contract profits to be higher than that declared. It was also held that since the A.O. had accepted the income declared from hiring of trucks, there was no reason to restrict the depreciation allowable on the trucks run on hire and accordingly deleted the addition of Rs.1,43,971/- on this account also.

7. It is against the aforesaid orders that the present appeal has been filed and vide order dated 13.11.2009 was admitted on the following substantial questions of law as taken in the memorandum of appeal.

"1. Whether the accounts maintained by the Assessee were incorrect and incomplete in terms of section 145(3) of the Income Tax Act, when it was not possible to verify from such accounts whether any unvouched expenses relating to one business, profits from which were declared on estimate basis, have actually been debited in the accounts of another business?

2. Whether the findings of the ITAT that the accounts are not incorrect or incomplete are clearly vitiated and liable to be held as perverse?

3. Whether the Ld. ITAT has misinterpreted and misconstrued the material on record?"

ITA No.38 of 2010.

The facts, in brief, may be noticed.

8. The assessee is a Civil Contractor who filed his return for Assessment Year 2006-07 declaring income from Govt. contracts and other works as well as from running trucks on hire. In respect of the contract work, gross receipts were declared at Rs.14.56 crores on which net income was shown at Rs.58,22,845/- which came to just about 4% of the gross receipts. The expenses debited against the contract receipts included expenses on freight and carriage amounted to Rs.1,46,39,970/-.

9. Whereas, in respect of the truck hire business, the assessee declared estimated receipts of Rs.11,00,922/- which were stated to be net of expenses on diesel and salaries to drivers and conductors. Against these estimated net receipts, the assessee claimed expenses on purchase of tyres and spares and depreciation and finally declared net income from truck hire at Rs.3,95,600/-. It was stated in the return that the assessee owned fifteen trucks out of which nine trucks were run on hire and the income therefrom had been declared on estimate basis under Section 44AE of the Income Tax Act. The remaining six trucks were used in the contract business and expenditure incurred on the same was included in the freight expenses of Rs.1,46,39,970/-.

10. As against the returned income of Rs.65,33,790/-, the A.O. completed the assessment on 31.12.2008 assessing total income at Rs.1,19,87,466/-. In the course of assessment proceedings, the A.O. noted that no expenses on diesel and fuel had been shown in respect of the trucks run on hire on the ground that net receipts from the trucks were declared on estimate basis under Section 44AE. On the other hand, huge expenses of Rs.1,46,39,970/- were debited against the contract income on account of freight and carriage and no details could be furnished by the assessee to show the break-up of these expenses in respect of each of the six trucks stated to be used in the contract business. The A.O. observed the freight expenses debited in the contract account were apparently excessive considering that they were stated to be incurred only on six trucks and was of the view that since the assessee was unable to provide truck-wise details of such expenses, it was entirely possible that these expenses of Rs.1.46 crores included expenses incurred on the trucks run on hire. Since it was not possible to verify the actual expenses on freight incurred in the contract business, the A.O. held that the accounts were incorrect and incomplete and that the net income from contracts had been suppressed by inflating the expenses on freight and he, therefore, rejected the books of accounts under Section 145(3) and estimated net profit from contract at 8% of gross receipts which came to Rs.1,16,45,687/-. After giving credit for income already declared from contract as well as

from running of trucks, the A.O. made an addition of Rs.54,05,031/- to the contract income declared.

11. The assessee filed an appeal against the assessment order before the Commissioner of Income Tax (Appeals), who vide order dated 21.07.2009 allowed the same following the order of the ITAT in assessee's own case for the Assessment Year 2005-06 in ITA No.1076/Chandi/2008 (Para 6 supra).

12. The Department filed further appeal before the Income Tax Appellate Tribunal, who vide impugned order dated 20.04.2010 dismissed the revenue's appeal following its own order in assessee's own case for Assessment Year 2005-06 (Para 6 supra). It was observed that books of account in respect of the contract business had been found by the A.O. to be properly maintained and that no instance had been brought out to show that any expenses on trucks used in the hiring business had been debited in the accounts of the contract business. It was further observed that details of the expenses had been furnished by the assessee and these included payment of hire charges for which partywise details were furnished and on which tax had been deducted at source. Therefore, the freight expenses could not be considered to be excessive or incorrect and no specific reason had been brought out by the A.O. which could lead to the rejection of the books of account. Following the order for Assessment Year 2005-06, it was held that the A.O. was not justified in rejecting the accounts and in estimating the contract profits to be higher than that declared.

13. It is against the aforesaid orders that the present appeal has been filed and vide order dated 21.06.2011 was admitted on the following substantial questions of law as taken in the memorandum of appeal.

> "1. Whether the accounts maintained by the Assessee were incorrect and incomplete in terms of section 145(3) of the Income Tax Act, when it was not possible to verify from such accounts whether any unvouched expenses relating to one business, profits from which are declared on estimate basis, have actually been debited in the accounts of another business?
>
> 2. Whether the findings of the ITAT that the accounts are not incorrect or incomplete are clearly vitiated and liable to be held as perverse?"

14. It is vehemently contended by learned Senior Counsel for the revenue that the decision of the ITAT on the issue of rejection of books of accounts and estimation of income from contract business is absolutely erroneous as it has failed to appreciate the provisions of Section 145(3) readwith Section 144 of the Act. It is further contended that while assessing the income of the assessee from running of the trucks on hire, the provisions of Section 44AE have been completely ignored.

15. On the other hand, learned counsel for the assessee would contend that the order passed by the ITAT is in accordance with law and, therefore, called for no interference.

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

16. Since all the questions are inter-related and inter-connected, the same are taken up together for consideration.

17. It is not in dispute that the assessee in ITA No.55 of 2009 had maintained accounts in respect of the contract business showing a huge turn over of Rs.12.09 crores and insofar as the business in respect of trucks stated to be run on hire, the following account was furnished in the return:-

Tyres and spares	4,84,601/-	Receipts	15,03,466/-
Bank interest	58,571/-	Insurance claim	20,813/-
Bank charges	1,369/-		
Depreciation	3,83,925/-		
Net profit	5,95,813/-		

18. No separate accounts were maintained in respect of gross hiring receipts, diesel expenses and salaries of the drivers and helpers. Therefore, we are, prime facie, of the considered view that looking into the nature of the accounts maintained , the A.O. had rightly expressed his doubt regarding the correctness thereof.

19. It has been specifically recorded by the A.O. that when the assessee was asked to explain the freight and carriage expenses and how these were connected with the nine trucks, the assessee failed to give any reasonable explanation except maintaining that earlier also these accounts had been accepted by the A.O. This by no means can be held to be a valid explanation, more particularly, when the books of accounts have been rejected mainly on the ground that the assessee was unable to convince the A.O. that freight and expenditure of Rs.1,18,82,600/- debited in the contract account do not pertain to the expenditures on balance nine trucks. As per the A.O., the books of accounts had been written in such a way that the assessee could show net profit from hiring of trucks on higher side while, on the other side, he could reduce the profits from contract business by showing expenses on account of freight and carriage.

20. The learned counsel for the assessee would, however, argue that the assessee was maintaining regular books of accounts which were duly verified and audited, therefore, on mere suspicion the accounts could not have been rejected. He would further argue that the A.O. had infact failed to pin-point any expenditure claimed to be un-vouched and it was only on conjectures, surmises and suspicion that the books of accounts had been rejected.

21. Having gone through the records of the case, we are unable to agree with the aforesaid contention of the assessee for the reason that not only were the accounts properly maintained, but even the freight and carriage expenses debited in the profit and loss account at Rs.1,18,82,600/- are far too excessive, particularly keeping in view the fact that only six trucks were used for contract business. Further, the freight and carriage expenses that were debited were not segreable from unvouched expenses for plying of other nine trucks for which profit had been shown under Section 44AE of the Act. Admittedly, the assessee had failed to segregate expenses of the contract business from other nine trucks. Therefore, in such circumstances, no credence whatsoever could have been given to the books of accounts.

22. We are not satisfied that the reasoning given by the ITAT to reverse such findings only on the ground that the A.O. ought to have satisfied that either the accounts maintained were incorrect or incomplete or the method of accounting followed was such as would not lead to correct estimation of income. We are further failed to understand how the burden to establish that the books of accounts maintained were incomplete or incorrect would rest upon the A.O. The CIT (A) could not have un-necessarily been influenced by the fact that the assessee had been filing his return regularly and was continuing the business of contract and truck hiring to conclude that the accounts were properly maintained. Merely because no one had earlier cared to scrutinize the accounts furnished by the assessee could not be a ground to dislodge the order passed by the A.O. Even otherwise,

there is no presumption in law attaching presumption of correctness to the continuity of income tax returns. The assessments of each year have to be viewed and scrutinized independently as these are separate and distinct assessments.

23. Admittedly, the assessee had claimed truck running expenses at Rs.1,18,82,600/-, but the same was only qua six trucks being used for the contract business being carried out by the assessee which apparently was an impossibility, more particularly, when the assessment relates to the Assessment Year 2005-06, when the value of rupee was far more higher than today.

24. Likewise, in ITA No.38 of 2010, the assessee had maintained accounts in respect of contract business which showed a huge turn over of Rs.14.56/- crores. Whereas, in respect of trucks which were stated to be run on hire, the account furnished was as under:-

Purchases	5,75,600/-	Receipts	11,00,922/-
Depreciation	1,29,721/-		
Net profit	3,95,600/-		

The aforesaid return admittedly pertains to nine trucks, whereas, the details of the freight expenses reflected by the assessee for only six trucks are a whopping Rs.1.46/- crores which was bifurcated in various heads of expenses like diesel, repairs, spares, tyre, retreading etc. At no stage, the assessee furnished any truckwise bifurcation of such expenses or any other evidence to show that these expenses were only incurred on the six trucks stated to be used in the contract business. Running accounts have been maintained in the books in respect of diesel, repair and spares etc. without any indication as to which item of expenses was incurred for which particular truck. A mere assertion on the part of the assessee that the entire expenses related to the six trucks used in the contract business cannot at all be accepted without there being any supporting evidence and the accounts to this effect which could show that the assessee had made efforts to segregate the expenses incurred on the trucks used in the contract business or the expenses incurred on the trucks on hire.

25. It cannot be disputed that what is taxable under the Act is the real accrued or arisen income and irrespective of the method of accountancy adopted by the assessee, in case a true picture of the profits and gains, that is to say, the real income is disclosed, then the same ought not to be ordinarily disturbed. In such circumstances, the Department is bound by the assessee's choice of method regularly employed, but then in case by this method, the true income or profit of accounts cannot be arrived at, then the A.O. had every reason to invoke Section 145 of the Act in order to work out the real income and thereby deduce the profit and gain therefrom. As already observed earlier, the A.O. had given cogent reasons for not accepting the accounts. Though, these findings were set aside by the ITAT, but then even the ITAT did not conclude that the method of accountancy as employed by the assessee was in any manner correct. In absence of such findings, the order passed by the ITAT cannot be sustained.

26. In ***Commissioner of Income Tax*** versus ***M/s. Mcmillan and Co., AIR 1958 SC 207***, the Hon'ble Supreme Court has laid down that if true income or profit cannot be ascertained on the basis of the assessee's methods of preparing accounts, then income must be computed upon such basis and in such a manner as the ITO may determine. This infact is the underlying principle enshrined under Section 145(3) which directs the A.O. to

compute the income according to his best judgment in case where the accounts are found by him to be incorrect or incomplete.

27. Similarly, in ***Commissioner of Income Tax*** versus ***British Paints India Ltd. (1991) 188 ITR 44***, the Hon'ble Supreme Court has further held that it is not only a right but duty of the A.O. to consider whether the books have disclosed the true state of accounts and whether the correct income can be deduced therefrom.

28. At this stage, we may also refer to a Division Bench judgment of the Bombay High Court in ***Dhondiram Dalichand*** versus ***Commissioner of Income Tax, Poona (1971) 81 ITR 609,*** wherein it has been held that in absence of quantitative details of stock, which made it impossible to verify the correctness of stock shown, the method of accounting was such that the correct profit could not be deduced therefrom and the AO was justified in rejecting the accounts and determining profits.

29. The aforesaid judgment squarely applies to the instant case of the assessee, where the AO has found that it was impossible to verify the correctness of the expenses on freight debited in the contract account, and hence impossible to deduce the correct income from the accounts.

30. Thus, on the basis of the aforesaid exposition of law, it can safely be concluded that the income or profits as ascertained and determined by the assessee himself cannot always be accepted as correct because it is the duty of the A.O. to consider whether the books disclose the true state of accounts and whether the correct income can be deduced therefrom.

31. In such circumstances, no exception can be taken to the order passed by the A.O. whereby he after recording his dis-satisfaction and after recording reasoning thereof, passed the impugned assessment order in both the cases.

32. The learned counsel for the respondent, at this stage, would rely upon a judgment of this Bench in ***ITA No.24 of 2009, titled Commissioner of Income Tax*** *versus* ***M/s Swastik Food Products***, decided on 25th June, 2014, to canvass that until or unless the findings recorded by the ITAT were perverse, the same cannot be interfered with. He in particular relied upon the following observations:-

> "15. The findings recorded by the CIT (A) and the ITAT are based on true appreciation of facts and correct appreciation of the provisions of law and there is nothing on record to suggest or even infer that the said findings are in any manner perverse. A finding on a question of fact is open to attack only in case the same is erroneous in law or where the said finding can be termed to be perverse. In this case, both the aforesaid ingredients are lacking. The substantial questions of law are answered accordingly."

33. Obviously, there cannot be any quarrel with what has been held in ***M/s Swastik Food Products*** (supra). But, then this is a case where the findings recorded by the ITAT are not only erroneous but perverse. No fault could have been found by the ITAT when the A.O. had not only doubted the accounts, but had given cogent reasons for concluding that the accounts submitted by the assessee were incorrect and incomplete. It also needs to be noted that in ITA No.55 of 2009, even CIT (A) had concurred with the findings recorded by the A.O., whereas, the CIT (A) in ITA No.38 of 2010 had no option but to have followed the order given by the ITAT in ITA No.1076/Chandi/2008 which is already under challenge in ITA No.55 of 2009.

34. In view of the aforesaid discussion, we find merit in these appeals and answer all the aforesaid questions in favour of the revenue and against the assessee. Consequently, both the appeals are allowed by setting aside the order passed by the ITAT while restoring the order passed by the A.O. The parties are left to bear their own costs. Pending applications, if any, also stand disposed of. Registry is directed to place a copy of this judgment on the file of connected matter.

****

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

CMPMO No. 175 of 2015 along with CMPMOs No. 168, 169, 173, 174, 176, 177, 178, 179, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 202, 203, 207, 208, 221, 222, 224, 225, 226 and 227 of 2015
Judgment Reserved on 3.9.2015
Date of decision: 9.9.2015

---

1. CMPMO No. 175 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Tara Chand. ...Respondent

2. CMPMO No. 168 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Manoj Kumar. ...Respondent

3. CMPMO No. 169 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Pritam Chand. ...Respondent

4. CMPMO No. 173 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Karnail Singh. ...Respondent

5. CMPMO No. 174 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Krishan Kumar. ...Respondent

6. CMPMO No. 176 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Pawan Kumar. ...Respondent

7. CMPMO No. 177 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Ashwani Kumar. ...Respondent

8. CMPMO No. 178 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Mohammad Sharif. ...Respondent

9. CMPMO No. 179 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Sandeep Kumar. ...Respondent

10. CMPMO No. 182 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Ashish Kumar. ...Respondent

11. CMPMO No. 183 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Tarsem Lal. ...Respondent

12. CMPMO No. 184 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Iqbal Singh. ...Respondent

13 CMPMO No. 185 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Parkash Chand. ...Respondent

14. CMPMO No. 186 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Sharif Mohd. ...Respondent

15. CMPMO No. 187 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Ram Pall. ...Respondent

16. CMPMO No. 188 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Paramjit Singh. ...Respondent

17. CMPMO No. 189 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Ram Dass. ...Respondent

18. CMPMO No. 190 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Raj Kumar. ...Respondent

19. CMPMO No. 191 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Gulzari Lal. ...Respondent

20. CMPMO No. 202 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Ram Swaroop. ...Respondent

21. CMPMO No. 203 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Sudershan Kumar. ...Respondent

22. CMPMO No. 207 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Kamal Kishore. ...Respondent

23. CMPMO No. 208 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Mangal Singh. ...Respondent

24. CMPMO No. 221 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Ashok Kumar. ...Respondent

25. CMPMO No. 222 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Mukesh Kumar. ...Respondent

26. CMPMO No. 224 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Vijay Kumar. ...Respondent

27. CMPMO No. 225 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Deepak Kumar. ...Respondent

28. CMPMO No. 226 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Om Parkash. ...Respondent

29. CMPMO No. 227 of 2015
Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner
Versus
Tilak Raj. ...Respondent

30. CMPMO No. 207 of 2015

Managing Director, M/s Crest Steel and Power Ltd. ...Petitioner

Versus

Kamal Kishore. ...Respondent

Constitution of India, 1950- Article 141- Precedents- Precedents by the Hon'ble Apex Court have binding effect even if they were delivered four decades ago- doctrine of binding precedent promotes certainty and consistency in judicial decisions and enables an organic development of law. (Para-11)

Industrial Disputes Act, 1947- Section 36- Petitioner had appointed a legal practitioner before the Industrial Tribunal- respondents objected to the appointment of the Advocate by filing an application- petitioner filed an application seeking representation through an Advocate- Tribunal allowed the application filed by the respondents and dismissed the application filed by the petitioner- held, that workman has an absolute right to be represented by the member of the executive or office bearer of registered trade union- similarly, employer has an absolute right to be represented by an officer of association of which the employer is a member- workman can also be represented by an office bearer or member of the executive of the trade union, even if he was a legal practitioner prior to becoming an office bearer or member of the executive- similarly, a company can be represented by an officer, even if such officer was a legal practitioner prior to his appointment - an advocate can only be appointed with the consent of the other party and with the permission of the Tribunal- since, in the present case no such permission was granted by the Tribunal nor consent was taken from the opposite party- therefore, application was rightly dismissed. (Para-6 to 13)

Cases referred:

Paradip Port Trust, Paradip Vs. Their Workmen, AIR 1977 SC 36

Cement Corporation of India Vs. Presiding Officer, Labour Court Shimla, 1999 (1) Shiml. L.C. 91

T.K. Varghese Vs. Nichimen Corporation 2001 (90) FLR 91

Salvation Army Vs. Sunil J. Ingle 2005 (107) FLR 932

Samarendra Das Vs. M/s Win Medicare Pvt. Ltd. 2014 LLR 345

Sundeep Kumar Bafna Vs. State of Maharashtra and another AIR 2014 SC 1745

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

For the Respondent(s): Mr.Varun Rana, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

Since common question of fact and law raised for consideration, therefore, all these petitions are taken up together for disposal. With the consent of the parties CMPMO No. 175 of 2015 is taken as lead case.

2. The admitted facts of the case are that the respondents-workmen raised industrial dispute, wherein the parties completed their pleadings, but thereafter the respondents moved an application under Section 36 (2) of the Industrial Disputes Act, 1947 (for short "Act"), whereby they objected to the appearance of the legal practitioner engaged on behalf of the petitioner.

3. In reply to this application, it was contended that the same was not maintainable and it was further maintained that the respondents had in fact consented for appearance of the counsel, without any demur and once the consent has been given/implied, the same cannot be withdrawn or revoked later. The plea of estoppal was also raised and it was averred that the legal practitioner had been appearing from the very first day and from the first date of hearing without any objection from the respondents and therefore, the application was not maintainable and being misconceived should be dismissed.

4. The petitioner thereafter moved a separate application under Section 36(4) of the Act for seeking leave to represent the petitioner in the proceedings through the legal practitioner/penal counsel, who had already been representing the petitioner from the commencement of the proceedings.

5. Both these application came up for consideration before the learned Labour Court-cum-Industrial Tribunal, who vide its order dated 17.7.2014 (for short impugned order) allowed the application of the respondents-workmen preferred by them under Section 36 (2) and dismissed the application preferred by the petitioner under Section 36(4) of the Act. The petitioner has questioned the impugned order on various grounds taken in the memorandum of the petition.

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

6. Section 36 of the Act being at the heart of the controversy involved in these petitions is set out herein below for ready reference:

> *"36. Representation of parties.- (1) A workman who is a party to a dispute shall be entitled to be represented in any proceedings under this Act by -(a) [any member of the executive or other office-bearer] of a registered trade union of which he is a member;*
>
> *(b) [any member of the executive or other office-bearer] of a federation of trade unions to which the trade union referred to in Clause (a) is affiliated;*
>
> *(c) where the worker is not a member of any trade union, by [any member of the executive or other office-bearer of any trade union connected with, or by any other workman employed in the industry in which the worker is employed and authorised in such manner as may be prescribed :*
>
> *[Provided that, where there is a recognised union for any undertaking under any law for the time being in force, no workman in such undertaking shall be entitled to be represented as aforesaid in any such proceeding (not being a proceeding in which the legality or propriety of an order of dismissal, discharge, removal, retrenchment, termination of service, or suspension of an employee is under consideration) except by such recognised union.*
>
> *(2) An employer who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by –*
>
> *(a) an officer of an association of employers of which he is a member;*
>
> *(b) an officer of a federation of association of employers to which the association referred to in Clause (a) is affiliated;*

(c) whether the employer is not a member of any association of employers, by an officer of any association of employers connected, with, or by any other employer engaged in, the industry in which the employer is engaged and authorised in such manner as may be prescribed.

(3) No party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceeding under this Act or in any proceedings before a Court.

(4) In any proceeding before a Labour Court, Tribunal or National Tribunal, a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceedings and with the leave of the Labour Court, Tribunal or National Tribunal as the case may be."

7. The aforesaid provision came up for consideration before the Hon'ble Supreme Court in case of ***Paradip Port Trust, Paradip Vs. Their Workmen, AIR 1977 SC 36*** and it is apt to reproduce paragraphs 15 to 17, 21 to 24 and 26, which read as under:-

*"**15**. The parties, however, will have to conform to the conditions laid down in section 36(4) in the matter of representation by legal practitioners. Both the consent of the opposite party and the leave of the Tribunal will have to be secured to enable a party to seek representation before the Tribunal through a legal practitioner qua legal practitioner. This is a clear significance of section 36(4) of the Act.*

***16.** If, however, a legal practitioner is appointed as an officer of a company or corporation and is in their pay and under their control and is not a practising advocate the fact that he was earlier a legal practitioner or has a legal degree will not stand in the way of the company or the corporation being represented by him. Similarly if a legal practitioner is an officer of an association of-employers or of a federation of such associations, there is nothing in section 36(4) to prevent him from appearing before the Tribunal under the provisions of section 36(2) of the Act. Again, an office bearer of a trade union or a member of its executive, even though he is a legal practitioner, will be entitled to represent the workmen before the Tribunal under section 36(1) in the former capacity. The legal practitioner in the above two cases will appear in the capacity of an officer of the association in the case of an employer and in the capacity of an office bearer of the union in the case of workmen and not in the capacity of a legal practitioner. The fact that a person is a legal practitioner will not affect the position if the qualifications specified in section 36(1) and section 36(2) are fulfilled by him.*

***17.** It must be made clear that there is no scope for enquiry by the Tribunal into the motive for appointment of such legal practitioners as office bearers of the trade unions or as officers of the employers associations. When law provides for a requisite qualification for exercising a right fulfillment of the qualification in a given case will entitle the party to be represented before the Tribunal by such a person with that qualification. How and under what circumstances these qualifications have been obtained will not be relevant matters for consideration by the Tribunal in considering an application for representation under section 36(1) and section 36(2) of the Act. Once the qualifications under section 36(1) and section 36(2) are fulfilled prior to appearance before Tribunals,*

there is no need under the law to pursue the matter in order to find out whether the appointments are in circumvention of section 36(4) of the Act. Motive of the appointment cannot be made an issue before the Tribunal.

***21**. We have given anxious consideration to the above submission. It is true that "and" in a particular context and in view of the object and purpose of a particular legislation may be read as "or" to give effect to the intent of the legislature. However, having regard to the history of the present legislation, recognition by law of the unequal strength of the parties in adjudication proceedings before a Tribunal, intention of the law being to discourage representation by legal practitioners as such, and the need for expeditious disposal of cases, we are unable to hold that "and" in section 36(4) can be read as "or".*

***22**. Consent of the opposite party is not an idle alternative but a ruling factor in section 36(4). The question of hardship, pointed out by the Solicitor General, is a matter for the legislature to deal with and it is not for the courts to invoke the theory of injustice and other consequences to choose a rather strained interpretation when the language of section 36 is clear and unambiguous.*

***23**. Besides, it is also urged by the appellant that under section 30 of the Advocates Act, 1961, every advocate shall be entitled "as of right" to practise in all courts, and before only tribunal section 30(i) and (ii). This right conferred upon the advocates by a later law will be properly safeguarded by reading the word "and" as "or" in section 36(4), says counsel. We do not fail to see some difference in language in section 30(ii) from the provision in section 14(1) (b) of the Indian Bar Councils Act, 1926, relating to the right of advocates to appear before courts and tribunals. For example, under section 14(1) (b) of the Bar Councils Act, an advocate shall be entitled as of right to practise save as otherwise provided by or under any other law in any courts (other than High Court) and tribunal. There is, however, no reference to "any other law" in section 30(ii) of the Advocates Act. This need not detain us. We are informed that section 30 has not yet come into force. Even otherwise, we are not to be trammelled by section 30 of the Advocates Act for more than one reason. First, the Industrial Disputes Act is a special piece of legislation with the avowed aim of labour welfare and representation before adjudicatory authorities therein has been specifically provided for with a clear object in view. This special Act will prevail over the Advocates Act which is a general piece of legislation with regard to the subject matter of appearance of lawyers before all courts, tribunals and other authorities. The Industrial Disputes Act is concerned with representation by legal practitioners under certain conditions only before the authorities mentioned under the Act. Generalia Specialibus Non Derogant. As Maxwell puts it:*

"Having already given its attention to the particular subject and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language ..... or there be something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. In the absence of these conditions, the general statute is read as silently excluding from its operation the cases

which have been provided for by the special one." Maxwell on Interpretation of Statues, 11th Edition, page 169.

***24**. Second, the matter is not to be viewed from the point of view of legal practitioner but from that of the employer and workmen who are the principal contestants in an industrial dispute. It is only when a party engages a legal practitioner as such that the latter is enabled to enter appearance before courts or tribunals. Here, under the Act, the restriction is upon a party as such and the occasion to consider the right of the legal practitioner may not arise.*

***26.** A lawyer, simpliciter, cannot appear before an Industrial Tribunal without the consent of the opposite party and leave of the Tribunal merely by virtue of a power of attorney executed by a party. A lawyer can appear before the Tribunal in the capacity of an office bearer of a registered trade union or an officer of associations of employers and no consent of the other side and leave of the Tribunal will, then, be necessary."*

8. From the aforesaid judgment, the following principles can conveniently be culled out.

(i). Section 36(1) confers an 'unbartered' and 'absolute right' upon the workman to be represented by a member of the executive or an office bearer of the registered trade unions. Likewise, the employer is also placed at par with the workman in the matter of representation before the Labour Courts, Industrial Tribunals and National Tribunals. Consequently, an employer may also be represented by an 'Officer' of the association of employer of which the employer is a member. The right is extended to representation by an Officer of the federation of employer to which the association of employer is affiliated.

(ii). The rights of representation under Section 36(1) of the ID Act are unconditional and are not subject to the conditions laid down in Section 36(4) of the ID Act. Both the sub-sections are independent and stand by themselves.

(iii). Section 36 of the ID Act is not exhaustive in the sense that beside the person specified therein, there can be other lawful mode of appearance of the parties as such (para 13). Such an eventuality has been envisaged by Section 36(2)(c) in case of an employer, who is not a member of an association of employers. The device of representation provided therein would not fit in the case of a Government Department or a Public Corporation as an employer.

(iv). A legal practitioner, who is appointed as an officer of Company or Corporation can represent them subject to certain conditions. The first condition is that he must be on their pay rolls and under their control. The second is that if a legal practitioner is appointed as an officer of a company or corporation then the mere fact that he was earlier a legal practitioner or he has a law degree to his credit was not to stand in the way of the Company or the Corporation being represented by such a person. Section 36(3) of the ID Act imposes a complete embargo on representation by a legal practitioner by either party to the dispute before the Court or in any conciliation proceedings under the Act.

(v). In the matter concerning representation by a legal practitioner the parties are required to conform to the conditions laid down in Section 36(4) of the ID Act. The consent of the opposite party and the leave of the Labour Court or Tribunal have to be secured to enable a party to seek representation before the Tribunal through a legal practitioner.

(vi). If a legal practitioner becomes an officer of an association of employer or a federation of such association of employer which is affiliated to such a federation within the meaning of sub-Section 2 (a) and 2(b), then he can represent an employer. Merely because such an officer has been earlier a legal practitioner or he is a law graduate or has acquired legal acumen otherwise would not impede his appearance. Likewise, an 'office bearer' of a trade union or a member of its executive would be entitled to represent the workmen before the Tribunal under Section 36(1) in his capacity as the office bearers or member of its executive, even though, he is a legal practitioner.

(vii). The expression 'office bearer' or any member of the executive in relation to trade union as per Section 2(gg) of the ID Act means the body by whatever name called to which the management of the affairs of the trade union is entrusted. An 'office bearer' in relation to a trade union would include any member of its executive. However, the expression 'Officer' used in Section 36(2) has not been defined in the ID Act. In the absence of any definition, some controversy is likely to arise and no single test nor an exhaustive test can be laid down for determining as to who is an officer in absence of a definition in the Act. When such a question arises the Tribunal, in each individual case would be required to determine on the materials produced before it whether the claim is justified.

(viii). No advocate could claim a right to practice by placing reliance on Section 30 of the Advocates Act. That Act has to give way to ID Act because it is a special piece of legislation with the avowed aim of labour welfare. The mode of representation before adjudicatory authorities has to be regulated by keeping that object in view. Moreover, the matter is not to be viewed from the point of view of a legal practitioner but from that of the employer and the workmen, who are the principal contestants in an industrial dispute. In ID Act, restriction is upon a party as such and the occasion to consider the right of the legal practitioner to practise before every court as per provisions of Section 30 of the Advocates Act would not arise.

9. Similar issue came up for consideration before the learned Division Bench of this Court in ***Cement Corporation of India Vs. Presiding Officer, Labour Court Shimla, 1999 (1) Shiml. L.C. 91***, wherein it was held that an application under Section 36 (4) of the Act can be allowed only when the other party and Court consent to this. It was observed as under:-

"2. The petitioner-Cement Corporation of India has challenged the order dated 19.10.1995 passed by the Presiding Officer, Labour Court/Industrial Tribunal, Himachal Pradesh, Shimla, whereby despite the objection of the petitioner-Corporation, the application of the workmen for engagement of a legal practitioner was allowed. Section 36 of the

Industrial Disputes Act, 1947 (hereinafter referred to as the Act) provides for representation of parties. Sub-section (4) of Section 36 is as under:-

> *"In any proceeding before a Labour Court, Tribunal or National Tribunal, a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceedings and with the leave of the Labour Court, Tribunal or National Tribunal as the case may be."*

3. Sub-section (4) of Section 36 of the Act came for consideration of the learned Judges of the Supreme Court in Paradip Port Trust, Paradip V. Their Workmen, AIR 1977 S.C. 36, and they have held that for the engagement of a legal practitioner both the consent of other party as well as the permission of the Labour Court/Labour Tribunal is required. The observations of the learned Judges of the Supreme Court in paragraphs 21 and 22 are relevant. These are:

> *"**21**. We have given anxious consideration to the above submission. It is true that "and" in a particular context and in view of the object and purpose of a particular legislation may be read as "or" to give effect to the intent of the legislature. However, having regard to the history of the present legislation, recognition by law of the unequal strength of the parties in adjudication proceedings before a Tribunal, intention of the law being to discourage representation by legal practitioners as such, and the need for expeditious disposal of cases, we are unable to hold that "and" in section 36(4) can be read as "or".*
>
> ***22**. Consent of the opposite party is not an idle alternative but a ruling factor in section 36(4). The question of hardship, pointed out by the Solicitor General, is a matter for the legislature to deal with and it is not for the courts to invoke the theory of injustice and other consequences to choose a rather strained interpretation when the language of section 36 is clear and unambiguous."*

4. In view of the above law laid down by the Supreme Court, we have no hesitation to hold that the impugned order passed by the Presiding Officer of the Labour Court/Industrial Tribunal is wrong, illegal and against sub-section (4) of Section 36 of the Act. Therefore, we allow the writ petition and quash the impugned order (Annexure P-3). No order as to costs."

9. Learned counsel for the petitioner would vehemently argue that the judgment in Paradip Port Trust's case supra had been rendered nearly four decades ago, when the Trade Union movement in this country was in its infancy and the workmen and the industries were then treated as two unequals. However, the Trade Union movement has now become nearly 70 years old and crossed its age of infancy long back. A number of very good Trade Unions, who have acquired knowledge, legal acumen and skill are defending the working class and very often these dedicated and reputed Trade Union Leaders are more than a match to even best of the legal practitioners before the Labour Court or Tribunal. Similarly, they have many seasoned office-bearers of a number of Trade Unions functioning in this country, who have also acquired rich experience in the field of legal background and therefore, there is no longer a fight amongst unequals. This being the situation, the

judgment in Paradip's case supra has to be considered keeping in view these developments and changed conditions. In support of his submissions has relied upon ***T.K. Varghese Vs. Nichimen Corporation 2001 (90) FLR 91***, ***Salvation Army Vs. Sunil J. Ingle 2005 (107) FLR 932*** and ***Samarendra Das Vs. M/s Win Medicare Pvt. Ltd. 2014 LLR 345.***

10. I am unable to agree with the aforesaid submissions, as it cannot be disputed that the judgment of Hon'ble Supreme Court is the law of land and is binding on all. That apart, even if we assume that there is no judgment rendered by the Hon'ble Supreme Court on the subject, even then decision of learned Division Bench of this Court is binding upon this Court and this Court is bound to follow such decision.

11. This Court cannot swerve from the path of judicial decorum and propriety. In the hierarchical system of Courts, it is necessary for each lower tier to accept loyally the decision of the higher tiers. The doctrine of binding precedent is the merit of promoting a certainty and consistency in judicial decisions and enables an organic development of law.

12. Dealing with the question regarding rule of precedent, the Hon'ble Supreme Court in a recent judgment in ***Sundeep Kumar Bafna Vs. State of Maharashtra and another AIR 2014 SC 1745*** has held as under:-

> *"13. The Constitution Bench in Union of India vs Raghubir Singh, 1989 (2) SCC 754, has come to the conclusion extracted below:*
>
> > *"27. What then should be the position in regard to the effect of the law pronounced by a Division Bench in relation to a case raising the same point subsequently before a Division Bench of a smaller number of Judges? There is no constitutional or statutory prescription in the matter, and the point is governed entirely by the practice in India of the courts sanctified by repeated affirmation over a century of time. It cannot be doubted that in order to promote consistency and certainty in the law laid down by a superior Court, the ideal condition would be that the entire Court should sit in all cases to decide questions of law, and for that reason the Supreme Court of the United States does so. But having regard to the volume of work demanding the attention of the Court, it has been found necessary in India as a general rule of practice and convenience that the Court should sit in Divisions, each Division being constituted of Judges whose number may be determined by the exigencies of judicial need, by the nature of the case including any statutory mandate relative thereto, and by such other considerations which the Chief Justice, in whom such authority devolves by convention, may find most appropriate. It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the Rule has been evolved, in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges....."*

> ***14***. *This ratio of Raghubir Singh was applied once again by the Constitution Bench in Chandra Prakash v. State of U.P.: AIR 2002 SC 1652. We think it instructive to extract the paragraph 22 from Chandra Prakash in order to underscore that there is a consistent and constant judicial opinion, spanning across decades, on this aspect of jurisprudence:*
>
> > *"Almost similar is the view expressed by a recent judgment of a five-Judge Bench of this Court in Parijas case (AIR 2002 SC 296 (supra). In that case, a Bench of two learned Judges doubted the correctness of the decision a Bench of three learned Judges, hence, directly referred the matter to a Bench of five learned Judges for reconsideration. In such a situation, the five-Judge Bench held that judicial discipline and propriety demanded that a Bench of two learned Judges should follow the decision of a Bench of three learned Judges. On this basis, the five-Judge Bench found fault with the reference made by the two-Judge Bench based on the doctrine of binding precedent.*
>
> ***15***. *It cannot be over-emphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of Courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the Court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a Co-equal or Larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam."*

13. Adverting to the facts of the present case, it would be noticed that admittedly the petitioner had not sought leave nor obtained consent of the respondents for engagement of a legal practitioner, which in terms of the learned Division Bench judgment of this Court in Cement Corporation's case supra was not permissible. The mere fact that the legal practitioner had appeared on number of occasions, as contended by the learned counsel for the petitioner, would, therefore, be of no avail. In view of the aforesaid discussion, more particularly the binding force of the judgment rendered by the Hon'ble Supreme Court in *Paradip Port Trust* (supra) and learned Division Bench judgment of this Court in *Cement Corporation* (supra), I find no merit in these petitions and the same are accordingly dismissed, leaving the parties to bear their costs. The Registry is directed to place copy of this judgment on connected files.

****

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

State of Himachal Pradesh and another. .....Petitioners.

Vs.

Surinder Singh .....Non-petitioner.

CWP No.4148 of 2014.
Order reserved on: 6.8.2015.
Date of Order: September 9, 2015

Industrial Disputes Act, 1947- Section 25F- 'S' was working on daily wages in the office of Executive Engineer IPH Division Dalhousie- services of 363 workmen were terminated due to shortage of funds and work in the Division - he filed a petition before the Labour Court who directed the Executive Engineer to re-engage the service of 'S' and to consider his case for regularization- services of two workmen were re-engaged- it was not proved that any offer was made to 'S' for re-employment- held that the petitioner was deprived of his right of being engaged prior to the engagement of his juniors- petition dismissed. (Para-7)

Cases referred:

Mool Raj Upadhyaya Vs. State of HP and others, 1994 Supp (2) SCC 316

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

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

Collector Land Acquisition Anantnag and another Vs. Mst. Katji and others, AIR 1987 SC 1353

For the petitioners: Mr. M.L. Chauhan, Addl. Advocate General with Mr. J. S. Rana, Assistant Advocate General.

For the non-petitioner. Mr.Naresh Kaul, Advocate.

The following order of the Court was delivered:

P.S.Rana Judge.

Present civil writ petition is filed under Article 226 of Constitution of India against the award passed by Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala District Kangra HP in reference No. 374/2009 titled Surinder Singh Vs. Executive Engineer I&PH Division Dalhousie District Chamba HP.

BRIEF FACTS OF THE CASE:

2. Sh Surinder Singh non petitioner was working on daily wages basis in Executive Engineer I&PH Division Dalhousie District Chamba HP w.e.f. June 1994 to 19.11.2000. Non-petitioner Surinder Singh had worked for 330 days in 1995, 366 days in 1996, 365 days in 1997, 359 days in 1998, 363 days in 1999 and 241 days in 2000. Due to shortage of funds and work in the Division and due to huge financial crisis services of 363 workmen were terminated along with non petitioner Surinder Singh. Notice under Section 25F of Industrial Disputes Act 1947 was issued to Surinder Singh and other similarly situated workmen and compensation of retrenchment was paid to the tune of Rs.4590/- (Four thousand five hundred ninety).

3. Thereafter reference No. 374 of 2009 was sent to Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala District kangra HP who passed the award. Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala District Kangra HP directed Executive Engineer I&PH Division Dalhousie District Chamba HP to re-engage the service of Surinder Singh forthwith. Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala District Kangra HP further held that Surinder Singh would be entitled to the continuity and seniority in service from the date of his illegal termination i.e. 19.11.2000 except back wages. Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala District Kangra HP further directed Executive Engineer IPH Division Dalhousie District Chamba HP to consider the case of Surinder Singh for regularization of his service as per policies framed by government of Himachal Pradesh from time to time. Presiding Judge Labour Court-cum-Industrial Tribunal Dharmshala District Kangra HP further directed that if the services of any person junior to Surinder Singh have been regularized then Surinder Singh would be entitled to the regularization from the date/month of the regularization of the services of his juniors.

4. Feeling aggrieved against the award passed by Presiding Judge Labour Court-cum-Industrial Tribunal Dharmshala State of HP filed present civil writ petition.

5. Court heard learned Additional Advocate General appearing on behalf of the petitioners and learned counsel appearing on behalf of non-petitioner and also perused entire record carefully.

6. Following points arise for determination in present civil writ petition:

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

2. Final Order.

Reasons for findings.

Point No.1.

7. Submission of learned Additional Advocate General appearing on behalf of petitioners that Labour Court did not keep into consideration ruling given by Hon'ble Apex Court of India reported in 1994 Supp (2) SCC 316 titled Mool Raj Upadhyaya Vs. State of HP and others and on this ground civil writ petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the ruling given by Hon'ble Apex Court of India cited supra. Hon'ble Apex Court of India did not hold in case cited supra that junior employee would be placed senior to senior employee in public appointments retrenched under section 25G of Industrial Disputes Act 1947. In the present case it is proved on record that service of Surinder Singh non-petitioner was retrenched and petitioners were under legal obligation to strictly comply provision of Sections 25G and 25H of the Industrial Disputes Act 1947. Section 25G of the Industrial Disputes Act 1947 deals with procedure for retrenchment and section 25H deals with re-employment of retrenched workmen. In the present case Sh L.S.Thakur Executive Engineer IPH Division Dalhousie District Chamba HP had appeared in witness box in person and had stated in positive manner that services of Smt. Biasa Devi and Sh Hem Raj were re-engaged. Smt. Biasa Devi and Sh Hem Raj were juniors to Surinder Singh. Section 25H of Industrial Disputes Act 1947 is quoted in toto.

> "25H Re-employment of retrenched workmen—Where any workmen are retrenched and the employer proposes to take into his employ any persons he shall in such manner as may be prescribed give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-

employment and such retrenched workmen who offer themselves for re-employment shall have preference over other persons".

In the present case it is not proved on record that offer was given to Surinder Singh for re-employment as provided under Section 25H of Industrial Disputes Act 1947. It is held that word 'shall' used in Section 25H is mandatory in nature and not directory in nature. Facts of the present case and facts of the case reported in 1994 Supp (2) SCC 316 titled Mool Raj Upadhyaya Vs. State of HP and others are different. In the present case matter in dispute is relating to re-employment of retrenched employee but in Mool Raj Upadhyaya case supra the matter was relating to employee employed on daily wages in Irrigation and Public Health department and matter was not relating to retrenched employee. The matter in Mool Raj Upadhyaya case supra was on the concept of equal pay for equal work and for regularization of their services but in the present case the case of non-petitioner Surinder Singh will be governed under Section 25H of Industrial Disputes Act 1947. As per Annexure P-V placed on record issued by Executive Engineer it is proved that Sh Surinder Singh had worked more than 240 days continuously in the years 1995, 1996, 1997, 1998, 1999 and 2000. Annexure P-V placed on record is issued by public servant in discharging of official duty and is relevant fact under Section 35 of Indian Evidence Act 1872.

8. Submission of learned Additional Advocate General appearing on behalf of petitioners that claim petition of Surinder Singh was time barred and on this ground civil writ petition be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that reference was sent to Labour Court by Labour Commissioner in the present case under Section 12(5) of the Industrial Disputes Act 1947 and thereafter Labour Court had passed the award in favour of Surinder Singh. It was held in case reported in 2015 (4) SCC 458 titled Jasmer Singh Vs. State of Haryana and others that provisions of Article 137 of Limitation Act 1963 would not be applicable to Industrial Disputes Act 1947. It was held that relief would not be denied to workman merely on the ground of delay. Also see 2014 (10) SCC 301 titled Raghuvir Vs. G.M. Haryana Roadways Hissar. It was held in case reported in AIR 1987 SC 1353 titled Collector Land Acquisition Anantnag and another Vs. Mst. Katji and others that (1) Ordinarily a litigant does not stand to benefit by lodging matter late. (2) Refusing to condone delay can result meritorious matter thrown out at the very threshold and cause of justice defeated. It was held that if delay is condoned then highest that would happen would that case would be decided on merits after hearing the parties. (3) It was held that every day's delay must be explained does not mean that a pedantic approach should be made. It was further held that doctrine must be applied in a rational common sense. (4) It was held that when substantial justice and technical considerations are pitted against each other then cause of substantial justice deserves to be preferred. (5) It was held that there is no presumption that delay is occasioned deliberately or on account of culpable negligence or on account of mala fides. It was held that litigant does not stand to benefit by resorting to delay and in fact he runs a serious risk. (6) It was held that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Point No.1 is decided against petitioners.

Final Order

Point No.2.

9. In view of above stated facts and case law cited supra civil writ petition filed under Article 226 of the Constitution of India is dismissed. Award announced by Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala District Kangra HP on

20.5.2013 is affirmed. Civil writ petition is disposed of. No order as to costs. Pending application(s) if any also stands disposed of.

****

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

Vandana Kumari Guleria & anr ...Petitioners

Vs

Union of India & others ...Respondents.

CWP No. 3327 of 2013
Reserved on 20.8.2015
Decided on: 9-9-2015.

Constitution of India, 1950- Article 226- Respondents No. 2 to 4 issued an advertisement for the appointment of distributor of LPG- respondent No. 5 was declared as a selected candidate- petitioner contended that respondent No. 5 did not fulfill the eligibility criteria- respondent No. 5 was lessee of the land along with his brother-in-law- the case of the brother-in-law was rejected on the ground that show room and godown did not fulfill the criteria specified by respondents No. 2 to 4- respondent No. 5 and Sanjay Kumar were not free to assign, transfer, sublet, underlet, or part with possession of the property as per the lease deed – respondents No. 2 to 4 stated that all the applicants including petitioner were given a chance to remove deficiency- respondent No. 5 was considered eligible on the basis of experience and the documents submitted by him- status of respondent No. 5 and Sanjay Kumar was that of joint tenants and not tenant in common – mere execution of the affidavit will not bring out the partition without the consent of the lessor- respondent No. 5 was asked to verify her share including the dimension of the land for show room as well as godown- certificate was issued by the patwari, which was counter-signed by the Naib-Tehsildar specifying the length and width of the land offered by respondent No. 5 as 26 mtr x 35.3 sq. mtrs- however, patwari and Naib-Tehsildar appeared before the High Court and admitted that since the lease deed was jointly executed, the share of the lessee would be equal and the Revenue Authorities are not competent to determine the share, unless specified in the documents- this shows that mischief was committed by the authorities while issuing the certificates- petition allowed and the allotment made in favour of the respondent No. 5 quashed- Government directed to take departmental action against the patwari and Naib-Tehsildar. (Para-10 to 19 and 23 to 42)

Words and Phrases- Joint tenants and tenants in common- Joint tenants have unity of title, unity of commencement of title, unity of interest, have equal shares in the joint estate, unity of possession and right of survivorship; while tenants in common have unity of possession and no unity of title. (Para-20 to 22)

Cases referred:

S.Sanyal Vs. Gian Chand AIR 1968 SC 438

Sunita Gupta vs. Union of India and others 2015 (1) SLJ 83

For the Petitioners : Mr. Ajay Sharma, Advocate.

For the Respondents : Mr. Vivek Thakur, Sr. Panel Counsel for respondent No.1.
Ms. Vandana Panta, Advocate, for repsndents No. 2 to 4.
Mr. Dushyant Dadwal, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge:

The petitioners, who themselves were contenders for the distributorship of LPG, by the medium of this writ petition, have questioned the allotment of the same in favour of 5th respondent.

The facts in brief may be noticed.

2. The respondents No. 2 to 4 issued advertisement for distributorship of LPG which appeared in daily edition of 'Amar Ujala' dated 10.9.2011, whereby apart from other places, Daulatpur Chowk in District Una, was also advertised for appointment of distributor under general category. Petitioners along with other persons applied and after scrutiny, their names found mention in the list of eligible candidates. The draw of lots took place on 24.7.2012 at Una, in which 5th respondent was declared as selected.

3. Petitioners have laid challenge to this selection on the ground that 5th respondent does not fulfill the eligibility criteria and has been selected by misleading officials of respondents No. 2 to 4.

4. It is contended that the admitted facts in the instant case are that 5th respondent was not the sole lessee of the land and had taken the same on lease alongwith one Sanjay Kumar her brother-in-law. His (Sanjay Kumar) case had already been rejected by respondents 2 to 4 on the ground that dimensions of showroom and godown were not in consonance with the guidelines as laid down in the brochure, whereas 5th respondent, who was similarly situate and placed like Sanjay Kumar could not have been selected, more particularly being joint lessees in one lease deed, which lease was not divisible particularly in view of clause (e) of the lease deed for godown/showroom annexed with the petition as annexure P-5 which reads thus:

> *"(e) The lessees shall not be free to assign, transfer, sublet, underlet, or part with possession of the same or any part thereof to any person above named whoever it chooses without the consent of the lesser.".*

5. On the strength of this clause, it is vehemently urged that neither of the lessee i.e. Sanjay Kumar nor 5th respondent were free to assign, transfer, sublet, underlet, or part with possession of the property. While in the present case, the only basis on which 5th respondent has been considered to be fulfilling the eligibility criteria is on the basis of the conditional letters of relinquishments executed by both Sanjay Kumar and 5th respondent whereby Sanjay Kumar in the event of his non selection has asked the official respondents to consider the land offered by him to the exiting share of 5th respondent and to similar effect is the letter of relinquishment executed by 5th respondent in favour of Sanjay Kumar.

6. It is averred that affidavit to the same effect was also filed by 5th respondent which for the reasons best known to the official respondents, has not been placed on record.

7. Respondent No.1 has not chosen to contest the petition, whereas respondents No. 2 to 4 have contested the petition by contending that they have scrupulously followed the guidelines as set out in the brochure and it is only thereafter that 5th respondent came to be selected, that too, on the basis of a draw.

8. The respondents No. 2 to 4 have averred that in terms of clause 9.5 of the brochure, it was imperative upon it to have asked all the applicants to remove the

deficiencies which were found in their respective applications and this procedure was not only followed in the case of 5th respondent alone, but was followed even in the case of petitioners and a number of other applicants. It was on basis of this clause that it issued letters to both 5th respondent as also Sanjay Kumar on 1.3.2012 (Annexure R-2 and R-3 supra) and after satisfying itself not only on the basis of the explanation and documents submitted by 5th respondent, but thereafter on the basis of spot inspection and after getting clarification from the revenue authorities that 5th respondent was considered eligible and on the strength of the draw conducted at Una, was selected for the distributorship of LPG.

9. 5th respondent has contested the petition by filing a separate reply and has defended her selection as being based entirely on merit. 5th respondent has claimed that she was found suitable for the LPG distributorship after a field verification was undertaken by the officials of respondents No. 2 to 4 and it was only after satisfying themselves about her credentials that too strictly as per the policy and guidelines that the selection committee, after interviewing large number of candidates, found her to be the best amongst the entire lot. It is further averred that the petitioners while making reference to the lease deed, were in fact misinterpreting the provisions of the Transfer of Property Act, whereas true and correct position was that Sanjay Kumar, the brother in law of the replying respondent had executed a joint registered lease deed along with 5th respondent for a period of 15 years without specifying the actual area of each other but thereafter an affidavit to this effect had been executed by Sanjay Kumar on 4.10.2011 (quoted above), wherein it had clearly been stipulated that in the event of selection of 5th respondent being selected, he would have no objection if the godown is constructed on the land in question. It is further averred that 5th respondent fulfills the criteria as laid down in clause 7(vi) and 7(vii) of the brochure and was thus fully eligible for selection.

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

10. It is not in dispute that the selection in question is required to be made on the basis of the guidelines annexed with the petition as annexure P-4. At this stage, certain salient features as are necessary for the adjudication of this petition may be noticed. Clause (vii) relates to eligibility criteria for individual applicants. Clause (iv) defines 'Family Unit' in the following manner:

> *"(iv) 'Family Unit' in case of married person/applicant, shall consist of individual concerned, his/her Spouse(s) and their unmarried son(s)/daughter(s). In case of unmarried person/applicant, 'Family Unit' shall consist of individual concerned, his/her parents and his/her unmarried brother(s) and unmarried sister(s). In case of divorcee, 'Family Unit' shall consist of individual concerned, unmarried son(s)/unmarried daughter(s) whose custody is given to him/her. In case of widow/widower, 'Family Unit' shall consist of individual concerned, unmarried son(s)/unmarried daughter(s)."*

11. The size of the plot is set out in clause (vi), which provides as under:

> *"(vi) Should own a plot of land of adequate size (within 15 Km from municipal/town/village limits of the location offered in the same State) for construction of godown for storage of 8000 Kg of LPG in cylinders or ready LPG cylinder storage godown* ***as on the date of application****. As per Gas Cylinder Rules 2004, the floor area of the storage shed for storing 8000 kg LPG in cylinders should be 80 sq meters. The length of the storage shed*

should not be more than 1.5 times of width of storage shed. There should be clear minimum safety distance of 7 meters between storage shed and the boundary wall/fencing. The plot of land with minimum dimension of 26.15 metres by 27 metre is adequate. It should be freely accessible through all weather motorable approach road (pubic road or private road of the applicant connecting to the public road) and should be plain, in one contiguous plot, free from live overhead power transmission or telephone lines. Canals/Drainage/Nallahs should not be passing through the plot. The land for construction of LPG godown should also meet the norms of various statutory bodies such as PWD/Highway authorities/Town and Country Planning Department etc.

In case an applicant has more than one suitable plot for construction of go down for storage of minimum 8000 Kg of LPG in cylinders or ready LPG cylinder storage godown ***as on the date of application,*** *the details of the same can also be provided in the application."*

And clause (vii) gives the specification of the shop in the following terms:

'(vii) Own a suitable shop of minimum size 3 metres by 4.5 metre in dimension or a plot of land for construction of shop of minimum size 3 metres by 4.5 metre at the advertised location of locality as specified in the advertisement ***as on the date of application****. It should be easily accessible to general public through a suitable approach road.*

In case an applicant has more than one shop of minimum size 3 metre by 4.5 metre in dimension or a plot of land for construction of shop of minimum size 3 metre by 4.5 metre at the advertised location or locality as specified in the advertised ***as on the date of application,*** *the details of the same can also be provided in the application.*

It is further clarified with respect to clauses (vi) and (vii) supra that:

'Own' means having ownership title of the property or registered lease agreement for minimum 15 yrs in the name of applicant/family member as defined in multiple distributorship norm of eligibility criteria.

In case the land is jointly owned by the applicant/member of 'Family Unit' (as defined in multiple dealership/distributorship norm) with any other person(s) and the share of the land in the name of applicant/member of the 'Family Unit' meets the requirement of land including the dimensions required, then that land for godown/showroom will also qualify for eligibility as own land subject to no objection from other owner(s)."

12. 9.5 of the brochure relate to the procedure for receipt of application and provide that:

"9.5.Procedure For Receipt of Application

Application would be received in sealed envelope only. After application is received, serial number would be put on the envelope and also recorded in a 'Register'. Acknowledgement for applications received will be sent to the applicants.

In case deficiencies are found in the application, a letter would be sent to the applicant to rectify the deficiencies within a specified period of time."

13. Learned counsel for the petitioners invited my attention to the letters dated 1.3.2012 annexed with the reply of respondents 2 to 4 as Annexures R-2 and R-3, respectively, wherein both Smt. Ruchi Kumari and Sanjay Kumar were directed to clarify the following position:

> *"The land for the godown is jointly owned by you and your brother-in-law. The plot size of godown as indicated in your application is 35 mtr x 26 mtr. Kindly clarify your share in the aforesaid land."*

14. In response to this letter, Sanjay Kumar replied in the following terms:

"To

The Territory Manager (LPG)
Bharat Petroleum Corporation Ltd.
Lalru, PO Tiwana, Distt. Mohali (Pb)-140501

Sub: Representation on the Letter No. LRU/DPC/05 dated 01-03-2012

Sir,

The applicant respectfully submits as under:-

1. That the applicant has attached two affidavits along with the application regarding the detail of the Plot of Land for Godown.

2. That the Lease Deed no. 1779 dated 27-09-2011 registered in the office of Sub Registrar Amb, Distt. Una H.P. in respect of Land of Khasra no. 527, 525 Land measuring 0-13-44 hects situated at Village Dangoh Khas, Tehsil Amb, Distt. Una H.P. has been executed and registered in favour of the applicant and Sanjay Kumar son of Sh. Pritam Chand resident of Ward No. 7, Palampur PO and Tehsil Palampur, Distt. Kangra, H.P. who is a co-lessee with the applicant and is within the definition of reference 7.1 (vi, vii) of Guidelines on selection of Regular LPG Distributorship.

3. That the applicant fulfill the criteria of land as detailed in the definition of reference 7.1 (vi, vii) of Guidelines on selection of Regular LPG Distributorship as the above named Sanjay Kumar has given No Objection by way of affidavit as required by your goodself. No doubt Sanjay Kumar is brother-in-law of the applicant but so far as the land is concerned he is a co-lessee and the lease is for 15 years subject to renewable.

4. That the plot size of the godown fulfill the basic requirement rather the size of the plot is more than the requirement. The affidavit of Ruchi Kumar have not been appreciated properly as she is a co-lessee as well as sister in law. She be treated as co-lessee and she has given no objection.

Therefore your good self is requested to consider the application of the applicant and treat Ruchi Kumari as co-lessee with the applicant and plot size which is much more than requirement.

Thanking you in anticipation.

Date: 21-03-2012

Place: Palampur

Sd/-
Applicant
Sanjay Kumar S/o Sh. Pritam Chand
R/o Ward No. 7 Palampur"

15. Insofar as 5th respondent is concerned, she too filed a verbatim reply as filed by Sanjay Kumar, which has been annexed with the reply as Annexure R-5.

16. The petitioners have also drawn my attention to the notarized affidavit submitted by Sanjay Kumar, relevant portion whereof reads as under:

> *"1. That I am married and my sister in law Smt. Ruchi Kumari has applied for LPG distributorship of BPC at Doulatpur Chowk, HP under open category against the advertisement made in 'Amar Ujala news paper dated 10 Sep.2011.*
>
> *2. That in case she is selected for LPG distributorship, I have no objection for construction of godown/showroom on the land specified in item No.9 and 10 in my name as a Lease holder.*
>
> *3. That in case she is selected for LPG distributorship I will provide financial assistance to the extent of amount which is mentioned at Item No 11 & 12 under my name in the application submitted by Ruchi Kumari for LPG distributorship of BPC at Doulatpur Chowk,(HP)."*

17. As per the allegations of the petitioners, similar affidavit had also been sworn by 5th respondent to the effect that in the event of her non-selection, the official respondents should consider the land offered by her to the existing share of Sanjay Kumar, but the same had not been placed on record.

18. The records produced by respondents No. 1 to 4 reveal that 5th respondent had sworn an affidavit on 4.10.2011, which reads thus:

> *"I Ruchi Kumari wife of Sh. Ajay Kumar, age 29 year resident of Ward No. 7, Teh & P.O. Palampur, Distt. Kangra, H.P. do hereby affirm and say as under:*
>
> *1. That I am married and my brother in law Mr. Sanjay Kumar has applied for LPG distributorship of BPC at Doulatpur Chowk (H.P.) under open category against the advertisement made in Amar Ujjala news paper dated 10 Sep. 2011.*
>
> *2. That in case he is selected for LPG distributorship I have no objection for construction of godown/showroom on the land specified in item No. 9 & 10 in my name as a lease holder.*
>
> *3. That in case he is selected for LPG distributorship I will provide financial assistance to the extent of amount which is mentioned at item No. 11 & 12 under my name in the application submitted by Shri Sanjay Kumar for LPG distributorship of BPC at Doulatpur Chowk (HP).*
>
> *I hereby verify that what has been stated above is true and correct to the best of my knowledge and nothing material has been concealed therefrom.*
>
> *Solemnly affirmed and declared before me. This 4 day of Oct. 2011.*
>
> *Sd/-*
>
> *Ruchi Kumari."*

19. It is on the strength of the aforesaid documents that it is contended that since 5th respondent and Sanjay Kumar were joint tenants, the contract of tenancy amongst them was a single and indivisible contract and therefore, it was not open for either of them to divide the same in the aforesaid manner. He has in support of his contention relied upon the judgment of the Hon'ble Supreme Court in **Miss S.Sanyal** Vs. **Gian Chand AIR 1968 SC 438** , wherein, it held as follows:

> *"3. In the present case the First Appellate Court held that the house was "let out for running a school and for residence". The High Court held that where there is a composite letting, it is open to the Court to disintegrate the contract*

of tenancy, and if, the landlord proves his case of bona fide requirement for his own occupation to pass a decree in ejectment limited to that part which "is being used" by the tenant for residential purposes. In so holding, in our judgment. the High Court erred. The jurisdiction 'of the Court may be exercised under s. 13(1)(e) of the Act only when the, premises are let for residential purposes and not when the premises being let for composite purposes, are used in specific portions for purposes residential and non- residential. The contract of tenancy is a single and indivisible contract, and in the absence of any statutory provision to that effect it is not open to the Court to divide it into two contracts-one of letting for residential purposes, and the other for non-residential purposes, and to grant relief under s. 13(1)(e) of the Act limited to the portion of the demised property which "is being used" for residential purposes.

*6. In this case the letting not being solely for residential purposes, in our judgment, the Court had no jurisdiction to pass the order appealed from. We may note that a Division Bench of the Punjab High Court in Kunwar Behari v. Smt. Vindhya Devi, **AIR 1966 Punj 481** has held in construing S. 14(i)(e) of the Delhi Rent Control Act 59 of 1958, material part whereof is substantially in the same terms as S. 13(1)(e) of the Delhi & Ajmer Rent Control Act, that "where the building let for residence is the entire premises it is not open to the Court to further sub-divide the premises and order eviction with respect to a part thereof". In our view that judgment of the Punjab High Court was right on the fundamental ground that in the absence of a specific provision incorporated in the statute the Court has no power to break up the unity 'of the contract of letting and attribute incidents and obligations to a part of the subject-matter of the contract which are not applicable to the rest.*

20. Fundamentally, the concepts of joint tenancy and tenancy-in-common are different and distinct in form and substance. Herein, it is important to note that the incidents regarding the co-tenancy and joint tenancy are different. Joint tenants have unity of title, unity of commencement of title, unity of interest, so as in law to have equal shares in the joint estate, unity of possession, as well of every part as of the whole, and right of survivorship.

21. Tenancy-in-common on the other hand is a different concept. There is unity of possession but no unity of title, i.e. the interests are differently held which mean that none of the co-tenure-holders has title over the entire estate. The title varies. The tenants-in-common need have only unity of possession; they may have unequal shares, and there is no right of survivorship. Each tenant-in-common could at common law make a lease in respect of his own share alone, the interest of each being separate and distinct, and if tenants-in-common all joined in one lease it operated as a lease by each of his respective share and a confirmation by each as to the shares of the others. The principle will apply with equal force to tenancy rights held in common.

22. The joint tenancy can be converted and changed into tenancy-in-common by effecting a division of the same whereby the joint tenancy shall then change and become tenancy-in-common.

23. On the aforesaid basis it can conveniently be concluded that the status of 5th respondent with Sanjay Kumar was that of joint tenants and not tenant-in-common. If that be so, then there was a unity of equal shares in the joint estate which status could have

been brought about only by a division of the same. But in no event, could the share of one of the joint tenant exceed the share of the other without there being a lawful division of the same.

24. Since there are admittedly only two joint tenants in the instant case then the necessary corollary is that they have undivided equal share in the lease deed.

25. Now, the further question that arises for consideration is as to whether there was a lawful division brought about in the land so as to convert the status from joint tenants to joint tenants-in-common by executing an undertaking and affidavits to this effect? The answer would be in the negative for the simple reason that as per the "*Clause (e) of the lease deed, neither of the lessee is free to assign/transfer sublet, underlet or part with possession of the same or any part thereof to any person above named whoever it chooses without the consent of the lesser.*" Admittedly, no such consent has been obtained from the lesser and if at all it had been taken, then the same atleast has not been placed on the record.

26. That apart, the relinquishment or assignment are not mere empty words, but have definite legal connotations. 5th respondent and Sanjay Kumar could not have executed documents which are in the nature of "either or remainder" thereby making a reservation of berth for either of them in the selection. This is an unconscionable contract and therefore violates the provisions of the Indian Contract Act.

27. Learned counsel for the respondents would however contend that the petitioners after having participated in the selection process were estopped from questioning the allotment made in favour of 5th respondent. I am afraid that this contention is not available to the respondents for the simple reason that the petitioners could be said to be estopped to a fact or action, which is professed, but such estoppel would not be attracted to a condition of a brochure that has not been followed or where the procedure followed is not only arbitrary, capricious but even illegal. The grievance of the petitioners is not in respect of the criteria advertised, but the manner of applying such a criteria for making allotments and therefore, the plea of estoppel would not be attracted to the facts of the present case.

28. Insofar as 5th respondent is concerned, heavy reliance is placed on a recent judgment of the Hon'ble Supreme Court in ***Sunita Gupta vs. Union of India and others 2015 (1) SLJ 83*** to contend that there was no embargo in considering the land of Sanjay Kumar, who was non-other than the brother-in-law of 5th respondent to her share, more particularly, after he had relinquished the same in her favour by way of affidavit. Reliance in particular was placed upon the following observations of the Hon'ble Supreme Court:

> *"7. We have heard the rival legal contentions for the parties. The appellant was initially found eligible and was called for the interview. After the interview, she was shown as selected and the visit to the land mentioned along with the application for the dealership was accepted as sufficient and 35 marks were awarded in that regard. Subsequently, it was changed to zero, as per clause 12 of the guidelines, on the ground that consent letters of the co-owners were not submitted before the due date along with the application but much later and as per the said clause, no addition/deletion or alteration will be permitted in the application once it is submitted.*
>
> *In our considered viewpoint, this approach of the respondents was erroneous as the application form of the appellant was initially accepted along with the consent letters of her husband and father-in-law to whom the land belonged and the site visit was completed satisfactorily and she was called in*

for the interview. After the interview, her name was on top of the results list and she was shown as selected. She was awarded 35 marks under the head 'Land and Infrastructure'. Later, the respondents made an about turn and declared that she was ineligible as she had given the consent letters of the co-owners after the due date and hence, the marks awarded under 'Land and Infrastructure' were reduced to zero. Hence, the review order passed by the respondents is bad in law as the appellant was originally found to have fulfilled all the criteria for the land offered which was greater in area than the land required as per the rules and guidelines of the respondent Corporation. The review committee, on a mere technicality, denied the appellant her right to the dealership, after it was previously declared that she was selected for the same. It is evident that the documents the appellant provided at first were seen to be sufficient, and the fact that she chose to give some additional documents to buttress her application cannot be a ground to nullify her appointment, given that clause 14, 'Preference for applicants offering suitable land' of the HPCL "Guidelines for Selection of Retail Outlet Holders" details that the land owned by the family members namely spouse/unmarried children will also be considered subject to the consent of the concerned family member. Since, in this case, the land was owned by her husband and father-in-law, she gave their consent letters along with the application form within the due date. We feel that the appellant has sufficiently met the conditions of the application and the respondent Corporation has erred in subsequently cancelling the appointment on a flimsy technicality and has acted in an arbitrary and unfair manner. It is relevant to quote the case of Mahabir Auto Stores & Ors. v. Indian Oil Corporation and Ors.[1], wherein it was held that -

> *"Having regard to the nature of the transaction, we are of the opinion that it would be appropriate to state that in cases where the instrumentality of the state enters the contractual field, it should be governed by the incidence of the contract. It is true that it may not be necessary to give reasons but, in our opinion, in the field of this nature fairness must be there to the parties concerned, and having regard to the large number or the long period and the nature of the dealings between the parties, the appellant should have been taken into confidence. Equality and fairness at least demands this much from an instrumentality of the State dealing with a right of the State not to treat the contract as subsisting. We must, however, evolve such process which will work."*

For the reasons stated supra, we hold that the respondent- Corporation, being an instrumentality of the State has acted unfairly in the present case in cancelling the selection of the appellant for the retail outlet dealership in question and not issuing the letter of intent to her. The appellant has competed for the appointment and was selected fairly after satisfying the requirements. Therefore, we direct the respondents to restore the appointment to the appellant within six weeks from the date of receipt of the copy of this order. The appeal is accordingly allowed on the above terms with no order as to costs."

29. I have gone through the aforesaid judgment and find that the same is not at all applicable to the facts of the instant case. The Hon'ble Supreme Court in the aforesaid case was dealing with a case where the appellant therein alongwith the application form,

had appended a land map showing the plot in question to be divided into three parts, out of which the middle part belonged to the appellant and the same was also accompanied by the consent letter of her husband and her father-in-law. The total land measured 2980 sq.m. whereas the land required was only 900 sq.m. It was the contention of the appellant therein that once the land was far in excess of the requirement, then there was no requirement or occasion to submit the consent letters of other co-owners. It was in this factual background that the observations, as quoted above, were made and the appeal filed was allowed. Whereas, the facts in the instant case are entirely different because admittedly unlike in ***Sunita Gupta's*** case (supra) Sanjay Kumar and respondent No.5 are joint owners. It is also not in dispute that in case they are held to be joint owners to the extent of equal shares then none of them fulfill the eligibility as prescribed in the brochure.

30. It is further not in dispute that unlike in ***Sunita Gupta's*** case (supra), where there was a single applicant, here both Sanjay Kumar and 5th respondent are applicants having separately applied for the allotment and pertinently the application of Sanjay Kumar already stands rejected. Therefore, judgment aforesaid, is of no assistance to 5th respondent.

31. Another intriguing fact in the present case is as to how the shares of 5th respondent came to be determined when admittedly she was a joint lessee in equal shares with Sanjay Kumar. Vide letter dated 4.2.2013, 5th respondent was asked to clarify her share including the dimensions of the land for showroom as well as godown as would be clear from the relevant portion of the letter dated 4.2.2013 which reads thus:

> *".....During the FVC, the team visited sub-registrar office at Amb to verify the genuineness of registered lease deed no. 1779/2011 dt. 27/09/2011. The sub-registrar, Amb vide his letter no. 71/RC dt. 27/12/2012, has confirmed that the said lease deed has been duly registered in his office. However, the said office could not clarify on your share including dimensions in the lands for showroom as well as godown.*
>
> *'As per Boucher on Guidelines for selection of regular LPG distributors, April 2011*
>
> *Reference to point no. vi & vii of Land for Godown & showroom,*
>
> *'Own' means having ownership title of the property or registered long (minimum 15 yrs) in the name of applicant/ family member as defined in multiple distributorship norm of eligibility criteria.*
>
> *In case the land is jointly owned by the applicant/ member of 'Family Unit' (as defined in multiple dealership/ distributorship norm) with any other person(s) and the share of the land in the name of applicant/ member of the 'Family Unit' meets the requirement of land including the dimensions required, then that land for godown/showroom will also qualify for eligibility as own land subject to no objection from other owner(s).'*
>
> *You are requested to furnish documents from revenue records clarify your share including the dimensions in the lands for showroom as well as godown as per registered lease deed no. 1779/2011 dt. 27/09/2011 as on date of application within 15 days of receipt of this letter failing which your candidature for the above LPG distributorship will be treated as in-eligible."*

32. In response to the aforesaid letter, 5th respondent submitted the following reply:

> *".....That pursuant to my application for the LPG distributorship at Daulatpur Chowk & after my selection the field verification of my land was carried out by the officials of your company which is jointly leased by me with my brother in*

law, who has executed an affidavit in favour, with clear stipulation in the same that in case of my selection he would be having no objection, which affidavit was submitted alongwith the application form.

Sir, when even the verification from the office of Sub-Registrar, Amb about the lease deed has also been done & confirmed, it is not understood that how and on what basis the objection with respect to the share and its dimensions is being taken without any justification and reasoning, when there was no requirement of the same in the advertisement, which also loses its significance when affidavit has been executed by the other lessee i.e. Sh. Sanjay Kumar, my brother in law, who in clear and unequivocal terms has given undertaking that he has no objection with regard to establishment of LPG distributorship if the same is allotted to me. For the sake of clarification it is again submitted that the ladn which was mentioned in the lease deed meets out the specific requirements mentioned in the advertisement, the veracity of which has been confirmed and verified after field inspection and confirmation from the office of Sub-Registrar, therefore it is humbly submitted that the same may please be dropped, which is unjustifiable and improper as the same is being raked up for some extraneous reasons as far as the undertaking of the applicant goes.

The applicant is eligible and is fulfilling all the requirements strictly as per the brochure therefore, it is humbly requested that the applicant may please be issued letter of intent as soon as possible without wasting any further time.

So far as the lease deed is concerned the same is for a period of 15 years, which confirms the requirement as per the advertisement as also as per the brochure. Since the applicant has earlier also submitted that after execution of affidavit by Sh. Sanjay Kumar, the other lessee, she is the lessee of the entire land therefore there is no question of mentioning or specifying the share of the applicant.

For the sake of clarification once again the applicant is submitting the documents from the revenue officer stating therein the dimensions of the land and the affidavit executed by the co lessee mentioning therein the area and dimensions of the land."

33. It appears that thereafter the Deputy Manager of the respondent-Corporation approached the Sub-Registrar, Amb vide letter dated 8.3.2013 asking him to confirm the date on which the individual share of 5th respondent was incorporated in the registered lease deed no. 1779/2011 dt. 27/09/2011. It is on the basis of this letter that a certificate came to be issued by the concerned Patwari and counter-signed by the Naib-Tehsildar, the copy whereof was appended as Annexure R-16 with CMP No. 3734 of 2014 wherein the length and width of the land offered by 5th respondent was stated to be 26 mtr x 35.3 sq. mtrs.

34. At this juncture, it may be worthwhile to refer to another facet of the case. When the case had been argued for some time on 22.9.2014 this Court passed the following orders:

"Heard for some time. Respondent No.3 is directed to file an affidavit to the effect as to whether the land mentioned by Sanjay Kumar in his application for grant of dealership of LPG, which included the land of respondent No.5, were excluded at the time of calculating and computing the land disclosed by respondent No.5, Ruchi Kumari in her application for grant of dealership of

LPG. This be done within a period of three weeks. List on 17.10.2014, on which date the records of the case shall also be made available."

35. Thereafter, when the case came up for further consideration on 17.10.2014, the Court after not being satisfied with the affidavit filed by respondent No.4, passed the following orders:

"The affidavit filed by respondent No.4 does not comply with the directions passed by this Court on 22.9.2014. The respondent No.4 is directed to file supplementary affidavit strictly in accordance with the directions passed by this Court on 22.09.2014, failing which he shall appear before this Court in person. List on 04.11.2014."

36. In terms of the supplementary affidavit filed in compliance to the order dated 22.9.2014, it would be noticed that respondent No.4 in para 8 thereof, has made the following averment:

"8. That subsequently, during field verifications of credentials, it was verified from the revenue authorities (Sub-Registrar, Amb) that Smt. Ruchi Kumari has a share of 916 sq.mtrs in the lease land pertaining to khasra No. 527 and 525 with a dimension of 26 mtr x 35.3 mtr which is effective from 27/09/2011 i.e. from the date of execution of the lease deed."

37. Since this Court was not prima facie satisfied as to on what basis the certificate had been issued, this Court vide order dated 11.12.2014, directed the personal presence of the Patwari as well as Naib Tehsildar, Amb, District Una. The concerned officials appeared before this Court on 18.12.2014 and candidly conceded that since the lease deed was jointly executed by the 5th respondent and Sanjay Kumar, the shares of co-lessees would essentially be equal unless so specified and made clear in the lease deed itself. It was clarified that the matters of shares are determined by the document and the agreement between the parties and the revenue officers are not competent to work out the shares unless the document so specifies.

38. Here, it is pertinent to note that the total area of khasra No. 525 is 0-08-94 hectares, out of which 0-02-22 hectares has been taken on lease by Sanjay Kumar and 5th respondent jointly. Thus, the area of the two persons, will be 222/894 share, but how the share of Sanjay Kumar in the lease deed has been worked out to the extent of 428/1344 share and Smt. Ruchi Kumari to the extent of 916/1344 share is not forthcoming.

39. Once, it was a joint lease wherein 5th respondent and Sanjay Kumar were joint tenants then they would be lessees to the extent of 222/894 shares respectively. This clearly goes to show that a clear mischief has been played by the revenue authorities simply in order to extend undue benefit by manipulating a document in favour of 5th respondent. After all the revenue staff had no "magical wand" to divide a lease deed in the aforesaid manner which was jointly executed by 5th respondent and Sanjay Kumar.

40. It is further not in dispute that the requirement of the land as per brochure is 27 mt x 26.15 mtrs as against which the dimensions of the land offered by 5th respondent on the basis of the illegal certificate and other documents illegally manufactured by the revenue staff is still admittedly less and is 26 mtr x 35.3. mtrs. When confronted with this short-fall, the respondents No. 1 to 4 would claim that the difference was very marginal and could conveniently be ignored. I am afraid that this contention is not available to the official respondents for the simple reason that it is they, who have laid down the guidelines and having laid the same, they are estopped from questioning the validity thereof.

41. In view of the aforesaid discussion, the selection of respondent No.5 for the distributorship of LPG at Daulatpur Chowk, District Una cannot be sustained and is accordingly quashed.

42. Since the selection of 5th respondent was primarily made on the basis of the documents illegally manufactured and thereafter issued by the revenue authorities, let departmental proceedings be initiated against the then Patwari and Naib-Tehsildar, Amb, who illegally and in order to extend undue benefit to 5th respondent, who otherwise was not eligible for being LPG distributorship issued the same.

43. At the same time, respondents No. 1 to 4 would be well advised in future to adhere to the time schedule as provided in the brochure and desist from permitting the applicants from manipulating and manufacturing the documents under the garb of removing the deficiencies by invoking Clause 9.5 of the brochure as has been done in the present case.

The writ petition is allowed in the aforesaid terms, leaving the parties to bear their own costs. Pending applications are also disposed of. Interim stay granted by this Court, from time to time, is vacated.

44. Let copy of this order alongwith the complete paper book be sent to the Principal Secretary (Revenue) so as to enable him to initiate the departmental proceedings as aforesaid.

****

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

Gaurav Verma .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 118 of 2014
Reserved on: September 09, 2015.
Decided on: September 10, 2015.

Indian Penal Code, 1860- Section 302- Accused was student of IIT Rurkee and deceased was student of IIT Delhi- they came to Shimla and stayed in a hotel- room was found locked and was opened by the police- dead body of the deceased was found in the room- accused claimed that he was in love with the deceased- deceased had committed suicide- Medical Officer found self inflicted injury on the person of the accused while the injury found on the person of the deceased could not have been self inflicted- nature of the injuries found on the person of the accused were simple and cannot lead to an inferences that he had tried to commit suicide – deceased was found to have consumed alcohol- the fact that accused had run away from the scene of the crime falsifies his version that he had tried to commit suicide- held, that in these circumstances, prosecution version was proved beyond reasonable doubt and the accused was rightly convicted. (Para-30 to 39)

Case referred:
Kartarey and others vrs. State of U.P., AIR 1976 SC 76

For the appellant: Mr. Ajay Kochhar, Advocate.
For the respondent: Mr. P.M.Negi, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment and order dated 21.2.2014 and 25.2.2014, respectively, rendered by the learned Sessions Judge (Forests), Shimla, H.P. in Sessions Case No. 29-S/7 of 2012/11, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 302 IPC, was convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- and in default of payment of fine to further undergo imprisonment for six months.

2. The case of the prosecution, in a nut shell, is that the accused was student of Engineering in IIT Rurkee and deceased Pragti was student of Engineering at IIT Delhi. On 25.2.2010, both of them came to Shimla and stayed in room No. 26, Hotel Rasik at 2:30 AM. On 26.2.2010, they stayed in the room. On 27.2.2010 when the room was found locked from outside and no reply was coming from inside, the police was called and the room was opened with duplicate key and dead body of deceased Pragti was found in the room. The police recorded the statement of PW-4 Raj Kumar vide Ext. PW-4/A and rukka was sent to the Police Station. On the basis of the rukka, FIR Ext. PW-25/A was registered. The spot proceedings were photographed. The police took into possession various articles belonging to the accused and deceased. The dead body was handed over to the Uncle and Sister of Pragti. The accused had left Shimla and stayed at Hotel Haryana, Chandigarh and thereafter, he was nabbed from Jagadhari. The police took specimen handwriting and finger prints of the accused. The accused was got medically examined and his MLC Ext. PW-32/A was obtained. The post mortem of the deceased was also got conducted. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 37 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused filed his defence in writing and took defence that Pragti was in love with him and her parents were against their marriage. They came to Shimla and stayed in Hotel Rasik. They consumed liquor, smoke together and also had sex. The deceased committed suicide. He also tried to commit suicide. He was arrested from Jagadhari. The accused has also examined two DWs in defence. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Ajay Kochhar, Advocate for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. P.M.Negi, learned Dy. Advocate General, appearing on behalf of the State, has supported the judgment and order of the learned trial Court dated 21.2.2014 and 25.2.2014, respectively.

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

6. PW-1 Anil Kumar deposed that the accused was absent from the Institute on 24.2.2010 onwards.

7. PW-2 Mohinder Singh deposed that he was on night duty at reception on the intervening night of 27th and 28th February, 2010. The police came to the hotel on 28.2.2010 at 7-7:30 AM and Ramesh Chand, Manager was present in the hotel. He produced the photo copy of the abstract of the register for the period 26.2.2010 and 27.2.2010. It was also signed by Ramesh Chand. He identified his signatures. The accused stayed in the hotel on 27.2.2010 for about 1- 1½ hours.

8. PW-4 Raj Kumar deposed that on the night intervening 25/26th February, 2010, one boy and a girl visited their hotel. He was on duty. They asked for a room and he booked room No. 26 for them. Entries were made in the guest register by him. Entry form was filled in by the boy i.e. accused. The accused and the girl had come to their hotel in a vehicle. They came at 2:30 AM and stayed in the hotel. On 26.2.2010 at about 11:30 AM, he went to room No. 26 in order to inquire whether they wanted to have a vehicle for sight-seeing in Shimla. He went inside the room and asked the accused whether they wanted a vehicle or not. Thereafter, he did not go inside the room of the accused. At about 12:30 PM, both of them went out of their hotel for a walk. After about an hour, both of them came back to their hotel. He tried to contact in room No. 26 via intercom, from the reception but no reply came from the said room. As such, he sent Nitin, waitor to room No. 26 but he returned back after some time and told him that room No. 26 was locked from outside and none was responding despite knocking the door and making call. He took a duplicate key of the room from the reception and went to room No. 26 with Nitin. On opening the door, they saw the quilt lying over the body. They locked the door of the room and came back to reception. He telephonically informed M.D. of the Hotel Sh. Rajeev Sood. He directed him to inform the police. He rang up in the Police Station. The police came to their hotel at about 1:30 PM on 27.2.2010. The police recovered into their possession one laptop, two pen drives, one empty container vide memo Ext. PW-4/B. The police also took into possession two knifes vide memo Ext. PW-4/E. The clothes of the accused and deceased were also taken into possession. He proved guest register vide Ext. PW-4/R and entry form Ext. PW-4/S. Entry form Ext. PW-4/S was filled in by accused in his presence. In his cross examination, he deposed that when somebody raises alarm or makes hue and cry in room No. 26, the same could be audible in the adjoining rooms as well as in the reception. According to him, when the boy and girl came back, they were intoxicated. When he entered the room alongwith the police, he saw one paper lying by the side of bed and something was written on it. He was re-examined by the learned A.P.P. He admitted that paper was lying by the side of the bed on which names of Pragti and Gaurav were written but it was not read by him.

9. PW-5 Vipin Kumar Tiberewal, deposed that on 27.2.2010 at about 7:30 AM, a call came on the cell phone of Jayati. It was call of accused and he was making call through the cell phone of Pragati. The accused told Jayati that he and Pragati were together at Shimla and they intended to go to Dharamshala. On 27.2.2010 at about 7:30 PM, ASP, Shimla rang him on the cell phone and informed that Pragati had been murdered at Shimla and he should come to Shimla. He came to Shimla on the intervening night of 27th/28th February, 2010 at about 2:30 AM.

10. PW-6 Binder Singh deposed that he brought the accused and deceased to Shimla in vehicle bearing No. DL-1YA-0259 at 2:30 AM on 26.2.2010.

11. PW-7 Prem Singh Thamas, has proved Ext. PW-7/B to Ext. PW-7/D, I.D proof of the account holder Pragati.

12. PW-10 Nitin Sharma deposed that on 27.2.2010 at about 1:30 PM, he was in the hotel. Sh. Raj Kumar was Manager. He rang up room No. 26 but no response was received. So, he sent him to room No. 26 to check. He went there and rang the door bell. He also knocked the door. He found the door locked from outside. He came to reception and told Raj Kumar about the same. He alongwith Raj Kumar opened the door with duplicate key. They went inside and found dead body of girl lying on the bed. Raj Kumar informed Rajeev Sood, MD of the hotel. Rajeev Sood then informed the police. In his cross-examination, he deposed that one paper was found on which names of accused and girl were written. It was suicidal note which the police were reading. The Court question was put to him. He could not narrate the contents of the paper he overheard. He was also re-examined by the learned PP. He admitted that he has not gone through the suicidal note which was in the room.

13. PW-11 Jayati Tibrewal, deposed that she went to the hostel of Pragti on 26.2.2010 at about 7-8:00 AM. Her room was locked. On 26.2.2010 at around 11-12:00 day time, she rang her up on her cell phone. She appeared terrified. Then her cell phone was taken by the accused. She rang up her Uncle Vipin Tibrewal at Patna. He came to Delhi in the evening of 26.2.2010.

14. PW-12 Vinay Kumar Tibrewal is father of deceased Pragti. She was student of IIT Delhi in the year 2010. On 26.2.2010 at about 3:00 PM, he was in his shop at Patna when he received a call from the mobile cell of Pragati. However, the bell went on ringing. As such, he took the call. The caller was some male but he could not get as to what he was saying. He disconnected the call and again rang up on the same number. The phone was picked up by accused and he told him that he was boy friend of Pragati and he had killed her. In his cross-examination, he admitted that accused and Pragati were in love.

15. PW-13 Rajinder Bhagra deposed that knifes Ext. P-33 and P-34 were not from his shop.

16. PW-14 SI Viri Singh deposed that accused removed his T shirt in his presence and handed over to the I.O. The T-Shirt was carrying blood stains. It was taken into possession vide memo Ext. PW-14/A.

17. PW-16 Ramesh Chand, deposed that on 27.2.2010 at about 1:00 PM, accused came to their hotel and booked room No. 106. He made entries in the visitor register. He left the hotel at around 3:00 PM. He has given the extract of visitor register to the police vide Ext. PW-2/A.

18. PW-18 Vivek Tyagi deposed that on 26.2.2010, he alongwith Jayati went to IIT complex, Delhi in search of Pragati, however, she was not found there. On the same late evening, uncle of Pragati came. They went to Police Station Basant Vihar. He received a call from Pragati and he inferred that Pragati was very much disturbed.

19. PW-21 Shashi Mathur deposed that as per the record, the deceased attended the lecture in their Institute forenoon on 25.2.2010 and after that she did not return.

20. PW-2 HHC Om Parkash deposed that on 27.2.2010, he accompanied Insp. Gurdeep Singh Dhillon, SHO, PS West to Rasik Hotel Kaithu. He recorded the statement of Raj Kumar vide Ext. PW-4/A under Section 154 Cr.P.C.

21. PW-28 ASI Sanjeev Kumar has deposed in his cross-examination that accused was having bag in which two bottles of Phenyl were found.

22. PW-30 ASI Gian Chand deposed that accused produced blood stained T-Shirt before the SHO in his presence and SI Viri Singh vide memo Ext. PW-14/A.

23. PW-31 Dr. B.R.Rawat, proved report of the FSL vide Ext. PW-31/A.

24. PW-32 Dr. Vidya Prakash Madhiak, has noticed the following injuries on the person of accused:

> "1. Lacerated wound on ventral aspect of wrist left measuring 5 cm covered with clotted blood, serious discharge present, 2 to 3 attempts similar sizes parallel to each other have been made skin deeply.
>
> 2. One single laceration on dorsal aspect of wrists and hand about 6 cm curved in shape covered with clotted blood. Only superficial layer of skin has been scratched.
>
> 3. Left side hand on dorsal aspect on mat corporal joint 2 cm x 8 mm skin ragged. Superficial layer of skin ragged and dull in colour and area is covered with clotted blood.
>
> 4. A round burnt injury on dorsum of hand 7 cm of dia skin burnt and area is pillions in shape.
>
> 5. Lacerated wound right big toe, toe stained with clotted blood on the nail bed corresponding to nail 4 cm in size.
>
> 6. There are four lacerations on the medial aspect of left ankle of similar size and shape, clotted blood present."

According to him, the injuries No. 1 & 2 were self inflicted. Injury No. 3 was with teeth. Injury No. 4 was burning due to cigarette. He issued MLC Ext. PW-32/A. In his cross-examination, he admitted that in case a person makes attempt to commit suicide, he would cause injuries on wrist, chest and throat or will try to consume poison.

25. PW-33 SI Anil Kumar deposed in his cross-examination that he has not noticed any injury on the person of accused when he arrested him.

26. PW-35 Dr. Piyush Kapila deposed that on 28.2.2010, an application vide Ext. PW-35/A was presented to Professor & Head of the Forensic Medicine Department, for conduction of the post mortem examination on the dead body of the deceased. He issued final report Ext. PW-35/F. The probable time which might have elapsed between injury and death was opined to be immediate and that between death and post mortem was opined to be around 40 hours. The deceased died due to ante mortem pressure on neck. The injuries could be caused by weapon Ext. P-33 and P-34. These injuries were unlikely to be self inflicted. PW-35 Dr. Piyush Kapila, has noticed the following ante mortem injuries:

> "Head
>
> 1. 3x3 cms circumscribed bruise with swelling bluish present just over right eye brow, on right side of forehead, 1.5 cm from midline with faint bluish discoloration around right eye. (Contusion as was incised for confirmation).
> 2. 2x1.5 cm circumscribed scalp swelling present on back of scalp over right side 2.5 cms lateral to midline and occipital protuberance, incised and confirmed as scalp contusion.
> 3. 2x2 cms circumscribed scalp injury 1 cm below injury no. 2 written above (incised and confirmed scalp contusion).

Face.

4. Contusion 0.25 x 0.25 cm on left side of ala of nose with overlying abrasion blue and brownish respectively.

5. Mucosa on the vestibular side of lower lip lacerated and contusions present on both sides of inner aspect of mouth.

6. 1 cm scratch abrasion was present over chin transverse, reddish.

7. 2 cm scratched abrasion was present over skin on left angle on mandible, reddish.

Beck: Dried clotted blood was present (flaked) over right side of neck.

8. 1 x 1 cm contusion present on upper part of right side of neck, 1 cm lateral from midline with 0.5 cm abrasions overlying, bluish.

9. 1 x 1 cm abrasion was present in midline of neck curved over left side, brownish.

10. On dissection of neck 3x1 cm contusion was present in stern hyoid muscle of left side and also on the right and left sternothyroid muscle on the lower border of thyroid gland.

11. 5.5 x 1 cm spindal shaped incised wound was present with clean margins and clotted blood around on right side of neck, skin deep starting from 9 cm lateral from midline, placed obliquely transverse, 6 cm above suprasternal notch, below thyroid cartilage, directing right side to left, tailing present at left end.

12. 4x0. 5 c, abraded incision was present in superficial layers of skin, starting from midline towards left side (tailing on left most end) with 1 cm normal skin between injury no. 11 and 12, slightly directing upwards with clotted blood around.

13. 4.5 x 0.5 cm scratched abrasion was present ½ cm below injury No. 12 written above directing obliquely upwards from right to left side with tailing scratch, reddish.

14. Multiple scratch abrasions of varying sizes and multiple directions around injury no. 11, 12 & 13 were found, reddish in colour:

Right Arm:

15. 13.5 cm x 1.25 cm (at the broadest upper end) yellowish serrating patterned scratch deepest at lower end (distally) on medical aspect of arm 7 cm from tip of shoulder directing medial of lateral side.

16. Multiple scratched abrasions of various sizes and shapes were present on dorsal aspect of right forearm in an area of 17x 6 cms.

17. 9x2.5 cm (Broadest part) tendon deep incised wound present on ulnar aspect of flexor part of right distal forearm, 2 cm proximal to right wrist without hesitational marks, drawn twice from radius to ulnar side cutting skin, subcutaneous tissue and tendons of flexor aspect cleanly, through and through along with vasculature in the vicinity.

18. A single slash with serrated margins cutting tip of middle finger, base of distal phalanx of ring finger and base of distal phalanx of little finger obliquely on palmar aspect, muscle deep with clotted blood around

measuring 1 cm and ½ cm respectively, deepest part being at index finger (defence wound).

19. 1 cm x ½ cm incised wound was present on dorsal aspect of left wrist on ulnar styloid, oblique, directing ulnar to radial side with clotted blood trailing towards thumb.

Multiple scratched abrasions of various sizes and shapes directing everywhere all over the back, mainly over right side of back of chest, including gluteal regions, brownish and yellow. (Consistent with broken pieces of glass.)"

27. PW-37 Insp. Gurdeep Singh was the I.O. According to him, the articles lying in the room were taken into possession, including two knives vide memo Ext. PW-4/E. Sketches were also prepared. The T-Shirt worn by the accused was also taken into possession vide memo Ext. PW-14/A.

28. DW-1 Roopa Murghai deposed that in August, 2007, three girls had brought Pragati to her office. They disclosed that Pragati was trying to commit suicide. She counseled Pragati. She proved personal counselling record sheet Ext. DW-1/B. However, in her cross-examination, she admitted that DW-1/B does not bear any signatures. She also admitted that Pragati has not made any attempt to commit suicide in her presence.

29. The accused has appeared as DW-2. He deposed that on 25.2.2010, deceased told him on phone that her parents were not agreeing for their marriage, so she was depressed and he went to Delhi from where they came to Shimla. While on the way, she shared this fact with common friend Vivek. When he woke up on 26.2.2010, he found Pragati depressed. They consumed liquor and smoke together in the room at Shimla. She was pressurizing him to commit suicide with her. She even wrote a suicidal note. They signed the same. They both started making cuts on their respective wrists and in this process he also burnt his hand with cigarette. He felt like vomiting and rushed to the bath-room. When he came back, he noticed Pragati was having more injuries on neck and wrist caused by her. She was in tremendous pain and some broken glass pieces were also spread on the bed. He impulsively tried to snatch the knife from her hand and in this process she got some cut on her fingers and then she dropped the knife. She was in pain. He tried to stop blood coming out from her neck with his hands. He also got injuries on his toe and ankle. He then suddenly found her dead. He was confused. He tried to cut his wrist. He was scared. He was also in panic and left Shimla with motive that he would finish himself. He tried to finish himself with Phenyl, however, he failed. In his cross-examination, he admitted that he has never talked to the parents of Pragati about marriage. He also admitted that he has withdrawn some money from the ATM of Pragati. He went to Chandigarh and asked for sleeping pills. He also tried to get sleeping pills at Roorkey.

30. What emerges from the evidence discussed hereinabove is that accused came to Shimla with deceased on 25/26.2.2010. They stayed in hotel Rasik, Kaithu, Shimla. They went outside the room and came back. PW-4 Raj Kumar tried to contact them. However, the door was not opened. PW-4 went to the room with duplicate key alongwith Nitin Kumar. The room was opened with duplicate key. The body of the deceased was lying on the bed. PW-4 Raj Kumar informed the M.D of the hotel. He informed the police. The police reached the spot. The statement of PW-4 Raj Kumar was recorded under Section 154 Cr.P.C. vide Ext. PW-4/A. FIR Ext. PW-25/a was also registered. The post mortem was got conducted. The accused was also arrested.

31. It has come in the statement of PW-1 that accused was missing from the Institute from 24.2.2010 onwards. PW-21 Shashi Mathur deposed that as per the record, the deceased attended the lecture in their Institute forenoon on 25.2.2010 and after that she did not come back.

32. PW-4 Raj Kumar has testified that the accused came to their hotel in their presence. Entry was made in the visitor register. The form was also filled up by the accused. PW-10 Nitin Kumar also deposed that he went with PW-4 Raj Kumar to room No. 26. The room was opened and dead body was found in the room. The guest register Ext. PW-4/R and entry form Ext. PW-4/S have been duly proved. PW-5 Vipin Kumar Tibrewal visited Shimla alongwith PW-11 Jayati Tibrewal after getting the information of the murder of the deceased. The body was handed over to PW-5 Vipin Kumar Tibrewal and PW-11 Jayati Tibrewal.

33. PW-6 Binder Singh, has deposed that he has brought the accused and deceased to Shimla on 26.2.2010 at 2:30 AM. PW-7 Prem Singh Thamas has proved the ATM transactions made w.e.f. 25.2.2010 to 27.2.2010. The blood stained T-shirt was handed over by the accused which he was wearing at the time of arrest in the presence of PW-14 SI Viri Singh and PW-30 ASI Gian Chand. The accused after committing the crime has left Shimla and he went to Chandigarh. He stayed in Hotel Haryana at Chandigarh. The abstract of visitor register was duly proved. PW-16 Ramesh Chand has deposed that accused stayed in room No. 106 at hotel Haryana at Chandigarh.

34. Mr. Ajay Kochhar, Advocate, for the accused has vehemently argued that it was a case of suicide and not homicide. He has relied upon the statement of PW-32 Dr. Vidya Prakash Madhaik. The Court has noticed the demeanor of this witness when his statement was recorded. He was unable to read his own writing on opinion Ext. PW-32/A. The injuries were noticed by him. The nature of injuries recorded by him are simple. From the nature of injuries, it cannot be held that accused has also tried to commit suicide. He after committing crime has left Shimla and went to Chandigarh and he was arrested at Jagadhari. Moreover, PW-33 SI Anil Kumar has not noticed any injury on the person of accused when he was arrested by him.

35. The post mortem was conducted by PW-35 Dr. Piyush Kapila. PW-35 Dr. Piyush Kapila, has categorically deposed before the Court that the cause of death was due to ante mortem pressure on neck and the probable time elapsed between injury and death was opined to be immediate and that between death and postmortem was opined to be around 40 hours. He has deposed specifically that the injuries received by the deceased were unlikely to be self inflicted. In his cross-examination, he has admitted that sometimes minimum pressure on the neck can cause death and the amount of injuries present on the neck structure depends on the intention of the assailant and homicidal force. He has admitted that usually in cases of homicidal throttling the pressure on the neck can cause the fracture of underlying thyroid-hyoid complex. However, it is not a rule that there must be a fracture of the wounds to ascertain the homicidal throttling. He has also admitted that the fact that the person has died due to pressure on the neck, certainly the mode would be asphyxia and the act would be throttling. He has also denied that a contusion and abrasions as noticed on injury No. 8 & 9 on neck could appear on the person of the deceased in case of self strangulation. He has also admitted that a superficial pressure or a less pressure on neck can cause death due to vagal inhibition. He has denied the suggestion that his opinion regarding asphyxia was contrary to the standard textbooks on medical jurisprudence. He has also noticed 1 x 1 cm abrasion present on midline of neck curved over left side which was brownish and on dissection of neck 3 x 1 cm contusion was present in

stern hyoid muscle of left side and also on the right and left stern thyroid muscle on the lower border of thyroid gland. He has denied the suggestion that he has wrongly interpreted the mark on the neck as contusion.

36. The quantity of ethyl alcohol in blood sample was 112.15 mg% and in urine it was 162.72 mg%. In Modi's Medical Jurisprudence and Toxicology, 24th Edition 2011, at page 451, the learned author has stated that in strangulation, the death is due to asphyxia, but it may be due to other causes, namely, cerebral ischaemia or venous congestion, asphyxia and venous congestion combined, or shock due to reflex cardiac arrest. The author has also opined at page 455 that a person may be first rendered helpless by being bound or rendered unconscious by blows on the head or by intoxicating drugs, and then strangled by a small amount of compression and sometimes strangulation and suffocation by closure of the mouth and nostrils may both be attempted. It has come on record that the deceased has received injuries No. 1 to 3 on head. The possibility of the head of the deceased being banged by the accused on the wall cannot be ruled out. Moreover, when she had consumed liquor, as admitted by the accused himself and the quantity of the ethyl alcohol in blood and urine was 112.15 mg% and 162.72 mg%, respectively, she had become helpless. Thereafter, after rendering the deceased unconscious or helpless, he applied pressure on the neck resulting in asphyxia. The case of the prosecution is duly supported by medical evidence.

37. The injuries have been inflicted by the accused on the deceased as numerous abrasions and other injuries were also noticed on the body of the deceased which made her further helpless. The accused throttled her by pressing her neck. The accused in his statement under Section 313 Cr.P.C. has admitted that he had come to Shimla and they decided to die together and end their lives. They also wrote suicidal note and signed the same. Under the influence of liquor, they started causing injuries on their respective parts. He as well as Pragati both decided to cut their wrists and in this process burnt his hands with cigarette. He came out of the toilet and saw injuries being caused by Pragati on her neck and wrists. She was in tremendous pain. He tried to stop the blood coming out from the neck. He also received injuries in the process. He found that she was dead. He got confused and terrified and he could not think what he should do in such a condition. He again cut his wrist with the intention to end his life and also tried to control his pain by biting himself on the hand. He suddenly lost consciousness. The moment, he regained consciousness, he got scared and could not take further step to end himself at that moment. He came out in inebriated condition and left Shimla with the only purpose to finish himself. He made attempts to finish himself by consuming Phenyl but could not die. He went to Bhatinda and thereafter to Jagadhari. The version of the accused cannot be believed. If he was in deep love with the deceased, he should have stayed back and called for help. Help was available. Since it has come on record that the persons were present in the reception for 24 hours, he instead of taking care of the deceased, who was in tremendous pain, absconded to Bathinda and then to Jagadhari.

38. Their lordships of the Hon'ble Supreme Court in the case of ***Kartarey and others vrs. State of U.P.,*** reported in ***AIR 1976 SC 76,*** have held that to be an 'absconder', in the eyes of law, it is not necessary that a person should have run away from his home, it is sufficient if he hides himself to evade the process of law, even if the hiding place be his own home. Their lordships have held as follows:

> "42. Further it is wrong to say that Baljeet never absconded. Contrary to what Baljeet has said in his examination under Section 342. Cr.P.C. the Investigating Officer, P.W. 7, testified that Baljeet was found hiding in a

chhappar in the village from where he was arrested. This account of Baljeet's arrest was not challenged in cross-examination. To be an 'absconder' in the eye of law, it is not necessary that a person should have run away from his home, it is sufficient if he hides himself to evade the process of law, even if the hiding place be his own home. We therefore, do not find any ground to distinguish the case of Baljeet from that of Sita Ram and to treat him differently."

39. Thus, the prosecution has proved the case against the accused beyond all reasonable doubts. There is no occasion for us to interfere with the well reasoned judgment and order of the learned trial Court dated 21.2.2014 and 25.2.2014, respectively.

40. Consequently, there is no merit in this appeal and the same is dismissed.

****

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

State of Himachal Pradesh and another .....Petitioners.
Vs.
Chaman Singh. .....Respondent.

CWP No.4543 of 2014
Order reserved on:26.8.2015
Date of Order: September 10, 2015

Industrial Disputes Act, 1947- Section 25F- Petitioner was working on daily wages in the office of Executive Engineer IPH Division Dalhousie- services of 363 workmen were terminated due to shortage of funds and work in the Division - he filed a petition before the Labour Court who directed the Executive Engineer to re-engage the service of petitioner and to consider his case for regularization- services of two workmen were re-engaged- it was not proved that any offer was made to petitioner for re-employment- held that the petitioner was deprived of his right of being engaged prior to the engagement of his juniors- petition dismissed. (Para-7)

Cases referred:
Mool Raj Upadhyaya Vs. State of HP and others, 1994 Supp (2) SCC 316
Jasmer Singh Vs. State of Haryana and others, 2015 (4) SCC 458
Raghuvir Vs. G.M. Haryana Roadways Hissar, 2014 (10) SCC 301
Collector Land Acquisition Anantnag and another Vs. Mst. Katji and ors, AIR 1987 SC 1353

For the petitioners: Mr.M.L.Chauhan,Addl. Advocate General with Mr.J.S.Rana, Assistant Advocate General.
For the respondent: Mr. Naresh Kaul, Advocate.

The following order of the Court was delivered:

P.S.Rana Judge.

Present civil writ petition is filed under Article 226 of Constitution of India against the award passed by Presiding Judge Labour Court-cum-Industrial Tribunal

Dharamshala District Kangra HP in reference No.384 of 2009 titled Chaman Singh Vs. Executive Engineer I&PH Division Dalhousie District Chamba HP.

BRIEF FACTS OF THE CASE:

2. Respondent was working on daily wage basis in the office of Executive Engineer I&PH Division Dalhousie District Chamba HP w.e.f. August 1996 to 9.11.2000. Due to shortage of funds and work in the division services of respondent along with 363 workmen were disengaged. Compensation of retrenchment was paid to respondent Chaman Singh to the tune of Rs.3060/- (Three thousand sixty). Respondent challenged retrenchment order before Labour Court by filing claim petition. Reference was sent to Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala District Kangra HP. Thereafter Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala District Kangra HP passed the award on dated 3.7.2013 with direction to re-engage the respondent forthwith. Presiding Judge-cum-Industrial Tribunal Dharamshala further held that respondent would be entitled to continuity and seniority in service from the date of his illegal termination w.e.f. 9.11.2000 except back wages. Presiding Judge-cum-Industrial Tribunal Dharamshala further directed Executive Engineer IPH Division Dalhousie District Chamba HP to consider the case of Chaman Singh for regularization of his service as per policies framed by government of Himachal Pradesh from time to time. Presiding Judge-cum-Industrial Tribunal Dharamshala further held that if the services of any person junior to respondent Chaman Singh had already been regularized then respondent would be entitled to regularization from the date/month of the regularization of the services of his juniors.

3. Feeling aggrieved against the award passed by Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala District Kangra HP State of HP filed present civil writ petition.

4. Court heard learned Additional Advocate General appearing on behalf of petitioners and learned Advocate appearing on behalf of respondent and also perused entire record carefully

5. Following points arise for determination in present civil writ petition:

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

2. Final Order.

Reasons for Findings

Point No.1.

6. Submission of learned Additional Advocate General appearing on behalf of petitioners that respondent Chaman Singh did not work for 240 days continuously and on this ground writ petition filed by petitioners be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court has perused working chart of respondent Chaman Singh Annexure R1 placed on record. Working chart Annexure R-1 is issued by Executive Engineer I&PH Division Dalhousie and attested by Assistant Engineer I&PH Sub Division Sihunta. As per working chart Annexure R1 placed on record respondent Chaman Singh had worked continuously for 330 days in 1997, 352 days in 1998, 360 days in 1999 and 310 days in 2000. Document Annexure R1 has been issued by Executive Engineer I&PH Sub Division Dalhousie while discharging his official duty and is a relevant fact under Section 35 of the Indian Evidence Act 1872. There is no rebuttal document on record in order to rebut the entries of Annexure R1 placed on record. Plea of the petitioners that

respondent had not worked for more than 240 days continuously is not proved on record and is defeated on the concept of ipsi dixit (Assertion made without proof).

7. Submission of learned Additional Advocate General appearing on behalf of petitioners that petitioners did not violate Section 25H of Industrial Disputes Act 1947 as held by Labour Court and on this ground petition be allowed is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that service of respondent was retrenched as per Section 25G of Industrial Disputes Act 1947. As per section 25H of Industrial Disputes Act 1947 there is a provision of re-employment of retrenched workmen. As per section 25H of Industrial Disputes Act 1947 where any workman was retrenched and the employer at subsequent stage proposes to employ any person then employer would give an opportunity to retrenched workman who is citizen of India for re-employment. If retrenched workman offer himself for re-employment then he would have preference over other persons. In the present case it is proved on record that after retrenchment of respondent Chaman Singh employment was given by petitioners to Smt. Sodha Devi, Smt. Lata Devi, Smt. Biasa Devi and Sh. Hem Raj who were juniors to respondent Chaman Singh. Even Sh L.S.Thakur Executive Engineer IPH Division Dalhousie District Chamba HP had appeared in witness box in person and had stated in positive manner that services of Smt. Biasa Devi and Sh Hem Raj were re-engaged. It is proved on record that Smt. Biasa Devi and Sh Hem Raj were juniors to respondent Chaman Singh. It is well settled law that facts can be proved by way of oral evidence as per section 59 of Indian Evidence Act 1872. There is no evidence on record that offer was given to respondent for re-employment as requires under Section 25H of Industrial Disputes Act 1947. Hence it is held that it is proved on record that petitioners have violated provision of Section 25H of Industrial Disputes Act 1947.

8. Submission of learned Additional Advocate General appearing on behalf of petitioners that award passed by Labour Court is contrary to the judgment of Hon'ble Apex Court of India reported in 1994 Supp (2) SCC 316 titled Mool Raj Upadhyaya Vs. State of HP and others and on this ground civil writ petition be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. Facts of the present case and facts of the case reported in 1994 Supp (2) SCC 316 titled Mool Raj Upadhyaya Vs. State of HP and others are different. In the present case matter in dispute is relating to re-employment of retrenched employee as provided under Section 25H of Industrial Disputes Act 1947 but in Mool Raj Upadhyaya case supra the matter was relating to employee employed on daily wages and matter was not relating to retrenched employee.

9. Submission of learned Additional Advocate General appearing on behalf of petitioners that respondent is not legally entitled for the benefit of seniority and continuity in service is also rejected being devoid of any force for the reasons hereinafter mentioned. It is held that petitioners have not complied the provision of Section 25H of Industrial Disputes Act 1947 and petitioners have re-employed junior persons without giving offer of re-employment to respondent who was retrenched workman. It is held that respondent Chaman Singh is legally entitled for seniority in service above his juniors.

10. Submission of learned Additional Advocate General appearing on behalf of petitioners that Smt. Biasa Devi and others were re-employed as per direction of Court and on this ground petition be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. It is held that all public institutions are under legal obligation to adopt the concept of equality before law as mentioned under Article 14 of Constitution of India. Public authority cannot be allowed to give benefit to selective persons violating Article 14 of Constitution of India. Equality before law is fundamental rights of citizen of India.

11. Submission of learned Additional Advocate General appearing on behalf of petitioners that reference petition was time barred as respondent was retrenched w.e.f. 9.11.2000 and thereafter respondent raised industrial disputes in the month of April 2007 after a gap of five years and on this ground civil writ petition be allowed is also rejected being devoid of any force for the reasons hereinafter mentioned. It was held in case reported in 2015 (4) SCC 458 titled Jasmer Singh Vs. State of Haryana and others that provisions of Article 137 of Limitation Act 1963 would not be applicable to Industrial Disputes Act 1947 and it was held that relief would not be denied to workman merely on ground of delay. It was held that reference to Labour Court could not be questioned on the ground of delay. It was held in case reported in 2014 (10) SCC 301 titled Raghuvir Vs. G.M. Haryana Roadways Hissar that there is no limitation for reference to Labour Court under Section 10 of Industrial Disputes Act 1947. It was held in case reported in AIR 1987 SC 1353 titled Collector Land Acquisition Anantnag and another Vs. Mst. Katji and others that (1) Ordinarily a litigant does not stand to benefit by lodging matter late. (2) Refusing to condone delay can result meritorious matter thrown out at the very threshold and cause of justice defeated. It was held that if delay is condoned then highest that would happen would that case would be decided on merits after hearing the parties. (3) It was held that every day's delay must be explained does not mean that a pedantic approach should be made. It was further held that doctrine must be applied in a rational common sense. (4) It was held that when substantial justice and technical considerations are pitted against each other then cause of substantial justice deserves to be preferred. (5) It was held that there is no presumption that delay is occasioned deliberately or on account of culpable negligence or on account of mala fides. It was held that litigant does not stand to benefit by resorting to delay and in fact he runs a serious risk. (6) It was held that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Point No.1 is decided against petitioners.

Final Order

Point No.2.

12. In view of above stated facts and case law cited supra civil writ petition filed under Article 226 of the Constitution of India is dismissed. Award announced by Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala District Kangra HP on 3.7.2013 is affirmed. Civil writ petition is disposed of. No order as to costs. Pending application(s) if any also stands disposed of.

****

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

State of Himachal Pradesh. .....Appellant.

Versus

Praveen Kumar. ...Respondent.

Cr. Appeal No.: 135 of 2009.
Reserved on: 03.09.2015
Date of Decision : 10. 09.2015

Indian Penal Code, 1860- Sections 376, 342, 506 and 366- Prosecutrix alleged that while she was going to Government Senior Secondary School to obtain admission in +2, accused held her in the way, took her to nearby isolated field and committed rape- she tried to raise cry but her mouth was gagged and she was threatened to be killed- later on, accused took

prosecutrix to his house -prosecutrix in her cross-examination admitted that two paths existed on the spot and the spot was accessible from the village- she further admitted that villagers of 2-3 villages pass through the aforesaid path- prosecutrix remained on the spot throughout the day and had not raised hue and cry- such conduct of the prosecutrix shows that she was a consenting party - absence of physical injuries on the body of the prosecutrix further leads to an inference that she was a consenting party- held that the accused was rightly acquitted- appeal dismissed. (Para-9 to 11)

For the Appellant/State:	Mr. M.A. Khan, Addl. Advocate General.
For the respondent/accused:	Ms. Komal Chaudhary, Advocate vice Ms. Rita Goswami, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, *Judge*

The instant appeal has arisen against the judgment rendered by the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, H.P., in Sessions Trial No. 34 of 2005 whereby he acquitted the accused for his having allegedly committed offences under Sections 376, 342, 506 and 366 of the Indian Penal Code. The State of Himachal Pradesh is aggrieved by the findings of acquittal recorded by the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, hence, has instituted the instant appeal before this Court for setting aside the judgment of acquittal rendered by the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, H.P.

2. The brief facts of the case are that on 25.5.2005 the prosecutrix lodged an F.I.R. at Police Station Rampur with the allegations that the prosecutrix was inhabitant of Village Doi, Tehsil Rampur. On 24.5.2005 at about 8.30 a.m. the prosecutrix was going to Government Senior Secondary School, Delath to take admission in plus two. On way near Chunja at about 9.45 a.m, the accused Praveen Kumar came from behind and caught hold of the prosecutrix from her arm. The accused took the prosecutrix to a field and committed rape on the prosecutrix. The prosecutrix tried to cry and the accused gagged her mouth and threatened to kill her. The accused made an allurement to marry her and did not leave her throughout the day. On attempts of the prosecutrix to escape, the accused threatened to kill her. The accused committed rape with the prosecutrix thrice on the aforesaid day. The place was isolated and none happened to witness the occurrence. When it got dark, the accused forcibly took the prosecutrix to his house. The prosecutrix managed to escape from the house and narrated the incident to her family members. On the basis of the aforesaid information, the prosecutrix was got medically examined from Dr. Bharti Azad at Khaneri hospital and the doctor per medico legal certificate opined that the prosecutrix was sexually active and per report of the Chemical Examiner, ejaculation within vagina has not occurred in the past seventy two hours. The police also arrested the accused and he was also got medically examined and the doctor per medico legal certificate opinined that the accused was capable of performing sexual intercourse. Ext.PW-4/A extract of Pariwar register of the family of Shri Ramdayal recording the date of birth of the prosecutrix as 18.2.1987 was obtained from the Secretary, Gram Panchayat, Duttnagar. The spot was got identified per memo Ext.PW-7/B pursuant to disclosure statement of accused in the presence of S/Sh. Bishan Dass HHC and Sh. Hukkam Chand. As per Chemical Examiner report Ext.PW-9/C there was blood and semen on the underwear of the prosecutrix and semen was also present on the salwar of the prosecutrix and underwear of the accused. There was no blood or

semen on the shirt, bra, pubic hair of the prosecutrix and pant, banyan, pubic hair and coroner swab of the accused. Blood was present on the vaginal slide and vaginal swab of the prosecutrix was not sufficient for examination and semen was not present.

3. After completion of investigation, challan under Section 173 of the Cr.P.C. was prepared and filed in the committal Court. Since the case was exclusively triable by the Court of Sessions, the committal Court committed it for trial to the Court of learned Sessions Judge, Ki-+nnaur at Rampur Bushahr. The accused was charged by the learned trial Court for his having committed offences punishable under Sections 376, 342, 506 and 366 IPC to which he pleaded not guilty and claimed trial.

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

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

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Additional Advocate General has concertedly and vigorously contended that the findings of acquittal recorded by the learned trial Court are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross-mis-appreciation of the material on record. Hence, he contends that the findings of acquittal be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction.

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

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

9. The findings of acquittal recorded by the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, H.P. in its judgment impugned before this Court would warrant interference by this Court only in the event of theirs being a palpable disclosure by the evidence on record of it having misappraised the germane and apposite evidence besides having omitted to appraise relevant evidence. The testimony of the prosecutrix if on its wholesome reading omits to unearth the existence of any inter se contradictions viz.a.viz her deposition comprised in her examination in chief with the one comprised in her cross-examination would render it to be both trustworthy and inspiring besides credible. Naturally then it would be apt to hence place implicit reliance thereon besides constraining this Court to reverse the findings of acquittal recorded by the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr in his impugned judgment. A close and incisive reading of the testimony of the prosecutrix comprised in her examination-in-chief underscores the factum of the accused having on 24.5.2005, while the prosecutrix was proceeding to take admission in Government Senior Secondary School, Delath met her enroute at place Chunja. The accused has been deposed by the prosecutrix to have caught hold of her by her arms and then taken her to the nearby fields, where he perpetrated forcible sexual intercourse on her person. Though the prosecutrix has deposed

that she raised an outcry yet since the place of occurrence was secluded, hence, nobody responded to her outcries. She had proceeded to depose that the accused kept her in his company throughout the ill-fated day and though she tried to escape yet the accused continued to hold her. The prosecutrix has deposed that on the ill-fated day the accused thrice perpetrated forcible sexual intercourse upon her person. She in her examination in chief has unearthed the fact that in the evening the accused took her to his house wherefrom she escaped and came to her house where she disclosed the occurrence to her mother. On a disclosure of the incident by the prosecutrix to her mother, the latter telephonically apprised her father at Shimla, who instructed them to lodge an FIR with the police, whereupon the prosecutrix along with her mother proceeded to Police Station, Rampur and lodged FIR Ext.P.A. Subsequently, the medical examination of the prosecutrix was conducted at MGMSC, Khaneri, Rampur.

10. The deposition of the prosecutrix in her examination-in-chief has not to be read in isolation from her deposition comprised in her cross examination. The answers meted by the prosecutrix to the suggestions put to her during her cross-examination by the learned defence counsel would underscore, whether the deposition of the prosecutrix qua the incident comprised in her examination-in-chief necessitates its being fastened credibility. A studied and close analysis of the deposition of the prosecutrix comprised in her cross examination unearths the factum of the house of the accused being located at a distance of 3 K.M. from the site of occurrence. The prosecutrix in her cross examination admits the factum of two paths from the site of occurrence leading to the house of the accused, inasmuch as the house of the accused being accessible from the site of occurrence from a path passing through the village whereas it being also accessible through an alternative path passing through the jungle. She in her cross examination also admits the factum of 3 to 4 villages falling enroute the path they traversed from the site of occurrence to the house of the accused in the evening after hers having spent the entire day in the company of the accused at Chunja. However, before proceeding to, on the strength of the omission on the part of the prosecutrix to unravel besides divulge the occurrence to the inhabitants of 3 to 4 villages falling enroute the path traversed by both from the site of occurrence to the house of the accused whereto she had in the company of the latter proceeded to in the evening, form an invincible inference of hers having acquiesced to as also hers having consensually succumbed to the sexual overtures of the accused, it is imperative to make an advertence to the apposite evidence on record portraying the factum of the prosecutrix having arrived at the age of consent, hence, having acquired the capacity to render consent to the sexual overtures of the accused. The evidence unearthing the factum of the prosecutrix having arrived at the age of consent is constituted in Ext.PW.4/A, wherein entry No.170 portrays the factum of the prosecutrix being born on 18.2.1987. With the factum as portrayed by Ext.PW.4/A of the prosecutrix being born on 18.2.1987, hence, capacitated her to at the stage of the ill-fated occurrence especially when she then was aged above 18 years, to accord consent to the accused to his sexual overtures or to the perpetration of sexual intercourses upon her by him. With a formidable conclusion ensuing from Ext.PW.4/A of the prosecutrix having arrived at the age of consent, renders the omission on the part of the prosecutrix to not communicate the incident to the inhabitants of 3 or 4 villages, which fell enroute the path which both traversed from the site of occurrence till the house of the accused whereto she in the company of the latter proceeded to in the evening, to loudly bespeak the open and candid factum of hers having consented to the sexual overtures of the accused besides of the sexual intercourses perpetrated on her person by the accused being wholly consensual. Reinforced vigour to the inference aforesaid of the prosecutrix having consented to the perpetration of sexual

intercourse/intercourses upon her person by the accused is lent by the factum of hers having throughout the day without any remonstrance stayed in the company of the accused. The non-emanation in Ext.PW.5/A, the MLC prepared by the doctor concerned after his having subjected the accused to medical examination, of any physical injuries existing on his body in personification of the prosecutrix having resisted besides repulsed the sexual advances or sexual overtures of the accused, constrains an apt inference that the prosecutrix consensually succumbed to the sexual overtures of the accused or to the perpetration of the sexual intercourses, if any, on her person by him. In addition, the manifestation in Ext.PW.6/A, the MLC issued by the doctor concerned, who subjected the prosecutrix to medical examination of their being no sign of injury or struggle on the person of the prosecutrix for sustaining the version enunciated by the prosecutrix of hers having been subjected to forcible sexual intercourse by the accused renders as such the propagation by the prosecutrix of hers having been subjected to forcible sexual intercourse by the accused to not acquire any creditworthiness contrarily its credence gets belittled.

11. The embarking upon by this Court of a close analysis of the deposition of the prosecutrix comprised in her examination in chief and in her cross-examination for marshalling therefrom an inference of the prosecutrix having or having not consented to the sexual overtures of the accused given the indubitable fact of hers, as underlined by the aforesaid discussion having acquired the age of consent, fosters this Court for the reasons assigned hereinabove, to conclude that the ill fated occurrence, if any, was not under exertion of any compulsion or duress upon her by the accused besides was also not forcible rather the sexual intercourse/intercourses, if any, perpetrated upon her person by the accused were wholly consensual. It appears both from photograph Ext.D-1 wherein the prosecutrix is seen in the company of the accused at Rampur about 2 to 3 years prior to the occurrence besides from the factum of the houses of the prosecutrix and the accused being in close proximity to each other, of there being a previous intimacy inter se the prosecutrix and the accused. Given their previous intimacy, it appears that the ill-fated occurrence was not engendered as concerted to be propounded by the prosecutrix by the accused having exerted duress besides compulsion upon her to keep her in his company through out the day and with impressions thereof firmly etched in her mind, his having taken her through a village path from the place of occurrence to his house in the evening enroute whereof 2-3 villages fell, especially when the attention of whose inhabitants remained unattracted by the prosecutrix omitting to raise any outburst or outcry. Moreover, hence for reiteration the lack of raising of outbursts or outcries by the prosecutrix besides omission on the part of the prosecutrix to communicate the occurrence to the inhabitants of the villages falling enroute the place of occurrence to the house of the accused whereto she in the company of the accused proceeded to in the evening of the ill fated day constrains this Court to conclude that sexual intercourse, if any, perpetrated upon her person by the accused was not forcible.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

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

****

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

Gangadhar .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 01 of 2015
Reserved on: September 10, 2015.
Decided on: September 11, 2015.

Indian Penal Code, 1860- Sections 302, 498-A and 506- Deceased was married to the accused- accused and the deceased had a quarrel- accused brought the stove from the kitchen and sprinkled kerosene oil on her and put her on fire- deceased asked the accused to bring her clothes and to inform the ambulance but the accused did not so- villagers called the ambulance- initially, deceased stated that she had caught fire due to bursting of stove – but subsequently, she made a dying declaration that accused had put her on fire- accused had also tried to commit suicide by putting kerosene oil on himself- prosecution witnesses consistently deposed that accused used to beat the deceased- deceased had received a severe burn injury and had succumbed to the same- she had explained that initial statement was made by her due to fear- dying declaration is sufficient to convict the accused and no further corroboration is required – the fact that accused had tried to commit suicide shows his guilty mind- husband and wife were alone in the room and it was for the accused to explain as to how the deceased had received burn injury- theory of suicide is not plausible – held, that accused was rightly convicted. (Para- 27 to 46)

Cases referred:
Khushal Rao vrs. State of Bombay, AIR 1958 SC 22
State of Maharashtra vrs. Krishnamurti Laxmipati Naidu, AIR 1981 SC 617,
Paniben vrs. State of Gujarat, reported in AIR 1992 SC 1817,
Jai Prakash and others vrs. State of Haryana, 1999 Cri. L.J. 837
Hans Raj and another vrs. State, reported in 2006 Cri. L.J. 2540,
Suresh Vishwanath Jadhav vrs. State of Maharashtra, 2006 Cri. L.J. 4277
Sayarabano alias Sultana Begum vrs. State of Maharashtra, (2007) 12 SCC 562
Sher Singh and another vrs. State of Punjab, (2008) 4 SCC 265
State of Karnataka vrs. Shariff, AIR 2003 SC 1074,
P.V. Radhakrishna vrs. State of Karnataka, AIR 2003 SC 2859
Phundi vrs. State of M.P., 1993 Cri. L.J. 1881

For the appellant: Mr. Ramakant Sharma Sr. Advocate, with Mr. Basant Thakur, Advocate.
For the respondent: Mr. P.M.Negi, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment and order dated 30.10.2014 and 31.10.2014, respectively, rendered by the learned Addl. Sessions Judge (1), Mandi, H.P.

in Sessions Trial No. 14 of 2013, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 302, 498-A and 506 IPC, was convicted and sentenced to undergo rigorous imprisonment for life for offence punishable under Section 302 IPC and rigorous imprisonment for one year for the offences punishable under Section 498-A and 506 IPC and to pay a fine of Rs. 1,000/- each and in default of payment of fine to further undergo imprisonment for three months. All the sentences were ordered to run concurrently.

2. The case of the prosecution, in a nut shell, is that on 6.9.2012, complainant Veena Devi got recorded her statement with PSI Ranjan Sharma under Section 154 Cr.P.C in IGMC, Shimla. She reported that she was married to the accused 10 years back. Two sons, namely, Ayiush and Priyanshu were born. On 4.9.2012, her mother-in-law was going to Jammu and the accused had also asked her to go to her parents house and he does not require her. He started abusing her. Her husband used to suspect her character. The complainant out of anger started packing her luggage and the accused kept on abusing her. She started cooking meal in the kitchen. Her husband brought the stove from the kitchen and sprinkled kerosene oil on her and put her on fire. After a long time, he poured the water on her. The complainant asked to bring her clothes, but the accused did not bring the clothes. She asked her husband to inform the ambulance at number 108, but accused did not inform. When she caught fire, after hearing her cries, the villagers also gathered outside the house, who informed the ambulance at number 108. Her mother was also informed. Few people came inside the house. The accused asked them to leave. Her statement was recorded at Rewalsar. She had given the statement under the fear of her husband that she caught fire due to bursting of stove. She was referred to Zonal Hospital, Mandi. The accused also accompanied her. Thereafter, she was referred to IGMC, Shimla, but accused got down from the ambulance stating that he will not accompany in case his in-laws will go to Shimla. The dying declaration of the deceased was recorded by PW-25 SI Ranjan Sharma on 6.9.2012. The statement was attested by Dr. H.R. Rahi, MO, IGMC, Shimla. The FIR was also registered. The stove, match-box and two burnt match sticks and burnt clothes were taken into possession. On 4.9.2012, the accused also tried to commit suicide by sprinkling kerosene oil over him and case FIR No. 243 of 2012 dated 5.9.2012 for the offence under Section 309 IPC was registered against him. On 14.9.2012, the deceased was referred to PGI, Chandigarh. On 16.9.2012, she was discharged from PGI. On 17.9.2012 when her parents were bringing her to home at about 11:00 AM, at place Chadol, near Bilaspur she expired and her dead body was brought to Zonal Hospital, Mandi, where post mortem was conducted. The accused also remained under treatment from 5.9.2012 to 3.1.2013 at Zonal Hospital Mandi. Thereafter, he was interrogated and his statement under Section 27 of the Indian Evidence Act was recorded. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 32 witnesses. The accused was also examined under Section 313 Cr.P.C. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Ramakant Sharma, Sr. Advocate, for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. P.M.Negi, learned Dy. Advocate General, appearing on behalf of the State, has supported the judgment and order of the learned trial Court dated 30.10.2014 and 31.10.2014, respectively.

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

6. PW-1 Om Chand deposed that the deceased Vidya Devi was his sister. She was married to the accused Gangadhar about 10 years ago. Accused used to torture his sister after marriage. He used to give beatings to her. They had earlier reported the matter to the Police Post Rewalsar about three times and all the times the matter was compromised. The accused used to suspect the character of his sister. On 4.9.2012, he had gone to his in-laws at village Maseran. At about 1:30 PM, his father telephonically informed him that his sister was put on fire by the accused and called him to reach in the house. At about 2:00 PM, he reached in Rewalsar Hospital directly. The statement of his sister was already recorded and she was referred to Mandi from Rewalsar Hospital. Accused was also present in the hospital. When he inquired from the accused, he told that whatever he wants to do he has done. She was referred to IGMC, Shimla. The accused accompanied them up to Mandi and did not accompany them up to Shimla despite his request. At about 2:00 AM, his sister disclosed that the accused had put on her fire by pouring kerosene oil over her and threatened his siter to cut him and his mother like goat in case she disclosed this fact to them. On 6.9.2012, he accompanied the I.O to the village of accused. The police had lifted the sample of burnt mattresses, 4 pieces of burnt cover of mattresses, one piece of burnt table cloth etc. vide memo Ext. PW-1/A. He denied the suggestion in his cross-examination that his sister had caught fire from the stove as she was cooking meals in the kitchen.

7. PW-2 Savitri Devi is the mother of the deceased. According to her, the deceased was married to the accused about 10 years back. He used to mal-treat her daughter. He also used to give her beatings and used to suspect her after consuming liquor. They have reported the matter to the police but the matter was compromised. On 4.9.2012, one Smt. Manchali Devi telephonically informed her that accused had poured kerosene oil upon her daughter and set her ablaze. She telephonically informed her husband who was on his duty at Sidhpur. She went to Trambi by hiring the vehicle. 6-7 women were already in the house of the accused. Her daughter was inside the room and the room was bolted from inside. The accused was also inside the room. She saw her daughter in burnt condition lying on the bed. The accused abused her. Her daughter was wearing salwar at that time. The deceased was lifted to hospital with the help of ladies present on the spot. Accused also accompanied them up to Mandi. In her cross-examination, she deposed that her daughter had told her that accused had put her on fire by pouring kerosene oil upon her.

8. PW-3 Hima Devi deposed that she was called by Vidya Devi. Vidya Devi told her that she was burnt with the stove. She was lying on the bed. The deceased asked her to call 108 number vehicle for her treatment. Then, she returned to her house. She was declared hostile and cross-examined by the learned Public Prosecutor. In her cross-examination, she admitted that the deceased had asked her to call vehicle No. 108. She also admitted that when she went to the house of Fulmu, Manchali and Bhup Singh, she saw that Veena Devi was lying on the bed and was not wearing a shirt but was in the salwar. She asked her as to what had happened to her. Veena Devi was in critical condition.

9. PW-4 Om Chand deposed that deceased was married to the accused. On 4.9.2012, he came to know that his sister Veena had been burnt. There was smell of kerosene oil in the house. The burnt clothes were lying in the gallery. There was scattered water in the kitchen. The mattresses were in burnt condition.

10. PW-5 Tej Singh deposed that he was Pradhan of G.P. Lower Rewalsar. On 4.9.2012, the mother of the deceased had told him that her daughter was put on fire by her husband. He went to the hospital. The deceased was already referred to ZH Mandi.

11. PW-6 Bansi Lal deposed that he was Pradhan of Nagar Panchayat Rewalsar from the year 2011. On 19.3.2012, he went to Police Post, Rewalsar. Savitri Devi, accused and the deceased Veena Devi met him in the Police Post. Savitri Devi told him that her son-in-law used to beat her daughter. He made the accused to understand. Accused admitted his mistake in his presence and gave in writing that he will not beat Veena Devi in future.

12. PW-7 Parma Ram deposed that Savitri Devi was his real sister. Deceased Veena Devi was her daughter. She was married with the accused. The accused was in the habit of beating his niece.

13. PW-8 Dr. Punit Verma, deposed that on 4.9.2012 the deceased was brought to the hospital with the alleged history of burns. The police had filed an application Ext. PW-8/A for obtaining the MLC of deceased. He issued MLC Ext. PW-8/B. He noticed superficial burns over right cheek anterior aspect of neck, chest, back, arms, hands, legs and foot. On scalp and hair no burn was seen. He admitted in his cross-examination that he had given opinion that the injured was fit to give the statement and her statement was recorded by the police. He also admitted that she voluntarily got recorded her statement with the police. He also admitted the suggestion that the injured had disclosed that she had caught fire from the stove. She had neither told him nor to the police that her husband had put her on fire by pouring kerosene oil over her.

14. PW-9 Dr. H.R.Rahi, is the most material witness. According to him, the patient had given statement to the police in his presence under Section 154 Cr.P.C. vide Ext. PW-9/A. Injured Veena Devi had signed the statement in his presence and he also signed the same in red circle.

15. PW-12 Dr. Parveen Thakur deposed that he conducted the post mortem of the deceased on the application of police Ext. PW-12/A. He issued report Ext. PW-12/B.

16. PW-14 HHC Nathu Ram has recorded rapat No. 8 Ext. PW-14/A.

17. PW-16 ASI Karam Chand deposed that he investigated case FIR No. 243/12 Ext. PW-16/A, registered against the accused as he himself tried to immolate himself on 4.9.2012. FIR was registered on 5.9.2012.

18. PW-18 Manchali Devi deposed that accused was her neighbour. On 4.9.2012, in the noon time, deceased cried and she went to her house. She saw her lying unconscious on the bed in burnt condition. She asked her to call the Ambulance. She had telephonically informed her mother. She returned to her house. She was declared hostile and cross-examined by the learned Public Prosecutor. In her cross-examination by the learned defence counsel, she admitted that near the house of accused, houses of Baldev, Hari Ram, Lal Singh, Payare Lal and Badri were situated. 5-10 women were assembled in the house of accused on the day of incident.

19. PW-21 Shakuntla Devi is the mother of the accused. In her cross-examination, she admitted that the police has taken into possession the burnt articles from the house. She also admitted that mother-in-law of her son made complaint against her son for providing maintenance to the deceased.

20. PW-22 Dr. B.R.Rawat, has proved report Ext. PW-22/A.

21. PW-23 Rajesh Kumar deposed that one parcel sealed with seal “O” in the gunny was received through HHC Vidya Sagar in the Lab. on opening the parcel, non-pressure wick kerosene stove, whose upper body was red colour and fuel tank was painted

was found. The fuel tank lid was found missing. Some tool marks were present near the fuel tank lid portion. Fuel tank was found empty. He proved report Ext. PW-23/A.

22. PW-24 SI Om Parkash deposed that one Veena Devi was brought to the hospital in burnt condition. He moved an application Ext. PW-8/A to the M.O. for recording the statement of the injured and for MLC. The doctor opined that the injured was fit to give statement. He recorded the statement of the injured in the presence of M.O. The injured had got recorded that she got fire when she was cooking the meal. She was frightened as her husband was with her in the hospital. No rukka was sent on her statement by him to the Police Station. Thereafter, the injured was referred to Zonal Hospital, Mandi for treatment. He along with Om Chand and C. Surender Kumar went to the spot for investigation. The house was open and there was nobody in the house. He inspected the kitchen where inflammable material was lying scattered. The burnt items clothes, shirt, salwar, burnt bed sheet and bra was also lying in the kitchen. One stove was also lying in the kitchen and the lid of the stove was open. The lid was open with some tool. He took the photographs of the spot. In his cross-examination, he admitted that in rapat Ext. PW-14/B, it is mentioned that burnt clothes of Veena Devi Ext. P-10 to P-12 were recovered from the room. He also admitted that the statement was not in the Court file.

23. PW-25 SI Ranjan Sharma, deposed that he went to IGMC, Shimla alongwith LC Sarita Devi. He recorded the statement of injured Veena Devi vide Ext. PW-9/A in the presence of Dr. H.R.Rahi. He took the opinion from the doctor regarding the mental state of the injured as to whether she was fit to make statement. The doctor found her fit to give statement. After recording the statement, they returned to the Police Station and handed over the statement to SHO, on the basis of which FIR No. 246 of 2012 was recorded. When the statement of injured was recorded her parents were there.

24. PW-26 Dr. Richa Malhotra has examined the accused on 5.9.2012 and issued MLC Ext. PW-26/A.

25. PW-28 HHC Lalit Kumar, has conducted video grapy at the time of recording the statement of deceased vide Ext. PW-28/A and PW-28/B.

26. PW-32 SI Chhota Ram, has prepared the site plan vide Ext. PW-32/B and took the case property into possession. He also recorded the statements of the witnesses, namely, Manchali Devi and Shakuntala Devi.

27. What emerges from the evidence discussed hereinabove, is that the marriage of the deceased was solemnized with the accused 10 years ago. A quarrel took place between the deceased and the accused on 4.9.2012. The accused was insisting the deceased to go to her parents' house. She refused to go. Thereafter, the accused put kerosene oil on her and set her ablaze. She was taken to PHC Riwalsar. From PHC Riwalsar she was referred to Zonal Hospital Mandi and from Mandi she was referred to IGMC, Shimla. From IGMC Shimla, she was referred to PGI. She died on 17.9.2012 near Bilaspur on way to Mandi.

28. PW-1 Om Chand, PW-2 Savitri Devi, PW-4 Om Chand and PW-7 Parma Ram have deposed specifically that the accused used to beat the deceased. PW-3 Hima Devi deposed that she went to the house of deceased and saw deceased in burn condition. The deceased has asked her to call for 108 Ambulance. Though she was declared hostile but she has admitted that the deceased had asked her to call for the ambulance. When she went to the house of Fulmu, Manchali and Bhup Singh were also present. PW-4 Om Chand has also deposed that there was smell of kerosene oil in the house. When he went to the spot

with police, the burnt clothes were lying in the gallery. PW-6 Bansi Lal has also deposed that he had advised accused not to maltreat his wife.

29. PW-8 Dr. Punit Verma has issued MLC Ext. PW-8/B. According to him, the injury received by the deceased were superficial burns, however, we have seen the photographs. It is evident to the naked eye that the deceased had received severe burn injuries and she succumbed to injuries on 17.9.2012.

30. The statement of the deceased was also recorded under Section 154 Cr.P.C. vide Ext. PW-9/A. This statement was recorded by PW-25 SI Ranjan Sharma on 6.9.2012. It was recorded in the presence of PW-9 Dr. H.R.Rahi. PW-9 Dr. H.R.Rahi has specifically deposed that the injured Veena Devi had given statement to the police in his presence under Section 154 Cr.P.C. vide Ext. PW-9/A. We have gone through Ext. PW-9/A. There is endorsement of Dr. H.R.Rahi that the statement was recorded in his presence. PW-25 SI Ranjan Sharma has deposed that he had obtained opinion from the doctor as to whether the injured was fit to make statement. The doctor found her fit to give statement. Thereafter, FIR No. 246/12 was registered. The deceased has categorically stated the manner in which quarrel took place between her and her husband and he set her ablaze by sprinkling kerosene oil on her. The accused put water on her, but by that time, she had received 70% burn injuries. She requested to bring her clothes. He did not listen to her request. She requested him to contact 108 Ambulance, but he did not inform the Ambulance. PW-18 Manchali Devi has also deposed that deceased has asked her to call the Ambulance. Many people had gathered outside the house after hearing her cries. She requested them to call 108 Ambulance. Her mother was also informed. She has categorically stated in her statement Ext. PW-9/A that she was put on fire by her husband by sprinkling kerosene oil on her.

31. The post mortem report is Ext. PW-12/B. The cause of death was post burn septicemic shock and multiple organ dis-functioning. According to Ext. PW-22/A, report of the FSL, traces of kerosene were detected in the contents of parcels P/1, P/2 and P/3. It has also come in Ext. PW-23/A, FSL report that Ext. E/1 was big kerosene stove whose upper body was of red colour and the fuel tank was painted in blue and yellow colour. The fuel tank lid was found missing. Some tool marks were present near the fuel tank lid portion. The fuel tank was found empty.

32. Mr. Ramakant Sharma, Sr. Advocate, has vehemently argued that the deceased had earlier given statement before PW-24 SI Om Prakash that she got burnt due to accidental fire from stove. He has referred to Ext. PW-14/B. However, the fact of the matter is that the deceased in her statement Ext. PW-9/A has explained that the accused had threatened her that if she would narrate the incident to her parents or brothers, she would be killed. She was scared. In these circumstances, at Rewalsar, she deposed that she received burn injuries due to stove. The conduct of the accused was also strange. He has not tried to help the deceased by taking her to the hospital. It is only people who have gathered outside the house and entered the house later on and informed the Ambulance. She was taken to PHC, Rewalsar and then to Zonal Hospital, Mandi. The accused accompanied them to Mandi and refused to accompany them to IGMC, Shimla. The dying declaration Ext. PW-9/A was made voluntarily, consciously and the same is found to be trustworthy and creditworthy. It cannot be termed as tutored only on the ground that the parents of the deceased were also in the room at the time of recording the statement of the deceased. Since the deceased was lady, the parents were bound to be in the room to look after her.

33. It has also come on record that earlier also, the accused used to maltreat the deceased. The matter was reported to the police. The matter was compromised by the Panchayat. The accused has also tried to self immolate him on 4.9.2012. He was also admitted in the hospital. FIR No. 243 of 2012 was also registered against the accused under Section 309 IPC. The can of kerosene oil was also taken into possession. This act of the accused was also incriminating. He has done so due to his guilt.

34. Their lordships of the Hon'ble Supreme Court in the case of ***Khushal Rao vrs. State of Bombay,*** reported in ***AIR 1958 SC 22,*** have held that once the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. It has been held as follows:

> "17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration.
>
> If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case."

35. Their lordships of the Hon'ble Supreme Court in the case of ***State of Maharashtra vrs. Krishnamurti Laxmipati Naidu,*** reported in ***AIR 1981 SC 617,*** have held that where the crucial facts were found in the dying declaration in which there was a mention that the stabbing of the deceased by the accused was preceded by abusing of deceased's son by the accused, to which the deceased objected, the same could not be ignored merely on the ground that it did not include any statement as to how the accused had received injuries. It has been held as follows:

> "19. We further find that the learned Judges of the High Court were not justified in ignoring the dying declaration (Ex. 18) of the deceased merely on the ground that it did not include any statement as to how the accused had received the injuries. This dying declaration, which was recorded by the Taluka Magistrate in the Hospital, is a very brief statement. It is to the effect: "Krishna Laxmipati Madrasi stabbed me with the knife. He was abusing my son, Shivajirao. I objected him. Because of that he stabbed me with the knife....My son Chandrakant rushed (at us). On seeing him Krishna ran away." It may be noted that although the deceased was fit enough to make a statement, yet on account of being in great agony, his words were scarce. He could not be bothered more by the Magistrate in such a condition. It would have been sheer torture to him, if the Magistrate tried to interrogate him at length in regard to all the details. The crux of the whole matter was as to

who had stabbed the deceased and why. These crucial facts are to be found in the dying declaration (Ex. 18), in which there is a mention that the stabbing of the deceased by the accused was preceded by abusing of Shivaji by the accused, to which the deceased objected. True, that the dying declaration mentions about Chandrakant's coming to the scene of occurrence (possibly armed with a stick). It is further correct that in the dying declaration, the deceased did not say specifically anything with regard to Shivaji's coming to the spot armed with a stick. But the dying declaration does clearly mention that whosoever came out to intervene, whether it was Chandrakant or Shivaji or both, did so only after the deceased had been stabbed by the accused."

36. Their lordships of the Hon'ble Supreme Court in the case of ***Smt. Paniben vrs. State of Gujarat,*** reported in ***AIR 1992 SC 1817,*** have culled out the following principles governing dying declaration:

"(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. Mannu Raja v. State of M.P., [1976] 2 SCR 764.

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. State of M. P. v. Ram Sagar Yadav, AIR 1985 Sc 416; Ramavati Devi v. State of Bihar, AIR 1983 SC 164.

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. Ram Chandra Reddy v. Public Prosecutor, AIR 1976 S.C. 1994.

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. Rasheed Beg v. Sate of Madhya Pradesh, [1974] 4 S.C.C. 264.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M. P.., AIR 1982 S.C. 1021)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P. 1981 SCC (Crl.) 531).

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurthi Laxmipati Naidu, AIR 1981 SC 617).

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. Surajdeo Oza v. State of Bihar, AIR 1979 SC 1505)

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram and another v. State, AIR SC 912)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State U.P. v. Madan Mohan, AIR 1989 S.C. 1519)"

37. Their lordships of the Hon'ble Supreme Court in the case of ***Jai Prakash and others vrs. State of Haryana,*** reported in ***1999 Cri. L.J. 837,*** have held that the first information report given by the deceased before her death, earlier recorded as complaint and later on her death treated as dying declaration, the fact that it was recorded in question and answer form is no ground to doubt its genuineness. Their lordships have held as follows:

> "6. It was next contended by the learned counsel that the statement as not recorded in question and answer from and therefore no weight should be attracted to it. It also deserves to be rejected as misconceived because a complaint is required to be recorded in question and answer from even though there is a possibility that later on it might be treated as dying declaration receives corroboration from the site inspection report and also by the application - Ex. PL referring to the compromise arrived at n the previous day."

38. The Division Bench of the Delhi High Court in the case of ***Hans Raj and another vrs. State,*** reported in ***2006 Cri. L.J. 2540,*** has held that earlier dying declaration made before a Police Officer describing incident as an accident caused while heating food on stove, the second dying declaration made before the Magistrate implicating the accused was material showing that earlier dying declaration was extracted out of her by giving threats. Second dying declaration has to be accepted as it was corroborated by circumstantial evidence. It has been held as follows:

> "17. The trial court has found several circumstantial evidence to corroborate the dying declaration. However, we find two of the circumstances to be important. In the first place, the kerosene stove available in the house, from which the deceased could have caught fire was a sophisticated one with kerosene tank attached to a cylindrical burner and the chance of the kerosene leaking from the tank or container was almost nil. No leak in the kerosene tank was noticed. It is not the case of the defense that the tank had burst. The kerosene tank was intact when seized by the police. The second important circumstantial evidence is the detection of kerosene on the scalp hair of the deceased. The post mortem doctor had preserved the scalp hair and had handed over the same to the investigation which got it examined by the CFSL. The CFSL report, Exh.PA, shows the presence of kerosene residue in the hair. True, the same report does not find residue of kerosene in the partly burnt clothes with skin sticking to them. This, however, has been explained by the fact that the hair and the clothes were packed separately. The CFSL report, Exh.PA, bears the date 28.1.1991. It was a slip of pen. The report is actually of 28.1.1992 as is explained by PW-20, Dr. N.K. Parsad, Sr. Scientific Officer, CFSL. In fact the report itself was filed before the court in July, 1992. The same was not filed along with the challan. The slip of pen about the date has not been disputed. Thus, a year had passed between the collection of the sample and its testing. In the time period that elapsed between the incident and the examination, the kerosene could have evaporated on account of the loose packing of the clothes. This could also be explained by the factor that the part of the burnt clothes sent to the CFSL were not exactly the parts which may have received the kerosene. Dr. N.K. Prasad was specifically questioned about the absence of kerosene on the clothes. He explained that the testing was done taking representative samples from different portions of the clothes and that presence of kerosene residue would not be detected by the physio Chemical analysis if the part

subjected to analysis did not contain kerosene residue. Same was his answer in case exhibit in question was not properly preserved in air tight container. He also informed the court in his cross-examination that CFSL does not have the facility for taking extra precaution for preserving the exhibits received and they are kept in the open racks in the same form in which they are received. About the test done by him, namely, gas-liquid chromatography, he said that the same could detect a fraction of milliliter of kerosene. In any case the CFSL report cannot be discarded on the ground that the clothes did not produce positive result in respect of presence of kerosene whereas scalp hair did. Therefore, we have to accept the CFSL report which says that in the scalp hair of the deceased, there was presence of kerosene. If this is so, the theory that the deceased caught fire accidentally while heating food on the kerosene stove has to be discarded. The presence of kerosene on the head is possible only when by a deliberate act kerosene is poured on the hair. Kerosene cannot reach the scalp hair by accidental burns caused by a stove.

18. The defense initially say that Madhu did not sign the dying declaration because either she did not want to sign the dying declaration or because she was not in a proper frame of mind to sign the dying declaration. Both the suggestions have been denied by the SDM. In fact, the dying declaration carries a record that the statement as recorded was read out to the deceased and the deceased had accepted the same to be correct. Further argument against the dying declaration raised by the defense/appellants is that the second dying declaration is tutored by the parents of the deceased who were with her all through the period during which she was receiving treatment in the hospital. It was nobody's case that the family of the accused was also not there. Since the accused and their family as well as natal family of the deceased were present at the hospital it cannot be said that the natal family had the upper hand in tutoring the deceased. It can nevertheless be said that the deceased certainly gained confidence in speaking the truth as she approached death and in this the presence of her parents may also have been of some help. But most importantly the second dying declaration has to be accepted as it is corroborated by the circumstantial evidence as discussed above.

19. The Additional Sessions Judge in this case has taken the pains to visit the spot. He observed that nothing in the kitchen indicated that an incident of fire had taken place there. The kitchen, he found, was so small that in case any fire had taken place the same could certainly have left marks on the walls and the door of the kitchen. This factor has been taken into account by him in holding that the incident of fire did not actually take place in the kitchen but had taken place in the courtyard and that the same could be possible only if she was burnt by appellant No.1, Hans Raj, as indicated in her dying declaration.

20. The appellant No.1 has taken the plea that the prosecution has failed to produce the brother and sister-in-law of the appellant, who are eye-witnesses, and that it is a weakness in the prosecution case. We cannot accept this plea. The prosecution case has been sufficiently proved with the dying declaration and other circumstantial evidence."

39. In the case of ***Suresh Vishwanath Jadhav vrs. State of Maharashtra,*** reported in ***2006 Cri. L.J. 4277,*** the Division Bench has held that in first dying declaration deceased stating that she caught fire due to bursting of stove and in second dying declaration she implicated her husband by giving reason for not giving his name in first dying declaration as person who poured kerosene on her and set her on fire as to threats of killing her small daughter given by him if she reveals true facts. The medical evidence and nature of burn injuries found on her body showing that death was homicidal and not accidental, the conviction of husband for offence of murder and cruelty on basis of second dying declaration was held proper. It has been held as follows:

> "27. Mr. Khomane has also deposed to the effect that in addition to recording the dying declaration Ex. 11, he has also prepared certain notes which he has tendered in his evidence. The same is taken on record at Ex. 11-A which goes to show the precaution taken by Mr. Khomane while recording the statement of Sangita. The evidence of Shri Khomane goes unchallenged as nothing could be brought on record in cross-examination to show that he has not recorded the statement of Sangita as required by law. Further, his evidence stands duly corroborated by Dr. Patil on all counts who has also denied the suggestions that at the time dying declaration came to be recorded he was not present in the hospital and that Special Judicial Magistrate had not come at the time of recording dying declaration and that signature has been obtained subsequently.
>
> 28. Much hue and cry has been made by the learned Counsel for the appellant accused. On the issue of second dying declaration being inconsistent with the earlier during declaration of the victim and it is submitted that as in the first dying declaration which is earlier in point of time, the deceased had exonerated the appellant accused, it would be unsafe to arrive at the finding that the appellant accused is guilty of pouring kerosene on the person of his wife deceased Sangita and setting her ablaze because of which she suffered burn injuries. We find that if the prosecution wanted to suppress this fact they would not have placed the first dying declaration on record. Not only this, but initially the Investigating Agency did not register any offence against the Appellant accused as in the first dying declaration Sangita did not implicate her husband and gave her statement to the effect that she suffered burn injuries due to bursting of stove i.e. accidental when she was trying to put on the stove for cooking. It is only after her mother Vatsala P.W. No. 4 came to know from her that she has been actually burnt by her husband and made a grievance to the hospital authorities that the matter was reported to the police and P.W. No. 1 Mr. Khomane was requisitioned to record the dying declaration. In the second dying declaration itself, she has specifically given the reasons that her husband had threatened her that if she tells the truth he would kill her small daughter and therefore, she did not reveal the true facts when she was admitted in hospital.
>
> 29. It is now well settled by catena of decisions that the dying declaration can form the sole basis of conviction as in this case the deceased was conscious, alert and capable of making a statement and stated voluntarily that it is her husband who poured kerosene on her person and set her ablaze. In the present case, it has been tried to be canvassed that it is only after the mother and close relatives and friends of the deceased reached that

she gave her second dying declaration implicating her husband, though in the first statement made to the Magistrate, she has completely exonerated the accused. What we find is there is no reason for not acting on the dying declaration of the deceased wherein she has given a fair and vivid statement that she has been set on fire by pouring kerosene oil on her by her husband and explaining the circumstances under which she was required to ° make the first statement exonerating her husband under the threat that he would kill her child. One cannot overlook the fact that as the deceased was continuously treated with cruelty by her husband her concern for the child is but natural and the threat was potent enough to deter her from making a truthful statement.

30. The first dying declaration Ex. 24 was made under duress and is to be understood from the cause stated by her relating to suffering burn injuries by bursting of stove which does not stand corroborated by forensic evidence and from the evidence of the witness to the spot panchnama as well i.e. P.W. No. 6 and the panchnama dt. 21.8.95 does not go to show that the kerosene stove was in damaged condition. We find in the evidence of the panch P.W. No. 6, he had stated that when he went inside the kitchen room, he noticed that there was kitchen platform in the kitchen room and on such platform there was a kerosene stove. There was one plastic can containing small quantity of kerosene. There was match box partly burnt. There was partly burnt Nylon sari and partly burnt blouse and that the police seized all these articles from the spot. In his cross-examination, there is not even a suggestion to the effect that this stove had burst. Further the forensic evidence in the form of C.A. report which is tendered before the Court and marked Ex. 39 also go to show that kerosene was found on the burnt saree and burnt blouse of the victim. So also the medical evidence of Dr. Chandekar. P.W. No. 5 and Dr. Kurlekar, P.W. No. 2 who examined the patient at the time of admission found burn injuries all over the dead body of Sangita. The nature of burn injuries found on the lower limb and back of the victim belies the story of the victim suffering burn injuries due to bursting of stove i.e. by accident.

31. Insofar as evidence of other witnesses is concerned, which rather corroborates the prosecution's case that the victim was treated with cruelty and in all probability it is the appellant accused who poured kerosene on her and set her ablaze, it indicates that the appellant accused wanted to get rid of her.

33. Insofar as relatives of the victim are concerned i.e. P.W. No. 4, Vatsala Ingale mother of the victim and P.W. No. 7, Kalpana Krishnarao Jadhav, elder sister of the victim goes to show that the appellant accused used to treat Sangita with cruelty. Therefore, after taking into consideration the evidence on record, we have no hesitation to hold that it is the appellant accused who is guilty of having committed murder of his wife Sangita by pouring kerosene on her person and setting her ablaze resulting in burn injuries which was the cause of her death."

40. Their lordships of the Hon'ble Supreme Court in the case of ***Sayarabano alias Sultana Begum vrs. State of Maharashtra,*** reported in ***(2007) 12 SCC 562,*** have held that deceased was taken to the hospital by the appellant and members of her in-laws'

family, the second dying declaration recorded after arrival of her parents in hospital and when asked by Special Judicial Magistrate, who recorded both her dying declarations, as to the discrepancy in her statements, she stated that the appellant had warned her against implicating any family member. The dying declaration recorded by Special Judicial Magistrate endorsed by doctor certifying that the deceased was in "a position to make statement". The ill treatment meted out to the deceased by the appellant and beatings given by her husband at her mother's instigation, proved by the PWs and it was only after her parents' arrival that she could muster courage to state the truth. It has been held as follows:

> "4. On August 13, 1998, the appellant-accused started a quarrel with the deceased Halimabi and abused her over the fact that she had not got up early in the morning for Namaz. At that time, the deceased Halimabi was standing at a place where a burning lamp was hung on the nail in the wall. The husband as well as father-in- law of the deceased had gone to the Masjid for Namaz. In the house, apart from the deceased and the appellant-accused, brother-in-law of the deceasedShaikh Shakil and his wife Taslim were present. During the course of quarrel, the appellant-accused poured kerosene from the lamp on the deceased, due to which, the deceased caught fire and suffered burn injuries on her back, stomach and breast. She started screaming in pain. Her brother-in-law Shaikh Shakil put out the fire by pouring water and removed her clothes. Meanwhile, her husband had come and the deceased was taken to hospital.
>
> 5. The record indicates that when Halimabi was brought to the hospital, the history recorded accidental burns. She was taken to the hospital at 10.30 a.m. on August 13, 1998. Between 1.30 and 1.50 p.m. on the same day, Abdul RashidSpecial Judicial Magistrate, Beed (PW5) was called by the police and dying declaration of deceased Halimabi was recorded by him. In that dying declaration, deceased Halimabi stated that while opening the door, her hand hit the kerosene lamp which was kept on the pillow and fell on her and she sustained injuries. In other words, according to the said dying declaration, the deceased caught fire accidentally when she came into contact with the lamp. She absolved all the inmates of her husband's family of any wrong- doing or connecting with her catching fire. On the next day i.e., on August 14, 1998, at about 1.45 p.m., however, again PW5Special Judicial Magistrate was called for the purpose of recording dying declaration of deceased Halimabi. In the said dying declaration, she stated that on the previous day i.e. on August 13, 1998, her mother-in-law (appellant) started abusing her for not going for Namaz by getting up late. At that time, in the house, kerosene lamp was hung on the wall near which the deceased was standing. Her husband as well as her father-in-law had gone for Namaz and in the house, deceased Halimabi, her mother-in-law (appellant), her sister-in- law Taslim and her brother- in- law Shaikh Shakil were present. According to the deceased, her mother-in-law (appellant) threw the kerosene lamp on her, with the result both of her hands, entire back, stomach and both sides of her chest were burnt and she started screaming and crying. Her brother-in-law Shaikh Shakil poured water on her and extinguished fire and removed her clothes. She was then taken to the hospital. She also stated that her marriage took place before 8 to 10 months and had no child. Her husband used to beat after listening to his mother. She was asked to do

entire household work. In case she did not do work, her mother-in-law used to abuse her.

6. In the light of the fact that in the previous dying declaration, the deceased had not involved her mother- in-law and had described the incident as 'accidental', the Special Judicial Magistrate asked the deceased that when he recorded her dying declaration on August 13, 1998, in the said statement, the deceased had stated that she was hit by the kerosene lamp which fell on her and she was burnt. The Special Judicial Magistrate, therefore, asked her as to why she was changing her statement. The deceased replied that her mother-in-law (appellant) told her not to give any statement against the family members of her in-laws and that was the reason why she had given the earlier statement. But in fact, it was her mother-in-law who threw kerosene lamp on her and thus she was burnt. She also stated that her mother-in-law was harassing her.

7. Ultimately, Halimabi died on August 20, 1998 at about 7.00 p.m. On the basis of the second dying declaration recorded by the Special Judicial Magistrate, a case was registered by PW7PSI Sampat Shinde under C.R. No.60 of 1998 at Peth-Beed Police Station. Initially, the case was registered for an offence punishable under Section 307 IPC but after the death of Halimabi it was converted into an offence punishable under Section 302 IPC. The appellant was arrested on August 15, 1998. The matter was committed to the Court of Session and a charge was framed against the accused under Section 302 IPC.

14. Having heard the learned counsel for the parties, in our opinion, the Courts below were right in convicting the appellant. From the evidence, it is proved that on August 13, 1998, after the incident took place, the family members of the appellant took the deceased to the hospital. The record revealed that before few days of the incident, the deceased had been brought to her marital home. Before that, she was beaten by the appellant. She left marital home and went to parental home. It is also in the evidence that the deceased was beaten by her mother-in-law and two instances had been cited. Obviously, therefore, on August 13, 1998, when the deceased was taken to hospital by her mother-in-lawappellant, who insisted not to give the name of any of the family members of the appellant, the deceased had no courage to name her. In the circumstances, she stated that it was merely an accident. But, after her parents came, she could state true facts, the Special Judicial Magistrate was called again and the second dying declaration was recorded. From the evidence of PW1Dr. KishanMedical Officer, it was clear that total burns were about 57%. It is also in evidence of PW6Dr. Kishore that the deceased was "in a position to make statement". He, therefore, accompanied Special Judicial Magistrate to the ward of Halimabi and her dying declaration was recorded. He also stated that he was present throughout till the statement of Halimabi was recorded by the Special Judicial Magistrate and when it was over, he put endorsement on the paper given by Special Judicial Magistrate. The Trial Court as well as the High Court considered both the dying declarations of the deceased Halimabi and both the Courts held the second dying declaration true and inspiring confidence having disclosed true facts so far as the incident was concerned. Ill-treatment towards the deceased was clearly established and completely proved. The

evidence of PW2father as well as PW3mother of the deceased was clinching on the point. Both the Courts were right in holding that nothing could be elicited from the cross- examination of those witnesses. It, therefore, cannot successfully be contended that the only cause of throwing burning lamp on the deceased by the appellant was getting up late in the morning by the deceased and not performing Namaz. Even prior to that incident, the appellant used to beat the deceased and on the fateful day, it was an excuse to kill the daughter-in-law by the mother-in-law."

41. In the case of ***Sher Singh and another vrs. State of Punjab,*** reported in ***(2008) 4 SCC 265,*** their lordships of the Hon'ble Supreme Court have held that absence of doctor' certification is not fatal if person recording it was satisfied that the deceased was in a fit state of mind. The requirement of doctor's certificate is essentially a rule of caution. Their lordships have further held that when the first dying declaration exonerating accused persons made immediately after she was admitted in hospital was under threat and duress that she would be admitted in hospital only if she would give a statement in favour of accused persons in order to save her in-laws and husband, it was made in presence of mother-in-law and ASI deposed that she was under pressure. Hence, first dying declaration does not appear to be coming from a person with free mind. The second declaration was more probable and looks natural though it does not contain certificate of doctor that she was in a fit state of mind to give the dying declaration but the Magistrate who recorded the statement had certified that she was in a conscious state of mind and in a position to make the statement to him. It has been held as follows:

"3. On 20.7.1994, he moved an application before the District Magistrate to record her statement. The ADM directed the Executive Magistrate, Rajiv Prashar (PW 7) to record her statement and on 20.7.1994 he recorded her statement. Her uncle moved another application this time before the DSP(Rural) Kanwarjit Singh (PW 1) requesting him to re-examine the matter as according to him she was forced to make a wrong statement before Hakim Singh. On 22.7.1994 the S.I. recorded her statement (Exh.PJ) at about 8.05 p.m. after taking the doctor's opinion. He stated that she was fit to make a statement. On 23.7.1994 Jaspal Kaur died due to burn injuries. Hence the offence was converted into that of Section 302 read with Section 34 IPC which resulted in trial and conviction.

4. It is submitted by the learned Counsel for the appellant before us that while appreciating the evidence, reliance should have been placed upon the first dying declaration made on 18.7.1994, which was first in time immediately after the incident wherein she stated that the fire was accidental and no one was responsible for the same, particularly when there are 6 dying declarations in total (3 written and 3 oral) wherein the statement has been improved from time to time. Submission of the learned Counsel for the appellants is that it is only when the uncle of the deceased met her in the hospital that she changed her first dying declaration and implicated the accused appellants for commission of crime. When the dying declaration was recorded by the Executive Magistrate on 20.7.1994, there is no certification of the doctor that she was in a fit state of mind to give the dying declaration even though she had received 80% burns. It is urged that one local congress worker Nirmala Sharma was present at the bedside of the deceased when the dying declaration was made by her on 20.7.1994 and possibility of her being tutored could not be ruled out.

16. Acceptability of a dying declaration is greater because the declaration is made in extremity. When the party is at the verge of death, one rarely finds any motive to tell falsehood and it is for this reason that the requirements of oath and cross examination are dispensed with in case of a dying declaration. Since the accused has no power of crossexamination, the court would insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court should ensure that the statement was not as a result of tutoring or prompting or a product of imagination. It is for the court to ascertain from the evidence placed on record that the deceased was in a fit state of mind and had ample opportunity to observe and identify the culprit. Normally, the court places reliance on the medical evidence for reaching the conclusion whether the person making a dying declaration was in a fit state of mind, but where the person recording the statement states that the deceased was in a fit and conscious state, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of mind of the declarant, the dying declaration is not acceptable. What is essential is that the person recording the dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement without there being the doctor's opinion to that effect, it can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certificate by the doctor is essentially a rule of caution and, therefore, the voluntary and truthful nature of a statement can be established otherwise.

17. In the present case, the first dying declaration was recorded on 18.7.1994 by ASI Hakim Singh (DW-1). The victim did not name any of the accused persons and said that it was a case of an accident. However, in the statement before the court, Hakim Singh (DW-1) specifically deposed that he noted that the declarant was under pressure and at the time of recording of the dying declaration, her mother- in-law was present with her. In the subsequent dying declaration recorded by the Executive Magistrate Rajiv Prashar (PW 7) on 20.7.1994, she stated that she was taken to the hospital by the accused only on the condition that she would make a wrong statement. This was reiterated by her in her oral dying declaration and also in the written dying declaration recorded by SI Arvind Puri (PW 8) on 22.7.1994. The first dying declaration exonerating the accused persons made immediately after she was admitted in the hospital was under threat and duress that she would be admitted in the hospital only if she would give a statement in favour of the accused persons in order to save her in-laws and husband. The first dying declaration does not appear to be coming from a person with free mind without there being any threat. The second dying declaration was more probable and looks natural to us. Although it does not contain the certificate of the doctor that she was in a fit state of mind to give the dying declaration but the Magistrate who recorded the statement had certified that she was in a conscious state of mind and in a position to make the statement to him. Mere fact that it was contrary to the first declaration would not make it untrue. The oral dying declaration made to the uncle is consistent with the second dying declaration implicating the accused persons stating about their involvement in the commission of crime. The third dying declaration recorded by the SI on the direction of his superior

> officer is consistent with the second dying declaration and the oral dying declaration made to her uncle though with some minor inconsistencies. The third dying declaration was recorded after the doctor certified that she was in a fit state of mind to give the statement.
>
> 18. On overall consideration of the entire evidence, we find no infirmity in the judgment of the High Court which has considered all material evidence placed by the prosecution while arriving at the conclusion of finding the accused guilty of an offence they were charged with. The appeal is, accordingly, dismissed."

42. In the instant case also, the general condition of the deceased was stable to make dying declaration before the Police Officer. She gave the statement on 6.9.2012 and she died only on 17.9.2012. The accused has not tried to save her life by calling Ambulance.

43. Their lordships of the Hon'ble Supreme Court in the case of ***State of Karnataka vrs. Shariff,*** reported in ***AIR 2003 SC 1074***, have held that the dying declaration recorded by police personnel cannot be discarded on that ground alone. There is no requirement of law that dying declaration must necessarily be made to Magistrate. It has been held as follows:

> "21. It is true that PW 11 and PW 14 were Police personnel and a Magistrate could have been called to the hospital to record the dying declaration of Muneera Begum, however, there is no requirement of law that a dying declaration must necessarily be made to a Magistrate. In Bhagirath v. State of Haryana AIR 1997 SC 234 on receiving message from the hospital that a person with gun shot injuries had been admitted a head constable rushed to the place after making entry in the police register and after obtaining certificate from the doctor about the condition of the injured took his statement for the purposes of registering the case. It was held that the statement recorded by the head constable was admissible as dying declaration. Similar view was taken in Munnu Raja & Anr. v. State of Madhya Pradesh 1976 (2) SCR 764, wherein the statement made by the deceased to the investigating officer at the police station by way of First Information Report, which was recorded in writing, was held to be admissible in evidence."

44. In the case of ***P.V. Radhakrishna vrs. State of Karnataka,*** reported in ***AIR 2003 SC 2859,*** their lordships of the Hon'ble Supreme Court have held that dying declaration can be the sole basis for conviction since a person on death bed is in a situation so solemn and serene equal to obligation of oath. The absence of certificate as to state of mind of the declarant is not fatal when police official recorded statement of deceased in presence of doctor. In this case, the deceased received 80-85% burn injuries. Their lordships have held as follows:

> "15. There is no material to show that dying declaration was result of product of imagination, tutoring or prompting. On the contrary, the same appears to have been made by the deceased voluntarily. It is trustworthy and has credibility."

45. In the case of ***Phundi vrs. State of M.P.,*** reported in ***1993 Cri. L.J. 1881,*** the Division Bench of the M.P. High Court has held that when the accused has tried to commit suicide, it shows his guilty mind. It has been held as follows:

"7. Thirdly, the post-occurrence conduct of the accused was hightly incriminating. Even the accused's wife Kailashi (P. W. 3) felt compelled to admit that her husband after the incident had jumped down from the terrace of the house. The explanation given by the accused in his examination under Section 313, Cr. P.C. was ridiculous; namely, that he had slipped from the terrace. If he had really slipped, his wife would not have said that he had jumped from the terrace. What is more, the accused's real brother living in adjoining house, namely Tularam (P. W. 5) admitted that accused was seen trying to smash his head with a brick. Even Maharaj Singh (P. W. 6) admitted this fact. Thus the accused after jumping from the terrace tried to smash his head with a brick and was trying to end his life. Such conduct of the accused showed his guilty mind that he was so much overcome by remorse and repentence for the deed done by him that he wanted to end his life. If he had not confessed to his crime by speaking any words at that time, his conduct was more eloquent and telling."

46. The husband and wife alone were in the house. Children had gone to the School. Thus, it was for the accused also under Section 106 of the Indian Evidence Act to explain the circumstances under which the deceased received burn injuries. The theory of suicide is not plausible.

47. Thus, the prosecution has proved the case against the accused to the hilt. There is no occasion for us to interfere with the well reasoned judgment and order of the learned trial Court dated 30.10.2014 and 31.10.2014, respectively.

48. Consequently, there is no merit in this appeal and the same is dismissed.

****

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

Sushil Kumar. ....Petitioner

Versus

Sh. Lachhami Chand & another. ....Non-petitioners.

Cr.MMO No. 168 of 2015

ORDER Decided On: 11.9.2015.

Code of Criminal Procedure, 1973- Section 70- Trial Court issued non-bailable warrant for securing the appearance of the petitioner- petitioner had appeared before the trial Court; hence, petition has become infructuous.

For the petitioner : Mr. S.D. Vasudeva, Advocate.
For non-petitioner No.1 : Mr. Onkar Jairath, Advocate.
For non-petitioner No.2. Mr. J.S. Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Present petition is filed against the issuance of non-bailable warrants to the petitioner to appear before the learned trial Court. At this stage learned Advocate appearing on behalf of the petitioner submitted that petitioner appeared before the learned trial Court.

In view of the above stated facts present petition has become infructuous and same is accordingly dismissed as infructuous. Pending applications if any, also disposed of.

****

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

Kanti Swaroop Mehta. ...Petitioner.
Versus
State of H.P. and others ...Respondents.

C.W.P. No. 2356 of 2009.
Reserved on : 14.7.2015.
Decided on : 14.9.2015.

Constitution of India, 1950- Article 226- Respondent No. 2 sent a communication to respondent No. 3 regarding providing of road to sewerage treatment plant at Solan- respondent No. 3 was requested to prepare documents for acquisition of the land- petitioner is owner of the plot- a notification for acquiring the land was published in the news paper- compensation of Rs. 26,981.49 per biswa was proposed- total amount of Rs. 35,19,965/- was determined as compensation- proposed award was sent to Principal Secretary, I & PH- a communication for de-notification of khasra number mentioned in the communication was sent and the land was de-notified- held that the respondents had used the land for laying down pipes and construction of chambers- respondent also admitted that necessary cutting and dressing was undertaken on the land - no reason was specified for de-notification of the land- papers for acquiring the land and pronouncing the award were sent, therefore, the plea that possession was not taken over cannot be accepted- once the land has been acquired and no award has been pronounced, the acquisition will not lapse- petitioner cannot be deprived of his right to get compensation- once possession has been taken the Department is not at liberty to withdraw from the acquisition- Writ petition allowed and respondents No. 1 and 2 directed to grant necessary approval to draft award. (Para-7 to 25)

Cases referred:
Satendra Prasad Jain and others vs. State of U.P. and others, AIR 1993 SC 2517
Awdh Bihari Yadav and others vs. State of Bihar and others, AIR 1996 SC 122
Balwant Narayan Bhagde vs. M.D. Bhagwat and others, AIR 1975 SC 1767
Rajasthan Housing Board and others Vs. Shri Kishan and others, (1993) 2 SCC 84
Amarnath Ashram Trust Society Vs. Governor of U.P. and others, (1998) 1 SCC 591
Mohan Singh and others vs. International Airport Authority of India and others, (1997) 9 SCC 132
A.P. and another Vs. Syed Akbar, A.I.R. 2005 Supreme Court 492

For the petitioner : Mr. Neeraj Gupta, Advocate.
For the respondents. : Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge:

CWP No. 2356/2009 was allowed by this Court vide judgment dated 24.10.2011. Respondent-State filed an LPA against the judgment dated 24.10.2011 bearing

LPA No. 102 of 2012. The LPA was allowed by the Division Bench of this Court on 23.4.2014 and the matter was remanded back to this court. According to the observation made by the Division Bench, the Writ Court has not decided all the objections raised by the State including factum of possession. The petition was heard afresh.

2. "Key facts" facts necessary for the adjudication of this petition are that respondent No.2 sent a communication to respondent No.3 on 24.4.2003 regarding providing road to sewerage treatment plant at Solan. Respondent No.3 was requested to prepare documents under section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the "Act" for brevity sake) so that the land could be acquired for the public purpose. The Assistant Engineer I & PH, Sub Division, Solan sent a communication to the Land Acquisition Officer, Public Works Department, Solan on 23.06.2004 requesting him to prepare the papers under sections 6 and 7 as per Jamabandi for land comprised in 7/8 Khewat-Khatauni No. Khasra No.1. Respondent No.2 again sent a communication to respondent No.3 on 16.7.2004 to prepare the documents under sections 4, 6 and 7 of the Act. The petitioner is owner of plot, measuring 15 bighas and 4 biswas, comprised in Khasra No. 341/3 entered at Khewat No. 30, Khatauni No. 31 min, situated at Mauja Shamti, Pargna Keontan-I, Tehsil and District Solan, H.P. Notification under section 4 of the Act was issued for the construction of road of sewerage treatment plant at Solan on 7.2.2005. It was duly published in two daily newspapers i.e. Punjab Kesri and Divya Himachal on 15.3.2005. It was also got published in Rajpatra on 26.2.2005. It was also given wide publicity through Tehsildar Solan on 15.3.2005 vide report No. 493. A report under Section 5-A (2) was submitted to the Executive Engineer, I & PH, Solan by respondent No. 3 on 13.4.2005 alongwith draft notification under Sections 6 and 7 of the Act. The State Government after receiving report under Sections 5-A (2) of the Act issued notifications under Sections 6 and 7 on 8.9.2005 for acquiring 4-12 bighas of land situated in village Shamti Tehsil and District Solan for the construction of Sewerage Treatment Plant. These notifications were also published in two daily newspapers, i.e. Ajit Samachar and Divya Himachal on 30.10.2005. It was also published in the H.P. Rajpatra on 24.9.2005. Wide publicity was also given to the same through concerned Tehsildar Solan on 10.10.2005 vide report No. 103. Land measuring 4-12 bigha was demarcated by the Field Agency and it was checked by the Naib Tehsildar, LAO Office Solan in the presence of right holders and nominees of the department on 24.11.2005. Their statements were also recorded on the spot. The inquiry under Section 9 of the Land Acquisition Act was conducted on 7.12.2005 in the office of respondent No. 3. The District Collector, Solan vide order dated 25.11.2005, has approved the rates of Rs. 26981.49 paisa per biswa of Ghasni Kisam on the basis of sale transactions recorded before the issuance of notification under Section 4 of the Act. The draft award was made by respondent No. 3 on 17.1.2006. Respondent No. 3 has determined Rs.35,19,965/- as amount of compensation for acquiring the land as mentioned hereinabove. The proposed award was sent to the Principal Secretary (I & PH) on 17.1.2006 vide Annexure P-8. The announcement of award was fixed as 31.1.2006. Respondent No. 3 sent a communication to the Land Acquisition Officer on 11.9.2007 for de-notification of Khasra numbers of the land as per the details given in the communication. Thereafter, vide notification dated 9.10.2007, the land was de-notified whereby the land was to be acquired for construction of Sewerage treatment plant. The same was also published in Hindustan Times on 11.11.2007 and Dainik Bhaskar.

4. Mr. Neeraj Gupta, has vehemently argued that the possession of the land has been taken over and the same has been utilized and once the possession has been taken over, Annexure P-11, dated 9.10.2007 could not be issued. He has also contended that action of the respondent de-notifying the land is actuated with legal malafides. According to

him, the chambers have been constructed and the pipe lines have already been laid down on the land of the petitioner.

5. Mr. Ramesh Thakur, learned Assistant Advocate General has vehemently argued that the present petition is barred by delay and laches. He has also contended that path is common and the state government is using this path on the basis of agreement entered into between the Farm Scientists Housing Society, Solan and I & PH Department, dated 30.9.2003. He has also contended that separate access to the plant and the suit land was not required by the Department. The land is not in possession of the department. He has also contended that the Farm Scientists Housing Society, Solan was necessary party, which has permitted to use the path by the Department free of cost.

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

7. The notification de-notifying the land has been issued on 9.10.2007 and the present petition has been filed on 6.7.2009. It has come in the petition that the documents were being obtained by the petitioner and thereafter immediately the present petition has been filed. Thus, it cannot be held that the present petition is barred by delay and laches. It is not substantiated how the petitioner was estopped from filing the present petition. The land has been used without acquiring the same infringing his legal rights under Article 300-A of the Constitution of India. Thus, the present petition is duly maintainable.

8. It is evident from Annexure P-3 dated 24.4.2003 and Annexure P-4, dated 23.6.2004 that the I & PH Department has asked respondent No. 3 to prepare the documents of acquisition of land for providing road to sewerage treatment plant, Solan. The Executive Engineer has asked the Land Acquisition Officer to issue notification under Sections 6 & 7 of the Act. Thereafter, the notification as noticed hereinabove was published under Section 5 of the Act on 7.2.2005. It was duly published in the daily Edition of the Punjab Kesari on 15.3.2005. It was also got published in Rajpatra on 26.2.2005. Wide publicity was also given through Tehsildar, Solan on 15.3.2005. A report under Section 5-A (2) of the Act was submitted to the Executive Engineer (I & PH) Department Solan and after considering the report, notification under Sections 6 and 7 have been issued on 8.9.2005. It was also published in two daily newspapers i.e. Ajit Samachar and Divya Himachal on 30.10.2010. It was also published in the H.P. Rajpatra on 24.9.2005. Thereafter, the spot was demarcated by the Field Agency on 24.11.2005. The nominees of the State Government were also present alongwith right holders. The inquiry under Section 5-A (2) of the Act was also got conducted. The Collector has approved the value of the Ghasni Kisam as Rs.26,981.49 per biswa. The Land Acquisition Officer has assessed the compensation of Rs.35,19,965/-. The Land Acquisition Officer has specifically observed in para-8 of the draft Award that the possession of the land was already with I & PH Department. However, formal possession would be handed over by the Naib Tehsildar Land Acquisition Office, Solan to the nominee of the Department in accordance with law within one month from the date of payment. The Land Acquisition Collector has sent the draft award for the approval of the Principal Secretary, as per Annexure P-8. In the meantime, the Executive Engineer sent a communication to respondent No. 3 for de-notifying the land as per Annexure P-10, dated 11.9.2007. Petitioner has been issued notice on 4.10.2007. He filed reply to the same on 9.10.2007. However, without taking into consideration the reply filed by the petitioner, the land has been de-notified as per Annexure P-11 on 9.10.2007. The notification for the withdrawal of the land was also published in daily Edition of Divya Himachal on 11.11.2007 vide Annexure R-4.

9. Mr. Ramesh Thakur has drawn the attention of the Court to Annexure R-1, dated 22.9.2003. It is stated in this communication that the land provided for road from Solan-Rajgarh road has been provided free of cost by Sh. K.S. Mehta. Though there is a reference to sale deed dated 28.11.1984, but it is evident from Annexure R-1 that an access to the road has been provided by the petitioner free of cost. Thus, it cannot be said that the land has been sold by the owners to Farm Scientists Housing Society, Solan. They have only been given free access to the road. The use of the road by the members of the Farm Scientists Housing Society, Solan is permissive though the ownership remained with the petitioner. It is in these circumstances, State Government has entered into agreement with the Farm Scientists Housing Society, Solan to seek access to the road to transport man and machinery at the site. Thus, so-called agreement referred to in the reply has no relevance in the case whereby the land has been sold to Farm Scientists Housing Society, Solan. The Farm Scientists Housing Society, Solan was neither proper nor necessary party for adjudication of the present lis since no relief was ever asked for against the Farm Scientists Housing Society, Solan.

10. It has also come on record that respondents have used the land of the petitioner for laying down pipes and construction of chambers. The initiation of the land acquisition proceedings under sections 4, 6 and 7 of the Act were strictly in conformity of law. The land of the petitioner has already been used. The demarcation has been undertaken under section 8 of the Act and necessary inquiry was conducted under section 9 of the Act. The respondents have also admitted that necessary cutting and dressing was also undertaken on the land. No reasons have been assigned to de-notify the land as per Annexure P-10 dated 11.9.2007. The reply filed by the petitioner to the notice dated 4.10.2007 has not been taken into consideration.

11. Mr. Ramesh Thakur has also argued that the proceedings initiated on 7.2.2005 have elapsed, but this objection was never raised by the respondent-State in the reply to the main petition.

12. In the instant case, the proposed award was prepared as per Annexure P-8 dated 17.1.2006 and thereafter, a request was made by the Executive Engineer to de-notify the land. In these circumstances, it cannot be held that the land acquisition proceedings have elapsed. The moment, possession of the land in question has been taken over, petitioner stood divested of his right over the property.

13. Their Lordships of the Hon'ble Supreme Court in ***Satendra Prasad Jain and others*** vs. ***State of U.P. and others***, AIR 1993 SC 2517 have held that when the land is vested in Government, provisions of section 11-A regarding passing of award within two years are not applicable. Their Lordships have further held that taking of possession taken illegally, i.e. without making payment of estimated compensation would not absolve Government from making award. Their Lordships have held as under:

> **"[14] Ordinarily, the Government can take possession of the land proposed to be acquired only after an award of compensation in respect thereof has been made under Section 11. Upon the taking of possession the land vests in the Government, that is to say, the owner of the land loses to the Government the title to it. This is what Section 16 states. The provisions of Section 11-A are intended to benefit the land owner and ensure that the award is made within a period of two years from the date of the Section 6 declaration. In the ordinary case, therefore, when Government fails to make an award within two years of the declaration under Section 6, the land has still not vested in the**

Government and its title remains with the owner, the acquisition proceedings are still pending and, by virtue of the provisions of Section 11-A, lapse. When Section 17(1) is applied by reason of urgency, Government takes possession of the land prior to the making of the award under Section 11 and thereupon the owner is divested of the title to the land which is vested in the Government. Section 17 (1) states so in unmistakable terms. Clearly, Section 11-A can have no application to cases of acquisitions under Section 17 because the lands have already vested in the Government and there is no provision in the said Act by which land statutorily vested in the Government can revert to the owner.

[15] Further, Section 17(3-A) postulates that the owner will be offered an amount equivalent to 80 per cent. of the estimated compensation for the land before the Government takes possession of it under Section 17(1). Section 11-A cannot be so construed as to leave the Government holding title to the land without the obligation . to determine compensation, make an award and pay to the owner the difference between the amount of the award and the amount of 80 per cent. of the estimated compensation.

[16] In the instant case, even that 80 per cent. of the estimated compensation was not paid to the appellants although Sec. 17(3-A) required that it should have been paid before possession of the said land was taken but that does not mean that the possession was taken illegally or that the said land did not thereupon vest in the Ist respondent. It is, at any rate, not open to the third respondent, who, as the letter of the Special Land Acquisition Officer dated 27th June, 1990 shows, failed to make the necessary monies available and who has been in occupation of the said land ever since its possession was taken, to urge that the possession was taken illegally and that, therefore, the said land has not vested in the first respondent and the first respondent is under no obligation to make an award."

14. Their Lordships of the Hon'ble Supreme Court in ***Awdh Bihari Yadav and others*** vs. ***State of Bihar and others***, AIR 1996 SC 122 have held that when the land has been acquired under section 17 (1) and no award has been made within the period prescribed by section 11-A, proceedings would not lapse. Their Lordships have held as under:

"[8] The sheet-anchor of the appellant's plea is that the land acquisition proceedings have lapsed in view of Section 11-A of the Act. In order to understand the scope of the plea it will be useful to extract the relevant provision of the Act (Section 6, Section 11, Section 11-A, Section 17 and Section 48(1)).

"6. Declaration that land is required for a public purpose:-

(1) Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under Section 5-A, sub-section (2), that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secetary to such Government or of some officer duly authorized to certify its orders, and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under Section 4, sub-section (1), irrespective of whether one report

or different reports has or have been made (wherever required) under Section 5-A, sub-section (2);

Provided that no declaration in respect of any particular land covered by a notification under Section 4, sub-section (1),-

(i) published after the commencement of the Land Acquisition (Amendment and Validation) Ordinance 1967 (1 of 1967), but before the commencement of the Land Acquisition (Amendment) Act, 1984, shall be maded after the expiry of three years from the date of the publication of the notification ; or

(ii) published after the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of one year from the date of the publication of the notification :

Provided further that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority."

"11. Enquiry and award by Collector :- (1) On the day so fixed, or on any other day to which the equiry has been adjourned, the Collector shall proceed to enquire into objections (if any) which any person interested has stated pursuant to a notice given under Section 9 to the measurements made under Section 8, and into the value of the land at the date of the publication of the notifications under Section 4, sub-section (1), and into the respective interests of the persons claiming the compensation and shall make an award under his hand of-

(i) the true area of the land;

(ii) the compensation which in his opinion should be allowed for the land; and

(iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he had information, whether or not they have respectively appeared before him :

Provided that no award shall be made by the Collector under this sub-section without the previous approval of the appropriate Government or of such officer as the appropriate Government may authorise in this behalf:

Provided further that it shall be competent for the appropriate Government to direct that the Collector may made such award without such approval in such class of cases as the appropriate Government may specify in this behalf.

(2) Notwithstanding anything contained in sub-section (1), if at any stage of the proceedings, the Collector is satisfied that all the persons interested in the land who appeared before him have agreed in writing on the matters to be includeded in the award of the Collector in the form prescribed by rules made by the appropriate Government, he may, without making further enquiry, make an award according to the terms of such agreement.

(3) The determination of compensation for any land under sub-section(2) shall not in any way affect the determination of compensation in respect of other lands in the same locality or elsewhere in accordance with the other provisions of this Act.

(4) Notwithstanding anything contained in the Registration Act, 1908, (16 of 1908), no agreement made under sub-section (2) shall be liable to registration under that Act."

"11-A. Period within which an award shall be made :- The Collector shall make an award under Section 11 within a period of two years from the date of the publication of the declaration and if no award is made within that period, the entire proceedings for the acquisition of the land shall lapse.

Provided that in a case where the said declaration has been published before the commencement of the Land Acquisition (Amendment) Act, 1984, the award shall be made within a period of two years from such commencement.

Explanation :- In computing the period of two years referred to in this section, the period during which any action or proceeding to be taken in pursuance of the said declaration is stayed by an order of a Court shall be excluded."

"17. Special powers in cases of urgency :- (1) In cases of urgency, whenever the approprate Government so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in Section 9, sub-section (1), take possession of any land needed for public purpose. Such land shall thereupon vest absolutely in the Government, free from all encumbrances.

xxx xxx xxx xxx

(4) In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable, the appropriate Government may direct that the provisions of Section 5-A shall not apply, and, if it does so direct, a declaration may be made under Section 6 in respect of the land at any time after the date of the publication of the notification under Section 4, sub-section (1)."

"48. Completion of acquisition not compulsory, but compensation to be awarded when not completed :-

(1) Except in the case provided for in Section 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken."

It was contended that in view of Section 11-A of the Act the entire land acquisition proceedings lapsed as no award under Section 11 had been made within 2 years from the date of commencement of the Land Acquisition Amendment Act, 1984. We are of the view that the above plea has no force. In this case, the Government had taken possession of the land in question under Section 17(1) of the Act. It is not open to the Government to withdraw from the acquisition (Section 48 of the Act) In such a case, Section 11-A of the Act is not attracted and the acquisition proceedings would not lapse, even if it is assumed that no award was made within the period prescribed by Section 11-A of the Act. Delivering the Judgment of a Three Member Bench of this Court, in Satendra Prasad Jain v. State of U. P, (1993) (4) SCC 369 : (1993 AIR SCW 3184), S. P. Bharucha, J., at page 374, paragraph 15, (of SCC): (At P. 3189, para 14 of AIR), stated the law thus :

"Ordinarily, the Government can take possession of the land proposed to be acquired only after an award of compensation in respect thereof has been made under Section 11. Upon the taking of possession the land vests in the

Government, that is to say, the owner of the land loses to the Government the title to it. This is what Section 16 states. The provisions of Section 11-A are intended to benefit the landowner and ensure that the award is made within a period of two years from the date of the Section 6 declaration. In the ordinary case, therefore, when Government fails to make an award within two years of the declaration under Section 6, the land has still not vested in the Government and its title remains with the owner, the acquisition proceedings are still pending, and by virtue of the provisions of Section 11-A lapse. When Section 17(1) is applied by reason of urgency, Government takes possession of the land prior to the making of the award under Section 11 and thereupon the owner is divested of the title to the land which is vested in the Government Section 17(1) states so in unmistakable terms. Clearly, Section 11-A can have no application to cases of acquisition under Section 17, because the lands have already vested in the Government and there is no provision in the said Act by which land statutorily vested in the Government can revert to the owner."

(Emphasis supplied)

We, therefore, hold that the land acquisition proceedings in the instant case did not lapse."

15. The State Government has already set up the sewerage treatment plant and the process was initiated to acquire the land of the petitioner to provide access to the treatment plant. Petitioner could not be deprived of his legal right to get the compensation. Petitioner, in his objection, has highlighted that at one time Shri Man Singh had stopped the work and the matter was adjudicated by the Civil Court and on the assurance of the department that land will be lawfully acquired, the suit was withdrawn. He has also highlighted that the department has incurred expenditure, which was entered in the measurement book of the concerned Junior Engineer. The possession was already with the I&PH Department in the shape of chambers and laying of pipes. 11 chambers and RCC pipes were also laid. The State Government could not be oblivious to the facts as stated in the reply at the time when the notification was issued under section 4 of the Act on 7.2.2005 followed by notification under sections 6 and 7 of the Act on 8.9.2005. The land of the petitioner has been utilized but he has not been paid any compensation and till date the possession is with the State Government as per the draft award Annexure P-7.

16. The State Government did not take any action on Annexure P-8, dated 17.01.2006. However, the Executive Engineer, IPH Division, Solan, H.P. sent a communication to respondent No. 3 on 11.09.2007 to initiate the process for preparation of papers under Sections 4, 6 and 7 for de-notification of land for construction of Sewerage Treatment Plant in Mauza Shamti.

17. In the instant case, the department of Irrigation and Public Health has decided to set up Sewerage Treatment Plant. Though it has come in the reply filed by the State that main plant was set up on the land acquired vide Award No. 29/2000, dated 11.06.2000, however, fact of the matter is that the process was initiated by the State by issuing notification under Section 4 on 07.02.2005 and under Sections 6 and 7 on 08.09.2005 for the purpose of linking sewerage plant by road. The notifications issued under Sections 4, 6 and 7 were duly published in the Rajpatra and two news papers. The demarcation was also undertaken on 14.11.2005. The inquiry was also conducted under Section 9 of the Land Acquisition Act.

18. Their Lordships of the Hon'ble Supreme Court in ***Balwant Narayan Bhagde*** vs. ***M.D. Bhagwat and others***, AIR 1975 SC 1767 have held that it is well settled that after possession of the land forming the subject matter of acquisition has been taken in accordance with section 16 or 17 (1) of the Act, the land vests in the Government and the Government or any authority is not at liberty to withdraw from acquisition of any land of which possession has been taken over. Their Lordships have held as under:

> **"4. These two Civil Appeals filed by Shri Balwant Narayan Bhagde on grant of special leave by this Court arise out of a common judgment of the Bombay High Court allowing Special Civil Application No. 826/1968 filed by Shri M. D. Bhagwat and Shri E. R. Mahajani, respondent nos. 1 and 2 in Civil Appeal No. 75 of 1974 and Special Civil Application No. 389/1971 filed by the Punjabrao Krishi Vidyapeeth hereinafter called the Agricultural College - to quash the order of the Commissioner, Nagpur purporting to give sanction for withdrawal of the acquisition by his letter dated 8-8-1968 in respect of a portion of the land comprised in Survey No. 30/2 in village Umari, District Akola. The High Court has held that possession of the land in question was taken by the Collector, Akola and given to the Principal, Agricultural College it was, therefore, not open to the Commissioner to withdraw from the acquisition of the land under section 48 (1) of the Land Acquisition Act, 1894 as it stands amended by the Land Acquisition (Maharashtra Extension and Amendment) Act - hereinafter called the Act. It is well settled and nothing to the contrary was canvassed before us, that after possession of the land forming the subject matter of acquisition has been taken in accordance with Section 16 or Section 17 (1) of the Act, the land vests in the Government and the Government or any other authority is not at liberty to withdraw from the acquisition of any land of which possession has been taken; vide, State of Madhya Pradesh v. Vishnu Prasad Sharma, (1966) 3 SCR 557 = (AIR 1966 SC 1593) and Governor of Himchal Pradesh v. Sri Avinash Sharma, (1970) 2 SCC 149= (AIR 1970 SC 1576). The controversy, therefore, centered round the question as to whether possession of the land which was released by the Commissioner under Section 48 (1) of the Act had been taken or not."**

19. Their Lordships of the Hon'ble Supreme Court in **Rajasthan Housing Board and others** Vs. **Shri Kishan and others**, (1993) 2 Supreme Court Cases 84 have held that once possession of the land was taken over by the Government, thereafter it cannot withdraw the acquisition proceedings. Their Lordships have held as under:

> **"26. We are of the further opinion that in any event the government could not have withdrawn from the acquisition under Section 48 of the Act inasmuch as the government had taken possession of the land. Once the possession of the land is taken it is not open to the government to withdraw from the acquisition. The very letter dated 24/02/1990 relied upon by the counsel for the petitioner recites that "before restoring the possession to the society the amount of development charges will have to be returned back ...". This shows clearly that possession was taken over by the Housing Board. Indeed the very tenor of the letter is, asking the Housing Board as to what development work they had carried out on the land and how much expenditure they had incurred thereon, which could not have been done unless the Board was in possession of the land. The Housing Board was asked to send the full particulars of the expenditure and not to carry on**

any further development works on that land. Reading the letter as a whole, it cannot but be said that the possession of the land was taken by the government and was also delivered to the Housing Board. Since the possession of the land was taken, there could be no question of withdrawing from the acquisition under Section 48 of the Land Acquisition Act, 1894.

20. Their Lordships of the Hon'ble Supreme Court in **Amarnath Ashram Trust Society** Vs. **Governor of U.P. and others**, (1998) 1 Supreme Court Case 591 have held that the discretion of Government to withdraw from acquisition as justifiable and not absolute. Their Lordships have further held that it can be challenged on the ground that it was exercised *mala fide* or arbitrarily. Their Lordships have held as under:

> **"10. However, it is not necessary to go into this larger question whether in such a case the State Government can withdraw from acquisition without the consent of the company as the justification given by the Government is otherwise not sustainable. As stated earlier the reason given by the Government for withdrawing from the acquisition is that as no part of the cost of acquisition was to be born by the Government the acquisition could not have been sustained as for a public purpose. We have already pointed out that in this case the acquisition was not for a public purpose but it was an acquisition for a company under Chapter VII of the Act. In respect of an acquisition for a company under Chapter VII of the Act law does not require that the State should also bear some cost of the acquisition to make it an acquisition for public use. Thus the decision of the Government to withdraw from acquisition was based upon misconception of the correct legal position. Such a decision has to be regarded as arbitrary and not bona fide. Particularly in a case where as a result of a decision taken by the Government other party is likely to be prejudicially affected, the Government has to exercise its power bona fide and not arbitrarily. Even though Section 48 of the Act confers upon the State wide discretion it does not permit it to act in an arbitrary manner. Though the State cannot be compelled to acquire land compulsorily for a company its decision to withdraw from acquisition can be challenged on the ground that power has been exercised mala fide or in an arbitrary manner. Therefore, we cannot accept the submission of the learned counsel for the State that the discretion of the State Government in this behalf is absolute and not justiciable at all.**

21. Their Lordships of the Hon'ble Supreme Court in ***Mohan Singh and others*** vs. ***International Airport Authority of India and others***, (1997) 9 SCC 132 have held that when the possession of the land is taken, land stands vested in the State free from all encumbrances, subsequently power of withdrawal would not be available.

22. Their Lordships of the Hon'ble Supreme Court have reiterated in Government of **A.P. and another** Vs. **Syed Akbar,** A.I.R. 2005 Supreme Court 492 that under Section 48 of the Land Acquisition Act, Government could withdraw from the acquisition of any land of which possession has not been taken.

23. Their Lordships of the Hon'ble Supreme Court in ***Mandir Shree Sita Ramji alais Shree Sita Ram Bhandar*** vs***. Land Acquisition Collector and others,*** (2005) 6 SCC 745 have again reiterated that once possession has been taken, the Government could not withdraw from the acquisition under section 48. Their Lordships have held as under:

> **"[14] As against this, on behalf of the respondents, it is pointed out that this very ground had been considered by the Delhi High court on an earlier occasion. It was pointed out that after looking into the relevant records the Delhi High Court had recorded in paras 18 and 19 of its Judgments as follows: "18. It also appears that there was a decision relating to denotification of land in favour of one Sita Ram Bhandar Trust. File thereof had been called for by the Prime Minister who ordered that no land was to be denotified without the previous approval of the Cabinet/prime minister. When this file was sent to the Ministry, based on the decision contained in respect of Sita Ram Bahadur Trust, following noting was recorded in respect of the land in question on 17th June, 1999. "notes from page 38/n onwards may kindly be seen: The case of Denotification of village kotla Mahigiran, Tehsil Mehrauli New Delhi was examined without calling a fresh report upto date position of the case from DDA. The then Minister (UD) has ordered (P-41/n) for the denotification of the land. 2. Subsequently, DDA has informed that out of 615 bighas acquired by the Govt. physical possession of land measuring 600 bighas has already been taken over by the DDA. 3. In the mean time the file relating to denotification of land in favour of Sita Ram bhandar Trust has been called for by the prime Minister and the PM has ordered that no land is to be denotified without the previous approval of the Cabinet/pm. In view of this no further action is required in this case. Submitted please. 19. This file was placed before the Minister. It may be mentioned that in the meantime new incumbent had taken charge. This new minister took the following decision on the basis of aforesaid noting dated 17th June, 1999. "the file of Sita Ram Bhandar Trust has since been received back from the PMO and PM's instructions not to denotify the land have been noted. 2. On the Trust's file, I have recorded my observations. These observations apply in this case as well. There is no justification for denotifying land, particularly when 600 bighas have already been acquired and taken over. "**
>
> **[15] This could not be denied by the appellants. It is thus clear that letters and minutes relied upon are mere recommendations. No decision to release from acquisition had been taken. In any event the Prime minister had turned out this proposal."**

24. In view of the observations and discussions made hereinabove, the writ petition is allowed. Annexure P-11 dated 9.10.2007 is quashed and set aside. Respondent No.1 is directed to accord necessary approval to draft award Annexure P-7 within a period of two months from today. The pending application(s), if any, also stands disposed of.

****

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

RFA No.150 of 2005 with RFA No.311 of 2005.
Judgment reserved on 29th July, 2015.
Date of Decision: 15th September, 2015.

1. **RFA No.150 of 2005.**

Krishan Kumar Upmanyu ..Appellant.
Versus
Union of India and others ..Respondents.

For the appellant:	Mr. Karan Singh Kanwar, Advocate.
For respondent No.1:	Mr. Angrej Kapoor, Advocate, vice Counsel.
For respondents No.2 to 5:	Mr. D.S. Nainta, Additional Advocate General with Mr. Pushpinder Jaswal, Deputy Advocate General.

2. RFA No.311 of 2005.

State of H.P. and others ..Appellants.
Versus
Krishan Kumar Upmanyu and another ..Respondents.

For the appellants:	Mr. D.S. Nainta, AdditionalAdvocate General with Mr. Pushpinder Jaswal, Deputy Advocate General.
For respondent No.1:	Mr. Karan Singh Kanwar, Advocate.
For respondent No.2:	Mr. Angrej Kapoor, Advocate, vice Counsel.

Code of Civil Procedure, 1908- Section 96- Plaintiff claimed damages of Rs. 9,90,000/- against the Government on account of acquisition of 18 biswas of his land - held that suit for compensation is not maintainable- remedy lies in approaching the Land acquisition Collector, for determination of the compensation in respect of the acquired land and for seeking reference to the District judge for enhancement in case of inadequate compensation - in the event of compensation stands determined and paid to previous owner or lying un-disbursed with the Collector concerned and still not released in his favour, to file a suit for recovery thereof in a competent court and also to approach the Collector for making a reference under Section 18 of the Act to the Court of District Judge, if not satisfied with the compensation, if any, determined- suit dismissed with liberty to approach the collector or file the suit as the situation may be. (Para- 14 to 16)

Cases referred:

State of Maharashtra and another v. Umashankar Rajabhau and others, (1996) 1 SCC 299
Shayam Rao v. Land Acquisition Officer (Spl.) cum-Dy.Collector Singoor Project of Sanga Reddy and others, AIR 1991 AP 219
Mani Ram v. The State of Punjab and others, AIR 1975 P&H 135
P.K. Shaikh v. State of West Bengal and others, AIR 1976 Calcutta 149

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

This judgment shall dispose of the present appeal and also RFA No.311 of 2005 arising out of the judgment and decree dated 29.3.2005, passed by learned Additional District Judge (Presiding Officer, Fast Track Court), Solan, in Case No.66 FT/1 of

2004/2003, whereby the suit has been decreed partly for the recovery of Rs.58,000/- in favour of the appellant hereinafter to be referred as 'the plaintiff', against the respondents herein (appellants in connected RFA No.311 of 2005), hereinafter to be referred as 'the defendants'.

2. The plaintiff is aggrieved by the decree as the suit has not been decreed for the recovery of whole of the suit amount, i.e., Rs.9,90,000/-, whereas the defendants by the decree for the recovery of Rs.58,000/- passed against them.

3. The challenge to the impugned judgment and decree in the present appeal is on the grounds *inter alia* that the trial Court has erred in passing the decree for the recovery of Rs.58,000/- against the claim of the plaintiff to the tune of Rs.9,90,000/-. The evidence on record has been misread and misinterpreted. The award of a meager amount towards damages on account of 18 Biswas of land belonging to the plaintiff used for construction of road without following due process of law allegedly resulted in miscarriage of justice to the plaintiff. Non-issuance of notices mandatory in nature under the Land Acquisition Act, hereinafter to be referred as 'the Act', the award is vitiated. Learned trial Court has erred in not placing reliance on the sale instances Ext.PG/1 to PG/4 produced in evidence by the plaintiff because as per these documents the total value of the acquired land comes to Rs.8,96,310/-. The assessment of only a sum of Rs.58,000/- as the value of the land in question on the basis of Exts.PD/1 to PD/4 is stated to be not legally sustainable. These documents without there being any evidence, the value attached thereto should have not been relied upon. The sale consideration, i.e., Rs.9,000/- the plaintiff paid to purchase the suit land has erroneously been taken into consideration while determining the market value of the acquired land. Learned trial Court has also erred in adversely commenting against the plaintiff on account of his failure to produce on record the incomplete sale deed particularly when page No.2 thereof initially omitted to be placed on record, was also produced because the plaintiff had nothing to gain by withholding of the said page of this document. The acquisition of the land without following due process of law being violative of Article 300-A of the Constitution of India, has not been taken into consideration.

4. On the other hand in the connected appeal, the defendants have questioned the legality and validity of the judgment and decree on the grounds *inter alia* that the same is wrong, illegal and based on surmises and conjectures. The land bearing Khasra No.161/154, measuring 6 Bighas 7 Biswas on 3.12.1979, the day when notification under Section 4 of the Act issued, was in the name of one Krishan Singh son of Devi Singh. Out of it, the plaintiff purchased the land to the extent of 1 Bigha 3 Biswas in the year 1980 denoted by Khasra No.205/161 in the Jamabandi for the year 1981-82. The award was passed by the Collector Land Acquisition on 14.11.1983, however, before that somewhere during the year 1980 out of the land measuring 1 Bigha 3 Biswas purchased by the plaintiff, 18 Biswas of land was acquired by the defendants. As per evidence on record, compensation thereof stood paid to the original owner, i.e., Krishan Singh aforesaid. Since the notification under Section 4 of the Act was issued on 3.12.1979 and was given wide publicity, therefore, the plaintiff could have filed objections before the Land Acquisition Collector. His plea of ignorance, therefore, was liable to be rejected. The trial Court has allegedly overlooked the facts of the case and law applicable. The factum of Krishan Singh, the original owner, was necessary party in the suit, has erroneously been ignored. The suit being bad for non-joinder of necessary party was required to be dismissed. Otherwise also, when the Act is a complete code and the remedy, if any, available to the plaintiff is under the said Act, the suit is not maintainable and the judgment and decree under challenge is bad in law.

5. Now coming to the factual matrix. One Krishan Singh admittedly was the owner of the land measuring 6 Bighas 7 Biswas bearing Khasra No.161/154. There is no evidence to show that the land measuring 1 Bigha 3 Biswas bearing Khasra No.205/161 has been purchased by the plaintiff from Krishan Singh out of the land measuring 6 Bighas 7 Biswas aforesaid. The copy of the sale deed (mark-D) further reveals that khasra number of 1 Bigha 3 Biswas, land purchased by the plaintiff from said Shri Krishan Singh, was 161/154/4/9, new khasra number, as per the copy of field book Ext.PF/1, is 205/161. It is this very khasra number came to be reflected in the Jamabandis for the years 1981-82 and 1986-87 (Annexures-M and N). As per entries below column of remarks in the Jamabandi for the year 1991-92 (Annexure-O), a portion thereof measuring 18 Biswas denoted by Khasra No.602/205/161/45 was mutated in the name of Central Government consequent upon the acquisition proceedings. Admittedly, 18 Biswas land out of Khasra No.161/154/4/9 has been acquired for the construction of road. It is even recorded so in the copy of field book Ext.PF/1.

6. Although, as per the claim of the defendants, it is the original owner Shri Krishan Singh has received the compensation qua this land, yet no evidence to this effect has been brought on record and to the contrary the statement of compensation Ext.PF/3 reveals that said Krishan Singh has received compensation to the tune of Rs.2,864/- in respect of the acquired land bearing Khasra No.161/154/4/8. There is no iota of evidence that the land in dispute, i.e., 18 Biswas was also part of Khasra No.161/154/4/8 qua which Krishan Singh had received the compensation.

7. It is the admitted case of the parties that the plaintiff was not served with any notice under Section 9(3) of the Act. He even not joined the further proceedings from that stage onwards till the award announced. He has also not received any compensation. Although, on the day when the notification under Section 4 of the Act was issued, he had no right, title or interest in the suit land as he acquired the suit land by way of sale deed dated 24.12.1980 (mark-D). There is nothing on record to show as to what was the stage of acquisition proceedings on that day. The fact, however, remains that out of the land measuring 1 Bigha 3 Biswas he purchased from Krishan Singh, 18 Biswas have been acquired by the defendants for the public purpose, namely construction of Barog bye-pass road. It is in view of the pleadings of the parties as aforesaid, learned trial Court framed the following issues:

1. Whether the plaintiff was the owner of a portion of the property what was acquired by the State and the compensation whereof was assessed vide award dated 14.11.1983 of the Land Acquisition Collector? OPP.
2. If issue No.1 is proved, whether no notice of acquisition proceedings was given to the plaintiff by the Land Acquisition Collector nor was any amount of compensation paid to him in respect of his portion of the acquired land i.e., Khasra No.205/161? OPP.
3. If issue No.2 is also proved, whether the plaintiff is entitled to the damages/compensation? If so, how much and from whom? OPP.
4. Whether suit is bad for non-joinder of Shri Krishan Singh from whom the plaintiff allegedly purchased the aforesaid portion of the acquired land? OPD.

5. Whether the suit is not maintainable against the present defendants and the remedy if any lies against said Krishan Singh or his LRs? OPD.

6. Whether the suit is not within time? OPD.

7. Relief.

8. The parties were put to trial on all these issues. The attorney of the plaintiff Shri Mohan Lal in turn has stepped into the witness box as PW-1. The plaintiff has also examined Shri Ashok Kumar, Patwari, Patwar Circle, Deon (PW-2), who has proved the statements qua average market price of the land in the area Exts.PD/1 to PD/4. PW-3 Yogesh Kumar, has proved the sale deed Ext.PE, vide which he had purchased 202 square meters of land in a sum of Rs.3 lacs. PW-4 Gopal Singh, Patwari, LAO Office, Solan has proved the copy of award, Ext.PF, copy of field book, Ext.PF/1, copy of notification under Section 4 of the Act, Ext.PF/2, copy of statement of compensation Ext.PF/3/ Exts.DB and DC and copy of map Ext.PF/4. PW-5 Kirpa Ram has proved the books (Vahis) Exts.PG/1 to PG/5 in which the copies of sale deeds were pasted. PW-6 Amar Singh deals in purchasing and selling the land in the area and as per his version the current market value of the land in that area is Rs.1 lac per Biswa.

9. The defendants, on the other hand, have examined Shri Kirpa Ram Sharma, Naib Tehsildar as DW-1, who has proved the copy of the award Ext.DA, copy of para-55 Ext.DB and the copy of acquaintance roll Ext.DC.

10. On the completion of the record and hearing learned Counsel on both sides, the trial Court while answering issues No.1 and 2 has arrived at a conclusion that the plaintiff was the owner of the property a portion whereof has been acquired by the defendants without issuing any notice of acquisition to the plaintiff and paying any compensation to him. The objections qua the suit bad for non-joinder of Shri Krishan Singh and that the suit is not maintainable against the defendants have been rejected while answering issues No.4 and 5. With regard to issue No.6, the suit is also held to be well within the period of limitation. While answering issue No.3 the plaintiff, however, was held entitled to only a sum of Rs.58,000/- as damages and the suit decreed accordingly.

11. The judgment and decree has been challenged by the parties on both sides on several grounds as taken note of at the very outset.

12. Having gone through the record and hearing learned Counsel on both sides, following points arise for determination in these appeals:

(1) Whether learned trial Court has erred in law and facts in not decreeing the suit for the recovery of the entire suit amount, i.e., Rs.9,90,000/-?

(2) Whether the suit was not maintainable and also bad for non-joinder of Krishan Singh, the original owner, hence no decree could have been passed?

13. In a nutshell, the factual position is that on the day of issuance/publication of notification under Section 4 of the Act the owner of the acquired land was one Krishan Singh Mehta son of Shri Devi Singh and not the plaintiff. Although, sale deed is not proved in accordance with law, yet its copy mark-D even if believed to be true reveals that land

bearing Khasra No.161/154/9 measuring 1 Bigha 3 Biswas was purchased by the plaintiff thereby on 24.11.1980, i.e., after the issuance of notification under Section 4 of the Act. The onus was on the plaintiff to have proved the stage of such acquisition on the day when sale deed qua the suit land was executed in his name. He, however, has produced in evidence only the copy of award Ext.PF. There is no iota of evidence to show as to whether notification under Section 6 and further proceedings under Section 9, Section 10, Section 11 and Section 12 of the Act were well before he acquired the suit land or after that. There is also no iota of evidence to show that when mutation on the basis of the sale deed was sanctioned and attested in his name. He has not produced in evidence even the order of mutation. The copies of Jamabandis for the year 1981-82 and 1986-87, no doubt, reveal that he was recorded as owner in possession of the suit land. These documents being not proved in accordance with law cannot be relied upon. The facts, however, remain that out of the suit land bearing khasra No.161/154/4/9, measuring 1 Bigha 3 Biswas, 0-18-0 Bigha has been acquired for the widening of Barog bye-pass road.

14. As already observed, there is no iota of evidence to show that the previous owner of the suit land Shri Krishan Singh son of Devi Singh has received the compensation with respect to this land also because as per the entries in the field book Ext.PF/3 Shri Krishan Singh had received the compensation in respect of the land measuring 1 Bigha 1 Biswa bearing Khasra No.161/154/4/8, whereas the khasra number of the suit land was 161/154/4/9. It was for the defendant-State to have proved by producing cogent and reliable evidence that the compensation in respect of the acquired land measuring 0-18-0 bigha was received by the previous owner Shri Krishan Singh.

15. Anyhow, the present is a case of post notification sale because the notification under Section 4 of the Act has been issued on 3.12.1979, whereas the sale deed if believed to be true executed in favour of the plaintiff on 24.12.1980. The Apex Court while dealing with similar proposition in ***State of Maharashtra and another*** v. ***Umashankar Rajabhau and others, (1996) 1 SCC 299,*** has held as under:

> "1. This appeal by special leave arises from the judgment and order dated 18.7.1979 made in Special Civil Application No.92/75 by the High Court of Bombay. Notification under Section 4(1) acquiring an extent of about 5 acres of land was published in the State Gazette on 17.9.1970 for public purpose, namely, construction of staff quarters for Maharashtra Road Transport Corporation employees. Declaration under Section 6 was published on 29.7.1971. The award also was made on 15.9.1971. It would appear that respondents 1-3 had purchased three plots of land from Usmanshahi Mills which was under liquidation through the Official Liquidator on 17.6.1968. But the mutation of their names in the revenue records was not effected. In consequence, notices could not be issued. They, in turn, sold these plots to 4th respondent in 1973. A writ petition was filed on 19.12.1974 challenging the validity of the notification and also the award. The High Court set aside the notification on the ground that notices as required under law have not been served on respondents 1-3.
>
> 2. It is seen that Section 4(1) does not require the service of the personal notice nor the one under Section 6 declaration. What is needed to be served in the locality and the Gazette which have been

> complied with. As regards the notices under Section 9 is concerned, it now transpires from the revenue records that the original owner namely, Usmanshahi Mill was served. Since mutation had not been effected in the name of respondents 1-3 though purchased prior to the publication of notification under Section 4(1), they could not be issued notices as required under Section 9. Notice to the 4th respondent is obviously impossible, since the award has already been made on 15.9.1971.His purchase thereafter is obviously illegal as it does not bind the State after the notification under Section 4(1) was published. Under these circumstances, the High Court was wholly unjustified in quashing acquisition in respect of three plots of land of respondents 1-3".

16. The legal principles settled by the Apex Court in the judgment supra thus leave no manner of doubt that in a case of post notification sale the notification cannot be quashed on the ground that the vendee had no knowledge and notice of the acquisition proceedings. True it is that in this case the plaintiff has not questioned the validity of the notification under Section 4 of the Act, however, his only grouse is that he had no notice or knowledge of the proceedings initiated qua the acquisition of the suit land nor h as received any compensation.

17. As already noticed, at the time of issuance of notification under Section 4 of the Act it is Krishan Singh son of Shri Devi Singh who was owner of the suit land. Therefore, there is no question of issuance of notice to the plaintiff. The present at the most could have been said to be aggrieved from the non-issuance of notice under Section 9 of the Act, however, qua that also he failed to produce evidence to show as to when such notice was issued to various right-holders during the course of acquisition proceedings and that he had acquired the title in the suit land at that time. It is also not his case that the notice under Section 9 of the Act was not issued or published. He may be resident of District Chamba, however, his General Power of Attorney Shri Mohan Lal (PW-1) through whom he has filed the suit is resident of District Solan. Even if the plaintiff had no knowledge or notice of the acquisition proceedings, in that event also he cannot file a suit for the recovery of damages/compensation in a sum not the one determined by the Collector or by the reference Court or by any other higher Court in hierarchy. He can not claim the compensation/damages on the basis of the instances of sale or the average market price of the land in the area prevalent in the year 2003 when he allegedly acquired the knowledge about the suit land having been acquired by the defendants. The only remedy available to him was to have filed the suit for recovery of the compensation of the land determined by the Land Acquisition Collector or enhanced amount of compensation, if any, re-determined by the competent Court. It is held so by a Division Bench of Andhra Pradesh High Court in ***Shayam Rao*** v. ***Land Acquisition Officer (Spl.) cum-Dy.Collector Singoor Project of Sanga Reddy and others, AIR 1991 AP 219.*** This judgment reads as follows:

> "25. One other class of cases, however, presents no difficulty. Persons concerned who have not received notice under S.9(2) can file suits to recover the amount of compensation due to them against the State as well as the parties who have earlier received the same from the Collector and recover the same by invoking the 3rd proviso to Section 31(2). (Vide Birendra Nath v. Mritunjoy, AIR 1962 Cal 275; Shivmal v. Ramchandra

Bapu, AIR 1933 Nagpur 322; State of M.P. v. Sugandhi, AIR 1980 Madh Pra 19)."

18. Therefore, the plaintiff is not entitled to file a suit for recovery of Rs.9,90,000/- as compensation on the basis of sale instances Exts.PG/1 to PG/5 produced in evidence and also the average sale price certificate Exts.PD/1 to PD/4, being not pertain to the relevant period nor in proximity to the issuance of the notification under Section 4 of the Act.

19. Above all, the present also is not a case where the notice under Section 9 of the Act has been withheld from him intentionally or deliberately or with malafide intention because at the time of issuance of notification under Section 4 of the Act he was not owner of the suit land. Since his name was not there in the record available with the Land Acquisition Collector, therefore, there was no question of issuance of notice under Section 9 of the Act to him. In such a situation and even if the plaintiff is entitled to any notice under Section 9 of the Act, will only effect his claim with regard to compensation which can be taken care of by Section 31(2) of the Act and also by entertaining his prayer to make a reference under Section 18 of the Act to the Court of District Judge without insisting upon the question of limitation. The plaintiff has miserably failed to prove that the compensation qua the suit land acquired by the defendants was determined and received by the previous owner Shri Krishan Singh. He even has failed to implead the previous owner or his legal representatives as party(s) in the suit despite specific objection to this effect raised by the defendants in the written statement. The defendants have also failed to prove that the compensation in respect of the acquired suit land measuring 0-18-0 Bigha has been received by the previous owner Shri Krishan Singh son of Shri Devi Singh. In such a situation the remedy available to the plaintiff is to approach defendant No.4-Land Acquisition Collector, Solan, for determination of the compensation in respect of the acquired land and in the event of compensation stands determined and paid to previous owner Krishan Singh or lying un-disbursed with the Collector concerned and still not released in his favour, to file a suit for recovery thereof in a competent Court having jurisdiction to try and entertain the same and also to approach the Collector for making a reference under Section 18 of the Act to the Court of District Judge, if not satisfied with the compensation, if any, determined. It is held so by Punjab and Haryana High Court in ***Mani Ram*** v. ***The State of Punjab and others, AIR 1975 P&H 135***. This judgment reads as follows:

> **"7. In Shivdev Singh's case AIR 1963 Pat 201 (supra), if I may say with respect, Untwalia, J. seems to be concerned with failure of service of notice which merely affected the party concerned in regard to its right of submitting claim of compensation to the Collector and further to the District Judge if dissatisfied with the award of the Collector; and it appears to have been assumed that as a result of non-compliance of the provisions of Section 9(3) of the Act, no prejudice would be caused to the person concerned. I am afraid such an assumption is incorrect when regard is had to the fact that if the person concerned had been served with the requisite notice, he might have taken the necessary step of submitting his claim to the Collector and for ought we know the Collector would have accepted his estimation of the valuation of the land, and he in return might well have been**

satisfied with the award of the Collector and thus would have left the matter at that stage, but on the contrary in the eventuality of the failure of compliance with the provisions of notice under Section 9, such a party would have no opportunity to make its claim to compensation known to the Collector and the Collector would, on his own, give the award which may not measure upto the expectation of the party concerned. In that case the said party would perforce have to initiate proceedings under Section 18 of the Act in the Court of the District Judge and expend money and energy in claiming what he, if he had notice, would otherwise have claimed before the Collector and may well have been awarded by the Collector. Hence prejudice to such a party is obvious in the event of the failure of the Collector to serve upon him the requisite notice under Section 9 of the Act. I, therefore, finding myself in respectful agreement with the view expressed by Chagla, C. J. in Laxmanrao Kristrao's case AIR 1950 Bom 334 (supra) and the one expressed by Sambasiva Rao, J. in Velagapudi Kanaka Durga's case AIR 1971 Andh Pra 310 (supra), as also the observations made, though in passing, in the Division Bench decision of this Court in Karnail Singh's case ILR (1965) 2 Punj 525 (supra), hold that the requirement of Section 9(3) of the Act is mandatory and the failure to comply therewith renders the subsequent proceedings illegal and invalid".

20. Similar view of the matter has been taken by the High Court of Calcutta in ***P.K. Shaikh*** v. ***State of West Bengal and others, AIR 1976 Calcutta 149***. This judgment also reads as follows:

"15. The decision of the Division Bench is binding on me. In view of this decision of the Division Bench it does not really become necessary for me to consider the other decisions which were cited from the Bar. I may only note that the decision of the Patna High Court in the case of Shivdev Singh v. The State of Bihar, on a similar question under Bihar Town Planning and Improvement Trust Act adopts more or less the same view. The Patna High Court has observed at pp. 206-207:--

"In response to notice under Section 9, the only matter which can be agitated before the Collector by any person interested relates more or less to the question of compensation in respect of the land sought to be acquired. The order of acquisition or the act of taking possession cannot be challenged in a reference to Court either under Section 18 or Section 30 of the Land Acquisition Act. This also finds sup-post from the rules as to the amount of compensation provided in Section 25 of the Act. In my opinion, the petitioner, even if not served with a notice under Section 9 of the Land Acquisition Act could claim

such compensation, if he was entitled to any, by asking the Collector to make a reference to the Court under Section 18 of the Act. He could do so within 6 months from the date of the Collector's award as provided for under Section 18(2) (b).

I may also observe that on proof of the fact that he was not served with a formal notice under Section 9(3) of the Act or had no notice or knowledge of any proceeding under the Land Acquisition Act, he would not be bound by the period of limitation provided for in Clause (b) of Sub-section (2) of Section 18. If the petitioner is so advised, he may pursue his remedy against his landlord and claim any portion of the compensation money of Rs.44,318/25 np. paid to the owner of the premises. But it is clear to me that the proceeding or the award in relation to the acquisition of the premises in question cannot be held to be illegal or void or without jurisdiction for non-service of a notice on the petitioner under Section 9(3) of the Land Acquisition Act. The Collector's right, and as a matter of that, the right of the Chairman of the Improvement Trust to take possession of the property is consequently not affected"".

21. In view of what has been said hereinabove, the suit for the recovery of Rs.9,90,000/- was not maintainable nor the plaintiff was entitled to claim compensation/damages in respect of the acquired land at the rates prevalent in the market in the year 2003. As already pointed out, he could have at the most filed a suit for the recovery of compensation qua the suit land determined by the Collector, if able to establish his entitlement to receive the same and could have also sought a reference to District Judge under Section 18 of the Act irrespective of the limitation to do so expired long back. The judgment and decree under challenge, therefore, is not legally sustainable. Consequently, the connected appeal RFA No.311 of 2005 filed by the defendants succeeds and the same deserves to be allowed, whereas the appeal filed by the plaintiff being devoid of merits, deserves to be dismissed. The points for determination framed hereinabove are answered accordingly.

22. In view of what has been said hereinabove, the appeal filed by the plaintiff fails and the same is accordingly dismissed and the connected appeal filed by the defendants is allowed. Consequently, the judgment and decree under challenge in these appeals is quashed and set aside and the suit dismissed, of course, with liberty reserved to the plaintiff to file a suit against the Collector or the previous owner for recovery of the amount of compensation if the same, qua acquired land has been determined by the Collector and he otherwise is entitled to receive the same or if the same after determination by the Collector has been paid to the previous owner or is still un-disbursed. No order as to costs. Both appeals stand disposed of.

****

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

Sh. Rama Nand .....Appellant.
Versus
Smt. Mulmi Devi. .....Respondent.

RSA No. 59 of 2007.
Reserved on: 14.9.2015.
Decided on: 15.9.2015.

Specific Relief Act, 1963- Section 38- Plaintiff claimed to be the owner in possession of the suit land and sought injunction to restrain the defendant from dispossessing her from the suit land- defendant claimed that plaintiff had got herself recorded to be in possession of the suit land – defendant also raised a plea of adverse possession- record shows that separate parcel of land was allotted to the defendant and a plea of adverse possession was not proved- defendant had failed to prove that entries recorded in the revenue record are incorrect- there was no boundary dispute and Local Commissioner could not have been appointed- held, that in these circumstances, suit was rightly decreed by the trial Court.
(Para-11 to 13)

For the appellant(s): Mr. Satyen Vaidya, Sr. Advocate, with Mr. Vivek Sharma, Advocate.
For the respondent: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Shimla, H.P. dated 26.10.2006, passed in Civil Appeal No. 37-S/13 of 2006.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff), has instituted suit for permanent prohibitory injunction against the appellant-defendant (hereinafter referred to as the defendant). According to the plaintiff, she was exclusive owner-in-possession of the land comprised in Kh. No. 401 measuring 0-10-33 hectares, situated at Chak Purag, sub Chak Jamuni. She has raised an apple orchard on the land and defendant was trying to forcibly dispossess the plaintiff from the suit land.

3. The suit was contested by the defendant. On merits, the defendant pleaded that in connivance with the settlement staff, the plaintiff got herself recorded in possession over Kh. No. 400 and suit land comprised in Kh. No. 401. The revenue entries were alleged to be wrong. The plaintiff has not raised any orchard over the suit land. He was granted suit land in Nautor by the State of Himachal Pradesh. It was wrongly shown in possession of the plaintiff. He has also taken the plea of adverse possession.

4. The learned trial Court framed the issues on 13.9.2004. The suit was decreed vide judgment dated 28.3.2006. The defendant, feeling aggrieved, preferred an appeal against the judgment and decree dated 28.3.2006. The learned District Judge, Shimla, dismissed the appeal on 26.10.2006. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial question of law on 14.5.2007:

> "1. Whether the Courts below have erred in not appointing the Local Commissioner for ascertaining the respective boundaries of the parties to the lis as the dispute is the boundary dispute between the parties?
>
> 2. Whether the findings of the first Appellate Court are wrong to the effect that appellant has not applied for demarcation despite the fact that the appellant had made an application for appointment of Local Commissioner for demarcation of the suit land?"

6. Mr. Satyen Vaidya, Sr. Advocate, for the appellant, on the basis of the substantial questions of law framed, has vehemently argued that the Courts below ought to have appointed the Local Commissioner to ascertain the respective boundaries of the parties. On the other hand, Mr. Neeraj Gupta, Advocate has supported the judgments and decrees passed by the Courts below.

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

8. Since both the substantial questions of law are interconnected, the same are taken up together for determination to avoid repetition of discussion of evidence.

9. PW-1 Mulmi Devi has led her evidence by filing affidavit. She admitted that the road divides the land of both the parties and stated that her land is also above the road as well as that of the defendant. PW-2 Dinesh Bhandari, is the son of the vendor Amar Nath, from whom the plaintiff had purchased the land. He deposed that some land was above the road and some land was below the road and his father had planted apple trees in the year 1979.

10. DW-1 Joginder Singh deposed that Kh. No. 400 was wrongly shown in the ownership and possession of plaintiff alongwith Kh. No. 401. He has admitted that his father participated during settlement proceedings. He also admitted that there is apple orchard in the disputed land. However, he was not aware of the exact measurement of the land. He has also admitted that an appeal was filed before the revenue authorities, which was dismissed up to this Court qua Nautor land. DW-2 Chiranji Lal has led his evidence by filing affidavit. According to him, the house of the defendant is above the road which surrounded courtyard and apple orchard. The defendant was in possession of the same for the last more than 14 years. He was not aware of the disputed khasra numbers or its area. He was not aware that the plaintiff has raised the apple orchard. He has admitted that no demarcation was carried out in his presence, nor any settlement took place. DW-3 Prem Lal has led his evidence by filing affidavit. He was also not aware of the khasra numbers, the area or about how much land he was deposing. According to him, the plaintiff has not raised any apple orchard on the suit land. The land was never demarcated in his presence.

11. According to Ext. PA, copy of jamabandi for the year 2001-02, the plaintiff is shown owner-in-possession of Kh. Nos. 400,401, 405, 445, 446 and 447, measuring 0-74-94 hectares. Ext. PB, copy of Jamabandi for the year 1978-79 reflects Atma Ram owner-in-possession of Kh. No. 2037/1806/170, measuring 7 bighas and Kh. No. 2038/1806/170, measuring 2.18 bighas. In mutation No. 1191, Ext. PC, it has been shown that the numbers depicted in Ext. PB were carved out from Kh. No. 1806/170 and in Nautor were than

granted to Atma Ram and he accordingly on payment of compensation thereof, became owner-in-possession. A tatima of the carved portion was drawn at the back of this mutation. In this document, Kh. No. 2038/1806/170/2 has been shown above the road and Kh. No. 2037/1806/170/1 below the road. There is no dispute about the existence of this road on the spot. Mutation No. 1088, Ext. PD, shows grant of land in Nautor to defendant Rama Nand. Kh. No. 1806/170/2, measuring 11.13 bighas carved out of Kh. No. 1806/170 was granted in favour of the defendant. A tatima of this portion was also drawn on the copy of mutation Ext. PD. It cannot be said that the grant which was effected in favour of Atma Ram was of the same land which earlier stood granted in favour of defendant Rama Nand. It was also not expected from the revenue agency that they would have granted the same piece of land in favour of the two parties. Separate parcels of land were allotted in Nautor to defendant and Atma Ram. In Ext. PE Aks Sajara Kistwar, Kh. Nos. 400,401 and 405 are shown above the road which is passing through Kh. No. 403. Below this road, the other khasra numbers of the plaintiff are 445, 446 and 447. It thus duly establishes that the land which was allotted to Atma Ram from whom the land has been purchased by plaintiff remained as such even after recent settlement. The defendant has failed to prove that Atma Ram was granted land below the road. The land was sold to the plaintiff in the year 1997. The defendant has not got the demarcation of Kh. No. 400 and 401 from the revenue agency. The plea of adverse possession has not been substantiated by the defendant. The defendant has failed to prove that the entries recorded in the revenue records were wrong. The defendant has never challenged the settlement proceedings.

12. Mr. Satyen Vaidya, Sr. Advocate, has also argued that the Local Commissioner ought to have been appointed to ascertain the boundaries. The defendant, infact has filed the application under Order 26 Rule 9 CPC for appointment of Tehsildar Kotkhai and Horticulture Inspector, Kotkhai, as Local Commissioner(s). The application was contested by the plaintiff. The same was rejected by the learned trial Court on 26.11.2005. In the present case, the suit has been filed by the plaintiff with respect to Kh. No. 401 by asserting that she was owner-in-possession of the same and respondent was interfering with her peaceful possession. According to the revenue record, the plaintiff was in possession of Kh. Nos. 400 and 401. Thus, there was no boundary dispute in the instant case between the parties. It was only if there was any boundary dispute, the report of the Local Commissioner could be of utmost importance.

13. Now, as far as the age of the trees is concerned, the defendant was required to lead cogent evidence as observed by the learned trial Court. The age of the trees was to be ascertained by not appointing Horticulture Inspector as Local Commissioner but by leading cogent evidence. The defendant has not assailed the order dated 26.11.2005 by filing revision. Though, observation has come in the judgment rendered by the learned District Judge that the defendant has not got the boundary demarcated from the revenue agency, but the fact of the matter is that there was no requirement for appointment of the Local Commissioner for demarcation since the plaintiff was in settled possession of the suit property. The substantial questions of law are answered accordingly.

14. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

****

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

The General Secretary DAV College and another .... Petitioners.

Vs.

Bindu Lal and another .... Respondents.

CWP No. 582 of 2007
Date of Decision: 15/09/2015

Industrial Disputes Act, 1947- Section 25- **Constitution of India, 1950-** Article 226- Respondent No.1 was retrenched from school as he had failed to join the place where he was transferred – respondent No.1 had asked for transfer grant and one month advance salary from the petitioners so that he could join at the place of his transfer- Labour Commissioner also failed to effect conciliation- reference was made to Industrial Tribunal-cum-Labour Court, wherein Tribunal held that inquiry conducted against the respondent No.1 was exparte without granting him sufficient opportunity- the respondent No. 1 was ordered to be reinstated- petitioner feeling aggrieved by the award challenged the same by way of writ petition- held, that there is enough material available on record to show that respondent No.1 was not given ample opportunity to participate in the inquiry conducted against him and principle of audi alteram partem was vitiated- further held, that Tribunal has properly appreciated the factual situation and the evidence and the writ petition is without merits. (Para-2)

For the petitioners: Mr. Dilip Sharma, Sr. Advocate with Mr. Umesh Kanwar, Advocate.
For the respondents : Mr. Rahul Mahajan, and Mr. Prince Chauhan, Advocates.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.*(Oral):*

The respondent No.1 herein was engaged as an accountant at MRA DAV Sr. Sec. Public School, Bye-Pass, Solan, H.P. Under Annexure Ext.RA he on 26.3.2001 stood transferred by the Managing Committee of DAV College Managing Committee, Chitra Gupta Road, New Delhi from MRA DAV Sr. Sec. Public School, Bye-Pass, Solan, H.P to DAV Public School, Patliputra Colony, Patna, Bihar. Ext.RB is the order whereby the petitioner No.2 herein, to enable the respondent No.1 herein to join his duties at DAV Public School, Patliputra Colony, Patna, Bihar, relieved the latter. In sequel to the serving upon the respondent No.1 herein of Ext.RB, he under a communication comprised in Ext.RC addressed to the Principal, MRA DAV Public School, Solan, urged the latter for facilitating him to comply with the transfer order comprised in Ext.RA make arrangements to defray to him salary for the month of March, 2001. Besides, the respondent No.1 under Annexure RD urged the petitioner No.2 to release in his favour transfer grant, as the one month salary claimed by him under Ext.RC was insufficient to tide over the financial crises besetting him. Un-controvertedly, the respondent No.1 herein did not proceed to join duties at DAV Public School, Patliputra Colony, Patna, Bihar. Obviously, he did not mete out compliance with the transfer orders comprised in Ext.RA served upon him by petitioner No.1 herein. The respondent No.1 herein on 25.4.2001 served a demand notice upon both the petitioners herein claiming therein that since his services stood terminated at their instance hence he be re-instated with all consequential benefits. Respondent No.2 herein having hence raised an industrial dispute arising from his purported illegal retrenchment/oral termination by

the petitioners herein, sequelled the Labour Officer-cum-Conciliation Officer, Solan to concert to conciliate the dispute inter se the respondent No.1 and the petitioners herein. However, when efforts initiated by the Labour Officer-cum-Conciliation Officer, Solan to conciliate the dispute did not yield the desired results hence on failure of conciliation, the Labour Officer-cum-Conciliation Officer, Solan was constrained to refer the matter to the Labour Commissioner, Himachal Pradesh. The Labour Commissioner, Himachal Pradesh on receiving from the Labour Officer–cum- Conciliation Officer, Solan a requisition conveying therein his efforts to conciliate the dispute inter se the respondent No.1 herein and the petitioners herein having suffered frustration, the Labour Commissioner, Himachal Pradesh, constituted a reference couched in the hereinafter extracted phraseology, for its adjudication by the Industrial Tribunal-cum-Labour Court, Shimla;

> *"Whether the retrenchment of Shri Bindu Lal, Ex. Sub. Major Village and P.O. Subathu, Tehsil and District Solan, H.P. w.e.f. 30.3.2001 as alleged by the principal, Matthu Ram Aggarwal, DAV Senior Secondary Public School by pass road Solan, District Solan, H.P. is legal and justified? If not, to what relief Shri Bindu Lal is entitled to?"*

2. The Industrial Tribunal-cum-Labour Court, Shimla on a consideration of the entire material as placed before it was constrained to accord in favour of the workman the relief as canvassed by him in his claim petition. The employers of the respondent No.1 herein being aggrieved by the rendition of the Industrial Tribunal-cum-Labour Court, Shimla, instituted a writ petition before this Court seeking therein the relief of quashing the findings returned therein in favour of the workman respondent No.1 herein. An emphatic and focused address has been made before this Court by the learned counsel for the petitioners herein that given the factum as comprised in Ext.RA of the petitioner having come to be transferred by the Managing Committee of DAV College Managing Committee, Chitra Gupta Road, New Delhi from MRA DAV Sr. Sec. Public School, Bye-Pass, Solan, H.P to DAV Public School, Patliputra Colony, Patna, Bihar in quick succession whereof under Ext.RB he stood relieved to join his duties at DAV Public School, Patliputra Colony, Patna, Bihar. Besides with the manifestation in Ext.RC of the petitioner urging the Principal, MRA DAV Public School, Solan to release him salary for the month of March, 2001 to enable him to join his duties at the DAV Public School, Patliputra Colony, Patna, Bihar, as also his under Ext.RD addressed to the petitioner No.2 herein entreating the latter to apart from disbursing in his favour the salary for the month of March, 2001, also release in his favour the transfer grant to facilitate his joining his duties at DAV Public School, Patliputra Colony, Patna, Bihar, constitutes acquiescence on the part of the petitioners, of Ext.RA having come to be served upon him besides also portrays his acquiescence, to proceed to join his duties at DAV Public School, Patliputra Colony, Patna, Bihar. Given the manifestation of acquiescence of the respondent No.1 herein to Ext.RA having come to be served upon him, the learned counsel for the respondent No.1 submits that when the respondent No.1 as reflected in Ext.PB stood relieved from MRA DAV Sr. Sec. Public School, Bye-Pass, Solan, H.P, his having not meted out compliance with Ext.RA whereby he stood transferred from MRA DAV Sr. Sec. Public School, Bye-Pass, Solan, H.P to DAV Public School, Patliputra Colony, Patna, Bihar, rendered him incapacitated to continue to serve under the petitioners herein. He canvasses with force before this Court that the petitioners herein had never dispensed with nor orally terminated the services of respondent No.1 rather the respondent No.1 herein having derelicted in meting out compliance with his transfer order despite his having been relieved under Ext.RB, entailed upon him the obvious and natural sequelling effect of his being disabled to perform duties under the petitioners. He proceeds to argue

that the indolence on the part of the petitioners herein to join his duties at DAV Public School, Patliputra Colony, Patna, Bihar, has engineered his ouster from service in which ouster the petitioners have no overt or covert role rather the role if any in the ouster of the respondent No.1 from his employment under the petitioners herein is naturally self engineered besides self managed. The above arguments as addressed before this Court are glossy on their façade. However, they lose much of their sheen when this Court proceeds to advert to the testimony constituted in the cross-examination of RW-1 the principal of petitioner No.2 herein. An incisive reading of deposition of RW-1 constituted in her cross-examination unravels the fact that she had proceeded to order the holding of an inquiry against the respondent No.1 by a duly constituted inquiry committee. She has also unraveled therein the factum that no notice of holding of an inquiry against the respondent No.1 at the instance of RW-1 was ever served upon the respondent No.1 herein. The admission aforesaid existing in the cross-examination of RW-1 unravels the factum that the aforesaid had initiated/held an inquiry against the respondent No.1 by a duly constituted committee. As a corollary then the respondent No.2 is to be construed to be prodded to do so only in the event of their being an attribution of a misdemeanor against the respondent No.1 herein. Before proceeding to determine the tenacity of the conclusions arrived at by the inquiry committee which proceeded to hold an ex-parte inquiry against the respondent No.1 herein the impact of RW-1 herein having been goaded to hold an inquiry against the respondent No.1 upsurges an apt inference that the factum of non joining of duties by the respondent No.1 herein at DAV Public School, Patliputra Colony, Patna, Bihar, despite his being served with Ext.RA and despite his having stood relieved was merely a colourable disguise besides a well contrived stratagem on the part of the petitioners herein to in the garb of the aforesaid facts as canvassed by the learned counsel for the petitioners herein, render his ouster from employment under the petitioners herein to be purportedly entirely self engineered besides self managed, whereas the genuine reason which held good with the petitioners herein to oust the respondent No.1 from employment was constituted in the fact of an ex-parte inquiry having been conducted against the respondent No.1 herein. The holding of as emanable from an incisive reading of the testimony of the cross-examination of RW-1 an ex-parte inquiry as against respondent No.1 is in infraction of the principles of audi alteram partem consequently rendering it to be vitiated. In sequel, any findings recorded therein against the respondent No.1 herein are bereft of any legal tenacity. As a corollary, also the espousal by the workman respondent No.1 herein in his claim petition that he stood orally terminated from service by the petitioners herein appears not to be ill founded rather it is grooved upon weighty and cogent evidentiary material as portrayed in the cross-examination of RW-1. In sequel, with the Industrial Tribunal-cum-Labour Court, Shimla having in its impugned award concluded that the retrenchment or oral termination from service of the respondent No.1 under the petitioners was preceded by an ex-parte inquiry was anchored upon adequate material as existed before it. The reasons as prevailed upon the Industrial Tribunal-cum-Labour Court, Shimla in pronouncing that the respondent No.1 stood orally retrenched/terminated from service by the petitioners herein do not merit any interference. In aftermath the answer of the reference by the Industrial Tribunal-cum-Labour Court, Shimla in favour of respondent No.1 cannot be faulted on any count. There is no merit in the petition. No costs.

****

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

Hardev Singh & another .....Appellants.

Versus

Hira Singh (dead) through LRs. Smt. Damodari Devi & ors. .....Respondents.

RSA No. 515 of 2003.
Reserved on: 15.9.2015.
Decided on: 16.9.2015.

Specific Relief Act, 1963- Section 34- Plaintiffs claimed to be owner in possession of the suit and that name of 'G' was wrongly recorded to be in possession- defendants pleaded adverse possession- copy of mutation recording the name of 'G' was not produced on record- there is nothing on record to show that notice was issued to the plaintiffs at the time of attestation- 'G' had died in the year 1966 but the entries continued till 1993-94, which shows that entries were made in routine- mere attestation of mutation will not have effect of the commencement of adverse possession- held, that in these circumstances, adverse possession was not proved- appeal dismissed. (Para-12 to 16)

Cases referred:
Hemaji Waghaji Jat vrs. Bhikhabhai Khengarbhai Harijan and others, (2009) 16 SCC 517
Tribhuvanshankar vrs. Amrutlal, (2014) 2 SCC 788,

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

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Mandi, H.P. dated 20.11.2003, passed in Civil Appeal No. 95 of 2002.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the predecessor-in-interest of respondents-plaintiffs (hereinafter referred to as the plaintiff), namely, Hira Singh has instituted suit for declaration and permanent prohibitory injunction against the appellants-defendants (hereinafter referred to as the defendants) on the plea that the land, as detailed in the plaint, was owned and possessed by him. In the revenue record, the suit land has been wrongly shown in the name of Gawanu, so far as the column of possession is concerned. According to him, the suit land never remained in possession of Gawanu, in any capacity whatsoever. Gawanu was plaintiff's cousin. In the year 1962, he had shifted to Village Majhathal and since then he had been living separately from his only son Achhar Singh. In the year 1961, Gawanu had requested the plaintiff to allow him to take away fodder for his cattle from the suit land. The plaintiff permitted him to use fodder for the suit land for 2-3 years. Thereafter, Gawanu expired and the plaintiff again started cultivating the suit land. During settlement operation, Gawanu behind the plaintiff's back, disclosed his possession before the settlement officials and the settlement officials without the permission and knowledge of the plaintiff, incorporated the name of Gawanu over the suit land in the column of possession, whereas Gawanu never possessed

the suit land and his possession was permissive for only about 2-3 years. Gawanu expired in the year 1966, however, his name was still continuing in the column of possession. Sh. Achhar Singh, the only son of Gawanu had expired in the year 1990. The defendants, being grandsons were taking undue advantage of the wrong revenue entries in collusion with the revenue officials and got mutation attested in their names.

3. The suit was contested by the defendants. According to them, they were in continuous, peaceful, hostile and notorious as well as uninterrupted possession to the knowledge of the plaintiff.

4. The replication was filed by the plaintiff. The learned trial Court framed the issues on 11.10.1999. The suit was dismissed vide judgment dated 13.6.2002. The plaintiff, feeling aggrieved, preferred an appeal against the judgment and decree dated 13.6.2002. The learned District Judge, Mandi, partly allowed the same on 20.11.2003. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial questions of law on 17.12.2003:

> "1. Whether the Lower Appellate Court has misread and misinterpreted the entries in the revenue record which continuously showed uninterrupted possession of the defendants-appellants and their predecessor in interest for the last more than 40 years, by wrongly holding that since such entries were recorded in the name of the dead person for fairly long time, no presumption can be attached to the same? Has not the Lower Appellate Court misread and misinterpreted the signification of the sign ".x." in the rent column by observing that such sign or mark is not existing anywhere in the HP Land Revenue Act or Rules framed thereunder?
>
> 2. Whether the findings of the Lower Appellate Court that the pleadings of adverse possession are not specific are contrary to the record and based on no evidence rendering the impugned judgment and decree illegal and erroneous?"

6. Mr. Neeraj Gupta, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that the first Appellate Court has misread and misinterpreted the entries in the revenue record which continuously showed the uninterrupted possession of the defendants-appellants and their predecessor-in-interest for the last more than 40 years. He also contended that his clients have led sufficient evidence to prove their adverse possession. On the other hand, Mr. Sanjeev Kuthiala, Advocate has supported the judgment and decree passed by the learned first appellate Court dated 20.11.2003.

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

8. Plaintiff has appeared as PW-1. He has placed on record copy of jamabandi for the year 1993-94 vide Ext. P-1 and jamabandi for the year 1993-94 vide Ext. P-2. According to the statement of the plaintiff, the suit land was given to Gawanu, grandfather of the defendants, on his demand in the year 1960 to cut grass. The suit land was given for the aforesaid purpose for a limited period. He has taken back the suit land from Gawanu. Gawanu expired about 35-36 years back. Achhar Singh, father of the defendants never remained in possession of the suit land. He died 15 years back.

9. One of the defendants, Dina Nath has appeared as DW-1. He testified that they were in possession since the time of their ancestors i.e. 1958-59 onwards. Their possession was peaceful and open. DW-2 Balwant Singh deposed that the defendants were in possession of the suit land since the time of their ancestors for 40-45 years. DW-3 Brikam Ram has also made statement about the possession of the defendants and prior to their ancestors including their grandfather Gawanu. He treated defendants as owners-in-possession. Their possession was open, peaceful and without any interruption.

10. Though, DW-1 Dina Nath has deposed that they were in possession since the time of ancestors i.e. 1958-59 onwards but the fact of the matter is that this year was only stated for the first time in the Court. This fact was not pleaded in the written statement. DW-2 Balwant Singh has admitted that he was not on visiting terms with the plaintiff. DW-3 Brikam Ram has also not deposed about the commencement of the peaceful and hostile possession of the defendants.

11. PW-1 Hira Singh, has deposed that he was not present at the time of attestation of the mutation in favour of defendants. DW-1 Dina Nath has admitted that the plaintiff was not present at the time of attestation of the mutation. There is also no contemporaneous material placed on record by the defendants that notice was issued to the plaintiff at the time of attestation of the mutation. Even, the copy of mutation has not been placed on record. There is reference to this mutation only in the jamabandi for the year 1991-92.

12. According to jamabandi Ext. P-1 for the year 1993-94, Ext. D-1, copy of Misal Haquiat Bandobast, Ext. D-2 copy of jamabandi for the year 1969-70, Ext. D-4 copy of jamabandi for the year 1978-79, Ext. D-5 copy of jamabandi for the year 1974-75, Ext. D-6 copy of jamabandi for the year 1988-89, the land was entered in the ownership column in the name of the plaintiff and in possession column in the name of Gawanu. Gawanu was the grandfather of the defendants. Gawanu died somewhere in the year 1966. Sh. Achhar Singh, father of the defendants died in the year 1987. Though Gawanu has died in the year 1966, but the revenue entries show Gawanu in possession till jamabandi for the year 1993-94. These entries exist in the revenue record as a matter of routine. There was no entry w.e.f. 1966 till 1986 in the name of Achhar Singh. The revenue record did not reflect the actual person in possession right from 1966 to 1998 i.e. for about 32 years. Khatoni Ext. PA does not pertain to the suit land. The case of the defendants was that they were in adverse possession of the suit land for more than 12 years prior to settlement operation. There is no tangible evidence led by the defendants to prove as to when the settlement operation took place and in which particular year. The entries remained in existence against the dead person.

13. There has to be specific point of time for calculating the adverse possession. The party claiming adverse possession has to prove overt acts, treating himself to be owner of the property to the knowledge and exclusion of the true owner. The mere attestation of the mutation in favour of the defendants would not advance their cause. The mutation was attested in the year 1998, thus, 12 years were not completed on the date of institution of the suit i.e. 4.9.1998. In the revenue record, the status of Gawanu was not mentioned. Only sign "X" was shown in the column of possession as well as in the rent column. It is settled law that the party claiming adverse possession has to plead and prove the necessary ingredients of adverse possession.

14. Their lordships of the Hon'ble Supreme Court in the case of ***Hemaji Waghaji Jat vrs. Bhikhabhai Khengarbhai Harijan and others,*** reported in ***(2009) 16 SCC 517,***

have held that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his title was hostile to the real owner and amounted to denial of his title to the property claimed. The ordinary classical requirement of adverse possession is that it should be *nec vi, nec clam, nec precario* and the possession required must be adequate in continuity, in publicity and in extent to show that it is in possession adverse to the competitor. It has been held as follows:

> "14. In Secretary of State for India v. Debendra Lal Khan AIR 1934 PC 23, it was observed that the ordinary classical requirement of adverse possession is that it should be nec vi, nec clam, nec precario and the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.
>
> 23. This court had an occasion to examine the concept of adverse possession in T. Anjanappa & Others v. Somalingappa & Another [(2006) 7 SCC 570]. The court observed that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his title was hostile to the real owner and amounted to denial of his title to the property claimed. The court further observed that:
>
> > "20.....The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."

15. Their lordships of the Hon'ble Supreme Court in the case of ***Tribhuvanshankar vrs. Amrutlal,*** reported in ***(2014) 2 SCC 788,*** have held that possession to be adverse has to be actual, open, notorious, exclusive and continuous for the requisite frame of time as provided in law so that the possessor perfects his title by adverse possession. It has been held as follows:

> "34. The conception of adverse possession fundamentally contemplates a hostile possession by which there is a denial of title of the true owner. By virtue of remaining in possession the possessor takes an adverse stance to the title of the true owner. In fact, he disputes the same. A mere possession or user or permissive possession does not remotely come near the spectrum of adverse possession. Possession to be adverse has to be actual, open, notorious, exclusive and continuous for the requisite frame of time as provided in law so that the possessor perfects his title by adverse possession. It has been held in Secy. Of State for India In Council v. Debendra Lal Khan[11] that the ordinary classical requirement of adverse possession is that it should be *nec vi, nec clam, nec precario.*
>
> 37. It is to be borne in mind that adverse possession, as a right, does not come in aid solely on the base that the owner loses his right to reclaim the property because of his willful neglect but also on account of the possessor's constant positive intent to remain in possession. It has been held in P.T. Munichikkanna Reddy and others v. Revamma and others[14]."

16. The learned first appellate Court has correctly appreciated the oral as well as documentary evidence placed on record. The defendants have failed to prove the adverse possession. The substantial questions of law are answered accordingly.

17. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

****

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

Salig Ram. ...Appellant.
Versus
Devi Ram. ...Respondent.

RSA No. 478 of 2004
Reserved on: 15.9.2015
Decided on: 16.9.2015

Specific Relief Act, 1963- Section 38- Plaintiff claimed that he is owner in possession of the suit land and the defendant is interfering with the same without any right to do so- plaintiff had failed to identify the land purchased by him by filing any Tatima- it was not possible to demarcate the land in absence of the Tatima- plaintiff had not assisted the Local Commissioner by filing a Tatima- it was not permissible for the plaintiff to fill up the lacuna by leading the evidence- held, that suit of the plaintiff was rightly dismissed in these circumstances by the trial Court. (Para-14 to 16)

For the Appellant : Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate
For the Respondent : Mr. Sumeet Raj Sharma, Advocate

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 26.7.2004 rendered by the District Judge, Shimla in Civil Appeal No. 19-S/13 of 2002.

2. "Key facts" necessary for the adjudication of this appeal are that the appellant-plaintiff (herein after referred to as 'plaintiff' for convenience sake) instituted a suit for permanent prohibitory and mandatory injunction against the respondent-defendant (hereinafter referred to as the defendant" for convenience sake). According to the plaintiff, he was owner in possession of the house situated over the land comprised in Khata Khatauni No.30/40, Khasra No.638/33, measuring 0-4 biswa situated at Mauja Chakrial, Tehsil and District Shimla, as per Jamabandi for the year 1991-92. Defendant was owner in possession of the land comprised in Khata Khatauni No.30/44, Khasra No.638/33 measuring 0-4 biswa situated at Mauja Chakrial, Tehsil and District Shimla. Defendant has already covered his land and now started encroaching upon the land of the plaintiff.

3. Suit was contested by the defendant. Defendant has denied that he has made any encroachment over the land of the plaintiff. The construction of the house was raised by the defendant within his own land.

4. Replication was filed by the plaintiff. Issues were framed by the Sub Judge-4, Shimla on 15.9.1997. The Sub Judge dismissed the suit on 26.12.2001. Plaintiff filed an appeal before the District Judge, Shimla. He dismissed the same on 26.7.2004. Hence, the present appeal. It was admitted on the following substantial questions of law:

1. **"Whether the courts below have failed to get the boundaries fixed by getting legal and valid demarcation carried out to ascertain extent of the area occupied by each of the parties and since there has been violation of law as laid down by this Hon'ble Court as reported in AIR 2003 HP Page 87, therefore, needful is required to be done now?**
2. **Whether the learned District Judge, Shimla having failed to decide application under order 41 rule 27 read with order 26 rule 9 CPC because as per order dated 26.7.2004, he merely observed that this application has become infructuous, therefore, the findings recorded by him are contrary to the provisions of law?**

5. Mr. G.D. Verma, learned senior Advocate for the appellant, on the basis of the substantial questions of law framed, has vehemently argued that both the courts below have failed to get the boundaries fixed by way of demarcation. He has also contended that an application under order 41 rule 27 read with order 26 rule 9 of the CPC has been rejected without due application of mind.

6. Mr. Sumeet Raj Sharma, learned counsel for the respondent has supported the judgments and decrees passed by both the courts below.

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

8. Since both the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid repetition of discussion of evidence.

8. Plaintiff and defendant have purchased the land from joint Khasra No.638/33. The share of plaintiff came to about 4 biswas and the share of the defendant was also about 4 biswas. However, plaintiff has not led any tangible evidence on record to prove as to which 4 biswas of land out of the joint Khasra number was purchased by him. He has not placed on record any tatima showing the specific portion of the land purchased by him.

9. In fact, three local commissions were appointed at the request of the plaintiff. One commission was addressed to the Tehsildar (Urban), Shimla, who was asked to demarcate the land of the parties and another commission was addressed to Sh. Chandan Goel, Advocate, District Courts, Shimla to ascertain whether any encroachment has been made on the spot or not. Yet, another commission was addressed to the Station House Officer of Police Station, Dhalli, Shimla. The identity of the land of the plaintiff and defendant was not specified. Thus, it would not have been possible for any of the commissioners to identify the land on the spot. Sh. S.P. Sood, Local Commissioner has reported in his report that it was not possible to demarcate and show the particular portions of the parties on the spot because jamabandis did not indicate the particular portion which

has been purchased by the parties. The Local Commissioner carried out the demarcation as per actual possession of the parties existing on the spot.

10. Mr. G.D. Verma, learned Sr. Advocate has vehemently argued that objections filed against the report of the Local Commissioner were not taken into consideration by both the courts below.

11. Location of the land of plaintiff on the spot was not ascertainable from any revenue record before the Commissioner. The report was only objected to on the ground that plaintiff was not present. Since the revenue record was not produced, the land of the parties could not be demarcated on the spot. Plaintiff has not uttered even a single word when he appeared in the witness box on 28.7.2000 in support of his objections.

12. It has come in the report that plaintiff has constructed 53 feet x 38 feet building on the spot whereas he has purchased only 45 feet x 36 feet area. It is the plaintiff, who has raised construction beyond his area. Thus, it cannot be said that defendant has encroached upon his land.

13. DW-1 Ved Parkash has testified that when the Local Commissioner/Tehsildar (Urban), Shimla Sh. S.P. Sood visited the spot, he was present there. Wife of the plaintiff was present on the spot.

14. Defendant has appeared as DW-2. According to him, plaintiff has raised construction over 53 feet x 38 feet of land whereas he has purchased the area measuring 45 feet x 36 feet (4 biswas). This fact was admitted by the plaintiff. DW-3 Balak Ram has testified that the area constructed by the plaintiff exceeds the shares purchased by him.

15. Learned first appellate court has dismissed the application preferred under order 41 rule 27 read with order 26 rule 9 of the Code of Civil Procedure on 26.7.2004. Plaintiff has reiterated his demand for appointment of Local Commissioner repeatedly. Plaintiff, as noticed hereinabove, has not produced any revenue record before the Local Commissioner Sh. S.P. Sood. No purpose could be served by ordering fresh commission since the sale in favour of the plaintiff was not shown to have been made with reference to Tatima. There is no evidence on record to pin point specific portion of the land purchased by the plaintiff.

16. From the report submitted by Sh. S.P. Sood, Local Commissioner, it is evident that notice was served on the plaintiff. However, his wife was present on the spot. He was assisted by Mohinder Singh Patwari of the area and Settlement Patwari for carrying out the demarcation. The area occupied by the defendant was found to be less than 4 biswas by Sh. S.P. Sood, Local Commissioner. Plaintiff himself has not assisted the Local Commissioner by producing revenue record including tatima. The demarcation was carried out by the Local Commissioner on the basis of Mussabi. The adjoining owners of the area have also stated that the plaintiff has encroached upon the land of the path by constructing a septic tank on it. The parties cannot be permitted to fill up lacuna in their cases by permitting them to lead additional evidence.

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

18. The substantial questions of law are answered accordingly.

19. In view of the analysis and discussion made hereinabove, there is no merit in the present appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

****

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

Som Dutt .... Petitioner.
Vs.
State of H.P. and others .... Respondents.

CWP No. 8188 of 2012
Date of Decision: 16/09/2015

Constitution of India, 1950- Article 226- Petitioner contested for the office of Ward Member along with respondent No. 2- however, respondent No. 2 was declared as elected after counting the votes- petitioner feeling aggrieved by the manner of counting ballot papers thrice by Returning Officer before declaration of result, approached the SDO (Civil)-cum-Authorized Officer- petition was dismissed- an appeal was filed which was also dismissed- held, that Rule 41(2) of Himachal Pradesh Gram Panchayat (Election) Rules, 1978 provides that the ballot papers can be recounted only, if an aggrieved candidate applies in writing to the Returning Officer for re-counting and the Returning Officer while deciding the application, allows the recounting- further held, that since, the Returning Officer in this case has recounted the ballot papers thrice without there being a request from any of the candidates, the mandatory provisions were violated - orders passed by SDO (Civil)-cum-Authorized Officer and Deputy Commissioner in appeal do not stand the legal scrutiny, hence, both the orders set aside with the directions to SDO (Civil)-cum-Authorized Officer to recount the ballot papers within three weeks and thereafter to announce the result.

For the petitioner: Mr. I.D.Bali, Senior Advocate with Mr. Virender Bali, Advocate.
For the respondents : Mr. Vivek Singh Attri, Dy. A.G. for respondent No.1.
Mr. Jeevesh Sharma, counsel, for respondent No.3.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.*(Oral):*

The petitioner herein contested elections to the office of Ward Member for Ward No.5, Gram Panchayat Baragaon, Tehsil Kumarsain, District Shimla, H.P. The respondent No.3 declared respondent No.2 to be elected. The grievance ventilated in the writ petition is qua the factum of respondent No.2 having been illegally declared to be elected by respondent No.3 to the office of Ward Member for Ward No.5, Gram Panchayat Baragaon, Tehsil Kumarsain, and it stands grooved in the factum that respondent No.3 herein while being the Returning Officer for declaring the out come of elections of Ward Member for Ward No.5, Gram Panchayat Baragaon, Tehsil Kumarsain, in which besides the petitioner herein, the respondent No.2 and others also participated as contestants, had proceeded to after his having declared respondent No.2 herein to be elected, thrice recounted the ballot papers

without any compliance to sub rule (2) of Rule 41 of the Himachal Pradesh Gram Panchayat (Election) Rules, 1978 having been meted out rendering hence his recount on three occasions of the ballot papers to be constituting infringement of the mandate of Rule 41 of the Himachal Pradesh Gram Panchayat (Election) Rules, 1978, which stand extracted hereinafter:-

> "41. Recount of votes (1) The returning officer after signing the ballot paper account shall announce the total number of votes polled by each candidate and pause for a while.
>
> (2) After such announcement has been made a candidate or in his absence his election agent may apply in writing to the Returning Officer for a recount of all or any of the ballot papers already counted stating the grounds on which he demands such recount.
>
> (3) On such an application being made, the Returning Officer shall decide the matter and may allow the application in a whole or in part or may reject it in toto if it appears to him to be frivolous or unreasonable and the decision of the Returning Officer in this behalf shall be in writing and contain the reason thereof.
>
> (4) If the Returning Officer decides under sub rule (3) to allow an application either in whole or in part he shall count the ballot papers again in accordance with his decision; amend Part-II of ballot paper account in form XII or Result sheet in Form XVII as the case may be, to the extent, if necessary, after such recount; and announce the amendment so made by him.
>
> (5) The returning officer shall thereafter complete and sign the declaration in part-III of ballot paper account in Form XII or Part II of the Result sheet in Form XVII as the case may be, no application for any recount shall be entertained, thereafter.

In other words it is canvassed that after his having initially announced the total number of votes polled by each candidate his having proceeded to recount thrice the ballot papers even though it stands mandated by sub rule 2 of Rule 41 that before his proceeding to recount the ballot papers he was enjoined to, receive an application in writing from the aggrieved for recount of the ballot papers with a depiction therein of the reasons for the aggrieved seeking recount of the votes previously counted by the Returning Officer and which led him to announce the result or the outcome of his initial counting of ballot papers which application having not come to be preferred before him by the aggrieved rendered his recounting thrice of the ballot papers to be vitiated.

The petitioner herein had on grounds para materia to the ones constituted in this writ petition for setting aside the elections of respondent No.2 to the office of Ward Member for Ward No.5, Gram Panchayat Baragaon, Tehsil Kumarsain assailed the elections of respondent No.2 to the aforesaid office by his instituting an election petition before the Sub Divisional Officer (Civil) cum Authorised Officer Rampur Bushahr, District Shimla. The latter in his rendition constituted in Annexure P-4 dismissed the election petition. The petitioner herein being aggrieved by the dismissal of his election petition under Annexure P-4 by the Sub Divisional Officer (Civil) cum Authorised Officer, Rampur Bushahr, filed an appeal therefrom before the learned Deputy Commissioner, Shimla. The learned Deputy Commissioner, Shimla, too concurred with the conclusions and findings recorded in Annexure P-4. The rendition of the learned Deputy Commissioner, Shimla, in the appeal preferred before him, by the petitioner herein assailing the renditions constituted in

Annexure P-4, is comprised in Annexure P-6. The petitioner herein is aggrieved by the decision rendered by the learned Deputy Commissioner, Shimla. He has proceeded to assail it by filing the instant writ petition before this Court.

Before proceeding to test the vigour of the contention addressed before this Court by the learned counsel for the petitioner, that the respondent NO.3 had after his having initially counted the ballot paper and his having declared the petitioner herein having polled the highest number of votes which initial declaration aforesaid by him constituted an announcement by him of the outcome or fate of the election, he was hence unless compliance was meted out at the instance of the aggrieved with the mandate of sub rule 2 of Rule 41 of the Himachal Pradesh Gram Panchayat (Election) Rules, 1978, inasmuch as respondent No.2 having applied in writing to the Returning Officer for recount of all the ballot papers whose previous counting by him led him to make an announcement qua the fate of the result, was barred from proceeding to recount the ballot papers as he did so thrice thereafter, in sequel to which recounts he proceeded to declare respondent No.2 to be elected, an advertence is required to be made to the testimony of RW-3. The testimony of RW-3 underscores an admission on his part that he did proceed to thrice recount the ballot papers. Besides, in his cross-examination there is also an admission qua the fact that before proceeding to recount the ballot papers no written application was moved before him at the instance of respondent No.2 as mandated by sub-rule 2 of Rule 41 of the Himachal Pradesh Gram Panchayat (Election) Rules, 1978. The effect and impact of the deposition of RW-3 comprised in his examination in chief and in his cross-examination is that he had proceeded to recount the ballot papers thrice even when there was no written application moved before him at the instance of respondent No.2 stating therein the reason for his seeking recounts of the ballot papers. Consequently, when the Returning Officer had on his initially counting the ballot papers obviously announced the outcome or fate of the elections he could not, as he did, as is apparent from a reading of his testimony on oath, proceed to recount the ballot papers unless the aggrieved respondent No.2 had preferred before him an application in writing proclaiming therein the reasons for his seeking their recounts. Consequently, when the respondent No.3 on his initially having counted all the ballot papers proceeded to announce the result of the election, the subsequent recount by him of the ballot papers on three occasions without the respondent No.2 having moved before him an application in writing stating therein the reason for his seeking their recounts, though statutorily enjoined to be preferred before him at the instance of the aggrieved respondent No.2., constituted an open infringement of the mandate of Rule 41 of the Himachal Pradesh Gram Panchayat (Election) Rules, 1978. In aftermath, the declaration of result by respondent No.3 after his having untenably recounted the ballot papers thrice cannot come to be vindicated by this Court. Both the authorities below in their renditions constituted in Ext.P-4 and Ext.P-6 have discarded the testimony on oath of RW-3 the returning officer, besides they have omitted to apply after its proper appraisal at their instance, the provisions of Rule 41 of the Himachal Pradesh Gram Panchayat (Election) Rules, 1978 to it. Consequently, the discarding of the testimony of RW-3 by both the authorities with emanations aforesaid in it displaying the factum of an open infringement at the instance of respondent No.3 of the provisions of Rule 41 of the Himachal Pradesh Gram Panchayat (Election) Rules, 1978 have led both to form conclusions and findings which cannot come to be sustained by this Court. The reason as meted out in Annexure P-6 the annexure impugned before this Court of the uncontroverted act of the respondent No.3 in proceeding to thrice recount the ballot paper being vindicable, as such recounts of the ballot papers by him was not preceded by any official declaration of result, cannot gain any succor from a close evaluation of the provisions of Rule 41 of the Himachal Pradesh Gram Panchayat

(Election) Rules, 1978 inasmuch as, when it has been mandated therein, that the returning officer as respondent No.3 was, as borne out by his testimony when proceeded to, on an initial count of the ballot papers announce the total number of votes bagged by the contestants and which announcement at his instance constituted declaration of result yet his having proceeded to for reasons aforesaid in infraction of the mandate of sub rule 2 of Rule 41 of the Himachal Pradesh Gram Panchayat (Election) Rules, 1978, to recount them thrice rendered the subsequent recounts of the ballot papers by him to be legally vitiated. The spirit and import of Rule 41 of the Himachal Pradesh Gram Panchayat (Election) Rules, 1978 has been wholly misconceived besides misunderstood by the learned Deputy Commissioner inasmuch as his having proceeded to untenably hold that an official declaration of the result or the outcome of the counting of votes was a sine qua non for the provisions of Rule 41 of the Himachal Pradesh Gram Panchayat (Election) Rules, 1978 to come into play. The misconception at his instance of the spirit of Rule 41 of the Himachal Pradesh Gram Panchayat (Election) Rules, 1978 has led him to fallaciously draw a conclusion that the official declaration of result of the election was mandatory besides imperative for the provisions of Rule 41 of the Himachal Pradesh Gram Panchayat (Election) Rules, 1978, to come into play, rather when for the reasons aforesaid the spirit besides the import of Rule 41 of the Himachal Pradesh Gram Panchayat (Election) Rules, 1978 empowering the returning officer to recount the ballot papers as he did so was anvilled not upon the fact of the official declaration of the out come or the fate of the election having occurred, rather was grooved in the factum of the announcement of the result/fate of the election having been made by him after his having initially counted the ballot papers. Necessarily when he did announce the result within the ambit of sub rule 2 of Rule 41 of the Himachal Pradesh Gram Panchayat (Election) Rules, 1978, in sequel when he proceeded to recount the ballot papers thrice even when the aggrieved respondent No.2 had in terms thereof not meted out compliance with the mandatory provisions enjoined therein rendered his act of counting thrice the ballot papers to be legally unsustainable. Reinforcingly with no compliance of the aforesaid mandatory statutory provisions having been meted out at the instance of respondent No.2 it was not open for the respondent No.3 besides it was not open for the learned Deputy Commissioner to conclude that the recount of the ballot papers by respondent No. 3 was not outside the frame work of Rule 41 of the Himachal Pradesh Gram Panchayat (Election) Rules, 1978, merely for a specious reason that the result or fate of the election was not officially declared. Consequently, the writ petition is allowed. Impugned annexures are quashed and set-aside. The SDM, Rampur, is directed to recount the ballot papers within three weeks from today. Thereafter he is directed to announce the result. All pending applications are also disposed of.

****

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

State of Himachal Pradesh .....Appellant.

Versus

Kamal Swarup .....Respondent.

Cr. Appeal No. 280 of 2009.
Reserved on: 04.09.2015.
Date of Decision: 16th September, 2015.

Indian Penal Code, 1860- Section 376- Prosecutrix was cutting grass, when the accused came, caught hold of her and raped her- accused also threatened the prosecutrix not to disclose the incident to any person and promised to marry her- prosecutrix became pregnant and went to the house of the accused where she was abused- matter was reported to the police - prosecutrix was major at the time of incident- she died subsequently and, therefore, there was nothing on record to show whether she had consented or not- she had made a statement in the proceedings for claiming maintenance but had not deposed anything about the incident- held, that in these circumstances, acquittal recorded by the trial Court cannot be faulted- appeal dismissed. (Para-9 to 15)

For the Appellant: Mr. Ramesh Thakur, Assistant Advocate General.
For the Respondent: Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj K. Vashisht, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed by the State of H.P. against the judgment of the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahar, H.P. rendered in Sessions Trial No. 9 of 2001, whereby, the learned trial Court acquitted the accused/respondent of the charge of his having allegedly committed an offence punishable under Section 376 of the IPC.

2. Briefly stated the facts of the prosecution case are that on 27.7.1999, the prosecutrix accompanied by her borther-in-law Bhagat Singh lodged FIR, Ex.PW3/A at Police Station, Rampur that she was youngest of her parents amongst two brothers and three sisters and was resident of Deothi. The prosecutrix could not clear her compartment in matriculation examination held in the year 1996 and left the school. On 18.6.1998 in the morning, the prosecutrix went to the fields to bring grass. While she was cutting grass, the accused came to the field and caught hold of the prosecutrix and fell her on the ground. The accused broke the string of her salwar and committed rape on the person of the prosecutrix. The prosecutrix attempted to cry and the accused gagged her mouth. The accused threatened to do away with the life of the prosecutrix, if she disclosed the incident. The accused stated to her not to disclose the incident and assured to marry her. The prosecutrix told the accused that she was pregnant from his loins on which the accused told her to continue with the pregnancy. On 12.7.1999, when the prosecutrix accompanied by her mother and brother Sohan Lal went to the house of the accused, his parents and sister Kiran abused them and they returned to the house. The accused has committed forcible sexual intercourse with the prosecutrix on the pretext of performing marriage with her and the accused has refused to marry her. The prosecutrix was got medically examined from doctor Rajender Bisht. As per the opinion of the doctor the prosecutrix had 34 to 36 weeks of pregnancy (height of uterus) foetal part palpable. Foetal heart sound present. Labia and nigra present. The prosecutrix produced salwar which she was wearing on the date of incident and broken string of salwar on which knot was tied to join the two eds to the police and the police sealed the Salwar and string in two parcels and took the same in possession per memo Ex.PW1/A signed by the prosecutrix, Bhagat Singh and Daulat Ram. The salwar was sent to FSL and the Assistant Director, FSL per report Ex.PW14/A found that there was blood on the salwar and there was no semen. The birth certificate of the prosecutrix Ex.PW7/A wherein the date of birth of the prosecutrix is recorded to be 1.6.1979 was also

taken into possession from the Registrar, Births and Death, Gram Panchayat, Deothi per memo Ex.PW7/B signed by Sh. Krishan Lal HHC and the Registrar. The school certificate comprised in Ex.PW12/E of middle examination of the prosecutrix recording her date of birth to be 3.12.1978 was also taken into possession. The date of birth of the prosecutrix as per the father of the prosecutrix was 9.11.1982 and the prosecutrix was aged 16 ½ years at the time of the alleged occurrence. The Dental Surgeon after dental examination of the prosecutrix opined the age of the prosecutrix to be between 16-17 years. The prosecutrix was also examined by the Radiologist for determination of age. The Radiologist after radiological examination opined that the age of the prosecutrix was between 17 to 20 years. The prosecutrix gave birth to a male child on 11.8.1999. The blood sample of the accused, the prosecutrix and newly born baby was taken and the blood group of the accused, prosecutrix and newly born baby was found B+ and the doctor opined that Kamal Swarup may be possible father of baby of Roshani Devi. The police took up the case for DNA examination with CFSL, Kolkata on direction of the Hon'ble High Court of Himachal Pradesh in September, 2000. The prosecutrix consented to provide her blood sample and that of the child for DNA examination to the police per memo Ex.PW13/A, however, the accused refused to provide his blood sample per memo Ex.PW8/A. The prosecutrix also gave her consent for taking of blood before the Executive Magistrate and the accused made a statement refusing to provide blood sample before the Executive Magistrate per consent memo Ex.PW6/A. Site plan was prepared. The accused had committed sexual intercourse with the prosecutrix under the promise to marry her and after the pregnancy of the prosecutrix assured to marry her and continued committing sexual intercourse with her. The parents and brother of the accused accompanied by the prosecutrix went to the house of the accused to leave the prosecutrix at his house on which the family members of the accused abused her as the prosecutrix belong to scheduled caste and the accused was Brahmin and for this reason the accused did not want to marry her.

3. On conclusion of the investigation, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the competent Court.

4. The accused was charged by the learned trial Court for his having committed an offence punishable under Section 376 of the IPC. In proof of the prosecution case, the prosecution examined 18 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court, in which the accused claimed false implication. In defence, he examined one witness.

5. The learned trial Court on an appreciation of the evidence on record, returned findings of acquittal in favour of the accused.

6. The State of H.P. is aggrieved by the findings of acquittal recorded by the learned trial Court. The learned Assistant Advocate General appearing for the appellant/State has concertedly and vigorously contended that the findings of acquittal recorded by the learned trial Court are not based on a proper appreciation of evidence on record, rather, they are sequelled by gross mis-appreciation of material on record. Hence, he contends that the findings of acquittal be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended that the findings of acquittal recorded by the learned Court below are

based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

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

9. The alleged occurrence which took place on 18.06.1998 was reported to the police on 27.07.1999. The FIR is constituted in EX.PW3/A. In Ex.PW3/A, the prosecutrix has recorded therein that the pretext of or allurement of marriage proffered to her by the accused induced her to succumb to his sexually accessing her. The learned trial Court though had recorded the statements of the father, mother, brother and brother-in-law of the prosecutrix to whom the prosecutrix had unraveled the occurrence in the month of July, 1999. However, the statement of the prosecutrix which was to be recorded on 6.01.2003 could not then be recorded by the learned trial Court on account of the prosecutrix having gone missing. The belated lodging of the FIR qua the incident assumes significance, also the factum of the prosecutrix having succumbed to the sexual overtures of the accused under an allurement of or pretext of marriage proffered by him to her, whereas, she having carried a child in her womb purportedly fathered by the accused since November, 1998 which was delivered by her on 11.08.1999 assumes immense significance, in concluding whether the attribution of an inculpatory role by the prosecutrix in EX.PW3/A, besides in Ex.PW16/A is or is not ingrained with truth, especially when for the reasons which would be meted by this Court hereinafter, she at the stage contemporaneous to the ill-fated occurrence had acquired the capacity to accord consent to sexual intercourse/intercourses, if any, perpetrated upon her by the accused. The statement of the prosecutrix could not be recorded on 6.1.2003 before the learned trial Court as she had gone missing since 29.12.2002 qua which fact of hers having gone missing, a report came to be lodged with the police station concerned. The dead body of the prosecutrix was recovered in a field on 18.01.2003 and it was subjected to postmortem examination by Dr. Piyush Kapila. A photo copy of the postmortem report prepared by Dr. Piyush Kapila after his having subjected the dead body of the deceased to postmortem examination stands exhibited as Ex.PW18/A. Consequently, in the face of the demise of the prosecutrix, the learned trial Court was not seized of the best evidence comprised in the deposition of the prosecutrix. Obviously, for non recording of the deposition of the prosecutrix, no conclusion can hence be formed on the strength of Ex.PW3/A lodged by her qua the incident at police station Rampur whether it constitutes a trustworthy, credible and an inspiring version qua the incident. Also, the oral depositions of the father, mother, brother and brother-in-law of the prosecutrix who had come to be apprised by the prosecutrix in July, 1999 qua the factum of the accused having induced her on the pretext of marriage to succumb to his sexual overtures and of hers carrying in her womb a child purportedly begotten from his loins which she ultimately delivered on 11.08.1999, cannot carry probative tenacity or probative vigour at par with the deposition of the prosecutrix, who however has remained unexamined on account of hers not surviving at the time when her deposition was to be recorded by the learned trial Court. However, even though the deposition of the prosecutrix could not be recorded before the learned trial Court, nonetheless, the prosecutrix during the pendency of a petition laid by her before the Sub Divisional Judicial Magistrate, Rampur claiming therein maintenance against the accused herein, had recorded before the aforesaid her statement on oath comprised in Ex.PW16/A. Ex.PW16/A is a certified copy of the statement made by the prosecutrix before the learned Sub Divisional Judicial Magistrate, Rampur in a petition preferred by her before him claiming maintenance against the accused. PW16, who recorded the statement of the prosecutrix comprised in Ex.PW16/A has proved that the exhibit aforesaid constitutes the statement of the prosecutrix recorded under his dictation by his

Reader in maintenance petition No.83-4 of 2001 on 14.12.2001. Consequently, even in the face of the prosecutrix having not deposed before the learned trial Court for lending corroboration to the version qua the ill-fated incident spelt out by her in FIR Ex.PW3/A, the certified copy of her statement comprised in Ex.PW16/A is both, relevant and admissible for gauging therefrom whether the imputations of culpability reared therein by the prosecutrix against the accused arising from an incident which occurred on 18.06.1998 are founded upon truth or are on account of delay vitiated with the vice of concoctions and in aftermath whether the ensuing inference of consent of the prosecutrix to the accused sexually accessing her, is emanating therefrom. In the face of Ex.PW7/A, the certificate taken into possession by the Investigating Officer from the Registrar, Births and Deaths, Gram Panchayat, Deothi, disclosing therein her date of birth to be 01.06.1979 rendered her at the stage contemporaneous to the ill fated incident, to while hers having acquired majority capacitated to mete out consent to the accused to his sexually accessing her. Amplifying vigour to the inference aforesaid of the prosecutrix at the apposite stage having arrived at the age of consent for hers being construable to be clothed with competence to accord consent to the accused to his sexually accessing her, is lent by the factum of the father of the prosecutrix in his cross-examination having admitted that he had got the prosecutrix admitted in school. In sequel, with the father of the prosecutrix having admitted the fact of his having got the prosecutrix admitted in school constitutes the entry qua her date of birth recorded as 3.12.1978 in Middle Standard Examination Certificate, comprised in Ex.PW12/E to be not bereft of truth, besides also renders the testimony of DW1, who has proven the factum of the entry qua the date of birth of the prosecutrix existing at serial No.2357 in the school records of Government Primary School, Deothi wherein the date of birth of the prosecutrix stands recorded as 3.12.1978 to be also acquiring veracity. Even though some difference exists qua the date of birth of the prosecutrix recorded in Ex.PW12/E and Ex.PW7/A yet when the difference therein in the recording of the date of birth of the prosecutrix is minimal, besides when the entries qua the date of birth of the prosecutrix both in Ex. PW12/E and in Ex.PW7/A manifests the imminent fact of the prosecutrix on the ill-fated day having acquired majority, besides capacitated to mete out consent to the accused for his sexually accessing her, renders benumbed the oral deposition of the prosecution witnesses comprised in the testimonies of PW-1, PW-2 and PW-3, unfolding the factum of the prosecutrix at the time of occurrence being of an age lesser than the one portrayed in Ex.PW12/E and Ex.PW7/A.

10. Apart therefrom, the testimony of the prosecutrix comprised in Ex.PW16/A, on its threadbare analysis would unearth whether the purported succumbing of the prosecutrix to the sexual overtures of the accused under his meting out to her a purported pretext of or allurement of marriage mobilizes or garners any veracity or whether she having for the reasons aforesaid acquired majority at the apposite stage had meted consent to the accused to his sexually accessing her, on 18.06.1998. With the prosecutrix having purportedly succumbed to the sexual overtures of the accused under pretext of marriage proffered to her by the accused, she, as apparent from an incisive scrutiny of the testimonies of PW-1 Daulat Ram, Smt. Dassi Devi, her parents, besides a threadbare analysis of the testimonies of PW Bhagat Ram, her brother-in-law and of Sohan Lal, her brother, conceived in the month of November, 1998. Accuracy to the testimonies of the aforesaid prosecution witnesses qua the factum of the prosecutrix having conceived in the month of November, 1998 is lent by the factum of the prosecutrix 9 months thereafter on 11.08.1999 having delivered a child. Besides, when she in her examination-in-chief comprised in Ex.PW16/A had admitted the factum of hers having conceived in the month of November, 1998 gives

firmness to the inference aforesaid of hers having conceived in the month of November, 1998.

11. Now viewed in the context of the family of the prosecutrix having acquired knowledge qua the factum of the prosecutrix having conceived in the month of November, 1998 and theirs having omitted to promptly lodge a report qua the occurrence with the police station concerned does give ground to a firm and formidable inference that with the prosecutrix having arrived at the age of consent had meted consent to the accused to sexually access her, besides the effect of imprompt lodging of the FIR qua the alleged occurrence renders it to be acquiring the taint of afterthought as well as of falsehood. Even though the prosecutrix in Ex.PW3/A has narrated therein that the initial sexual encounter of 18.6.1998 which occurred inter se her and the accused was under a pretext of marriage proffered to her by the accused. Nonetheless, when in her statement constituted in her examination-in-chief comprised in Ex.PW16/A, she has disclosed therein that even thereafter she had repeated sexual intercourses with the accused while her consent to the accused sexually accessing her, having been induced by an allurement of marriage proffered to her by the accused or her consent to the sexual overtures of the accused emanating from pretext of marriage preferred to her by the accused, yet, even when the initial sexual encounter inter se the accused and the prosecutrix which occurred in the month of June, 1998, did not sequel hers conceiving within a month thereafter, hence the sexual encounters inter se her and the accused subsequent thereto are to be concluded to have sequeled hers conceiving in November, 1998. In aftermath, with the accused having not stood to his purported commitment to the prosecutrix of his marrying her, on score whereof he induced her to permit him to sexually access her in the month of June, 1998, the relenting by the prosecutrix to his subsequently sexually accessing her and such sexual accesses being under the purported pretext of marriage cannot find countenance with this Court, especially when with the accused having not stood by his commitment nor adhered to his promise to marry her on which allurement he coaxed the prosecutrix to succumb to his initial sexual overture, the prosecutrix thereafter too having succumbed to his sexual overtures, cannot render her subsequent succumbings to the sexual overtures of the accused to be under the pretext of or allurement of marriage proffered to her by the accused. The effect of pretext of marriage or allurement of marriage whereunder she initially succumbed to the sexual overtures of the accused stood ground till the initial sexual encounter. However, when the promise of marriage or pretext of marriage whereunder she initially succumbed to the sexual overtures of the accused did not come to be adhered to by the accused, hers thereafter succumbing to the sexual overtures of the accused cannot be construed to be under any impression of allurement of or pretext of marriage proffered by the accused to her. In other words, the effect of allurement of or pretext of marriage proffered by the accused to the prosecutrix remained awakened or alive only till the initial sexual encounter inter se the prosecutrix and the accused, obviously, the subsequent relenting by the prosecutrix to the sexual overtures of the accused cannot be construed to be under any impression of allurements of or pretexts of marriage proffered by the accused to the prosecutrix rather in the accused sexually accessing the prosecutrix subsequent to the initial sexual encounter inter se them, is to be concluded to be bereft of any impression of allurement of marriage purportedly proffered by the accused to the prosecutrix, besides an inference which is garnerable is that in the accused sexually accessing the prosecutrix subsequent to the initial sexual encounter inter se them was without any tinge, trace or element of pretextuality or of allurement of marriage, more so when the effect thereof given her repeated sexual indulgences with the accused stood subsided as well as waned. Contrarily, this Court is constrained to conclude with invincibility that the relenting by the prosecutrix to the sexual

overtures of the accused subsequent to the initial sexual encounter inter se her and the accused were wholly consensual bereft of any impression of pretext or of allurement of marriage purportedly proffered by the accused to her, whereunder she purportedly succumbed to the accused sexually accessing her.

12. With a conclusion having been drawn by this Court that the story propounded by the prosecutrix in her relevant and admissible statement comprised in Ex.PW16/A qua hers having succumbed to the sexual overtures of the accused under pretext of marriage is bereft of credibility, the impact and effect of the deposition of the prosecutrix comprised in Ex.PW16/A wherein she has disclosed that the protuberance of her stomach was noticeable in the 5th month since November, 1998, as such, while reckoning from the month of November, 1998, whe she had conceived a child in her womb, a period of five months thereafter, when a bulge/protuberance in her stomach was immediately noticeable on the growth of the fetus in her womb, inasmuch as in the month of March, 1999, yet when at that stage too she remained reticent qua the accused having under pretext of or of allurement of marriage sexually accessed her and his having fathered the child carried by her in her womb, is that it with aplomb fosters an apt conclusion that the sexual encounters inter se the prosecutrix and the accused were neither forcible nor under the pretext of or of allurement of marriage rather were wholly consensual. The disclosure qua the incident by the prosecutrix to her family members was made on 10.07.1999 whereas the bulge in her stomach personifactory of the fact of hers carrying a pregnancy was even noticeable in the month of March, 1999, at which earlier stage, the prosecutrix neither named the accused to be the person who had sexually accessed her nor urged her parents to urge the family members of the accused to apprise them of the factum that she was carrying in her womb a child reared by the accused hence they accept her as the wife of the accused, rather belatedly on 10.07.1999, the prosecutrix as well as her family members took to approach the family members of the accused for apprising them qua the fact that the fetus carried by the prosecutrix in her womb was nurtured or reared from the loins of the accused and that the latter marry her. The family members of the accused, as deposed by PW-1, PW-2 and PW-3, abused and hurled invectives at them when the latter apprised them about the prosecutrix carrying in her womb a fetus nurtured from the loins of the accused. The evidence of the parents of the family members of the prosecutrix, who deposed as PW-1, PW-2 and PW-3 qua the family members of the accused having, when apprised by the aforesaid of the fact of the prosecutrix carrying in her womb a foetus fathered by the accused, hurled invectives at them, is of no avail to the prosecution to contend that the sexual encounters inter se the prosecutrix and the accused which purportedly sequeled the prosecutrix carrying in her womb a child purportedly fathered by the accused were anvilled upon a pretext of or of allurement of marriage, proffered by the accused to her when otherwise the reasons which have been assigned hereinabove given the repeated indulgence by the prosecutrix in sexual intercourses with the accused, the espousal by her of the entire sequence of sexual intercourses to which she was subjected to, by the accused commencing from the initial to the last being spurred by pretext of or of allurement of marriage proffered to her by the accused, suffers effacement.

13. The nuance or the underlying current of the aforesaid discussion is that the purported penal mis-demeanor attributed to the accused by the prosecutrix which occurred in the month of June, 1998 which mis-demeanors were successively repeated thereafter having remained not reported by the prosecutrix or her family members to the police station concerned either in November, 1998 when she conceived a child in her womb nor in the month of March, 1999 when there was a noticeable protuberance in her stomach conveying the growth of a fetus in her womb, rather when the incident/incidents came to be reported

only after the family members of the accused repulsed the offer of the parents of the prosecutrix to accept her as the wife of the accused or as their daughter-in-law, begets an inference that the attribution of penal mis-demeanors to the accused by the prosecutrix in Ex.PW3/A, besides in Ex.PW16/A is spurred by afterthought, hence acquiring the vice of concoction and invention rendering the versions in both to be untrustworthy and unreliable for concluding thereupon the guilt of the accused.

14. The accused had refused to give his blood for DNA test for facilitating formation of an opinion by the FSL concerned qua the paternity of the child delivered by the prosecutrix on 11.08.1999. Even for the accused having not given his blood for carrying out an apposite DNA test for determination of the paternity of the child delivered by the prosecutrix on 11.08.1999 and purportedly fathered by him may give leverage to an inference that he did father the child carried in the womb of the prosecutrix, nonetheless, even when the aforesaid inference for the reasons aforesaid may be formable against the accused, yet the forming of the conclusion aforesaid would not to the considered mind of this Court constitute evidence that the sexual intercourses, if any, which occurred inter se the accused and the prosecutrix were forcible or under the pretext of or of allurement of marriage proffered by the accused to her rather the portrayal by the aforesaid discussion bed-rocked on a whole some appraisal of the apposite evidence comprised in the deposition of the prosecutrix in Ex.PW16/A, is given the factum of the prosecutrix having arrived at the age of consent she permitted the accused to sexually access her without any duress or compulsion having been exercised upon her by the accused nor also without any trace, element or tinge of allurement or of pretext of marriage having been proffered to her by the accused.

15. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

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

****

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

State of Himachal Pradesh .....Appellant.
Versus
Kamal Swarup .....Respondent.

Cr. Appeal No. 333 of 2010.
Reserved on: 04.09.2015.
Date of Decision: 16th September, 2015.

Indian Penal Code, 1860- Sections 302, 364, 201 - **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989-** Section 3(2)(v)(vi)- Deceased was found

missing from her home and could not be found- earlier deceased had registered a rape case against the accused – father of the deceased suspected the involvement of the accused- subsequently, her dead body was found- dogs squad was called which led the police to the house of the accused- two bottles of thyodine were recovered at the instance of the accused- Medical Officer found that cause of death was strangulation with Dhatu- father of the deceased had detected dead body – an inference can be drawn that he in collusion with I.O. had tied Dhatu around the neck of the deceased- the fact that bottles of poison were recovered by the I.O shows that he had no idea regarding the cause of death- testimony of sister of the deceased that she had seen the accused in the company of the deceased was not believable as she had not narrated the incident to any person- extra judicial confession made by the accused was also not proved satisfactorily- mere motive is not sufficient to implicate the accused- held, that accused was rightly acquitted by the trial Court.

(Para- 11 to 19)

For the Appellant: Mr. Ramesh Thakur, Assistant Advocate General.

For the Respondent: Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj K. Vashisht, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed by the State of H.P. against the judgment of the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahar, H.P. rendered on 21.12.2009 in Sessions Trial No. 3 of 2004, whereby, the learned trial Court acquitted the accused/respondent of the charge of his having allegedly committed offences punishable under Sections 302, 364, 201 of the Indian Penal Code and Section 3(2)(v)(vi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

2. Briefly stated the facts of the prosecution case are that on 31.12.2002, complainant Daulat Ram reported the matter in the Police Station, Rampur which was incorporated into daily diary disclosing therein that he had 3 sons and 5 daughters and Roshani Devi being youngest daughter, who had been sitting in her room on 29.12.2002 at about 6.00 p.m. and when at about 8.00 p.m., she was called for taking her meal then she was found missing from her room. Despite efforts to trace her by the family members in and outside the house, she could not be traced and thereafter even in the relations she was not found anywhere. The description of the missing daughter by Daulat Ram was given to the police. Thereafter when the daughter of Daulat Ram could not be traced thereafter on 7.1.2003, Daulat Ram made a written complaint to Incharge, Police Station, Rampur for registration of FIR further disclosing therein that his youngest daughter Roshani Devi on 29.12.2002 after performing her household affairs at about 6 p.m., she went towards water source (Bowari) and the family members thought that she might be sitting in her room as she was not to come over in the kitchen because of her menstruation period and when at about 8 p.m., the food was ready and Roshani Devi was called from her room then it was found that she was not there in the room and thereafter every effort was made to trace Roshani Devi in the village and in the relations but she could not be traced and thereafter the matter was reported to the police Station on 31.12.2002 about her missing. Despite efforts to trace her, she could not be traced and Daulat Ram suspected in his written complaint that since his daughter had registered a rape case against Kamal Swarup in Police Station, Rampur and in that case the date has been fixed from 6.01.2003 to 8.1.2003 for the recording of the evidence of the prosecution witnesses and she was to give her

evidence before the Court on 6.1.2003 but she did not appear in the Court for her evidence and in addition to the rape case she had also filed a maintenance petition before the Court in which the Court had awarded maintenance at the rate of Rs.500/- per month vide order dated 14.11.2002 in favour of Roshani Devi and her son Akshay Kumar. Shri Daulat Ram father of Roshani Devi further suspected in his written complaint that Kamal Swarup had taken away his daughter Roshani Devi so as to prevent her from giving evidence before the Court and to Claim further maintenance. He further suspected therein that either his daughter had been murdered or had been forcibly kept behind and thereby prevented her from giving her evidence in Court against Kamal Swarup. Sh. Daulat Ram further claimed in his written complaint that had his daughter gone in the relations somewhere she must had appeared for her evidence before the Court and thereby Sh. Daulat Ram sought legal action against Kamal Swarup. The FIR on the written complaint of Daulat Ram was registered and thereafter accused Kamal Swarup was arrested on 8.1.2003. On 18.1.2003 a telephonic information was received from the complainant Sh. Daulat Ram from village Deothi that the dead body of his missing daughter was found buried in the land and some of the body parts had been taken out by the wild animals including the clothes were lying outside. The police went to the spot and on 19.1.2003, the dead body of Roshani Devi was found in the shape of skeleton in the field in the presence of the witnesses as the police accompanied with Medical Officer, Magistrate and dog squad visited the spot and the dog squad after getting the smell of the dead body of the deceased and her clothes and belongings and thereafter the dog squad led the police party to the door of the kitchen of the accused Kamal Swarup as well as gate to the house of the accused Kamal Swarup. The dead body was found in the shape of skeleton as only the portion of the head and face above the neck was found intact and below neck there was only skeleton on the dead body. The right leg and left arm were missing from the skeleton. There was dhatu/Scarf having two knots over the throat and the dead body was identified by the father of the deceased Roshani Devi to be of Roshani Devi from her face and the clothes of the deceased were found in and around the dead body in the field. The police also found one empty small bottle of Dabur Janam Ghutti lying at some distance from the dead body giving smell of some poisonous substance and the grass over the spot was pressed. The police also recovered and taken into possession one small and some long hair lying on the spot as well as the clothes and the bones were also taken into possession on the spot. The inquest report was prepared on the spot and a team of doctors after observing the condition of the dead body on the spot had sent the dead body for expert opinion and autopsy to Forensic Expert, IGMC , Shimla. The FIR which was initially registered qua the missing of the deceased for an offence under Sections 364 and 365 of the IPC, was converted into an offence under Section 302 of the IPC as well. The accused was arrested on 8.1.2003 and thereafter sent to judicial custody. On 22.1.2003, the police custody of the accused was taken and thereafter the medical exmaination of the accused was sought in which the injuries were observed on the body of the accused. The accused during police custody made disclosure statement to get his store room identified in the ground floor in his house from where he had taken thyodine in a small bottle of Dubur Janam Ghutti and in pursuance thereof two bottles of thyodine were recovered at the instance of the accused. The accused also produced during custody his clothes one sweater, pyjama, one shirt which were put on by the accused on the date of occurrence. The scene of occurrence was also visited by the Forensic Expert who lifted some objects lying on the spot which were sent for examination and further observed the presence of blood stains over the spot and the spot was found to be remained unnoticed if any person remains seated there or in the lying down position taking into consideration its surroundings with the vegetation including trees and further suggested the presence of wild animals including birds etc., on the spot. As per the postmortem report, it appeared to be a

case of homicidal strangulation owing to ligature material i.e. dhatu tied with two knots around the neck of the deceased sequeling antemortem fracture of hyoid bone and thyroid cartilage. The time since death and postmortem of the dead body had been opined around three weeks.

3. On conclusion of the investigation, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the competent Court.

4. The accused was charged by the learned trial Court for his having committed offences punishable under Sections 302, 364, 201 of the Indian Penal Code and under Section 3(2)(v)(vi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. In proof of the prosecution case, the prosecution examined 33 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the trial Court, in which the accused claimed false implication. In defence, he examined three witnesses.

5. The learned trial Court on an appreciation of the evidence on record, returned findings of acquittal in favour of the accused.

6. The State of H.P. is aggrieved by the findings of acquittal recorded by the learned trial Court. The learned Assistant Advocate General appearing for the appellant/State has concertedly and vigorously contended that the findings of acquittal recorded by the learned trial Court are not based on a proper appreciation of evidence on record, rather, they are sequelled by gross mis-appreciation of material on record. Hence, he contends that the findings of acquittal be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction.

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

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

9. Deceased Kumari Roshni Devi had lodged an FIR against the accused/respondent herein in July, 1999 with Police Station, Rampur Bushahr alleging therein the perpetration of forcible sexual intercourse upon her by the accused. The deceased/prosecutrix in sequel to the perpetration of forcible sexual intercourse upon her by the accused/respondent had delivered a male child. It was claimed by her that the male child delivered by her was begotten from the loins of the accused/respondent. She had before the Court of the learned Sub Divisional Judicial Magistrate, Rampur Bushahr filed a petition for maintenance against the accused/respondent. The court of the learned Sub Divisional Judicial Magistrate had awarded to the deceased prosecutrix a sum of Rs.500/- per month as maintenance against the accused/respondent herein. The deceased/prosecutrix was to depose as a witness before the learned Sessions Judge, Kinnaur at Rampur Bushahr, before whom the accused/respondent was facing trial for his having allegedly committed an offence punishable under Section 376 of the IPC. The deposition of the deceased/prosecutrix before the Court of the learned Sessions Judge, Kinnaur at Rampur Bushahr was to be recorded on 06.01.2003. Summons had been issued to her to depose as a prosecution witness before the learned Sessions Judge, Kinnaur at Rampur Bushahr and which summons had come to be served upon the

deceased/prosecutrix about 2-3 days prior to her disappearance. The father of the deceased/prosecutrix PW Daulat Ram given the factum of the deceased prosecutrix being untraceable was constrained to hence on 31.12.2002 lodge a report with Police Station, Rampur Bushahr disclosing therein the factum of his daughter Kumari Roshani Devi being untraceable. The information purveyed by the father of the deceased/prosecutrix to Police Station, Rampur Bushahr on 31.12.2002 stood incorporated in daily diary No. 10, copy whereof is comprised in Ex.PW1/A. Furthermore, when the deceased prosecutrix did not on 06.01.2003 appear before the learned Sessions Judge, Kinnaur at Rampur Bushahr for which date summonses had been served upon her for the recording of her deposition before the Court aforesaid in the Sessions trial which the accused was facing for his having committed an offence punishable under Section 376 of the IPC, prodded the father of the deceased prosecutrix to lodge a written complaint on 7.01.2003 comprised in Ex.PW1/B with the police station concerned. Therein he had reared a suspicion against the accused/respondent qua his having committed the murder of the deceased prosecutrix.

10. PW-15 Smt. Attar Dasi, the mother of deceased Roshani Devi subsequent to the disappearance of the deceased when had in the middle of the January, 2003 proceeded to collect grass in the village, had noticed movement of crows in the field towards the upper side of village Deothi. She proceeded towards the aforesaid field and found clothes of her deceased daughter, thereupon she returned home and informed her husband PW-1 Daulat Ram about the location in the fields of the clothes of her deceased daughter. Subsequently, PW-1, the father of the deceased prosecutrix arrived at the relevant spot along with the villagers and detected the body of the deceased prosecutrix. On the body of the deceased having come to be detected, information was purveyed by PW-1 Daulat Ram to the police station concerned qua its detection. On body of the deceased having stood detected by PW-1 Daulat Ram and information qua the factum of its detection having been purveyed by him to the police agency concerned, led the Investigating Officer to reach the place of its detection besides location. It was taken into possession vide memo Ex.PW10/A. It came to be identified by PW-1 to be the dead body of Roshani Devi. The clothes of the deceased and other articles lying thereon including small bottle were taken into possession vide seizure memos Ex.PW3/H, Ex.PW3/K, Ex.PW3/M, Ex.PW3/N, Ex.PW3/O and Ex.PW3/P, Ex.P-1 to Ex.P-15.

11. On preparation of Ex.PW10/A, PW-9, Dr. Adi Gupta, Medical Officer, CHC, Taklech on 19.01.2003 visited the spot where the body of the deceased was located. He was accompanied by the police, besides by Dr. Padam Dev Sharma, Block Medical Officer, CHC Nankhari. He examined the body of the deceased in the fields at Village Deothi. He deposes that he had observed that clothes were lying scattered about 100 meters from the dead body having some stains and they comprised of salwar red flowerish, kameez red flowerish, jacket white and red, sweater grey and black print, handkerchief reddish flowerish, bra white, socks white and a pair of shoes The body was identified to be of Roshani Devi by PW-1 Daulat Ram, the father of the deceased. He further deposes that the body was lying in the fields over dry grass with head tilted to one side and the whole body was in one piece. He deposes that there were long black hair on the head but the eyes were not in the eye sockets and one of the ear pinna was also missing and the rest of the skin of the face was nearly intact. He has testified that there was a pinkish cloth around the neck with two knots and the skin of the neck was not present and the underlying tissues were visible and there were stains on pinkish cloth around the neck. He testifies that both the arms were missing and there was no skin, soft tissue or organ in the thorasic and abdominal region. The rib cage and the vertebrae column were visible, besides pelvic bone without any soft tissue or organ was also visible. The right leg was present without any skin or soft tissue.

The right foot was missing. The dead body was sent for expert opinion and autopsy. He deposes that the clothes aforesaid and the bottle of some insecticide, as also, the dead body was handed over to the police in a sealed box. PW-8, Dr. Piyush Kapila, Registrar Forensic Medicines, IGMC Shimla conducted the postmortem examination of the dead body on 20.01.2003. He has proved Ex.PW8/A which constitutes the postmortem report prepared by him after his having subjected the dead body to postmortem examination. He in his deposition recorded on oath has also deposed therein that after his receiving the report of the chemical examiner, in his opinion the cause of demise of the deceased is attributable to hers being strangulated with "dhatu" (Ex.P-15). In Ex.PW8/A, he has recorded the hereinafter extracted details which he observed to be existing on the body of the deceased when he subjected it to postmortem examination:-

> "The body was enclosed in a sealed plywood box and was wrapped in a white cloth with no cloth or any other belonging except for a "dhatu" (a kind of scraf which is usually worn over head by females of upper hilly region of Himachal Pradesh) which was present in the neck of the body with two knots on right side. The length of the skeleton from head to styloid process of tibia was 60". Whole body was skeletonized except for Head and upper neck region. There was faint smell of decomposition. No live or dead magoots were present either over the body or in the belongings or wrapping material.
>
> Head.
>
> Long black, scalp hair, noncurly nondyed with black 'Paranda' in situ were present over all of the scalp without any injury. Hair were not easily pluckable. Small pieces of dried leaves and grass were entangled in the tuft of hair. There was no mud or dust present over or entangled in the hair. There was no sand or mud particles in and around mouth. The total circumference of the head was 51 cms. Biparietal diameter of the head was 14 Cms. Maximum length of the skull antero-posteriorly was around 19.4 Cms. Scalp tissue was present without any external or internal injury, no underlying fracture was found. The medial 1/3 of the coronal suture was not having any straightening endo/ecotocranially. Inside the cranial cavity the brain matter has not undergone putrefactive liquefaction and was preserved to a greater extent. No intracranial heaemorrhage was found (some amount of brain was preserved for the purpose of quantitative estimation of any poison if present).
>
> Face.
>
> Skin was normal, dry, mummified, parchmentised, without any breach except for a 5 x 6 cms. Patch of skin not present which is a post mortem injury over chin and underlying mandible was visible. The eye balls were not present in the sockets as being eaten away by vultures. Tip of the nose was shriveled and dried.
>
> Dental formula is given as under:
>
> All permanent teeth present except for third molar which is only present in the upper left quadrant and was impacted and rest all quadrants were not having any third molar making total number of teeth as 29.

Neck.

Ligature material: There was a "Dhatu' pink flowers having clotted blood stains in the neck as ligature made of semisynthetic material present with two knots. The inner circumference of the ligature was around 31 cms. The ligature material was cut away from the knots and cut ends were tied with thread and sealed with one seal of "DKG" knots were preserved as such for exhibit purposes. After opening the knot the maximum length of the Dhatu including knot area was 39 cms. No skin or underlying soft tissue was present. 6 cms long larynx was present with hyoid bone attached at upper end. After blunt dissection an antemortem fracture was found on the junction between middle and distal 1/3 of the left greater cornu of hyoid bone having contusion underlying the muscles. There was antemortem fracture of the left Cornu of the thyroid cartilage with contusion below it. (Both hyoid and thyroid cartilage were preserved for the exhibit purposes). No other tissue was present in the neck except for the vertebrae which were joined with each other with ligaments. No other injury present over neck.

Thorax

No soft tissue or organ was present except for bony thoracic cage. Medial costal ends of the ribs were not present. 8th rib of the right side and 9th rib of left side were not present and were detached near the vertebral ends. No injury except for gnawing marks was present. Both clavicles and scapulae were present attached with each other and medial ends of the scapulae were eaten away by animals. The clavicles were attached to the sternum and medial ends of the clavicles were fused.

Abdomen and Pelvis.

No soft tissue or visceral organs were present. No evidence of any injury was present. All pelvic bones were present in anatomical position except for coccyx which was not present with the help of ligaments. Except for SI all other sacral vertebrae were fused with each other.

Upper Extremity.

25 cms. Long humerous was present over right side attached with ligaments with the glenoid cavity. Lower end of the humerous was not present and was having gnawing marks. No other bone of upper extremity was present.

Lower Extremity.

Right femur, tibia, fibula and patella were present attached with each other in anatomical position with ligaments having gnawing marks. Head of the femur was present on left side and rest was eaten away by animals. No other bone or soft tissue of the lower extremity was present. No other injury was present.

Vertebral Column.

All vertebrae were present in anatomical position with the help of ligaments except for coccyx. There was no injury found over the vertebral column.

Conclusion.

A single, human, female, body with facial architecture preserved. The body belonged to a female as there was face preserved without any moustaches or beard and also because of the pelvic bones having female anatomy. The age of the deceased was around 24 years.

Race.

The facial architecture was preserved and so ethnically the deceased belonged to hilly areas of Himachal Pradesh. Cephalic index is equal to 72 which is consistent with Caucasoid people and matches with people of upper Shimla area.

Stature.

The length of the skeleton from head of styled process of tibia was 60". Adding length of heel and soft tissue in the above length, the living height of the deceased would be around 5 feet and 2 inches+/- 2 inches.

Identification mark.

No peculiar identification mark was found. However, the facial architecture of the faces was preserved and on the basis of the clothes (which were not shown to the undersigned) the relatives of the deceased identified her. One small piece of the bone has been preserved for identification.

Injuries.

Except for antemortem fracture of hyoid bone and thyroid cartilage no other antemortem injury could be appreciated. The extremities were not separated by any sharp weapon and they were having only gnawing marks almost on every bone.

The mean temperature of Deothi area where the body was found in the month of December and January (which were considered as coldest months) near snowline is around 5-10 centigrades, keeping in view facial tissues had undergone mummification, the brain had not undergone putrefactive liquefaction, absence of maggots, it was opined that the time since death and the examination of the body was around 3 weeks. As per post-mortem report Ext.PW-8/A and after receipt of report of Chemical Examiner, this witness has opined that the death of Roshani Devi has been caused with Dhattu (scarf) Ext.P-15 which was found around the neck of the deceased."

12. For providing sustenance to the espousal of the prosecution that the deceased was subjected to homicidal strangulation by the accused by his taking to tie two knots around the neck of the deceased with ligature material "Dhatu" comprised in Ex.P-15, which as deposed by PW-8, begot fracture of hyoid bone and thyroid cartilage, it is

incumbent upon this Court to, with incision and with circumspection analyse the testimony of PW-8 in its entirety and in entwinement with the deposition of PW-9 Dr. Adi Gupta, who on 19.01.2003 had along with the police agency concerned proceeded to the place where the body of the deceased was previously located by PW-1 Daulat Ram, the father of the prosecutrix. An advertence to the testimony of PW-9, who along with the police agency concerned visited the site of occurrence where the body of the deceased was located/detected by PW-1 Daulat Ram, is imperative for discerning therefrom the extent to which the body of the deceased was dismembered arising from its having come to be eaten away, besides gnawed at by wild animals. He therein has recorded a vivid account as reproduced hereinafter qua the extent and the magnitude of dismemberment entailed upon the limbs of the deceased:-

> "Both the arms were missing. There was no skin, soft tissue or organ in the thorasic and abdominal region. The rib cage and the vertebrae column were visible. The pelvic bone without any soft tissue or organ was also visible. The right leg was present without any skin or soft tissue. The right foot was missing."

However, he has been consistent in his deposition in his examination-in-chief as well as in his cross-examination in pronouncing the fact that he had not removed the ligature material "Dhatu", Ex.P-15 with two knots tied around the neck of the dead body. Also PW-8 has deposed that skin and soft tissues were present on the neck below the "dhatu". Apparently hence it appears that PW-9 who along with the police agency had visited the site of location/detection by PW-1 of the dead body of Roshani Devi and had then not removed ligature material, Ex.P-15 tied with two knots around the neck of the deceased, as such his deposition qua his having observed both skin as well as soft tissues being present on the neck below the ligature material, is to be tentatively accorded sanctity as such observations made by him may have ensued from his having minimally lifted Ex.P-15 to enable him to gauge the condition of the skin/tissues underneath it, even without his having removed Ex.P-15 tied around the neck of the deceased. Concomitantly tentatively then it has to be held that "dhatu" Ex.P-15 was used as a ligature material to strangulate the deceased. However, before imputing implicit reliance to the deposition of PW-9 and thereupon concluding with firmness that the ligature material aforesaid was used to strangulate her for begetting her demise, it is imperative to bear also in mind, besides not letting unslighted the fact as deposed by PW-8 in his examination-in-chief, while his describing the injuries observed by him to be existing on the body of the deceased, his vividly pronouncing therein the factum of occurrence of fracture of hyoid bone and of thyroid cartilage of the body examined by him, besides his having also bespoken therein the factum of gnawing marks of animals existing on every bone. The factum as observed by him which stand recorded in Ex.PW8/A of ante mortem injuries existing on the body of the deceased and of gnawing marks existing on almost every bone does instantaneously render the testimony of PW-9 of his having not removed the ligature material, Ex.P-15 with two knots tied around the neck of the deceased for discerning on its removal whether the soft skin or tissues under the ligature material were intact or not to be bereft of veracity, necessarily then it cannot constitute unshakable foundation for succoring unimpeachable credence to the opinion of PW-8 that Ex.P-15 begot the fracture of hyoid bone, besides of thyroid cartilage, rather want of its removal therefrom cannot render emanable an unfilinching inference of it being the ligature material or if the inference aforesaid as has emanated from PW-8, it for the reasons to be assigned hereinafter cannot inspire the unbreached confidence of this Court. As a corollary also, it is to be deduced that he did remove the ligature material, Ex.P-15 tied with two knots around the neck of the deceased and has prevaricated while testifying in Court

that he did not do so merely for sustaining the propagation by the prosecution that the fracture of hyoid bone and thyroid cartilage were not begotten by theirs being gnawed at by wild animals, rather by the user thereon of "dhatu" Ex.P15. Enfeeblement in entirety to the espousal by the prosecution of "dhatu" Ex.P-15 having begotten the fracture of hyoid bone, besides of thyroid cartilage is marshaled by the fact as adverted to hereinabove, of PW-8 while describing in Ex.PW8/A the injuries noticed by him on the dead body of the deceased having also divulged therein that he had noticed the existence of gnawing marks almost on every bone. The emanation of the aforesaid disclosure in the deposition of PW-8 entrenchedly underscores the factum of both PW-8 and PW-9 having prevaricated qua the existence of soft skin and tissues below the ligature material merely to give boost to the propagation of the prosecution of the fracture of hyoid bone, besides of thyroid cartilage having been begotten by user of ligature material, Ex.P-15 tied with two knots around the neck of the deceased. For reiteration, such prevarication gets stalled in the face of a candid depiction in the testimony of PW-8 of gnawing marks existing on every bone of the body examined by him which communication therein is to be held to be encompassing even the hyoid bone, besides the thyroid cartilage. Necessarily then, the fracture of hyoid bone and thyroid cartilage is to be held to have occurred on account of theirs having come to be gnawed at by wild animals, more so when the depositions of PW-9 and PW-8 pronounce the factum of dismemberment of vital portions of the body of the deceased having occurred on account of predation thereupon by wild animals.

13. Now in the face of the fact that PW-1 Daulat Ram, the father of the deceased initially located/detected the body of the deceased hence such location by him of the dead body of the deceased subsequently led PW-9 Dr. Adi Gupta to visit along with the police agency the place of its location/detection, besides when PW-9 has been unequivocal in his deposition that the clothes of the deceased were found lying at a distance of about 100 meters from the dead body, it is enigmatic that the ligature material with two knots tied around the neck of the deceased continued to exist, even when the body of the deceased was, after the disappearance of the latter on 29.12.2002 detected more than two weeks thereafter. The enigma or the aforesaid conundrum comes to be resolved when this Court proceeds to conclude given the initial detection or location of the dead body at the instance of PW-1, of his having either prior to the visit of PW-9 along with the police agency to the site concerned, tied it around the neck of the deceased or his having colluded with the Investigating Officer to tie it around the neck of the deceased for portraying that it constitutes the ligature material which begot the fracture of hyoid bone, besides the fracture of the thyroid cartilage. Necessarily then, this Court is constrained to dispel the factum of the ligature material having been used by the accused or it having sequelled the fracture of hyoid bone or of thyroid cartilage. Apart therefrom, the fact that recovery of a vial, Ex.P-1 was effected from the vicinity of the dead body of the deceased by the Investigating Officer under memo Ex.PW3/E purportedly to convey it that it contained poison and was administered by the accused to the deceased, for giving succor to which propagation, the Investigating Officer also proceeded to recover under memo Ex.PW3/K, a bottle of poison, Ex.P-14, contents whereof were disclosed by the accused in his interrogation by the Investigating Officer, to have been poured into a small bottle Ex.P-1 recovered from the vicinity of the dead body of the deceased, which endeavour of the Investigating Officer magnifyingly appears to manifest the fact that the Investigating Officer was clueless of the reason for the demise of the deceased and was contriving a mechanism to ingeniously implicate the accused in the alleged commission of murder of the deceased. More so, when the demise of the deceased has not been underscored by the prosecution to have been sequelled by consumption of poison rather has been attributed to the user of ligature

material by the accused to beget the fracture of hyoid bone of the neck of the deceased, besides the fracture of thyroid cartilage, which reason too as attributed by the prosecution for the demise of the deceased has been for the reasons assigned hereinabove, held to be also not carrying any tenacity. In aftermath, the attribution by the prosecution to the accused of his having used ligature material, Ex.P-15, to beget the fracture of hyoid bone of the neck of the deceased, besides of thyroid cartilage appears to be also a well devised strategem on its part to ingeniously maneuver the implication of the accused.

14. The unfoldment by the aforesaid discussion is that the prosecution has been unable to sustain its plea against the accused of his having tied the ligature material around the neck of the deceased hence begotten the fracture of hyoid bone, besides the fracture of thyroid cartilage, sequelling her demise. With the aforesaid plea of the prosecution getting foundered a vital link in the chain of circumstances against the accused comes to be severed as well as broken.

15. Another link in the chain of circumstances which has been propagated by the prosecution to connote the guilt of the accused is comprised in the testimony of PW-4, Smt. Gauri Devi, the younger sister of deceased Roshani Devi, who has in her deposition comprised in her examination-in-chief proclaimed the factum of hers in the evening of 29.12.2002 having last seen the accused in the company of her deceased sister. The legal efficacy of the above deposition in case stands uneroded would be immense, in concluding qua the guilt of the accused in the commission of the offences for which he was charged and stood tried before the learned trial Court. However, before imputing implicit reliance to the testimony of PW-4 unfolding the factum of hers having last seen the accused in the company of the deceased, it is imperative to bear in mind the fact that PW-1 Daulat Ram, the father of the deceased who had proceeded on 31.12.2002 to purvey information to the Police Station concerned qua the factum of his daughter being untraceable, besides qua hers having gone missing, had omitted to divulge to the police authorities concerned the factum of his daughter, PW-4 having last seen the accused in the company of the deceased. Even though daily diary No.10, copy whereof is Ex. PW 1/A came to be recorded by the police agency concerned on communication to it, by the father of the deceased qua the factum of the deceased having gone missing or hers being untraceable, yet it omits to divulge therein the factum of PW-4 having last seen the former in the company of the accused, necessarily then the apt inference is that at the stage of recording of PW1/A on 31.12.2002 by the police agency concerned at the instance of the father of the deceased, the latter was unaware of the factum of PW-4 having last seen the accused in the company of the deceased. However, his unawareness qua the factum of PW-4 as deposed by her in Court of hers having last seen the accused in the company of the deceased and his omitting to disclose it to the police agency concerned on 31.12.2002 which sequeled the scribing of Ex.PW1/A by it wherein there is an omission of narration of PW-4 having last seen the accused in the company of the deceased would be explicable, besides would also render the deposition in Court of PW-4 qua hers having last seen the accused in the company of the deceased, in the event of a wholesome analysis of her deposition comprised in her examination-in-chief and cross-examination omitting to both unearth the factum of there being no disclosure by her to her father on 29.12.2002 of hers having last seen the accused in the company of the deceased, besides there being no emanation on a wholesome reading of her testimony of the fact aforesaid as deposed by her in Court being not either improved or embellished arising from the fact of hers omitting to disclose it earlier to the Investigating Officer at the stage contemporaneous to the recording of her statement under Section 161 of the Cr.P.C. by him, to be ingrained with veracity. A piercing analysis of her testimony unfolds the fact that she had disclosed to her father on 29.12.2002 of the accused having called the deceased. Since

the father of the accused had come to be apprised by PW-4 Gauri Devi of the deceased having proceeded to meet the accused necessarily then the said fact ought to have been transmitted further by PW-1 to the police agency concerned when he on 31.12.2002 proceeded to lodge a report with it qua the missing of his daughter. Its non occurrence therein constrains this Court to conclude that PW-4 is prevaricating qua the fact of hers having disclosed to her father on 29.12.2002 the fact of the deceased on the date aforesaid having proceeded to meet the accused. Apart therefrom PW-4 having deposed the factum of hers having last seen the accused in the company of the deceased on 29.12.2002 only in Court whereas she omitted to divulge the said fact to the Investigating Officer when he recorded her statement under Section 161 of the Cr.P.C. paves way for an inference that the version of PW-4 comprised in her examination-in-chief of hers having last seen on 29.12.2002 the accused in the company of the deceased, is an embellished or an improved version, which hence is ridden with the taint of falsehood. In sequel, no reliance can be placed upon the testimony of PW-4 in hers pronouncing therein the factum of hers having last seen on 29.12.2002 the accused in the company of the deceased. Consequently, another potent link in the chain of circumstances also gets dismembered. What finally shatters the testimony of PW-4 qua the fact as deposed by her in Court of hers having last seen on 29.12.2002 the accused in the company of the deceased stands constituted in the fact that even on 7.01.2003 when the father of PW-4 lodged a report comprised in Ex.PW1/B with the police station concerned, the said fact also does not find occurrence therein rather the narration therein merely portrays the factum of his rearing a suspicion against the accused of his having committed the murder of the deceased.

16. Under Ex.PW2/A, PW-2 Ram Chander recorded a statement before the Sub Divisional Judicial Magistrate, Rampur Bushahr, on 31.01.2003 displaying therein the factum, that on his visiting the house of the accused on 29.12.2002 at about 7.45 p.m., he noticed one injury/scar mark on his face and when he concerted to elicit from him the reason for its occurrence a disclosure was made to him by the accused that he had murdered Kumari Roshani Devi. On the strength of proof lent by PW-2 to Ex.PW2/A recorded at his instance by the Sub Divisional Judicial Magistrate, Rampur Bushahr, on 31.01.2003 and its comprising the purported extra judicial confession made by the accused to PW-2, the prosecution canvasses that the aforesaid constitutes proof of a clinching link in the chain of circumstances for providing sustenance to the prosecution case. However, the existence of one injury/scar mark on the face of the accused as observed by PW-2 on 29.12.2002 when he visited the house of the accused at 7.45 p.m., whose existence thereon prompted him to seek an explanation from the accused qua the reason for its existence, whereupon the accused made the purported extra judicial confession to him which came to be proclaimed by PW-2 under Ex.PW2/A on 30.01.2003 before the Sub Divisional Judicial Magistrate, Rampur Bushahr, is in conflict with the MLC Ex.DW3/A prepared on 8.01.2003 when the accused came to be arrested. With a portrayal in Ex.DW3/A prepared on 8.01.2003 of no injury on the face of the accused existing hence conflicting with, besides in dire contradiction qua the factum as disclosed by PW-2 in Ex.PW2/A of his on 29.12.2002 on his visiting the house of the accused having observed one injury/scar mark on his face, naturally then falsehood is lent to the factum as divulged by PW-2 in Ex.PW2/A of his having on 29.12.2002 at about 7.45 p.m., noticed a facial injury on the person of the accused. The sequeling effect thereof is that when the portrayal in EX.PW2/A of his having on 29.12.2002 visited the house of the accused and his having observed an injury/ a scar mark on his face, is not credible, necessarily when the aforesaid factum loses its creditworthiness or when its credence is breached, the factum of PW-2 having visited the house of the accused on 29.12.2002 at 7.45 p.m. and on his having elicited from him the

reason for the existence of injury/scar mark on his face, sequeled the accused making an extra judicial confession to him qua his having murdered the deceased, is also bereft of any credibility. Amplifyingly, when there exists a graphic display in MLC Ex.PW17/A prepared 22.01.2003 qua the accused, of linear scars on the right side of his head, also gears an inference that the said reflection in Ex.PW17/A conflicts with the reflection in Ex.PW2/A of PW-2 having noticed a scar mark on his face when he visited the house of the accused on 29.12.2002, especially when Ex.PW2/A has been recorded on 31.01.2003, subsequent to the preparation of Ex.PW17/A, with the revelations aforesaid existing therein, it appears that the injuries pronounced in Ex.PW17/A are a sequel to the accused having been tortured in police custody, more so when the prior MLC prepared qua him on his arrest on 18.01.2003 omits to disclose the existence of any injuries on his person, besides with PW-2 having remained reticent since 29.12.2002 till 31.03.2003 qua the factum of the accused having made before him an extra judicial confession qua his role in the murder of Kumari Roshani Devi, accentuates a deduction from this Court that it is a wholly contrived as well as an engineered mechanism to falsely implicate the accused. Consequently, no reliance can be placed upon it, for constraining this Court to conclude that it provides clinching proof of an important link in the chain of circumstances. In aftermath with Ex.PW2/A, proved by PW-2, losing its credibility, another crucial link in the chain of circumstances gets delinked.

17. PW-12 Jivat Ram, in his examination-in-chief has deposed that when he had visited the police station, Rampur Bushahr, he had noticed that the police officials were interrogating the accused, during course whereof, the accused in his presence had made a confession qua his having committed murder of deceased Roshani Devi and his having also administered poison. However, reliance, if any, by the prosecution on the statement of PW-12 is mis-founded, besides stands grounded in the face of the confession aforesaid which the accused made to the police during his interrogation by the latter and which PW-12 over heard, being inadmissible. Consequently, on strength thereof the prosecution cannot succeed in persuading this Court that it constitutes a valid and tenacious piece of evidence for forming thereupon a conclusion qua the guilt of the accused.

18. The accused was facing trial before the learned trial Court for his having perpetrated forcible sexual intercourse upon the deceased. The deceased was to depose as a prosecution witness before the learned trial Court on 6.1.2003, hence, the prosecution contends that to thwart the prosecutrix to depose as a witness, the accused had murdered her. Further it is also canvassed before this Court that hence when the motive stands established, this Court ought to pronounce upon the guilt of the accused. However, even if assuming that the motive nursed by the accused to eliminate the deceased may stand substantiated, nonetheless, even if it stands substantiated, the dismemberment or severance of the afore referred links in the chain of circumstances cannot give any sustenance to the factum of the accused while his carrying in his mind the aforesaid motive his having murdered the deceased. In sequel, the mere carrying of a motive or nursing of a motive by the accused in his mind, is insufficient to sway this Court to conclude that given its mere existence in the mind of the accused can sustain a finding qua the guilt of the accused for the offence for which he stood charged and was subjected to trial, especially when for reiteration the predominant links aforesaid in the chain of circumstances have suffered severance, besides dismemberment. Consequently, this Court find no force in the submission of the prosecution that the mere existence of a motive in the mind of the accused is sufficient to constrain this Court to record findings of conviction against the accused for the offences for which he stood charged and tried by the learned trial Court.

19. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

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

****

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

The Chairman Market Committee and another .....Petitioners.

Versus

Geeta Ram and another .....Respondents.

CWP No.8015 of 2012.
Judgment reserved on : 04.09.2015.
Date of decision: September 16th , 2015.

Constitution of India, 1950- Articles 226 and 227- Award passed by the Industrial Tribunal-cum-Labour Court can be challenged before the High Court in case it is shown that there are manifest errors or the order is contrary to the provisions of the law and the order has been passed without jurisdiction. (Para-8)

Indian Evidence Act, 1872- Section 115- Estoppel- The award was challenged by the petitioner on the ground that workman was a contractual employee and his case was not covered under Industrial Disputes Act- held, record shows that workman had filed original application before the Administrative Tribunal prior to approaching the Industrial Tribunal-cum-Labour Court and it was held by the Administrative Tribunal that matter was covered under the Industrial Disputes Act- this order was never challenged by the petitioner and has attained finality- secondly, a demand notice was also served upon the workman by the petitioner and after failure of conciliation proceedings the matter was referred to Industrial Tribunal-cum-Labour Court- petitioner is now estopped from taking plea that case of the workman is not covered under the Industrial Dispute Act and he is a contractual employee. Petition dismissed. (Para-18)

Industrial Disputes Act, 1947- Section 25(g)- Workman/respondent alleged that he was retrenched by the petitioner despite the fact that he had completed 240 days in a calendar year and person junior to him was retained- reference made to the Tribunal was answered holding that services of respondent were wrongly and illegally terminated without complying with the relevant provisions – tribunal ordered reinstatement of services of the workman with seniority- the award challenged by the petitioner under Articles 226 and 227 of the Constitution of India- held, that material on record clearly established that workman has completed 240 days in a calendar year and workman junior to respondent was still working- the award passed by the Tribunal was based upon proper appreciation of the material- petition liable to the dismissed. (Para-9 to 13)

Cases referred:
Harjinder Singh Vs. Punjab State Warehousing Corporation (2010) 3 SCC 192
K.V.S. Ram Vs. Bangalore Metropolitan Transport Corporation JT 2015 (1) SC 252
Jasmer Singh Vs. State of Haryana and another (2015) 4 SCC 458
Sadhu Ram vs. Delhi Transport Corporation (1983) 4 SCC 156
Queen vs. Commissioners for Special Purposes of Income Tax (t), [1888] 21 QBD 313
Central Bank of India vs. S. Satyam and others, (1996) 5 SCC 419

For the Petitioners : Mr.Navlesh Verma, Advocate.
For the Respondents : Mr.Anuj Gupta, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This petition under Articles 226/227 of the Constitution of India is directed against the award passed by the Industrial Tribunal-cum-Labour Court (for short 'Tribunal') on 24.07.2012.

The facts, in brief, may be noticed.

2. The following reference was sent by the appropriate Government for adjudication to the Tribunal:-

> "Whether the termination of services of Shri Geeta Ram S/o Shri Ram Lal by the (1) Chairman Market Solan, H.P. (2) Secretary, Market Committee Solan, H.P. w.e.f. 1.12.2003 without complying the provisions of the Industrial Disputes Act, 1947, whereas junior to him are retained by the employer as alleged by the workman is proper and justified? If not, what relief and service benefits and amount of compensation the aggrieved workman is entitled to?"

3. The workman (respondent herein) filed a claim petition stating that he was appointed at the first instance by proforma respondent on 01.12.2000 as Chowkidar on contractual basis for one year. He completed more than 240 days and thereafter his services were transferred to petitioners No.1 and 2. In this manner, the workman had completed 240 days in a calendar year when his services came to be illegally retrenched.

4. The petitioners filed reply and opposed the petition on the ground that the provisions of the Industrial Disputes Act (for short the 'Act') were not applicable to the case of the workman since his services were to be governed by the contract.

5. On the basis of the pleadings, the following issues were framed by the Tribunal.

1. Whether the termination of services of Shri Geeta Ram workman by the Chairman Market Committee Solan and Secretary, Market Committee Solan w.e.f. 1.12.2003 without complying the provisions of Industrial Disputes Act, 1947 is proper and justified? OPP.
2. Whether the junior retained by the employer as alleged by the workman is legal and justified? OPP.
3. Relief.

6. On the basis of the pleadings and evidence, the Learned Tribunal held that the services of the workman had been wrongly and illegally terminated without complying with the provisions of the Industrial Disputes Act, 1947. After arriving at such a conclusion, the workman was held entitled for reinstatement in service with seniority and continuity with effect from his date of termination, but without backwages. The award has been challenged by the petitioners on various grounds as taken in the petition.

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

7. At the outset, it may be observed that while adjudicating upon the case of the present kind, this Court is duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and provisions contained in Part IV thereof in general and Articles 38, 39 (a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to subserve the common good and also ensure that the workers get their dues. Once the Labour Court has exercised the discretion judiciously, the High Court can interfere with the award of the Labour Court only if it is vitiated by any fundamental flaws and not otherwise. (refer ***Harjinder Singh Vs. Punjab State Warehousing Corporation (2010) 3 SCC 192, K.V.S. Ram Vs. Bangalore Metropolitan Transport Corporation JT 2015 (1) SC 252, Jasmer Singh Vs. State of Haryana and another (2015) 4 SCC 458.)***

8. It has been the well established principle that industrial adjudication is not merely adjudicating contractual rights based on strict principles of law. The higher courts can interfere against the awards passed by the Labour Courts only if there are manifest errors or the order is contrary to the provisions of law and the order has been passed without jurisdiction and that is the scope of jurisdiction of this Court under Article 226 of the Constitution of India. It was held that the High Court cannot sit on appeal over the findings recorded by the competent tribunal by converting itself into a court of appeal.

9. In a plethora of judgments, while deciding about the jurisdiction of the Hon'ble Supreme Court under Article 226 of the Constitution of India, the Hon'ble Supreme Court has held that in a writ of certiorari, it is not merely an error but it must be something more which must be manifest on the face of the records and that alone gives jurisdiction to interfere with the awards. When once the tribunal having jurisdiction decides the question and comes to a finding of fact, it is certainly not open to the High Court to interfere with such finding of fact by re-appreciation of evidence unless the finding is perverse and the award passed is wholly based on unwarranted evidence. Therefore, one has to see the overall view of the award passed by the Labour Court while dealing with the writ of certiorari.

10. While holding that the jurisdiction of the High Court under Article 226 of the Constitution of India is very wide but while exercising it great care has to be taken, especially in respect of the orders of the tribunals constituted under the special legislation, the Hon'ble Supreme Court in ***Sadhu Ram vs. Delhi Transport Corporation (1983) 4 SCC 156*** has observed as follows:-

> *"3. We are afraid the High Court misdirected itself. The jurisdiction under Art. 226 of the Constitution is truly wide but for that very reason, it has to be exercised with great circumspection. It is not for the High Court to constitute itself into an appellate court over Tribunals constituted under special*

legislations to resolve disputes of a kind qualitatively different from ordinary civil disputes and to readjudicate upon questions of fact decided by those Tribunals. That the questions decided pertain to jurisdictional facts does not entitle the High Court to interfere with the findings on jurisdictional facts which the Tribunal is well competent to decide. Where the circumstances indicate that the Tribunal has snatched at jurisdiction, the High Court may be justified in interfering. But where the Tribunal gets jurisdiction only if a reference is made and it is therefore impossible ever to say that the Tribunal has clutched at jurisdiction, we do not think that it was proper for the High Court to substitute its judgment for that of the Labour Court and hold that the workman had raised no demand with the management. There was a conciliation proceeding, the conciliation had failed and the Conciliation Officer had so reported to the Government. The Government was justified in thinking that there was an industrial dispute and referring it to the Labour Court."

11. By applying the above said broad principles of law laid down categorically, I am not able to see any manifest error in any of the awards passed by the Labour Court. While deciding about the jurisdictional fact and the interference by the higher courts against the orders of the inferior courts or tribunals, Lord Esher, M.R., in an illustrative judgment in ***Queen*** vs. ***Commissioners for Special Purposes of Income Tax (t), [1888] 21 QBD 313*** has made the following remarkable assertion:

"When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by an Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature is establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned that it is an erroneous application of the formula to say that the tribunals cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction. The above said principle of law is an universally acclaimed one."

12. Bearing in mind the aforesaid principles, it would be seen that it was after evaluating the oral and documentary evidence on record that the learned Tribunal passed the award.

13. Workman has stepped into the witness box as PW-1 and has duly proved his case that he had been engaged on 01.12.2000 and thereafter his services were illegally retrenched after 30.11.2003 or with effect from 01.12.2003.

14. Shri Bhanu Sharma, the Secretary, Market Committee, Solan, appeared as a witness and stated that workman was initially engaged by the Market Board where he worked for two years and thereafter transferred to the Market Committee. He did not dispute that the workman had worked for more than 240 days preceding his retrenchment and categorically admitted that one workman named Pat Ram, junior to the workman was still working.

15. In ***Harjinder Singh's* case** (supra), it was held that for attracting the applicability of Section 25G of the Act, the workman is not required to prove that he had worked for a period of 240 days during twelve calendar months preceding the termination of his service and it is sufficient for him to plead and prove that while effecting retrenchment, the employer violated the rule of 'last come first go' without any tangible reason.

16. In decision reported as ***(1996) 5 SCC 419 Central Bank of India vs. S. Satyam and others***, the Hon'ble Supreme Court considered an issue in the context of Section 25H of the Act, which casts a duty upon the employer to give an opportunity to the retrenched workmen to offer themselves for re-employment on a preferential basis. It was argued on behalf of the bank that an offer of re-employment envisaged in Section 25H should be confined only to that category of retrenched workmen who are covered by Section 25F and a restricted meaning should be given to the term 'retrenchment' as defined in Section 2(oo). While rejecting the argument, this Court analysed Section 25F, 25H, Rules 77 and 78 of the Industrial Disputes (Central) Rules, 1957 referred to Section 25G and held:-

> "7. *Section 25H then provides for re-employment of retrenched workmen. It says that when the employer proposes to take into his employ and persons, he shall, in such a manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment, and such retrenched workmen who offer themselves for re-employment shall have preference over other persons. Rules 77 and 78 of the Industrial Disputes (Central) Rules, 1957 prescribe the mode of re-employment. Rule 77 requires maintenance of seniority list of all workmen in a particular category from which retrenchment is contemplated arranged according to seniority of their service in that category and publication of that list. Rule 78 prescribe and mode of re-employment of retrenched workmen. The requirement in Rule 78 is of notice in the manner prescribed to every one of all the retrenched workmen eligible to be considered for re-employment. Shri Pai contends that Rules 77 and 78 are unworkable unless the application of Section 25-H is confined to the category of retrenched workmen to whom Section 25-F applies. We are unable to accept this contention.*
>
> *8. Rule 77 requires the employer to maintain a seniority list of workmen in that particular category from which retrenchment is contemplated arranged according to the seniority of their service. The category of workmen to whom Section 25-F applies is distinct from those to whom it is in applicable. There is no practical difficulty in maintenance of seniority list of workmen with reference to the particular category to which they belong. Rule 77, therefore, does not present any difficulty. Rule 78 speaks of retrenched workmen eligible to be considered for filling the vacancies and here also the distinction based on. The category of workmen-can be maintained because those falling*

in the category of Section 25-F are entitled to be placed higher than those who do not fall in that category. It is no doubt true that persons who have been retrenched after a longer period of service which places them higher in the seniority list are entitled to be considered for re- employment earlier than those placed lower because of a lesser period of service. In this manner a workman falling in the lower category because of not being covered by Section 25-F can claim consideration for re-employment only if an eligible workman above him in the seniority list is not available. Application of Section 25-H to the. Other retrenched workmen not cove-red by Section 25-f does not, in Any manner, prejudice those covered by Section 25-F because the question of consideration of any retrenched workman not covered by Section 25-F would arise only, if and when, no retrenched workman covered by Section 25-F is available for re-employment. There is, thus, no reason to curtail the ordinary meaning of 'retrenched workmen' in Section 25-H because of Rules 77 and 78, even assuming the rules framed- under the Act could have that effect.

9. The plain language of Section 25-H speaks only of re- employment of 'retrenched workmen'. The ordinary meaning of the expression 'retrenched workmen must relate to the wide meaning of 'retrenchment' given in Section 2(oo). Section 25-F also uses the word 'retrenchment' but qualifies it by use of the further words 'workman' who has been in continuous service for not less than one year'. Thus, Section 25-F does not restrict the meaning of retrenchment but qualifies the category of retrenched workmen covered therein by use of the further words workman. Who has been in continuous service for not less than one year. It is clear that Section 25-F applies to the retread a workman who has been in continuous service for not less: one year and not to any workman who has bean in continuous service for less than one year; and it does not restrict or curtail the meaning of retrenchment merely because the provision therein is made only for the retrenchment of a workman who has been in continuous service for not less the one year. Chapter V-A deals with all retrenchments while Section 25-F is confined only to the mode of retrenchment of workmen in continuous service for not less than one year. Section 25-G prescribes the principle for retrenchment and applies ordinarily the principle of 'last come first so' which is not confined only to workmen who have been in continuous service for not less than one year, covered by Section 25-F."

17. Thus, on the perusal of the above decisions, it becomes clear that:

a) The employer may deviate from rule of 'last come first go' enshrined in Section 25G of the Act in cases of lack of efficiency or loss of confidence, etc. on the part of the workman but in such a case the onus will be on the employer to justify such deviation;

b) It is sufficient for a workman to plead and prove that while effecting retrenchment, the employer violated the rule of 'last come first go' without any tangible reason for the purpose of applicability of Section 25G of the Act.

c) Section 25G of the Act prescribes the principle for retrenchment and applies ordinarily the principle of "last come first go" which is not confined only to workmen who have been in continuous service for not less than one year, covered by Section 25F."

18. The learned counsel for the petitioners has vehemently contended that the provisions of the Industrial Disputes Act are not applicable to the instant case as the services of the workman would be governed by the contract of his service. This argument cannot be accepted for the simple reason that admittedly prior to making the reference to the Industrial Tribunal-cum-Labour Court, the respondent herein had filed Original Application No.3523 of 2003 before the Administrative Tribunal, Shimla and as per the decision rendered in the same, it was held that the matter was covered under the Industrial Disputes Act. Admittedly, not only as the said order attained finality, but thereafter the workman even served a demand notice, which was sent to the Labour-cum-Conciliation Officer and after failing of the conciliation, the matter was ultimately referred to the Industrial Tribunal-cum-Labour Court. Admittedly, the petitioners neither challenged the order of reference nor did they ever raise the plea of jurisdiction before the Tribunal.

19. It cannot be disputed that the Industrial Tribunal-cum-Labour Court can only adjudicate upon such like matters only in case the person approaching it is a "workman" as defined under Section 2(s) of the Act. Having said so, the petitioners are clearly estopped from raising such a plea. In addition to above, the learned Tribunal has come to a categorically conclusion that one Pat Ram, who is junior to the workman has been retained while the services of the workman have been dispensed with. Even if, for a moment, it is presumed that the provisions of the Industrial Disputes Act are not applicable, even then this action of the petitioners is in violation to the principle of 'last come first go' and any violation of the aforesaid principle would perse be discriminatory and violative of the Article 14 of the Constitution of India.

20. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

LPA No. 16 of 2012
a/w LPA No. 32 of 2012
Date of order: 17.09.2015

LPA No. 16 of 2012

Dr. (Ms.) Monica Sharma ...Appellant.

Versus

Dr. Y.S. Parmar University of Horticulture & Forestry, Nauni and others ...Respondents.

.....

LPA No. 32 of 2012

Dr. Y.S. Parmar University of Horticulture & Forestry, Nauni ...Appellant.

Versus

Dr. Manica Tomar and others ...Respondents.

Constitution of India, 1950- Article 226- Respondent was appointed as Assistant Professor – her appointment was quashed on the ground that her selection and appointment were arbitrary- petitioner was appointed in her place- petitioner had suffered at the hands of the

University- when a candidate is deprived of the appointment illegally, he is deemed to have been appointed from the date of the denial - direction issued to treat the petitioner to be appointed on regular basis. (Para-7 to 11)

Cases referred:
Sanjay Dhar versus J & K Public Service Commission and another, (2000) 8 Supreme Court Cases 182
Balak Ram versus State of Himachal Pradesh and others, I L R 2014 (VI) HP 338
Hem Chand versus State of H.P. & others, 2014 (3) Him L.R. 1962

LPA No. 16 of 2012

Present: Mr. Dilip Sharma, Senior Advocate, with Mr. Manish Sharma, Advocate, for the appellants.
Ms. Ranjana Parmar, Senior Advocate, with Ms. Komal Kumari, Advocate, for respondent No. 1.
Ms. Jyotsna Rewal Dua, Senior Advocate, with Ms. Shalini Thakur, Advocate, for respondent No. 2.
Mr. M.R. Verma, Advocate, for respondents No. 3 and 4.

LPA No. 32 of 2012

Ms. Ranjana Parmar, Senior Advocate, with Ms. Komal Kumari, Advocate, for the appellant.
Ms. Jyotsna Rewal Dua, Senior Advocate, with Ms. Shalini Thakur, Advocate, for respondent No. 1.
Mr. Dilip Sharma, Senior Advocate, with Mr. Manish Sharma, Advocate, for respondent No. 2.
Mr. M.R. Verma, Advocate, for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Manica Tomar filed a writ petition, being CWP No. 1066 of 2010, questioning the selection and appointment of Monica Sharma as Assistant Professor, Mycology and Plant Pathology, in the Dr. Yashwant Singh Parmar University of Horticulture and Forestry, Solan (for short "University"), on the grounds taken in the writ petition.

2. Learned Single Judge, after examining the pleadings and the law applicable, vide judgment and order, dated 13.01.2012, held that the selection and appointment of Monica Sharma was arbitrary and accordingly, quashed the same with a command to the University to consider the case of Manica Tomar for her appointment to the post of Assistant Professor in the discipline of Mycology and Plant Pathology (for short "the impugned judgment").

3. Monica Sharma questioned the impugned judgment by the medium of LPA No. 16 of 2012 and the University questioned the same by the medium of LPA No. 32 of 2012. Thus, both the LPAs are outcome of the impugned judgment relating to selection made by the University against the post of Assistant Professor in the discipline (supra).

4. Both the LPAs were clubbed and came up for consideration. This Court, after hearing the learned counsel for the parties, vide order, dated 09.04.2015, directed the

University to consider the case of Manica Tomar for her adjustment/ appointment without disturbing the status of Monica Sharma.

5. Ms. Ranjana Parmar, learned Senior Counsel, on 07.05.2015 had sought and was granted two weeks' time to comply with the directions made by this Court and on 28.05.2015, stated at the Bar that the University had issued appointment order in favour of Manica Tomar and also produced copy of the appointment order, dated 26.05.2015 before this Court, which was made part of the file.

6. Ms. Jyotsna Rewal Dua, learned Senior Counsel, stated that the appointment was not in tune with the relief sought in the writ petition and granted by the learned Single Judge, Manica Tomar be permitted to join in terms of the said appointment order with all just exceptions.

7. Manica Tomar was allowed to join with all just exceptions in terms of order, dated 28.05.2015 and learned counsel appearing on her behalf sought permission to file supplementary affidavit, which was filed on 22.06.2015. After perusing the said supplementary affidavit, Ms. Ranjana Parmar, learned Senior Counsel, was asked to seek instructions keeping in view the fact that Manica Tomar has suffered at the hands of the University, has earned judgment in her favour and came to be appointed on contract basis. She is entitled to regular appointment on the same terms as was granted to Monica Sharma with all consequential benefits.

8. The Apex Court in a case titled as **Sanjay Dhar versus J & K Public Service Commission and another,** reported in **(2000) 8 Supreme Court Cases 182,** has dealt with the issue and held that when a candidate is deprived of appointment illegally, he is deemed to have been appointed right from the same date. It is apt to reproduce paras 14 to 16 of the judgment herein:

> *"14. .....As the appellant participated in the process of selection protected by the interim orders of the High Court and was also successful having secured third position in the select list, he could not have been denied appointment. The appellant is, therefore, fully entitled to the relief of his appointment being calculated w.e.f. the same date from which the candidates finding their place in the order of appointments issued pursuant to the select list prepared by the J&K PSC for 1992-93 were appointed and deserves to be assigned notionally a place in seniority consistently with the order of merit assigned by the J&K PSC.*
>
> *(21) We have already noticed the learned Single Judge having directed the appellant to be appointed on the post of Munsif in the event of his name finding place in the select list subject to the outcome of the writ petition which order was modified by the Division Bench in LPA staying the order of the learned Single Judge but at the same time directing one vacancy to be kept reserved. The High Court and the Government of J&K (Law Department) were not justified in bypassing the judicial order of the High Court and making appointments exhausting all available vacancies. The right of the appellant, if otherwise sustainable, cannot be*

allowed to be lost merely because of an appointment having been made wittingly or unwittingly in defiance of the judicial order of the High Court.

16. For the foregoing reasons the appeal is allowed. The judgment under appeal is set aside. It is directed that the appellant shall be deemed to have been appointed along with other appointees under the appointment order dated 6-3-1995 and assigned a place of seniority consistently with his placement in the order of the merit in the select list prepared by J&K PSC and later forwarded to the Law Department. During the course of hearing the learned senior counsel for the appellant made a statement at the Bar that the appellant was interested only in having his seniority reckoned notionally in terms of this order and was not claiming any monetary benefit by way of emoluments for the period for which he would have served in case he would have been appointed by order dated 6-3-1995. We record that statement and direct that the appellant shall be entitled only to the benefit of notional seniority (and not monetary benefits) being given to him by implementing this order. The appeal is disposed of accordingly. The contesting respondents shall pay the appellant costs quantified at Rs. 5,000/-."

9. The same view has been taken by this Court in **LPA No. 170 of 2014,** titled as **Shri Balak Ram versus State of Himachal Pradesh and others,** decided on 19.11.2014.

10. A learned Single Judge of this Court in a case titled as **Hem Chand versus State of H.P. & others,** reported in **2014 (3) Him L.R. 1962,** has also laid down the same principle. It is apt to reproduce paras 3 and 4 of the judgment herein:

"3. Admittedly, the appointment of the petitioner was delayed for no fault of his and came to be appointed only in the year 2009, that too after the intervention of this Court. The result of delayed appointment of the petitioner is that he has been paid less salary and denied the seniority over a long period of time. It has been consistently opined that in case a candidate is wrongly denied appointment for no fault on his part, he cannot be denied appointment from due date and consequential seniority. Reference in this regard can conveniently be made to 1996 (8) SCC 637, Pilla sitaram Patrudu & others vs. Union of India and others, 2000 (8) SCC 182 Sanjay Dhar vs. J&K Public Service Commission & another, 1991 (6) Vol. 76, Services Law Reporter 753, Hawa Singh Sangwan vs. Union of India & others and 1996 (6) vol. 116, Services Law Reporter, 335, Hawa Singh and others vs. The Haryana State Electricity Board. Moreover, it is not the case of the respondents that the petitioner was not recommended to be appointed on 26.6.2004 but the only ground taken is

that it was the Pradhan, Gram Panchayat Sawindhar, Tehsil Karsog, who delayed the appointment of the petitioner. This is the precise reason that the petitioner is entitled for the seniority from the date of offer of appointment, as held by the Division Bench of this Court in similar circumstances, in case titled as Chatter Singh vs. State of H.P. & others, CWP No. 188 of 2012-I:-

"3. No doubt, the petitioner joined duty only on 13.5.2003. But in his favour admittedly there is an order by the Appointing Authority on 8.8.2002 to give appointment, as has been noted by the Tribunal in Annexure P-1, order. It is that order, which has been upheld by the Tribunal and the direction issued by the Tribunal is for implementing the said order. Therefore, for all purposes, the petitioner shall be deemed to be appointed on 8.8.2002, on the date admittedly the petitioner was directed to be appointed by the Sub Divisional Magistrate. However, taking note of the fact that the petitioner has joined duly on 13.5.2003 after the order was issued to him, the entitlement of the petitioner for actual monetary benefit shall be only from 13.5.2003. In order to avoid any ambiguity, it is made clear that the petitioner shall be deemed to be appointed in the post of Gramin Vidya Upasak on 8.8.2002 for all purposes; but from 8.8.2002 to 13.5.2003, the benefits shall only be notional and from 13.5.2003, the petitioner shall be entitled to all monetary benefits."

4. In view of the exposition of the law referred to above, the petitioner is entitled to be treated as having been appointed as a Part Time Water Carrier at Government Primary School Alyas, Gram Panchayat, Sawindhar, Karsog-II, District Mandi from 30.6.2004, pursuant to the recommendation of the Government of H.P., as per order dated 26.6.2004 for the purpose of seniority. However, the entitlement of the petitioner for actual monetary benefits shall be only from 9.6.2009. In order to avoid any ambiguity, it is made clear that the petitioner shall be deemed to be appointed as Part Time Water Carrier from 30.6.2004 for all purposes, but from 30.6.2004 to 9.6.2009, the benefits shall only be notional and w.e.f. 9.6.2009, the petitioner shall be entitled to all monetary benefits."

11. Applying the ratio laid down by the Apex Court and this Court in the judgments (supra), we direct the University to treat the appointment of Manica Tomar on contract basis to be on regular basis with all service benefits without monetary benefits and report compliance within one week.

12. List on **8th October, 2015.**

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Municipal Corporation ...Petitioner.
Versus
Shri Dinesh Kuthiala and others ...Respondents.

COPC No. 365 of 2015
Decided on: 17.09.2015

Contempt of Courts Act, 1971- Section 2(b) - Respondents No. 1 and 2 have committed contempt of the Court's order and no reply to the notice filed- Respondents tendered unconditional apology and threw themselves at the mercy of the Court- similarly, respondent No. 3 also tendered unconditional apology and submitted in writing not to indulge in any such activity in future- unconditional apology accepted and further directions issued. (Para-2 to 6)

For the petitioner: Mr. Hamender Chandel, Advocate.
For the respondents: Mr. Vinay Kuthiala, Senior Advocate, with Mr. Vinay Mehta, Advocate, for respondents No. 1 and 2.
Mr. R.K. Sharma, Senior Advocate, with Mr. Mohan Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The respondents have filed the replies.

2. Respondents No. 1 and 2 have tendered the unconditional apology and have thrown themselves at the mercy of the Court.

3. Respondent No. 3, in para 3 of the preliminary submissions of the reply, has tendered unconditional apology, but has stated that he was not aware of the Court orders.

4. Learned counsel appearing on behalf of respondent No. 3 was asked as to in which capacity, he was appearing before the Court, if respondent No. 3 did not know the Court orders.

5. At this stage, learned counsel appearing on behalf of respondent No. 3 stated at the Bar that the unconditional apology submitted by respondent No. 3 be accepted and he will not indulge in any such activities in future. His statement is taken on record.

6. In the given circumstances, the Rule is dropped and contempt petition is disposed of by providing that the petitioner is at liberty to undertake the process of 'Beat of Drum' so that all the persons/people of the locality will have knowledge of the Court orders. The directions contained in the orders passed by the Court from time to time in CWPIL No. 4 of 2013 be implemented in letter and spirit. Copy **dasti.**

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Union of India & ors. .....Petitioners.

Versus

Shri Balwant Singh Chandel .....Respondent.

CWP No. 1366 of 2008.
Date of decision: 17th September, 2015.

Constitution of India, 1950- Article 226- Administrative Tribunal found that the orders of the Disciplinary and Appellate Authority were not reasoned- Appellate Authority had not given findings whether Disciplinary Authority had followed prescribed procedure or not- Appellate Authority had also not given due consideration to the explanation given by the delinquent- orders were quashed and the consequential benefits were ordered to be extended to the delinquent- no infirmity was pointed out in the orders passed by the Administrative Tribunal- petition dismissed. (Para-4 to 6)

For the petitioners: Mr. Ashok Sharma, ASGI with Mr. Ajay Chauhan, Advocate.
For the respondent : Mr. Dilip Sharma, Senior Advocate with Ms. Nishi Goel, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (*Oral*)

Subject matter of challenge in this writ petition is the judgment and order dated 4.10.2007 made by the Central Administrative Tribunal, Chandigarh (for short 'CAT') in OA No. 695/HP/05, whereby writ petitioners have been directed to examine the case of the respondent for promotion and Annexures A/1 to A/3 stand quashed (for short 'the impugned judgment') on the grounds taken in the writ petition.

2. Respondent has filed the reply.

3. Petitioners have not filed the rejoinder. Thus, the averments contained in the reply have remained un-rebutted.

4. We have examined the impugned judgment made by the CAT. It is apt to produce paras-21, 22, 23, 25 and 26 of the impugned judgment hereunder:

> *"21. Undoubtedly, provision to prefer appeal is provided under rule 27 of the said rules. Therefore, it was obligatory on the part of the Disciplinary Authority to pass a detailed and reasoned order while meeting all the points raised by the applicant in his explanation which we have not found in the impugned order dated 21.12.04 (A/2). Similarly, the order of the Appellate Authority lacks reasons on the same ground as has been pointed out by us in preceding para with regard to order passed by Disciplinary Authority. Clause (2) of Rule 27 provides as to what should be the consideration of the Appellate authority while deciding the appeal of the delinquent. This rule lays down as under:-*

"(2) In the case of an appeal against an order imposing any of the penalties specified in Rule 11 or enhancing any penalty imposed under the said rules, the appellate authority shall consider-

(a) Whether the procedure laid down in these rules has been complied with and if not, whether such non-compliance has resulted in the violation of any provisions of the Constitution of India or in the failure of justice;

(b) Whether the findings of the disciplinary authority are warranted by the evidence on the record; and

(c) Whether the penalty or the enhanced penalty imposed is adequate, inadequate or severe."

22. As is seen from the order of the Appellate Authority, he has not given finding whether Disciplinary Authority has followed the prescribed procedure or not and has not discussed other points to be decided. Appellate Authority has also failed to give due consideration to the explanation given by the applicant in his grounds of appeal vide Annexure A/3 wherein he has also pointed out his supersession on 3.1.05 and his juniors were promoted as AO. The appellate Authority has not whispered a single word as to why his promotion was withheld. Therefore, in our view, this order was non speaking and contravenes the provisions of Rule 27. He has not even satisfied himself that the penalty imposed on the applicant was adequate.

23. We further find force in the arguments raised by the learned counsel for the applicant that in such like cases where allegations are to be proved, oral or documentary evidence is required and once the delinquent has made his explanation, it was required that regular departmental enquiry should have been conducted. We have also not found any document on record with regard to satisfaction of the Disciplinary Authority with reasons while he proceeded against the applicant for imposition of minor penalty without resorting to regular departmental proceedings against the applicant. So far as plea of the applicant with regard to withholding of his promotion for the year 2005 is concerned, in view of judgment of Hon'ble Supreme Court in the case of ***Union of India Vs. K.V. Jankiraman,*** *AIR 1991 SUPREME COURT 2010, were are of the view that respondents were not right in deferring the case of the applicant for promotion without assigning reasons not to keep it in sealed cover in view of pendency of charges against the applicant. It was rather incumbent upon them to keep the case of promotion of the applicant in a sealed cover. Para 6 of the judgment rendered in K.V. Jankiraman (supra) is relevant to be quoted and reads as under:-*

> *"From the materials on the record, it cannot be determined as to who considered the appeal*

> *addressed to the State Government, and what was considered by the authority exercising power on behalf of the State Government. The practice of the executive authority dismissing statutory appeals against orders which prima facie seriously prejudice the rights of the aggrieved party without giving reasons is a negation of the rule of law. This court had occasion to protest against this practice in several decision.....The power of the District Magistrate was quasi-judicial: exercise of the power of the State Govt. was subject to the supervisory power of the High Court under Art. 227 of the Constitution and of the appellate power of this Court under Article 136 of the Constitution. The High Court and this Court would be placed under a great disadvantage if no reasons are given, and the appeal is dismissed without recording and communicating any reasons."*
>
> *25. Be that as it may, now keeping in view that we have held that the charges leveled against the applicant were vague and not specific and the orders passed by the Disciplinary Authority and Appellate Authority are not supported with reasons and are non speaking orders, this issue raised by the parties has become redundant at this stage.*
>
> *26. Resultantly, after careful consideration of the matter as discussed above, we quash the impugned orders Annexures A/1, A/2 and A/3 while giving further directions to the respondents to extend all consequential benefits to the applicant as a result of quashing of these orders including consideration of his promotion, if otherwise found eligible. Needful be done within a period of three months from the date of receipt of copy of this order."*

5. Learned counsel for the petitioners was asked to show how the impugned judgment is bad and whether the petitioners had done the needful as required in terms of the procedure and law applicable, as pointed out in the impugned judgment. He has failed to carve out a case. However, we have gone through the pleadings. The writ petitioners have not made out the case for interference.

6. The writ petitioners have to examine the case of the respondent for the grant of promotion. Thus, it is for them to make decision.

7. Viewed thus, we find no merit in the writ petition. Accordingly, the same is dismissed and the impugned judgment is upheld.

8. Pending application(s), if any, also stands dismissed.

****

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

Anupam Gupta .....Petitioner.
Versus
Dharmender Gupta .....Respondent.

CMPMO No.129 of 2015.
Date of decision: 18.09.2015.

Code of Civil Procedure, 1908- Section 24-Proceedings under Section 25 of Guardian and Award Act, 1890 pending in the Court of Civil Judge (Sr. Division) Kasauli- petitioner/wife, a resident of Tehsil Nurpur, District Kangra prayed for transfer of proceedings from Kasauli to District Kangra at Dharamshala on the ground of inconvenience, insufficiency of means and other practical difficulties making it difficult to her to attend the Court at Kasauli- held, that in case where wife seeks transfer of the petition, her convenience must be looked into- taking into account the convenience of the wife, proceedings ordered to be transferred to Civil Judge, Kangra at Dharamshala. (Para-5 to 12)

Cases referred:
Sumita Singh versus Kumar Sanjay and another (2001) 10 SCC 41
Soma Choudhury versus Gourab Choudhaury (2004) 13 SCC 462
Rajani Kishor Pardeshi versus Kishor Babulal Pardeshi (2005) 12 SCC 237
Kulwinder Kaur alias Kulwinder Gurcharan Singh versus Kandi Friends Education Trust and others (2008) 3 SCC 659
Arti Rani alias Pinki Devi and another versus Dharmendra Kumar Gupta (2008) 9 SCC 353
Anjali Ashok Sadhwani versus Ashok Kishinchand Sadhwani AIR 2009 SC 1374

For the Petitioner : Ms.Megha Kapur Gautam, Advocate.
For the Respondent : Mr.M.L.Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

This petition under Section 24 of the Civil Procedure Code readwith Article 227 of the Constitution of India has been filed by the petitioner for transfer of the proceedings pending before the learned Civil Judge (Senior Division), Kasauli, District Solan, under Section 25 of the Guardians and Wards Act, 1890, (for short the 'Act') to the Court of learned Civil Judge, Nurpur, District Kangra.

2. The petitioner is a resident of Tehsil Nurpur and was married to respondent on 04.11.2008. But, on account of matrimonial differences, the parties are not only living separately, but are also involved in several litigations. The respondent has instituted proceedings under Section 25 of the Act, giving rise to the instant petition and apart therefrom there was one petition under Section 13 of the Hindu Marriage Act between the parties which has since been ordered to be transferred by this Court from the Court of learned District Judge, Solan to the Court of learned District Judge, Kangra at Dharamshala.

3. Petitioner has sought transfer of proceedings on the grounds of inconvenience, insufficiency of means, compulsive litigation and on the ground that she has to look after three year old child, making it difficult for her to attend the Court at Kasauli.

4. The respondent has though not filed any reply to this petition, but has vehemently argued that mere inconvenience of a party cannot be a ground to transfer the proceedings.

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

5. Ms. Megha Kapur Gautam, learned counsel for the petitioner, has strenuously argued that in matrimonial proceedings and other proceedings which are outcome of matrimonial discord (like the instant petition filed under the Guardians and Wards Act), it is the convenience of the wife which has to be looked at. In support of her contentions, strong reliance has been placed upon the judgments of the Hon'ble Supreme Court in ***Sumita Singh*** *versus* ***Kumar Sanjay and another (2001) 10 SCC 41, Soma Choudhury*** *versus* ***Gourab Choudhaury (2004) 13 SCC 462, Rajani Kishor Pardeshi*** *versus* ***Kishor Babulal Pardeshi (2005) 12 SCC 237, Kulwinder Kaur alias Kulwinder Gurcharan Singh*** *versus* ***Kandi Friends Education Trust and others (2008) 3 SCC 659, Arti Rani alias Pinki Devi and another*** *versus* ***Dharmendra Kumar Gupta (2008) 9 SCC 353 and Anjali Ashok Sadhwani*** *versus* ***Ashok Kishinchand Sadhwani AIR 2009 SC 1374.***

6. In ***Sumita Singh*** *versus* ***Kumar Sanjay and another (2001) 10 SCC 41,*** it was held by the Hon'ble Supreme Court that in a case where the wife seeks transfer of the petition, then as against husband's convenience, it is the wife's convenience which must be looked at.

7. In ***Soma Choudhury*** *versus* ***Gourab Choudhaury (2004) 13 SCC 462,*** it was held by the Hon'ble Supreme Court that once the wife alleges that she has no source of income whatsoever and was entirely dependent upon his father, who was a retired government servant, then it was the convenience of the wife which was required to be looked into and not that of the husband, who had pleaded a threat to his life. It was further observed that if the respondent therein had any threat to his life, he could take police help by making an appropriate application to this effect.

8. In ***Rajani Kishor Pardeshi*** *versus* ***Kishor Babulal Pardeshi (2005) 12 SCC 237,*** in a case seeking transfer of the case at the instance of the wife, it was specifically held by the Hon'ble Supreme Court that convenience of wife was the prime consideration.

9. Similarly, while dealing with the application for transfer of proceedings in ***Kulwinder Kaur alias Kulwinder Gurcharan Singh*** *versus* ***Kandi Friends Education Trust and others (2008) 3 SCC 659***, the Hon'ble Supreme Court after analyzing the provisions of Sections 24 and 25 of the Code of Civil Procedure laid down certain broad parameters for transfer of cases and it was held:-

> "23. Reading Sections 24 and 25 of the Code together and keeping in view various judicial pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by Courts. They are balance of convenience or inconvenience to the plaintiff or the defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues

raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; "interest of justice" demanding for transfer of suit, appeal or other proceeding, etc. Above are some of the instances which are germane in considering the question of transfer of a suit, appeal or other proceeding. They are, however, illustrative in nature and by no means be treated as exhaustive. If on the above or other relevant considerations, the Court feels that the plaintiff or the defendant is not likely to have a "fair trial" in the Court from which he seeks to transfer a case, it is not only the power, but the duty of the Court to make such order."

10. In ***Arti Rani alias Pinki Devi and another*** *versus* ***Dharmendra Kumar Gupta (2008) 9 SCC 353***, the Hon'ble Supreme Court was dealing with a case where the wife had sought transfer of proceedings on the ground that she was having a minor child and it was difficult for her to attend the Court at Palamu, Daltonganj, which was in the State of Jharkhand and at a quite distance from Patna where she was now residing with her child. Taking into consideration the convenience of the wife, the proceedings were ordered to be transferred.

11. Similarly, in ***Anjali Ashok Sadhwani*** *versus* ***Ashok Kishinchand Sadhwani AIR 2009 SC 1374***, the wife had sought transfer of the case to Bombay from Indore in Madhya Pradesh on the ground of inconvenience as there was none in her family to escort her to Indore and on this ground the proceedings were ordered to be transferred.

12. From the conspectus of the aforesaid judgments the broad consensus that emerges is that in dispute of the present kind where the petitioner is residing with her father alongwith her three year old minor child, it is the convenience of the petitioner which is required to be considered over and above the inconvenience of the husband.

13. But then once the petitioner and the husband are attending the proceedings under Section 13 of Hindu Marriage Act pursuant to directions to this effect by this Court at Dharamshala, then does it mean that the proceedings should be transferred to Nurpur and not Dharamshala where the parties are already litigating only because the petitioner is residing at Nurpur. The answer to this is definitely in the negative for the simple reason that here even the inconvenience of the respondent will have to be taken into consideration.

14. In view of the aforesaid discussion, the present petition is partly allowed and the proceedings pending before the learned Civil Judge (Senior Division), Kasauli, District Solan, H.P. under Section 25 of the Guardians and Wards Act, 1890, titled Dharmender Gupta versus Anupam Gupta, are ordered to be transferred to the Court of learned Civil Judge, Kangra at Dharamshala. The parties through their counsel(s) are directed to appear before the learned Civil Judge (Junior Division), Kangra at Dharamshala, on **26.10.2015.** Pending application, if any, also stands disposed of.

****

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

FAO Nos.425, 486 & 504 of 2008
Date of decision: 18.09.2015

1.	**FAO No.425 of 2008**	
	Himachal Raod Transport Corporation	.....Appellant
	Versus	
	Banti Devi & others	.....Respondents
2.	**FAO No.486 of 2008**	
	Prem Lal	.....Appellant
	Versus	
	Banti Devi and others	.....Respondents
3.	**FAO No.504 of 2008**	
	Banti Devi & Others	.....Appellants
	Versus	
	The Managing Director, HRTC and others	..... Respondents

Motor Vehicles Act, 1988- Section 173- HRTC and the claimant had challenged the award on the ground of adequacy and the driver of private bus had challenged the award on the ground that he was not negligent and was wrongly saddled with the liability – drivers of both the buses admitted in the pleadings that deceased was crushed in between two buses- this admission proved their rashness and negligence- salary of deceased was Rs.18,000/- per month- 1/3rd amount was rightly deducted towards personal expenses- awarded amount has rightly been calculated by the Tribunal- appeal without merits and dismissed.

(Para-3 to 9)

Presence for the parties

Mr.G.D. Sharma, Advocate, for the claimants.
Mr.J.L. Bhardwaj, Advocate, for Gopal, Driver.
Mr.D.S. Nainta, Advocate, for Prem lal, Driver.
Mr.Rohit Bharoll and Mr.Nishant Kumar, Advocates, for the HRTC.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

These appeals are the outcome of award, dated 7th June, 2008, passed by Motor Accident Claims Tribunal, Shimla, (for short, the Tribunal), in Claim Petition No.22-S/2 of 2006, titled Banti Devi and others vs. Managing Director, HRTC and others, whereby compensation to the tune of Rs.8,85,000/-, with interest at the rate of 7.5%, from the date of filing of the Claim Petition till realization, was awarded in favour of the claimants and the Himachal Road Transport Corporation, (for short, the HRTC), being the owner of bus No.HP-07-3029, and respondent No.3, who was the driver of bus bearing No.HP-11-9902, were jointly saddled with the liability, (for short, the impugned award).

2. Since all the appeals arise out of one award, therefore, the same are taken up together for final disposal.

3. Precisely, in FAO Nos.425 of 2008 and 504 of 2008, the HRTC and the Claimants, respectively, have questioned the impugned award on the ground of adequacy of

compensation, while the driver of the private bus has challenged the impugned award by way of FAO No.486 of 2008 on the ground that he was not negligent and has been wrongly saddled with the liability.

4. The learned counsel appearing for the HRTC submitted that he is under instructions not to question the impugned award on any other ground, except on the ground of adequacy of compensation. His statement is taken on record. The learned counsel for the claimants submitted that the amount awarded by the Tribunal is on the lower side and the same needs to be enhanced accordingly.

5. Thus, in FAO No.425 of 2008 and FAO No.504 of 2008, the question needs to be determined is – Whether the amount awarded by the Tribunal is adequate or otherwise?

6. Admittedly, the deceased was a government employee and was drawing a salary of Rs.18,874/- per month, as per the salary slip Ext.PW-5/A. The Tribunal, while assessing the loss of dependency, has taken the salary of the deceased as Rs.18,000/- and after deducting 1/3rd amount towards the personal expenses of the deceased, held that the claimants lost source of dependency to the tune of Rs.12,000/- per month. The Tribunal has rightly made discussion in paragraph 26 of the impugned award and I am of the considered view that the said findings are correct and cannot be said to be perverse in any manner. The Tribunal has correctly assessed the loss of source of dependency, therefore, the amount awarded by the Tribunal cannot be said to be either inadequate or excessive in any way.

7. Having said so, the appeals (FAO Nos.425 of 2008 and 504 of 2008), merits to be dismissed.

8. Now, coming to FAO No.486 of 2008, having been filed by the driver of the private bus, bearing No.HP-11-9902, the learned counsel for the appellant argued that the Tribunal has wrongly fastened the liability on the appellant since the appellant has never contributed to the accident in question.

9. I have gone through the Claim Petition, the replies filed to the same and the evidence adduced by the parties before the Tribunal. The driver of the HRTC, namely, Gopal, in paragraph 1 of his reply, and the driver of the private bus, namely, Prem Lal, in paragraphs 2 and 5 of the reply, have specifically admitted that the deceased was crushed in between the two buses, which is admission on their part that the accident had taken place due their negligence. The Tribunal has rightly made discussion in paragraphs 11 to 19 of the impugned award and has rightly held that the accident was on account of contributory negligence on the part of both the drivers.

10. Having said so, no interference is warranted in the impugned award. Accordingly, the appeal filed by the driver Prem Lal, (FAO No.486 of 2008), also merits to be dismissed.

11. In view of the above discussion, there is no merit in all the appeals and the same are dismissed. Consequently, the impugned award is upheld.

12. The Registry is directed to release the amount in favour of the claimants strictly in terms of the impugned award.

****

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

Jai Singh ...Petitioner
Vs.
Manisha ....Respondent.

Cr.MMO No. 239 of 2015
Date of decision: 18.9.2015

Code of Criminal Procedure, 1973- Section 125- **Indian Evidence Act, 1872-** Section 138- husband directed to pay interim maintenance to his wife @ Rs. 3,000/- per month from the date of application- husband showed his inability to pay interim maintenance so awarded by the Court - on refusal of the respondent to pay interim maintenance, Magistrate denied the opportunity to the husband to cross-examine the witnesses produced by his wife and listed case for respondent's evidence- held that the right to cross-examine a witness is a valuable right provided under Section 138 of Indian Evidence Act and cannot be denied to adversary party - arrears of maintenance could be recovered through the ways and means provided in Cr.P.C. itself – under no circumstances the right to cross-examine the witnesses could be closed. (Para-3 and 8)

Cases referred:
Browne Vs Dunn (1893) 6 R 67
Vipul Lakhanpal Vs. Pooja Sharma, 2015 (3) Him.L.R.1529

For the Petitioner : Mr. Ajay Sharma, Advocate.
For the Respondent: Mr.N.K. Thakur, Senior Advocate with Mr.Ramesh Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge: (Oral)

This is rather an unusual case where the right of the petitioner to cross-examine the witnesses of the opposite party has been closed by the order of the Court only because he had stated that he was not in a position to comply with the orders imposing interim maintenance upon him.

The facts, in brief, may be noticed.

2. The petitioner is the husband and was directed to pay interim maintenance of Rs.3000/- per month to the respondent from the date of filing of the present petition, i.e. with effect from 3.10.2013 till the disposal of the main petition in proceedings under Section 125 of the Cr.P.C. It appears that application seeking execution of the aforesaid order and the evidence of the respondent in the main petition was fixed on the same date, i.e. 25.6.2015 when the trial Magistrate passed the following order:

"25.6.2015

Present: As above.

Taken up today vide separate office order. Respondent present today and stated that he can not make the payment to the applicant. Statement recorded separately. Therefore, as the respondent has

refused to make the payment therefore, no opportunity can be granted to him to cross examination the witnesses of the applicant. Hence, be proceed further and case be now listed for RWs and taking steps within 7 days for 14.8.2015."

3. It is not only surprising, but rather shocking as to how the learned Magistrate passed the aforesaid order without taking into consideration that Section 138 of the Evidence Act confers the valuable right of cross-examining the witnesses tendered in evidence by the opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by allowing the witness to be questioned;

1. to test his veracity,
2. to discover who he is and what is his position in life, or
3. to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

4. Lord Herschell LC **in Browne Vs Dunn (1893) 6 R 67** clearly elucidates the principles, underlined those provisions and the same reads thus:

"I *cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses."*

5. It cannot be disputed that in order to assess the veracity of a witness, it is necessary to cross examine him and without cross-examination, a party loses his valuable right. No doubt, the proceedings under Section 125 Cr.PC are not *stricto sensu* 'criminal' yet it is elementary that the ultimate quest in any judicial determination is to arrive at the truth, which is not possible unless the deposition of witnesses goes through the fire of cross-examination. In fact, using a statement of the witnesses without affording the opposite party an opportunity to cross- examination, tantamounts to condemning him unheard.

6. Undoubtedly, so long as the order of maintenance continues to exist, the petitioner cannot avoid the same by claiming that he not in a position to pay the same. This court was confronted with a similar position in case titled **Vipul Lakhanpal** Vs. **Pooja Sharma, (Cr.MMO No.26 of 2015),** decided on 1.6.2015, **2015 (3) Him.L.R.1529**, where too the husband though able-bodied had shown his inability to pay the maintenance amount and this court has held as under:

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

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

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

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

> *"15. .....Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 CrPC, unless disqualified, is an absolute right. While determining the quantum of maintenance, this Court in Jabsir Kaur Sehgal v. District Judge Dehradun & Ors. [JT*
>
> *1997 (7) SC 531: 1997 (7) SCC 7] has held as follows: -*
>
> *"The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed f or the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the a mount so fixed cannot be excessive or extortionate."*
>
> *16. Grant of maintenance to wife has been perceived as a measure of social justice by this Court. In Chaturbhuj v. Sita Bai[JT 2008 (1) SC 78 : 2008 (2) SCC 316], it has been ruled that:-*
>
> *"Section125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Veena Kaushal[1978 (4) SCC 70] falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted*

in Savitaben Somabhai Bhatiya v. State of Gujarat[JT 2005 (3) SC 164]".

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

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

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

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

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

7. Having said so, yet the question still remains as to whether the learned Magistrate could have closed the right of the petitioner to cross-examine the witness only because he had had stated that he could not comply with the order of maintenance. I am afraid, the procedure adopted by the learned Magistrate in passing the impugned order is something totally unknown to law and practice, which not only amounts to denial of fair justice, but also amounts to abuse of power.

8. In case the petitioner had expressed his inability to comply with the order of maintenance, then there are ways and means provided in the Code of Criminal Procedure itself whereby such order could be enforced, but under no circumstances could have the learned Magistrate have closed the right of the petitioner to cross-examine the witnesses of the respondent.

9. In view of the aforesaid discussion, impugned order passed by the learned Magistrate on 25.6.2015 cannot be sustained and is accordingly quashed and set aside. The petitioner is allowed in the aforesaid terms, leaving the parties to bear the costs.

****

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

Kamal Bhardwaj .....Appellant.
Versus
Paramjit and others ...Respondents

FAO (MVA) No. 345 of 2008.
Date of decision: 18th September, 2015

Motor Vehicles Act, 1988- Section 149- Tribunal passed an award and directed the insurer to satisfy the award and to recover the amount from the owner- owner challenged these findings- held, that insurer has not pleaded and proved willful default on the part of the owner- Driving Licence of the driver was also effective- Tribunal, had fallen in error in granting right of recovery- award modified. (Para-5 to 8)

For the appellant: Mr.N.S. Chandel,, Advocate.
For the respondents: Respondents No. 1 to 4 ex parte.
Mr. Sanjeev Kuthiala, Advocate, for respondent No.6.
Mr. Neel Kamal Sharma, Advocate, for respondent No.7.
Mr. Ratish Sharma, 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 judgment and award dated 12.5.2006, made by the Motor Accident Claims Tribunal (II), Una, in MAC Petition No. 28 of 2001, titled Paramjit versus Balwinder Kumar and others, for short "the Tribunal", whereby compensation to the tune of Rs.5,60,000/- was awarded in favour of the claimants, with direction to the insurer to satisfy the same with right of recovery, hereinafter referred to as "the impugned award", for short.

2. Claimants, owner, drivers and insurer have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. Kamal Bhardwaj, one of the owners of Jeep No.HP-35-0803 has questioned the impugned award on the ground that the Tribunal has decided issues No. 4 and 5 in favour of the owner and drivers and against the insurer but has fallen in an error in granting right of recovery to the insurer.

4. The findings returned on other issues are not in dispute and have attained finality. Thus, the only question to be determined in this appeal is whether the Tribunal has rightly granted the right of recovery?

5. Admittedly, Maruti Van is a light motor vehicle. Thus, the Tribunal has rightly decided issues No. 4 and 5 which fact has not been questioned by the insurer and has failed to discharge the onus. Thus, the same has attained finality.

6. It was for the insurer to plead and prove that the owner has committed willful breach. He failed to do so. Even the findings recorded on issues No. 4 and 5 have not been questioned. Thus, the Tribunal was not within its power to grant right of recovery.

7. The learned counsel for the insurer Mr. Ratish Sharma, Advocate stated that the driving licence was not valid. He was asked to reply whether he has questioned the findings recorded, was not able to do so. However, I have gone through the entire record. It appears that both the driving licenses were valid and cannot in any way be said to be ineffective, as rightly discussed by the learned Tribunal. Thus, the Tribunal has fallen in an error in granting right of recovery.

8. Having said so, the impugned award is modified by providing that the insurer is saddled with the liability and has to satisfy the award.

9. Accordingly, impugned award is set aside so far it relates to right of recovery and the appeal is allowed.

10. The Registry is directed to release the amount in favour of the claimants, strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

11. Send down the record, forthwith, after placing a copy of this judgment.

****

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

Karam Chand Sood (deceasde) through his LRs :
Smt. Ram Kumari Sood and others ...Petitioners.

Versus

State of H.P. and another ...Respondents.

CWP No. 8045 of 2012
Date of decision: 18.9.2015

Constitution of India, 1950- Articles 14 and 226- Government of Himachal Pradesh introduced a scheme/policy of free hold for a limited period of one month w.e.f. 15th January to 15th February, 2007 and for six months w.e.f. 15.9.2012 to 14.3.2013 to regularize the ownership of the land- introduction of the schemes for such a short period was not based upon any intelligible differentia and violated article 14 of the Constitution – only few could avail the benefit of those schemes due to shortage of time- petitioner had prayed for issuance of writ of mandamus against the respondent to process and sanction his house plan and also to cause changes in the revenue entries- held, that the schemes were in violation of Article 14- Government directed to re-introduce the schemes on similar line as were introduced earlier in 2007 and 2013 without fixing unreasonable duration of its operation and thereafter to consider the case of the petitioner within three months from the date of the order as per schemes – writ petition disposed of. (Para-2 to 12)

For the Petitioners : Mr. G.C.Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the Respondents : Mr. Shrawan Dogra, Advocate General, with Ms. Meenakshi Sharma and Mr. Rupinder Singh, Additional Advocate Generals and Ms. Parul Negi, Dy. Advocate General, for respondent No.1.
Mr. Hamender Chandel, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (*Oral*)

The facts of the case are that the petitioners and late Sh. Kapil Dev on 18.5.1984 purchased building bearing Khasra No. 12-13 situated at lakkar Bazar, Shimla in an auction conducted in execution of the decree in a Civil Suit No.75/1979 titled Indian Bank vs. Bhagwan Dass and another. After purchase of the building, the petitioners and Kapil Dev are alleged to have purchased the land underneath the building from its owner Sh. Puran Chand and other co-owners vide sale deed dated 14.10.1993 duly registered in the office of the Sub Registrar, Shimla. The petitioners and the successor-in-interest of Kapil Dev submitted the plan for re-building and re-constructing the building on old lines. After claiming full ownership of the land and the building standing thereupon, the petitioners have prayed for the grant of following reliefs:

> *"(a) That a writ of mandamus be issued against the respondent No.1 directing it to change the revenue entries in the name of the petitioner and successor-in-interest of late Shri Kapil Dev in accordance with the Sale Deed Annexure P-2.*
>
> *(b) That a writ of mandamus be also issued to the respondent No.2 to process and sanction plan (Annexure P-5) submitted by the petitioner for reconstruction/re-building of Shop No. 12-13, Lakkar Bazar, Shimla and sanction the same in accordance with law."*

2. Respondent No.2-Municipal Corporation in its reply has not disputed the factual position and has only stated that the building plan submitted by the petitioners was considered from time to time and objections/ observations made thereupon were duly conveyed to the petitioners. The map was lastly returned vide letter dated 15.9.2012 whereafter the petitioners have not submitted any fresh drawings.

3. The respondent-State has filed its reply wherein it is stated that the Government of Himachal Pradesh initially in the year 2006-2007 and thereafter w.e.f. 15.09.2012 to 14.3.2013 had introduced "Freehold Scheme" for cases like the petitioners in which such persons were required to pay certain charges in order to get property free hold and obtain ownership rights of the land, but the petitioners had failed to complete the codal formalities as required under the Scheme and thus were not entitled to the benefit of the Scheme.

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

4. At the outset, it may be observed that this Court is unable to find any legally justifiable object in introducing the Scheme/Policy of Freehold only for a limited period w.e.f. 15th January to 15th February, 2007 i.e. only one month and w.e.f. 15.9.2012 to 14.3.2013 i.e. only six months, which benefit obviously would have only been availed of by a fortunate few. Why the rest of the persons who are similarly situate to those who have already availed of the benefit of freehold have been denied and can otherwise be denied the said benefit is not forthcoming. What, in fact, is the object sought to be achieved by introducing the Scheme of Freehold for a limited period is also not forthcoming?

5. In this background, the seminal question that falls for consideration is whether the time frame as introduced in the Schemes aforesaid in fact has any nexus with the object sought to be achieved.

6. There is a long line of decisions of the Hon'ble Supreme Court that have explained the meaning of equality guaranteed by Article 14 of the Constitution and laid down tests for determining the constitutional validity of a classification in a given case. These pronouncements have by now authoritatively settled that Article 14 prohibits class legislation and not reasonable classification. It is more than settled that a classification passes the test of Article 14 only if:

(i) there is an intelligible differentia between those grouped together and others who are kept out of the group; and

(ii) there exists a nexus between the differentia and the object sought to be achieved by such policy.

At the same time, it must be remembered that the classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out, and those qualities or characteristics must have a reasonable relation to the object sought to be achieved. The differentia which is the basis of classification and the object of the Scheme are distinct things and what is necessary is that there must be a nexus between them.

7. Article 14 of the Constitution of India states that "*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*". Article 14 forbids class-legislation but it does not forbid reasonable classification. The classification however must not be "arbitrary, artificial or evasive" but must be based on some real and substantial bearing, a just and reasonable relation to the object sought to be achieved by the policy. Article 14 applies where equals are treated differently without any reasonable basis. Class legislation is that which makes an improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected from a large number of persons all of whom stand in the same relation to the privilege granted and between those on whom the privilege is conferred and the persons not so favoured, no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privilege.

8. Adverting to the facts, it would be noticed that the policy of Freehold introduced earlier did provide for certain procedural formalities, including payment of certain amount, which amount essentially may not have been readily available with those interested in availing the benefit of the Scheme. That apart, there could be a number of factors and varied reasons which may have prevented similarly situated persons from availing of the benefit of the Scheme because of the limited duration of the same.

9. This Court is unable to comprehend any plausible reason as to how the interest of the respondent-State would in any manner be affected by re-introducing a 'Freehold Scheme' that too without containing any stipulation of a time frame. Admittedly, the introduction of the previous Scheme has not in any manner adversely affected the interest of the State. Therefore, in such circumstances, the restriction of the time frame of the duration in the earlier Schemes was definitely unreasonable as it had no reasonable nexus whatsoever with the object sought to be achieved.

10. Further, this Court is unable to assimilate as to what is the special advantage, right, privilege or anything of the like for the State to keep the properties under its name without making them freehold as has been done previously in the years 2007 and 2012, respectively. Even the respondents have not been able to satisfy me in this regard.

11. Now, therefore, what emerges is that an arbitrary, artificial or evasive classification has been made between the freehold owners of the property who got this benefit only because of the limited duration of the aforesaid Schemes and those occupants who are continuously in possession of the land belonging to the Government like the freehold owners from 1907 onwards. But then there is practically no difference between either of the classes because the freehold holders prior to their depositing the requisite amount in the Government treasury and after completion of certain other formalities, were actually in the same position as that of the petitioners and other similarly situated persons. The action of the State Government in granting benefit of freehold scheme only to few persons on account of the short duration of such schemes, is, therefore, discriminatory and cannot be countenanced.

12. Taking into consideration the entire conspectus of the case, this Court is of the considered opinion that the ends of justice would be subserved in case the respondents are directed to consider the feasibility of re-introducing a Scheme on similar lines as the Schemes that were introduced earlier in the years 2007 and 2012-2013, that too, without fixing any unreasonable duration of its operation as had been done in the earlier Schemes within a period of three months from today and consider the case of the petitioners in accordance with the said Scheme. Ordered accordingly. If for any reason the Scheme is not re-introduced within the aforesaid time frame, then in that event to consider the case of the petitioners in accordance with the Scheme of 2012.

13. Insofar as the building plan of the petitioners are concerned, the same shall be considered by the respondents strictly in accordance with Act, Rules and building bye-laws governing the same and decision thereupon shall be taken and communicated to the petitioners within a period of four months.

The petition is disposed of in the aforesaid terms, so also the pending application(s), if any.

****

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

Laxmi Bhardwaj .....Appellant

Versus

Lalit Kumar and others ..... Respondents

FAO No.281 of 2008

Decided on: 18.09.2015

Motor Vehicles Act, 1988- Section 149- Insurer had challenged the award on the ground that offending vehicle was not insured at the time of accident- no material placed by the appellant to show this fact- held, that the appeal is without merits and dismissed.(Para-5)

For the appellant: Mr.Suneet Goel, Advocate.

For the respondents: Mr.V.S. Chauhan, Advocate, for respondent No.1.
Nemo for respondents No.2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 31st March, 2008, passed by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P., (for short, the

Tribunal), in Claim Petition No.32-MAC/2 of 2005, titled Lalit Kumar vs. Laxmi Bhardwaj and others, whereby compensation to the tune of Rs.1,26,988/-, with interest at the rate of 7.5% per annum from the date of filing of the Claim Petition till realization, came to be awarded in favour of the claimant (respondent No.1 herein) and the insured/appellant came to be saddled with the liability, (for short the impugned award).

2. The insurer, the driver and the claimant have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

3. The insured/appellant has questioned the impugned award on the grounds taken in the memo of appeal.

4. The main ground urged in the appeal was that the Tribunal has wrongly fastened the liability on the insured/appellant.

5. Therefore, on the last date of hearing, the learned counsel for the appellant/owner was asked to show whether the vehicle was insured at the relevant point of time and the insurer can be saddled with the liability. Today, the learned counsel for the appellant frankly conceded that he was not in a position to get the copy of the insurance policy. Therefore, no other conclusion can be drawn than the one taken by the Tribunal that the offending vehicle was not insured at the relevant point of time.

6. I have gone through the impugned award, the same is speaking one and needs no interference.

7. Having said so, there is no merit in the appeal filed by the appellant/owner and the same is dismissed.

8. The Registry is directed to release the entire amount in favour of the claimant forthwith.

****

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

Narain Chauhan .....Appellant

Versus

Ramesh Kumar & another ..... Respondents

FAO No.304 of 2008
Date of decision: 18.09.2015

Motor Vehicles Act, 1988- Section 149 - Owner/insurer had questioned the amount awarded on the ground that he had wrongly been saddled with the liability- claimant pleaded that he was travelling in the truck carrying apple boxes- owner on the other hand pleaded specifically in the reply that claimant was not travelling in the offending vehicle with the apple boxes – held, that claimant was proved to be a gratuitous passenger and the owner of the offending vehicle- owner had committed the breach of terms of the policy and was rightly fastened with the liability. (Para-3 to 6)

For the appellant: Mr. V.S. Chauhan, Advocate.

For the respondents: Mr. B.S. Chauhan, Senior Advocate with Mr. Vaibhav Tanwar, Advocate, for respondent No.1.
Mr. G.D. Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award dated 1st March, 2008, passed by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, H.P., (for short, "the Tribunal") in M.A.C. No.150-S/2 of 2005/2004, titled Ramesh Kumar vs. Narain Chauhan & another, whereby a sum of Rs.95,000/-, with interest at the rate of 9% per annum, came to be awarded as compensation in favour of the claimant and the owner/appellant was saddled with the liability, (for short the "impugned award")

2. The insurer and the claimant have not questioned the impugned award on any count. Thus, the same has attained finality so far it relates to them.

3. Only the insured-owner has questioned the impugned award on the grounds taken in the memo of appeal.

4. The learned counsel for the appellant has argued that the Tribunal has fallen in an error in saddling the owner with the liability. The argument is devoid of any force for the reason that the owner is caught by his own pleadings. The owner has specifically pleaded in the reply that the claimant was not traveling in the offending vehicle with apple boxes. Thus, the owner is precluded from taking the plea that the claimant was not traveling in the offending vehicle as gratuitous passenger and therefore, the insurer is liable. Having said so, this ground fails.

5. Learned counsel for the appellant further argued that the policy in question was comprehensive one and the risk of '2+1' was covered i.e. owner and the driver and the person who was traveling alongwith his goods, but not of a gratuitous passenger. Once it is established on record that the claimant was traveling in the offending vehicle as gratuitous passenger, how the insurer can be saddled with liability.

6. Having said so, no interference is required. Hence the appeal is dismissed and the impugned award is upheld. The Registry is directed to release the award amount in favour of the claimant, strictly as per the terms and conditions contained in the impugned award, after proper identification.

7. Send down the record after placing a copy of the judgment on the Tribunal's file.

****

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

National Insurance Company Ltd. .....Appellant
Versus
Ashwani Kumar & others .....Respondents

FAO No. 411 of 2008
Decided on : 18.09.2015.

Motor Vehicles Act, 1988- Section 149- Insurer challenged the award on the plea that claimants had not proved rashness and negligent driving of the driver of the offending vehicle- claimants had led sufficient evidence to prove rash and negligent driving of the driver- insurer did not lead any evidence to this effect- driver could have challenged these findings but no appeal was filed by him- insurer was rightly held liable- appeal dismissed.

(Para-4 to 7)

For the Appellant : Ms. Seema Sood, Advocate.
For the Respondents: Mr. Ajay Sharma, Advocate, for respondent No. 1.
Mr. V.D. Khidtta, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award dated 31st March, 2008, made by the Motor Accidents Claims Tribunal-II, Kangra at Dharamshala, H.P. (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 60-J/2004, titled Ashwani Kumar versus Shri Jalam Singh & others, whereby compensation to the tune of Rs.1,67,145/- with interest @ 7½% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimant-respondent No. 1 herein and the insurer-appellant herein was saddled with liability (for short, "the impugned award").

2. The claimant, owner and driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned Counsel for the appellant argued that the claimant has not proved the rash and negligent driving of the driver, thus the claim petition was liable to be dismissed.

5. The factums of insurance and adequacy of compensation are not in dispute. The only question to be determined in this appeal is-*whether the Tribunal has rightly recorded the findings on Issue No. 1?* Issue No. 1 reads as under:-

> "*whether the respondent No. 1 had struck the offending vehicle pick up van owned by respondent No. 2 against the scooter of the petitioners on the road at Kotla on 16.5.04 and caused injuries to the petitioners? …OPP*"

6. It was for the claimant to prove the factum of rash and negligent driving, has led evidence and proved the same. The insurer has not led any evidence to this effect. It was for the driver to question the said findings. He has not questioned the same. Thus, how the insurer can question the said findings.

7. However, I have gone through the findings returned by the Tribunal. It has rightly made discussion in paras 7 to 10 of the impugned award. Thus, I am of the considered view that the Tribunal has rightly made the impugned award.

8. Having said so, the impugned award is upheld and the appeal is dismissed.

9. Registry is directed to release the awarded amount in favour of the claimant, strictly as per the terms and conditions contained in the impugned award.

10. Send down the records after placing a copy of the judgment on the Tribunal's file.

****

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

The New India Assurance Company Limited ...Appellant
Versus
Smt. Nirmala Devi & others ...Respondents

FAO No. 586 of 2008
Date of decision: 18.09.2015

Motor Vehicles Act, 1988- Section 149- Insurer contended that insurance policy was not subsisting on the date of the accident – insurance policy provided that it was valid w.e.f. 3.11.2003 till the midnight of 2.11.2004- it was further provided that policy was effective w.e.f. 3.12.2003 instead of 3.11.2003 and this rectification was made on the request of the claimant- therefore, insurance policy would expire on 2.12.2004- vehicle was purchased on 15.11.2003 and, therefore, rectification was justified – Insurance policy was valid up to 2.12.2004- accident had taken place on 4.11.2004- held, that vehicle was under a subsisting policy. (Para-12 to 16)

For the appellant : Mr. Praneet Gupta, Advocate.
For the respondents : Mr. Dinesh Kumar, Advocate, for respondent No. 1.
Mr. Lokender Paul, Advocate, for respondent No. 2.
Mr. Manoj Thakur, Advocate, for respondent No. 3.
Mr. Ashwani Kaundal, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award dated 7th July, 2008, passed by the Motor Accident Claims Tribunal, Bilaspur, H.P. (hereinafter referred to as "the Tribunal") in MAC Case No. 28 of 2005, whereby compensation to the tune of Rs.1,07,000/- with interest at the rate of 6% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimant-respondent No. 1 herein and against the insurer-appellant herein, (for short, "the impugned award"), on the grounds taken in the memo of appeal.

2. The claimant, insured-owner, driver and other respondent i.e M/s Ashoka Layland through Managing Director, have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. Only, the insurer-Insurance Company has questioned the impugned award on the ground that insurance policy was not subsisting on the date of accident. Thus, the

only issue raised in this appeal is – *whether the insurance policy was subsisting on the date of accident?*

4. In order to determine the said issue, it is necessary to give brief facts of the case herein.

5. The claimant, had filed a claim petition before the Tribunal for grant of compensation to the tune of Rs.20,00,000/-, as per the break-ups given in the claim petition on the ground that driver, namely, Sanjeev Kumar, had driven the vehicle-Tipper bearing registration No. HP-69-0309, on 04.11.2004, at about 7.45 a.m., near A.C.C. Factory, Barmana, District Bilaspur, rashly and negligently, hit Virender Singh, who was standing outside his vehicle, sustained injuries and succumbed to the injuries.

6. The respondents contested the claim petition on the grounds taken in the memo of appeal.

7. Following issues came to be framed by the Tribunal:

> "*1. Whether Shri Virender Singh had died on account of rash and negligent driving of Tipper No. HP-69-0309 which was being driven by respondent no. 2, Sanjeev Kumar, as alleged? …OPP*
>
> *2. If issue No. 1 is proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom? …OPP*
>
> *3. Whether respondent No. 2 Sanjeev Kumar, the driver of Tipper No. HP-69-0309, was not having valid and effective driving licence at the time of accident, if so, its effect? …OPR-3*
>
> *4. Whether the respondent No. 2 Sanjeev Kumar was plying the offending vehicle without the insurance policy, if so, its effect? …OPR-3*
>
> *5. Relief."*

8. Parties have led evidence. The Tribunal, after scanning the evidence, oral as well as documentary, passed the impugned award, whereby a compensation to the tune of Rs.1,07,000/- with interest @ 6% per annum was awarded in favour of the claimant and liability was fastened upon the insurer.

9. The parties have not disputed the findings on issues No. 1 & 3. Accordingly, the findings returned on these issues are upheld.

10. The issue raised in this appeal revolves around issues No. 2 and 4, are interlinked.

11. The Tribunal has made discussion and held that the insurance policy was subsisting on the date of accident, while deciding Issues No. 2 & 4.

12. The Tribunal has held that the amount of premium was paid for 12 months and as per page No. 20 of the book of Motor Insurance Law and Practice, if the premium is paid annually, the insurance policy shall remain in force for a period of 12 months and in case premium is paid for less than one year, the short period scale will apply. In this case, premium was paid for one year and the insurance policy was existing on the date of accident. It is apt to reproduce the relevant portion of para-10 of the impugned award herein:-

> "*Now bearing in mind the extract as contained in page 20 of the book of Motor Insurance Law and Practice, the relevant portion of which is*

extracted hereinafter and on whose reading, it emerges that premiums are chargeable on an annual basis, but, the insurance cover can be availed of for any duration of less than 12 months, when short period scale will apply, obviously in the face of the fact, that, the normal rule for the currency of the Motor Vehicle insurance policy would be a period of 12 months and for policy to fall within the exception, as, contained hereinafter extracted portion of the book, as, titled above, envisaging in what eventuality the period of policy shall construe to be lesser than 12 months, then obviously the burden of proving the exception lay upon the learned counsel for the insurance, however, he has failed to discharge the burden. Consequently, an adverse inference has to be drawn against him for failing to discharge the onus, of, the insurance cover falling out side the normal rule of duration of an Insurance Policy known, to, resultantly, as also, its falling within the domain of the exception to the normal rule, resultantly the normal rule for operation or the currency of the Insurance Policy, being, on an annual basis, is to be taken to be one which is to be applied to the insurance cover, as, issued with respect to the offending vehicle. Resultantly, while disagreeing with the contention of the learned counsel for the insurer that when there is no limit prescribed for the currency of or the duration of the policy and that accordingly, it has been to be construed to be for a period of 11 months policy, in, the light of the above discussion is of no worth, accordingly, the liability to pay the compensation is borne by the insurer.

> *"Minimum Premium: With effect from 1st April, 1981. Insurers in India charge a minimum premium of Rs. 30/-, under a Motor Policy issued by them. Premiums are chargeable on an annual basis, but the insurance cover can be availed of for any duration of less than 12 months when Short period Scale will apply. It is not possible to extent on piecemeal basis, a Policy taken for a short period by remitting the difference between the short period and annual premium." Both these issues are decided accordingly."*

13. I have gone through the record. The insurance policy, Ext. RW-4/B is on the record, which provides that insurance policy was valid w.e.f. 3rd November, 2003 to midnight of 2nd November, 2004. This document further provides that the policy was effective from 3rd December, 2003 instead of 3rd November, 2003 and the rectification was made on the request of the claimant. Ext. RW-4/B is not in dispute. Premium has also been paid. It is also admitted by the learned Counsel for the appellant that annual premium has been paid. Thus, the insurance policy was to expire on 2nd December, 2004.

14. Learned Counsel for the appellant-insurer has also produced book on "India Motor Tariff". GR.11 at page No. 5 of the said book provides period of insurance, which reads as under:

> "**G.R. 11 Period of Insurance**.
>
> *Unless specifically stated otherwise, premiums quoted in the Schedules under various Sections of the India Motor Tariff are the premiums*

payable on policies issued or renewed for a period of twelve months. No policy is permitted to be issued or renewed for any period longer than twelve months. It shall, however, be permissible to extend the period of insurance under the policy for any period less than twelve months, for the purpose of arriving at a particular renewal date or for any other reasons convenient to the insured, by payment of extra premium calculated on pro-rata basis. Provided such policies are renewed with the same insurer immediately after the expiry of such an extension. All such extensions will require attachment of the following Warranty to the policy.

"In consideration of the premium for this extension being calculated at a pro-rata proportion of the annual premium, it is hereby declared and agreed by the insured that upon expiry of this extension, this policy shall be renewed for a period of twelve months, failing which the difference between the extension premium now paid on pro rata basis and the premium at short period rate shall become payable by the insured."

15. While applying the test, the expiry date of the insurance policy was 2nd December, 2004 and not 2nd November, 2004.

16. The vehicle was purchased on 15th November, 2003, vide bill Ext. RW-1/A. Thus, keeping in view Ext. RW-1/A and Ext. RW-4/B, the mistake had crept-in while recording the date of commencement of the policy and the expiry date. The insurance policy was valid upto 2nd December, 2004, the accident had occurred on 4th November, 2004 and the policy was in force. Viewed thus, the Tribunal has rightly held that the insurance policy was subsisting.

17. Having said so, the Tribunal has rightly made discussion and saddled the insurance company with the liability.

18. Accordingly, no interference is required. The impugned award is upheld and the appeal is dismissed.

19. The Registry is directed to release the compensation amount in favour of the claimant, strictly as per the terms and conditions, contained in the impugned award.

20. Send down the records after placing a copy of the judgment on the file of the claim petition.

****

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

FAO (MVA) No. 352 of 2008 alongwith
connected FAOs & C.O. No. 125 of 2011.
Date of decision: 18th September, 2015

FAO No. 352 of 2008.

Oriental Insurance co. Ltd. .....Appellant.

Versus

Ms. Mahtaba and others ...Respondents

FAO No. 511 of 2008.

Oriental Insurance co. Ltd. .....Appellant.

Versus

Smt. Subhadra and ...Respondents

FAO No. 362 of 2008.

Oriental Insurance co. Ltd. .....Appellant.

Versus

Smt. Magu Devi others ...Respondents

Motor Vehicles Act, 1988- Section 173- Award passed by the Tribunal challenged by the insurer on twin grounds i.e. owner has committed willful breach and the amount awarded is not in accordance with the second Schedule of Motor Vehicles Act read with the judgment passed by Apex Court titled **Sarla Verma and others**- held, that first plea has been covered in the judgment delivered in bunch of appeals and had attained finality- issue once decided finally cannot be re-opened- Tribunal had fallen in error while applying multiplier of '16', whereas multiplier of '14' was applicable- secondly, age of the deceased was 16 years and he was bachelor- therefore, ½ of the income was to be deducted towards personal expenses - award modified accordingly. (Para-9 to 14)

Cases referred:

Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

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

For the appellant(s): Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.

For the respondent(s): Mr.D.S. Nainta, Advocate, for respondents No. 1 and 2 in FAO No. 511/2008 and for respondents No. 1 to 4 in FAO No. 362/2008.

Mr. Naresh Sharma, Advocate, for the cross-objectors in FAO No. 352/2008.

Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

All these appeals are outcome of a common accident and the vehicle involved is also the same hence taken up together for disposal.

2. The claimants being the victims of a vehicular accident filed claim petitions before the Tribunal for the grant of compensation, as per the break-ups given in the claim petitions, on the ground that the driver, namely, Mr. Baby son of Sh. Attar Singh, has driven the offending vehicle, i.e. Maxi Cab bearing registration No. HP-01A-3184 at Sawara Kainchi rashly and negligently and caused the accident.

3. The claim petitions were resisted and contested by the respondents and following issues were framed in ***FAO No. 352 of 2008***.

1. Whether on 15.8.2004 at about 12:00 PM at Parhat pul respondent No. 3 was driving maxi cab No. HP-01A-3184 rashly and negligently and as such caused death of Sanaulla War? OPP.

2. *If issue No. 1 is proved to what amount of compensation the petitioner is entitled and from whom? OPP.*
3. *Whether the driver of maxi cab No. HP-01A-3184 was not having any valid driving licence at the time of accident? OPR.*
4. *Relief.*

4. In FAO No. 511 of 2008, following issues were framed:

1. *Whether on 15.8.2004 at Parhat the respondent No. 4 was driving maxi cab No. HP-01A-3184 rashly and negligently and as such caused death of Shri Rajeev Kumar War? 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 was not holding valid driving licence at the time of accident? OPR.*
4. *Relief.*

5. In FAO No. 362 of 2008 the Tribunal framed the following issues:

1. *Whether on 15.8.2004 at about 12.00.00 PM at Parhat Pul the respondent No. 1 was driving maxi cab No. HP-01A-3184 rashly and negligently and as such caused death of Shri Balak Ram? OPP.*
2. *If issue No. 1 is proved to what amount of compensation the petitioner is entitled and from whom? OPP.*
5. *Whether the driver of maxi cab No. HP-01A-3184 was not having any valid driving licence at the time of accident? OPR.*
6. *Relief.*

6. The Tribunal, in ***FAO No. 352 of 2008,*** arising out of impugned award dated 21.6.2008, titled ***Mst. Mahtaba and others versus Mr. Baby and others*** made by the Motor Accident Claims Tribunal (II), Shimla , Camp at Rohru in MAC Petition No. 114-R/2 of 2004 has awarded compensation to the tune of Rs.6,11,000/- alongwith interest @ 7.5% per annum, in ***FAO NO.511 of 2008,*** arising out of the award dated 18.7.2008 passed in MAC Petition No. 8-R/2 of 2005 titled ***Smt. Subhadra and another versus Kumari Nisha and others*** has awarded compensation to the tune of Rs.4,61,200 alongwith interest @ 7.5% per annum and in ***FAO No. 362 of 2008,*** arising out the award dated 21.6.2008 in MAC petition No. 1-R/2 of 2005 titled ***Smt. Meghu Devi and others versus Mr. Baby and others*** has awarded compensation to the tune of Rs.1,45,000/- along with interest @ 7.5% per annum.

7. It is stated at the Bar by the learned counsel for the parties that the batch of appeals, arising out of the same accident have already been decided by this Court on 15.10.2011 in ***FAO NO. 423 of 2006*** titled ***Oriental Insurance Company Ltd. Versu Sagura Begam and others*** alongwith other connected matters and the appeals of the insurance company have been dismissed.

8. The claimants, owners and drivers have not questioned the impugned awards on any grounds, thus the same have attained finality so far they relate to them.

9. The insurer has questioned he impugned awards on two grounds (*i) that the owner has committed willful breach, (ii) that the amount awarded is not in accordance with 2nd Schedule of the Motor Vehicles Act read with* ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***.

10. The learned counsel for the appellants frankly conceded that the first point is covered by the judgment delivered by this Court in batch of appeals lead case of which is FAO No. 423 of 2006, referred to supra.

11. I have gone through the judgment referred to supra in FAO No. 423 of 2006. It has attained finality. Thus, the first point is governed by the said judgment.

12. **Second Point.** In FAO No. 362 of 2008, the amount awarded is too meager and cannot be said to be excessive in any way. Accordingly the impugned award in FAO No. 362 of 2008 is upheld.

13. The Tribunal has fallen in an error in assessing the compensation and applying the multiplier while making the award impugned in FAO No. 352 of 2008. The Tribunal has applied the multiplier of "16" whereas multiplier of "14" was applicable, as per the law applicable. Thus, the claimants are entitled to Rs.3000x12x14= Rs.5,40,000/- plus Rs.15,000/- awarded by the Tribunal on account of collecting the dead body, total to the tune of Rs.5,55,000/-.

14. Adverting to ***FAO No. 511 of 2008***. The deceased was bachelor aged 16 years at the time of death. The claimants are the parents of the deceased. The apex Court in ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***, has held that one half has to be deducted towards the personal expenses and 1/3rd has to be deducted towards loss of dependency. The Tribunal has assessed the income of the deceased to the tune of Rs.4000/- which has not been disputed by any of the parties. Thus, the findings returned have attained finality. Now by taking the income of the deceased as Rs.4000/- per month and deducting one half the income of the deceased is to be assessed at Rs.2000/- per month and the multiplier applicable is 14 instead of "16". The claimants are entitled to Rs.2000x12x14, i.e. Rs.3,36,000/- plus Rs.30,000 and Rs.10,000, as awarded by the Tribunal in para 17 of the impugned award. Thus, the claimants, in all are entitled to Rs. Rs.3,36,000+Rs.40,000= Rs.3,76,000/-.

15. Accordingly, the impugned awards in FAO No. 511 of 2008 and FAO 352 of 2008 are modified as indicated hereinabove.

16. The Cross objections No. 125 of 2011 filed in FAO No. 352 of 2008 are dismissed.

17. The Registry is directed to release the amount in favour of the claimants, strictly, in terms of the conditions contained in the impugned award, through payee's cheque account and excess amount if any, shall be refunded to the insurer, through payee's account cheque.

18. All the appeals stand disposed of accordingly.

19. Send down the record, forthwith, after placing a copy of this judgment.

****

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

Oriental Insurance Company Ltd. .....Appellant
Versus
Mansha Ram and others .....Respondents

FAO No.429 of 2008
Decided on: 18.09.2015

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver of the offending vehicle was having a learner's licence at the time of accident and thus, he was not competent to drive the same- held, that a person possessing a learner's licence is competent to drive the motor vehicles of any specified class or description for which he has been given the licence- Tribunal has rightly held that licence in question was valid and effective- appeal dismissed. (Para- 11 to 14)

Cases referred:
Anuj Sirkek versus Neelma Devi and Ors., I L R 2014 (VI) HP 1242
Oriental Insurance Company Ltd. vs Sh. Krishan Dev and others, I L R 2015 (III) HP 621
New India Assurance Co. Ltd. vs. Kamla Devi and others, I L R 2015 (III) HP 820
National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant: Mr.Deepak Bhasin, Advocate.
For the respondents: Mr.O.P. Negi and Mr.Vijay Sharma, Advocates, for respondents No.1 to 3.
Nemo for respondents No.4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 28th April, 2008, passed by the Motor Accident Claims Tribunal, Solan, H.P., (for short, the Tribunal), in Claim Petition No.19-S/2 of 2007, titled Mansha Ram and others vs. M.K. Sharma and others, whereby compensation to the tune of Rs.5,60,000/-, with interest at the rate of 9% per annum from the date of filing of the Claim Petition till deposit, came to be awarded in favour of the claimants (respondents No.1 to 3 herein) and the insurer/appellant came to be saddled with the liability, (for short the impugned award).

2. The insured/owner, the driver and the claimants have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the insurer/appellant has questioned the impugned award on the grounds taken in the memo of appeal.

4. Before issue-wise findings are returned, I deem it proper to give a flash back of the facts of the case, the womb of which gave birth to this appeal.

5. Claimants, being the victim of a vehicular accident, had invoked the jurisdiction of the Tribunal claiming compensation to the tune of Rs.6.00 lacs, as per the break-ups given in the claim petition, on the ground that the driver of the offending vehicle i.e. Mahindra Pick Up, bearing No.HP-11-7100, had driven the offending vehicle rashly and negligently on 11th March, 2007, hit the deceased Shakuntla at about 12.30 p.m. at a place known as Sarli, Tehsil Arki, District Solan, H.P., as a result of which the said Shakuntla sustained injuries and succumbed to the same later on.

6. The owner, the driver and the insurer resisted the Claim Petition on various grounds.

7. The Tribunal after examining the pleadings of the parties, settled the following issues:

> "1.Whether the death of deceased Shakuntala Devi has been caused due to rash/negligent driving of Mahindra Pick Up by the respondent No.2? OPA
>
> 2. If issue No.1 is proved in affirmative to what amount of compensation the petitioners are entitled to and from whom? OPA
>
> 3. Whether respondent No.2 did not possess a valid and effective driving licence? OPR3
>
> 4. Whether the vehicle was being driven in contravention of the provisions of Motor Vehicles Rules and the Standard terms of the Insurance Policy? OPR3
>
> 5. Relief."

8. Claimants, in order to prove their claim, have examined as many as three witnesses, including the claimant Mansa Ram, who stepped into the witness box as PW-1. The driver and the owner of the offending vehicle have not led any evidence. However, the insurer has examined three witnesses, namely, Narender Kumar, P.S. Chandel and Pawan Kumar, as RW-1 to RW-3.

9. The Tribunal after examining the pleadings of the parties and the evidence, held that the claimants have proved that the driver of the offending vehicle had driven the vehicle rashly and negligently and had caused the accident. There is no dispute about the findings recorded by the Tribunal on issue No.1. However, I have gone through the pleadings of the parties and the evidence on record and am of the view that the Tribunal has rightly recorded findings on issue No.1. Accordingly, the same are upheld.

10. Before issue No.2 is taken up, I deem it proper to deal with issues No.3 and 4.

11. The learned counsel for the appellant-insurer argued that the driver of the offending vehicle was having a learner's licence and was not competent to drive the same.

12. Section 2 (19) of the Act defines learner's licence. It provides that a person who is holding a learner's licence is authorized to drive a light motor vehicle or a motor vehicle of any specified class or description. It is apt to reproduce Section 2 (19) of the Motor Vehicles Act, 1988, (for short, the Act), herein:

> *"2 .....*
>
> *(19) "learner's licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive as a learner, a motor vehicle or a motor vehicle of any specified class or description;"*

13. While going through the said definition, one comes to an inescapable conclusion that a person who is having a learner's licence is competent to drive the motor vehicle or a motor vehicle of any specified class or description, for which he has been given the licence.

14. In the instant case, a copy of the licence has been proved on record as Ext.RW-3/A, a perusal of which does disclose that the driver of the offending vehicle was having a learner's licence to drive a light motor vehicle. Since the offending vehicle is Mohindra Pick Up, which, as per Section 2(21) of the Act, falls within the definition of Light Motor Vehicles, and the driver of the offending vehicle was having a licence, though learner's, to drive a light motor vehicle, therefore, I am of the considered view that the Tribunal has rightly held that the driver of the offending vehicle was having a valid and effective driving licence at the relevant point of time.

15. This Court has dealt with the issue in the cases titled as **Anuj Sirkek versus Neelma Devi and Ors.,** being **FAO No. 57 of 2014,** decided on 19.12.2014, **Oriental Insurance Company Ltd. versus Sh. Krishan Dev and others,** being **FAO No. 476 of 2007,** decided on 22.05.2015, and New India Assurance Co. Ltd. vs. Kamla Devi and others, being FAO No.243 of 2008, decided on 29.05.2015, and taken the similar view.

16. Having said so, the Tribunal has rightly decided issue No.3 against the insurer/appellant.

17. Coming to issue No.4, it was for the insurer to plead and prove, by leading cogent evidence, that the owner had committed willful breach in terms of Sections 147 to 149 of the Act, and in terms of the conditions contained in the insurance policy, as has been held by the Apex Court in **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531** and **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217.** The insurer, in the instant case, has not been able to prove that the insured was in breach of the terms and conditions contained in the insurance policy.

18. Having said so, the findings recorded by the Tribunal on issue No.4 are also liable to be upheld.

19. Coming to issue No.2, the adequacy of compensation is not in dispute. Accordingly, the findings of the Tribunal recorded on this issue are also upheld.

20. In view of the above discussion, I accordingly hold that there is no merit in the appeal filed by the insurer/appellant and the same is dismissed.

21. The Registry is directed to release the entire amount in favour of the claimants strictly in terms of the impugned award.

****

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

Oriental Insurance Company ...Appellant

Versus

Smt. Padma Devi and others ...Respondents.

FAO (MVA) No. 317 of 2011.
Judgment reserved on 4.9.2015
Date of decision: 18. 09.2015.

Motor Vehicles Act, 1988- Section 166- Claimant had suffered permanent disability of 35%- she had spent Rs. 40,000/- on her treatment and is entitled to Rs. 40,000/- - she had spent Rs. 23,500/- as taxi charges and is entitled to the same as transportation charges- she remained in hospital w.e.f. 29.8.2002 till 25.9.2002 and is entitled to Rs. 10,000/- under the head 'special diet', Rs. 10,000/- under the head 'attendant charges'- she is entitled to Rs. 50,000/- under the head 'pain and suffering' and Rs. 50,000/- on account of future pain and suffering- injury has shattered her physical frame and has affected her matrimonial home - amount of Rs. 50,000/- awarded under the head 'loss of amenities of life'- her monthly income was Rs. 4,000/- and she was unable to work after the accident- therefore, loss of income can be treated as Rs. 2,500/- per month- she is 26 years of age and applying multiplier of '16', she is entitled to Rs. 2,500 x 16 x 12=Rs.4,80,000/- - thus, claimant is entitled to Rs. 7,13,500/-. (Para-17 to 22)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771
Sarla Verma and ors. versus Delhi Transport Corporation and anr., AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and anr. 2013 AIR SCW 3120

For the appellant:	Mr.G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For the respondents:	Mr.Dheeraj Vashisht, Advocate, for respondent No.1. Nemo for respondent No.2. Mr. Dibender Ghosh, advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This appeal is directed against the judgment and award dated 6.9.2008, passed by the Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr, District, Shimla, H.P. in MAC Petition No.62 of 2006, titled *Padma Devi versus Sh. Tejwant Singh Negi and others*, hereinafter referred to as "the Tribunal", for short, whereby compensation to the tune of Rs.7,35,000/- alongwith interest @ 9% per annum came to be awarded in favour of the claimant and insurer was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Claimant, driver and owner have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The insurer has questioned the impugned award on various grounds, taken in the memo of appeal.

4. The claimant had invoked the jurisdiction of the claims Tribunal for the grant of compensation to the tune of Rs.8 lacs, as per the break-ups given in the claim petition on the ground that the driver, namely, Vijay Singh had driven vehicle bearing registration No. HP25-0383 rashly and negligently on 29.8.2002 and had caused the accident, wherein the claimant had sustained injuries. The claimant was brought to

Bhabanagar hospital from where, she was referred to IGMC Shimla for further treatment. FIR No. 53 of 2002 was registered at police Station Bhabanagar. The petitioner is stated to have spent more than Rs.2,50,000/- on her treatment and after the accident the claimant has become permanently disabled to the extent of 35% and has affected her agricultural and horticulture vocation, the details of which have been given in the impugned award.

5. The claim petition was resisted and contested by the respondents and following issues came to be framed:

(i) *Whether the accident has taken place due to rash and negligent driving of the bus bearing no. HP25-0383? OPP*

(ii) If issue no.1 is proved, whether the petitioner is entitled to compensation, if so to what amount and at what rate of interest? OPP.

(iii) Whether the present petition is not maintainable? OPR-3.

(iv) Whether there was no valid and effective driving license with the driver at the time of accident? OPR-3.

(v) Whether the vehicle was being driven in violation of the terms and conditions of insurance policy? OPR-3

(vi) Whether the petitioner was a gratuitous passenger, if so its effect? OPR-3.

(vii) Whether the driver of the vehicle was driving the bus under the influence of liquor at the time of accident? OPR-3.

(viii) Relief.

6. The claimant led evidence and has examined Dr. L.R. Verma as PW3. He deposed that he was Chairman of Disability Board and the claimant had suffered fracture in neck scapular left with fracture superior pubic rami right with fractured-6 spine with straightening of cervical spine with transverse process fracture of L-1 and L2 and C-3 abdominal injury with spelenectomy. The disability of the claimant, on examination was assessed to be 35%, which was permanent in nature. He stated that the claimant cannot do any hard work of agriculture, horticulture and labour due to disability suffered.

7. The claimant stated that she was doing agriculture work and was earning Rs.4000-5000/- per month which has remained un-rebutted. The disability certificate Ext. PW1/A do disclose 35% permanent disability. Ext. PW1/B is the copy of FIR. The claimant has proved that her income was Rs.4000-5000 per month. She has placed on record Taxi bills Mark-B to Mark-F, medical bills Mark-G-1 to G-64 and MLC Ext. PW1/C, which do disclose that the claimant has undergone pain and suffering which has affected her amenities of life.

8. The learned counsel for the appellant resisted the appeal on the ground of adequacy of compensation and argued that the compensation was to be awarded in terms of the guidelines issued by the apex Court in series of judgments.

9. In the injury cases, the compensation has to be awarded under two heads “pecuniary damages” and “non-pecuniary damages.”

10. The Apex Court in case titled as **R.D. Hattangadi** versus **M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** had discussed all aspects and laid down guidelines how a guess work is to be made and how compensation is to be

awarded under various heads. It is apt to reproduce paras 9 to 14 of the judgment hereinbelow:

> *"9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.*
>
> *10. It cannot be disputed that because of the accident the appellant who was an active practising lawyer has become paraplegic on account of the injuries sustained by him. It is really difficult in this background to assess the exact amount of compensation for the pain and agony suffered by the appellant and for having become a life long handicapped. No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame.*
>
> *11. In the case Ward v. James, 1965 (1) All ER 563, it was said:*
>
> *"Although you cannot give a man so gravely injured much for his "lost years", you can, however, compensate him for his loss during his shortened span, that is, during his expected "years of survival". You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to*

him. Yet Judges and Juries have to do the best they can and give him what they think is fair. No wonder they find it well-nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The Judges have worked out a pattern, and they keep it in line with the changes in the value of money."

12. In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards.

13. This Court in the case of C.K. Subramonia Iyer v. T. Kunhikuttan Nair, AIR 1970 SC 376, in connection with the Fatal Accidents Act has observed (at p. 380):

"In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable."

14. In Halsbury's Laws of England, 4th Edition, Vol. 12 regarding non-pecuniary loss at page 446 it has been said :-

"Non-pecuniary loss : the pattern. Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award.

The fall in the value of money leads to a continuing reassessment of these awards and to periodic reassessments of damages at certain key points in the pattern where the disability is readily identifiable and not subject to large variations in individual cases."

11. The said judgment was also discussed by the Apex Court in case titled as **Arvind Kumar Mishra** versus **New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085**, while granting compensation in such a case. It is apt to reproduce para-7 of the judgment hereinbelow:

"7. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be

in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases - and that is now recognized mode as to the proper measure of compensation - is taking an appropriate multiplier of an appropriate multiplicand."

12. The Apex Court in case titled as **Ramchandrappa** versus **The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787** also laid down guidelines for granting compensation. It is apt to reproduce paras 8 & 9 of the judgment hereinbelow:

"*8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.*

9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."

13. The Apex Court in case titled as **Kavita** versus **Deepak and others**, reported in **2012 AIR SCW 4771** also discussed the entire law and laid down the guidelines how to grant compensation. It is apt to reproduce paras 16 & 18 of the judgment hereinbelow:

"16. *In Raj Kumar v. Ajay Kumar (2011) 1 SCC 343, this Court considered large number of precedents and laid down the following propositions:*

"The provision of the motor Vehicles Act, 1988 ('the Act', for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the

loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned.

The heads under which compensation is awarded in personal injury cases are the following:

"Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

v) (Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

17. .....

18. In light of the principles laid down in the aforementioned cases, it is suffice to say that in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily, efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and inability to lead a normal life and enjoy amenities, which would have been enjoyed but for the disability caused due to the accident. The amount awarded under the head of loss of earning capacity are distinct and do not overlap with the amount

awarded for pain, suffering and loss of enjoyment of life or the amount awarded for medical expenses."

14. Applying the test in this case, it is to be determined whether the amount awarded is excessive or inadequate.

15. The Tribunal has made discussion in paras 10 to 18 of the impugned award as to how it has come to the conclusion that the claimant is entitled to compensation. In para 16 the claimant, on the basis of medical bills MarkG-3 to Mark G-64 is stated to have spent Rs. 40,000/- on her treatment and on the basis of taxi bills Mark-A to Mark-F is stated to have spent Rs.23,500/- and has been held entitled to the tune of Rs.1,35,000/- on attendant and transportation charges. In para 17, the Tribunal has awarded an amount of Rs.80,000/- on account of mental and physical pain and Rs.80,000/- on account of loss of amenities of life and loss of income of the claimant has been assessed at Rs.4,00,000/- but inadvertently in the last para of para 18, while summing up the expenditure on medical treatment is held as Rs.40,000/-, expenditure on attendant and transportation Rs.1,35,000/-, pain and suffering Rs.1,60,000 and loss of amenities of life Rs.4,00,000/- whereas it should have been recorded as Rs.80,000/- on account of mental and physical pain and Rs.80,000/- on account of loss of amenities of life and Rs.4,00,000/- on account of loss of income. Thus, the Tribunal has inadvertently recorded the same.

16. In the given circumstances, I deem it proper to determine to which amount, the claimant is entitled to.

17. The medical bills Mark G-3 to G64 which do disclose that the claimant has spent Rs.40,000/-, on medical treatment. Thus, she is entitled to ***Rs.40,000***/-under the head "medical treatment". She has placed on record taxi bills Mark-A to Mark-F to the tune of Rs.23,500/- under the head "transportation charges". Thus she is held entitled to ***Rs.23500/-*** under the head "transportation charges.

18. The MLC Ext. PW1/C and discharge slip Mark-A do disclose that the claimant remained admitted in the hospital w.e.f. 29.8.2002 to 25.9.2002. By a guess work, it can safely be held that the claimant is entitled to ***Rs.10,000/-*** under the head "special diet" and also a ***Rs.10,000/-*** under the head "attendant charges".

19. The claimant is also entitled under the head "pain and suffering" which she has undergone and pain and suffering for future. The claimant has suffered 35% disability, is not in a position to discharge agriculture and horticulture vocation and cannot work as a labourer. Thus, it is held that she is entitled to ***Rs.50,000/-*** under the head "pain and suffering undergone" and ***Rs.50,000/-*** on account of "future pain and suffering". The said injury has shattered her physical frame and has virtually affected her matrimonial home and other amenities of life. Thus, I deem it proper to award ***Rs.50,000***/- under the head "loss of amenities of life".

20. The claimant has pleaded and proved that her monthly income was Rs.4000/- and she is not in a position to do her agriculture, horticulture and labour work, as discussed hereinabove but she can still perform domestic work. Thus, it can be safely held that she has lost Rs.2500/- per month. The claimant is stated to be 26 years of age at the time of accident and multiplier "16" is applicable, as per the Schedule appended to the Motor Vehicles Act read with ***Sarla Verma and ors. versus Delhi Transport Corporation and anr.,*** reported in ***AIR 2009 SC 3104*** and upheld by the larger Bench of the Apex Court in **Reshma Kumari and others *versus* Madan Mohan and anr.** reported in **2013 AIR SCW 3120**. Thus, the claimant is entitled to Rs.2500/-x16x12= Total Rs.4,80,000/-.

21. Having said so, the claimant is held entitled to compensation as follows:

(i)	*Loss of income*	*Rs.4,80,000/-*
(ii)	*Medical treatment*	*Rs.40,000/-*
(iii)	*Transportation charges*	*Rs.23500/-*
(iv)	*Special diet*	*Rs.10,000/-*
(v)	*Pain and sufferings undergone*	*Rs.50,000/-*
(vi)	*Future pain and suffering*	*Rs.50,000/-*
(vii)	*Loss of amenities of life*	*Rs.50,000/-*
(viii)	*Attendant charges*	*Rs.10,000*
	Total	*Rs.7,13,500/-*

22. The claimant in all is entitled to Rs.7,13,500/-. with interest, as awarded by the Tribunal. The impugned award is accordingly modified.

23. The insurer is directed to deposit the entire amount, if not already deposited, within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, after proper verification. The excess amount, if any, be released to the appellant, through payees' cheque account.

24. Viewed thus, the appeal is disposed of along with pending applications, as indicated hereinabove and the impugned award is modified as indicated hereinabove.

25. Send down the record forthwith, after placing a copy of this judgment.

****

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

FAO No.332 of 2008 and
FAO No.333 of 2008
Date of decision: 18.09.2015

---

1. FAO No.332 of 2008

The Oriental Insurance Co. Ltd. .....Appellant

Versus

Thano Devi & others .....Respondents

2. FAO No.333 of 2008

The Oriental Insurance Co. Ltd. .....Appellant

Versus

Kesro Devi and others .....Respondents

Motor Vehicles Act, 1988- Section 173- Insurer had challenged the award on the plea that amount awarded was excessive and that sitting capacity of the offending vehicle was '9+1' at the relevant time- held, that since only two claim petitions were before the Court – therefore, plea regarding sitting capacity is not tenable- deceased were bachelor in both the cases at the time of their death- Tribunal fell in error while deducting 1/3rd amount towards personal expenses, whereas, deduction should have been ½- Tribunal had also fallen in

error by applying multiplier of '17', whereas, multiplier should have been '15' as the age of the deceased were respectively 21 years and 23 years- award accordingly modified.

(Para-9 to 14)

Cases referred:

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation & another, (2009) 6 SCC 121

Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

In FAO No.332 of 2008

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

For the respondents: Mr.S.D. Gill, Advocate, for respondents No.1 and 2.
Mr.Nimish Gupta, Advocate, for respondent No.3.

In FAO No.333 of 2008

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

For the respondents: Mr.S.D. Gill, Advocate, for respondents No.1 and 2.
Mr.Nimish Gupta, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

The awards, impugned in these appeals, passed by Motor Accident Claims Tribunal, Chamba, (for short, the Tribunal), are the outcome of one accident caused by driver Gendu, while driving Maxi Cab bearing No.HP-01-2708 rashly and negligently, on 2nd August, 2006. Therefore, both the appeals are being disposed of by this common judgment.

2. Facts of the case, in brief, are that on 2nd August, 2006, the deceased (Manoj Kumar and Changa Ram) were traveling in the offending vehicle and when the said vehicle reached Jhulki Ghar near Sunku-Di- Tappari, the vehicle met with an accident, as a result of which the deceased sustained multiple injuries and died on the spot.

3. The claimants/legal representatives of deceased Manoj Kumar, who was 21 years of age at the relevant time, filed Claim Petition No.40 of 2006, titled Thano Devi and another vs. Darshna Thakur and another, (subject matter of FAO No.332 of 2008), claiming compensation to the tune of Rs.13.00 lacs.

4. The claimants/legal representatives of deceased Changa Ram invoked the jurisdiction of the Tribunal by filing Claim Petition No.39 of 2006, titled Kesro Devi and another vs. Darshna Thakur and another, whereby compensation to the tune of Rs.12.00 lacs was claimed. The deceased Changa Ram was 23 years of age at the time of his death.

5. The Tribunal, after appreciating the pleadings of the parties and the evidence adduced, awarded a sum of Rs.4,70,000/-, with interest at the rate of 9% per annum, in favour of the claimants in each claim petition and the insurer was saddled with the liability.

6. The Claimants and the owner have not questioned the impugned awards on any count, thus, the same have attained finality so far as these relate to them.

7. Feeling aggrieved, the insurer has filed the instant appeals challenging the impugned awards on the grounds, namely – i) the amount awarded by the Tribunal, in both the cases, is excessive; and ii) the owner/insured has committed willful breach.

8. Before the first ground is dealt with, I deem it proper to take up the second ground at the first instance.

9. The learned Senior Advocate appearing for the appellant-insurer argued that the insured has committed breach of the terms and conditions contained in the insurance policy inasmuch as the sitting capacity of the offending vehicle was '9+1' and at the relevant point of time, the number of passengers traveling in the vehicle was more than the permitted limit.

10. The argument is devoid of any force for the reason that in terms of the Policy, the risk of '9+1' was covered, meaning thereby that the risk of driver and nine passengers/occupants was covered. Only two claim petitions are before us. Thus, the insurer has to satisfy the impugned awards.

11. While dealing with the identical issue, this Court relying upon the law expounded by the Apex Court, has taken a similar view in FAO No.224 of 2008, titled Hem Ram and another vs. Krishan Chand and another, decided on 29th May, 2015.

12. As far as second contention is concerned, the Tribunal has fallen in error in assessing the amount under the head loss of source of dependency. A perusal of the impugned awards shows that the Tribunal has rightly assessed the monthly income of the deceased, in both the cases, as Rs.3,000/-. Admittedly, the deceased, in both the cases, were bachelor at the time of death. Therefore, the Tribunal has fallen in error in deducting 1/3rd amount towards their personal expenses, whereas, as per the pronouncement of the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** 50% was to be deducted from the monthly income of the deceased towards personal expenses.

13. Thus, applying the dictum of the apex Court, it is held that the claimants, in each case, lost source of dependency to the tune of Rs.1,500/- per month.

14. Now, coming to the multiplier, the age of the deceased was 21 years (in FAO No.332 of 2008) and 23 years (in FAO No.333 of 2008). The Tribunal has again fallen in error in applying the multiplier of 17. As per the dictum of the Apex Court in Sarla Verma's case (supra), read with the 2nd Schedule attached to the Motor Vehicles, Act, 1988, multiplier of 15 is appropriate in these cases.

15. In view of the above discussion, the claimants in each case are held entitled to Rs.1,500 x 12 x 15 = Rs.2,70,000/-, under the head 'loss of dependency'. The amount awarded by the Tribunal under the other heads, i.e. Rs.50,000/ under the head 'loss of a living being of the family, Rs.10,000/- under the head 'funeral expenses', and Rs.2,000/- under the head litigation cost, in both the cases, is maintained. Thus, the claimants are held entitled to Rs.2,70,000/- + Rs.50,000/- + Rs.10,000/- + Rs.2,000/- = Rs.3,32,000/-, in each case, alongwith interest as awarded by the Tribunal.

16. Accordingly, the appeals are allowed and the impugned awards are modified to the extent as indicated above.

17. The Registry is directed to release the amount in favour of the claimants strictly in terms of the impugned awards, and the excess amount, if any, alongwith up-to-date interest, be refunded in favour of the insurer through payee's account cheque.

****

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

R.B.S. Negi & ors ...Petitioners

Vs.

State of HP & others ...Respondents.

CWP No. 8215 of 2013
Decided on: 18.9.2015

Constitution of India, 1950- Article 226- Petitioners are the retired employees of the bank- they claimed benefit in accordance with the Government Memorandum- respondent is a creation of the statute and falls within the definition of the State - as per Rule 30(3) employees of the respondent are entitled to the gratuity fixed by the Government of Himachal Pradesh- Government had issued a notification enhancing the gratuity from 3.5 lacs to 10 lacs- this notification was made applicable to those who had retired or would be retiring after 1.1.2006- Board of Directors issued a circular providing the enhanced gratuity w.e.f. 24.5.2010- held that in case of conflict between Act, the Rules, and circulars, provisions of the Act will prevail -Board of Directors could not have superseded the provisions of the rules- therefore, the decision taken by the Bank that enhanced gratuity will be given to the employees who had retired after 24.5.2010 cannot be sustained.

(Para-8 to 13)

Cases referred:

Union of India and others vs.Arun Kumar Roy, AIR 1986 SC737

Shish Ram and others vs. State of H.P. and others, (1996) 10 SCC 166

Union of India vs. Madras Telephones Scheduled Castes and Scheduled Tribes Social Welfare Association (1997) 10 SCC 226

For the Petitioners : Mr. B.M.Chauhan, Advocate.

For the Respondents : Mr. Meenakshi Sharma, Mr. Rupinder Singh, Addl.AGs and Ms. Parul Negi, Dy.AG for the respondents No. 1 and 2.
Mr.Lalit K. Sharma, Advocate for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral):

This writ petition has been filed seeking the following reliefs:

"(i) That the letter dated 31.8.2013 issued by the respondent No.3 to the extent the benefit of enhanced gratuity has been confined only to those employees of the respondent No.3 Bank who have retired after 24.5.2010 instead of to all those who have retired on or after 1.1.2006 may kindly be quashed and set aside and the petitioners may kindly be held entitled for the payment of enhanced gratuity of ceiling of Rs.10.00 as per the provisions of Rules of the Bank as

> Annexure P-1 and Office memo issued by the Government of HP Department of Finance (Pension) dated 14.10.2009 Annexure P-2 with effect from due date with all consequential benefits and arrears may kindly be ordered to be paid along with interest. "

Facts, in brief, may be notice.

2. The petitioners are retired employees of the respondent bank having retired after 1.1.2006, but before 18.5.2010 and are claiming benefits on the basis of Memorandum issued by the State Government on 14th October, 2009, whereby the gratuity of the employees of the Government of Himachal Pradesh was enhanced/ revised from Rs. 3.5 lacs to Rs. 10.00 lacs. This enhancement has been claimed on the basis of Service Rules formulated by the respondent bank known as "*The Service Rules for the employees of the Himachal Pradesh Co operative Agricultural and Rural Development Bank Ltd."* (for short 'Rules')

3. The respondent bank has filed reply wherein it has raised preliminary objection regarding maintainability of the petition on the ground that it is not the State within the meaning of Article 12. Insofar as the merits of the case are concerned, it is averred that Ministry of Labour & Employment, Government of India, vide its notification dated 18.5.2010 issued, in exercise of the power conferred by Sub Section (2) of Section 1 of the Payment of Gratuity (Amendment) Act, 2010, appointed 24th May, 2010 as the date on which the said Act shall come into force. Therefore, it is only the employees, who retired after this date, who alone will be entitled to the enhanced amount of gratuity of Rs. 10.00 lacs as against the existing Rs.3 .5 lacs. This decision, according to the respondents, was taken by the apex body, i.e. Board of Directors after due deliberations and, therefore, cannot be faulted.

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

5. Indisputably, the respondent bank is a creation of the statute i.e. Himachal Pradesh Co operative Agriculture Societies Act, 1968 and by virtue of this fact alone, is the *'State'* within the meaning of Article 12 of the Constitution of India and, therefore, amenable to the writ jurisdiction of this court.

6. Adverting to the merits of the case, it would be evident from the perusal of Rule 30, more particularly Sub Rule 3 thereof that the employees of the respondent bank are entitled to the gratuity as is fixed by the government of Himachal Pradesh from time to time. Sub Rule 3 of Rule 30 reads as follows:

> *"The amount of gratuity to an employee shall not exceed 20 months wages or the maximum amount of gratuity as fixed by the Government of Himachal Pradesh from time to time whichever is less."*

7. Now in case the notification issued by the government of Himachal Pradesh on 14.10.2009, whereby gratuity was enhanced from Rs. 3.5 lacs to Rs.10.00 lcs is perused, it would be noticed that this notification was to be apply to all those who had retired or would be retiring after 1.1.2006.

8. The question, therefore, which falls for consideration, is as to whether the respondent bank through its Board of Directors could have superseded the express provisions of rules.

9. According to the "pure theory of law" of the eminent jurist Kelsen, in every legal system there is a hierarchy of laws, and the general principle is that if there is a conflict between a norm in a higher layer of the hierarchy and a norm in a lower level of the hierarchy, then the norm in the higher layer prevails, and the norm in the lower layer becomes ultra vires.

10. In our country this hierarchy is as follows:

(1) The Constitution of India.

(2) Statutory law, which may be either law made by the Parliament or law made by the State Legislature.

(3) Delegated legislation which may be in the form of rules, regulations etc. made under the Act.

(4) Administrative instructions which may be in the form of GOs, Circulars etc.

11. Therefore, in the event of there being a conflict between the Act, Rules and regulations, the Act will prevail and if there is a conflict between the Act, Rules and the regulations on the one hand and the circular or prospectus on the other hand, the Act will prevail and the later becomes ultra vires. (Refer: Union of India and others vs.Arun Kumar Roy, AIR 1986 SC737, Shish Ram and others vs. State of H.P. and others, (1996) 10 SCC 166 and Union of India vs. Madras Telephones Scheduled Castes and Scheduled Tribes Social Welfare Association (1997) 10 SCC 226).

12. In view of the exposition of law, referred to above, it is abundantly clear that the decision taken by the Board of Directors could not have and cannot supersede the provisions contained in the rules and if there is a conflict between the rules and the decision, it is obvious that it is the provisions of the rule which will prevail and later becomes *ultra vires.*

13. Having said so, there is no difficulty in concluding that the letter dated 31.8.2013, issued by the respondent bank confining the benefit of enhanced gratuity only to those of its employees who had retired after 24.5.2010 instead of those who had retired on or after 1.1.2006, is contrary to Rule 30(3) of the Rules and is accordingly quashed and set aside. The petitioners are accordingly held entitled to the payment of enhanced gratuity of Rs. 10.00 lacs in terms of the notification issued by the Government of HP on 14.10.2009.

14. It is further made clear that in case the enhanced gratuity is not paid within the period of 60 days, then in addition to the enhanced gratuity, petitioners shall also be entitled to simple interest @ 9% p.a. from the date when the gratuity became due till the date of actual payment. The petition is disposed of in the aforesaid terms, leaving the parties to bear the costs.

****

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

Smt. Rita Devi & others .....Appellants
Versus
Sh. Dinesh Kumar & others .....Respondents

FAO No. 418 of 2008
Decided on : 18.09.2015.

Motor Vehicles Act, 1988- Section 166- claimants had pleaded that deceased was earning Rs. 5,000/- per month from agriculture and horticulture - affidavit by one of the claimants filed to this effect- held, that in view of the fact that deceased was owner of the agricultural land, he would have been earning at least Rs. 2,000/- p.m. from it- age of the deceased was 29 years at the time of accident and multiplier of 16 will be applicable - claimants held entitled to Rs. 3500/- x 12 = Rs. 42,000 x 16= Rs. 6,72,000/- under the head of loss of dependency after deducting 1/3rd of monthly income for his personal expenses.

(Para-13 to 17)

Cases referred:

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

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

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

For the Respondents: Nemo for respondents No. 2 & 3.
Mr. Ashwani K. Sharma, Senior Advocate with Mr. Nishant Kumar, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Appellants-claimants have challenged the award dated 21st April, 2008, made by the Motor Accidents Claims Tribunal-II, Shimla, H.P. (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 66-S/2 of 2004, titled Rita Devi & others versus Shri Dinesh Kumar & others, whereby compensation to the tune of Rs.4,62,000/- with interest @ 7½% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimants-appellants herein and driver, namely, Dheeraj Sharma came to be saddled with liability (for short, "the impugned award").

2. The insurer, owner and driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. The claimants have questioned the impugned award on the ground of adequacy of compensation.

4. Thus, the only dispute in this appeal is –whether the award amount is inadequate?

5. It is necessary to give a brief summary of the case, the womb of which has given birth to the present appeal.

6. The claimants became the victims of the motor vehicular accident, which was caused by driver, Dheeraj Sharma, on 7th February, 2005, at about 8.20 p.m., near Himachal Pradesh Government Press, Chakkar Bye-Pass, Shimla-5, while driving the vehicle-Maruti Car bearing registration No. HP-34A-0645, rashly and negligently. Deceased, namely, Liaq Ram sustained injuries and succumbed to the same, leaving behind widow, two minor sons and mother.

7. The claimants filed claim petition before the Tribunal for grant of compensation to the tune of Rs.14,20,000/-, as per the break-ups given in the claim petition. In para-6 of the claim petition, it is specifically averred that the deceased was earning Rs.8,000/- per month, i.e. Rs.5,000/- from agriculture and Rs.3,000/- from daily wages work.

8. The respondents contested the claim petition on the grounds taken in their memo of objections.

9. Following issues came to be framed by the Tribunal:

"1. *Whether on 07.02.2005, at about 8.20 P.M. near H.P. Govt. Press, Chakkar by-Pass, the respondent No. 2 was driving the vehicle No. HP-34-A=0645 rashly and negligently and as such caused the death of Sh. Liaq Ram? …OPP*

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

3. Whether the driver of vehicle was not having valid and effective driving licence to drive the same at the time of accident?…OPR

4. Whether the car in question was being driven in violation of the policy as the owner of the car was not possessing relevant documents to ply the car? …OPR

5. Relief."

10. The parties led evidence. The Tribunal after scanning the evidence, oral as well as documentary, held that driver Dheeraj Sharma has driven the offending vehicle, rashly and negligently, on 7th February, 2005, at about 8.20 p.m., near Himachal Pradesh Government Press, Chakkar Bye-Pass, Shimla-5 and caused the accident.

Issue No. 1.

11. The claimants have proved issue No. 1. The findings returned by the Tribunal on this issue are not in dispute. Accordingly, the same are upheld.

12. Before I deal with issue No. 2, I deem it proper to deal with Issues No. 3 & 4.

Issues No. 3 & 4.

13. It was for the insurer to plead and prove that the driver of the offending vehicle was not having valid and effective driving licence at the relevant time and the vehicle was being driven in violation of the terms and conditions of the insurance policy. The insurer has not questioned the findings on issues No. 3 & 4. Accordingly, the findings returned by the Tribunal on the aforesaid issues are upheld.

Issue No. 2.

14. The Tribunal has held that the deceased was earning Rs.3,000/- per month by working as a labourer, but has fallen in an error while making assessment and determining - whether the deceased had any income from other vocation? The claimants

have specifically averred in para-6 of the claim petition that the deceased was earning Rs.5,000/- per month from agriculture and horticulture vocation. Claimant Rita Devi has filed affidavit to this effect, which is also on record.

15. Keeping in view the fact that the deceased was owner of the agricultural land, he would have been earning at least Rs.2,000/- per month from it. Accordingly, it is held that the monthly income of the deceased was not less than Rs.5,000/-. 1/3rd of the monthly income is to be deducted for his personal expenses, while keeping in view the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104** read with **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.** Thus, it can safely be held that the claimants have lost source of dependency to the tune of Rs.3,500/- per month.

16. The Tribunal has applied the multiplier of '18'. The claimant was 29 years of age at the time of accident. The multiplier of '16' was to be applied as per the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the apex Court in ***Sarla Verma's*** case, supra.

17. In the given circumstances, the claimants are held entitled to compensation to the tune of Rs.3500/- x 12 = Rs.42,000 x 16= Rs.6,72,000/-, under the head 'loss of dependency'.

18. The Tribunal has rightly awarded Rs.20,000/- under the heads 'loss of consortium' and 'loss of love and affection' and Rs.10,000/- under the head 'funeral expenses', and the same are upheld.

18. Thus, the claimants are held entitled to compensation to the tune of Rs.6,72,000/- + Rs.20,000/- + Rs.10,000/- total amounting to Rs. 7,02,000/-.

19. Respondent No. 2 stands saddled with liability as per the impugned award. The said finding is not in dispute. Accordingly, respondent No. 2 is directed to satisfy the award amount.

20. Accordingly, the amount of compensation is enhanced. The impugned award is modified, as indicated above and the appeal is disposed of.

21. Send down the records after placing a copy of the judgment on the Tribunal's file.

****

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

Sh. Sada Nand S/o Fata. ....Appellant/defendant No.1.

Vs.

Smt. Bhagti Devi widow of Shamboo Ram and others. .....Respondents/Plaintiffs.

RSA No. 231 of 2000
Order reserved on: 28.8.2015
Date of order: September 18, 2015**.**

Code of Civil Procedure, 1908- Order 1 Rule 10 CPC- Plaintiffs challenged the revenue entries reducing their share in the suit land and the area under tenancy- defendants took

the objections that the owner of the land is a necessary party- held, that since owner 'C' had died and her legal representatives were not before the Court, question regarding the tenancy and its extent cannot be adjudicated in their absence - suit is bad for non-joinder of necessary parties- appeal accepted and suit remanded to the trial Court with the directions to implead legal representatives of deceased 'C' as co-owners and thereafter to dispose of the same within three months. (Para-10 to 13)

Cases referred:

Vidur Impex and Traders Pvt. Ltd and others vs. Tosh Apartments Pvt. Ltd and others, AIR 2012 SC 2925

Mumbai International Airport Pvt. Ltd. vs. Regency Convention Centre and Hotels Pvt. Ltd. and others, AIR 2010 SC 3109

Amit Kumar Shaw and another vs. Farida Khatoon and another, AIR 2005 SC 2209

Bibi Zubaida Khatoon vs. Nabi Hassan Saheb and another, AIR 2004 SC 173

Dhurandhar Prasad Singh vs. Jai Prakash University and others, AIR 2001 SC 2552

Savitri Devi vs. District Judge, Gorakhpur and others, AIR 1999 SC 976

Khemchand Shankar Choudhary and another vs. Vishnu Hari Patil & ors, AIR 1983 SC 124

Jayaram Mudaliar vs. Ayyaswami and others, AIR 1973 SC 569

Rajendar Singh and others vs. Santa Singh and others, AIR 1973 SC 2537

Nagubai Ammal and others vs. B. Shama Rao and others, AIR 1956 SC 593

For the appellant: Mr Bhupender Gupta, Sr. Advocate with Mr. Ajeet Jaswal, Advocate.
For respondents: Mr. K.D.Sood, Sr. Advocate with Mr. Rajnish K.Lall, Advocate.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed under Section 100 of the Code of Civil Procedure against the judgment and decree passed by learned District Judge Hamirpur HP in civil appeal No. 49 of 1991 decided on 23.3.2000 titled Sada Nand Vs. Sahamboo Ram and others.

BRIEF FACTS OF THE CASE:

2. Deceased Shamboo Ram and others filed suit for declaration that plaintiffs and defendants No. 2 to 6 are the owners in possession of 3/8th shares and are tenants of 1/8th share over land comprised khata No.1 min khatauni No.5 khasra Nos. 650/15, 652/15, 28, 200, 291, 302 measuring 6 kanals 5 marlas as per jamabandi for the year 1984-85 situated in village Tika Khangalta, Tappa Pahlu, Tehsil Barsar, District Hamirpur H.P and revenue entries to the contrary are wrong and unauthorized and are liable to be corrected. In alternative plaintiffs have sought relief that in case co-defendant No.1 dispossessed plaintiffs and defendants No. 2 to 6 during pendency of the suit then decree for possession of suit land be also passed in favour of plaintiffs and against co-defendant No.1. It is pleaded that plaintiffs and co-defendant No.1 are descendants of Tulsi and Fata and defendants No. 2 to 6 are descendants of Sudama, Dhari, Jaggan and Hamira. It is pleaded that parties are cultivating the suit land as tenants since long. It is pleaded that in the year 1974 plaintiffs became owners of 3/16th shares and continued as tenants over 1/16th share under Smt. Chinti Devi and defendants No 2 to 6 became owners of 6/16th shares and continued as tenants of 2/16th share under Chinti Devi. It is pleaded that co-defendant

No.1 in collusion with revenue officer between 1950-1974 un-authorizedly got himself entered in possession of suit land exclusively in revenue papers. It is pleaded that during consolidation operation in the village plaintiffs and co-defendant Nos.2 to 6 came to know about revenue entries recorded in the name of co-defendant No.1. It is pleaded that cause of action arose in the year 1987 when plaintiffs acquired knowledge of wrong entries and when co-defendant No.1 threatened to dispossess plaintiffs and co-defendants No. 2 to 6 from suit land. Prayer for decree of suit as mentioned in relief clause of plaint sought.

3. Per contra written statement filed on behalf of co-defendant No.1 Sada Nand pleaded therein that suit is not maintainable and plaintiffs have no locus standi to file present suit. It is pleaded that suit is barred by limitation. It is pleaded that plaintiffs are estopped by their act and conduct from filing the present suit. It is pleaded that suit is bad for non-joinder of necessary parties. It is pleaded that co-defendant No.1 Sada Nand is owner of 3/4th shares and is non-occupancy tenant over remaining 1/4th share. It is pleaded that co-defendant No.1 is exclusively in possession over suit land. It is pleaded that plaintiffs did not remain in possession over suit land. It is pleaded that mutation No.1387 relating to proprietary right was sanctioned in favour of co-defendant No.1. It is pleaded that plaintiffs have full knowledge about revenue entries. It is pleaded that plaintiffs have no cause of action to file present suit. Prayer for dismissal of suit sought. As per pleadings of the parties following issues were framed by learned trial Court on 7.9.1988:

1. Whether plaintiffs are owners in possession of suit land and partly tenant in possession of the same, as alleged? ...OPP

2.Whether suit is not maintainable? ...OPD-1

3. Whether plaintiffs have no locus-standi to file the suit? ...OPD-1

4. Whether suit is barred by limitation? ...OPD-1

5. Whether plaintiffs are estopped from filing suit due to their act and conduct? ..OPD-1.

6. Whether suit is bad for non-joinder of necessary parties?. ..OPD-1.

7. Relief.

4. Finding of learned trial Court upon issue No.1 is in affirmative and findings of learned trial Court upon issues No. 2 to 6 are in negative. Learned trial Court passed decree for declaration in favour of plaintiffs and against co-defendant No.1 to the effect that plaintiffs and co-defendants No. 2 to 6 are owners in possession of 3/8th shares and are tenants of 1/8th share of suit land. Learned trial Court held that entries of revenue record in favour of co-defendant No.1 are wrong. Learned trial Court further held that plaintiffs and co-defendants No. 2 to 6 are in joint possession of suit land. Learned trial Court in alternative dismissed the suit for possession.

5. Feeling aggrieved against the judgment and decree passed by learned trial Court co-defendant No.1 Sada Nand filed appeal before learned District Judge Hamirpur. Learned District Judge Hamirpur decided civil appeal No. 49 of 1991 on 23.3.2000 titled Sada Nand Vs. Shambhoo Ram and others. Learned District Judge Hamirpur modified the judgment and decree passed by learned trial Court and held that out of total tenancy land inherited from Gokul half portion of suit land would go to plaintiffs and half would go to Sada Nand.

6. Feeling aggrieved against the judgment and decree passed by learned District Judge Hamirpur HP appellant Sada Nand filed present RSA under Section 100 CPC. Shamboo Ram and others also filed cross objections under Order 41 rule 22 read with

section 151 CPC against judgment and decree passed by learned District Judge Hamirpur HP. RSA was admitted on 24.11.2000 on the following substantial questions of law:

1. Whether impugned judgment and decree are not in consonance with the provision of Order 20 of the Code of Civil Procedure. Whether lower appellate Court gone beyond its jurisdiction to partially accept the appeal while returning findings in favour of the co-defendant No.1/appellant?. Was not suit of the plaintiff-respondents liable to be dismissed in its entirety?

2. Whether civil court had no jurisdiction to go into the validity of the proceedings made during the consolidation of holdings? Was not the suit of the plaintiff-respondents beyond the competence of the civil court as per the provisions of H.P Consolidation of Holdings (Prevention of Fragmentation) Act?.

3. Whether both courts below failed to take into consideration the true import of the definition of the 'Tenant" as defined under the Punjab Tenancy Act as well as Himachal Pradesh Tenancy and Land Reforms Act?.

7. At this stage High Court framed additional substantial question of law in present RSA exercising powers vested under Section 100(5) proviso Code of Civil Procedure. After perusal of pleadings of parties carefully and after perusal of oral and documentary evidence placed on record carefully High Court is satisfied that present case involves additional substantial question of law in order to dispose of RSA properly and effectively and in order to impart substantial justice to parties.

4. Additional substantial question of law framed by High Court. "Whether Smt. Chinti Devi or in alternative if Chinti Devi had died her legal representatives ought to be impleaded as co-defendant in present suit being necessary party order 1 rule 10(2) CPC in order to enable the court effectually and completely to adjudicate upon and settled all questions involved in suit and to pass effective decree of declaration?

8. Court heard learned Advocate appearing on behalf of the parties at length and also perused the entire record carefully.

9.Findings upon additional substantial question of law No.4 with reasons

9.1 PW1 Shambhoo Ram son of Tulsi Ram has stated that Kanshi Ram etc. were owner of the suit land. He has stated that half portion of the suit land was cultivated by Salla and half portion of suit land was cultivated by Gokul. He has stated that after the death of Gokul and Salla his legal representatives cultivated the suit land. He has stated that khatauni of suit land is joint. He has stated that suit land is 12 kanals and some marlas. He has stated that parties are in joint possession of suit land. He has stated that in the year 1987 consolidation took place and plaintiffs came to know that entry of the suit land is recorded in the name of co-defendant No.1. He has stated that Fata had died 4-5 years ago. He has stated that suit land is cultivable land. He has stated that there were two owners namely Kanshi Ram and Chinti Devi. He has stated that Kanshi Ram had died. He has stated that he does not know about Chinti Devi. He has stated that he did not pay any rent during his life time to land owners. He has stated that his father had paid rent to land owners. He has stated that his father had died 12-13 years ago. He has stated that property of his father devolve upon his and his brothers. He has denied suggestion that suit land is in exclusive possession of co-defendant No.1. He has denied suggestion that co-defendant No.1 is the owner of suit land. He has denied suggestion that parties are cultivating land separately**.**

9.2 PW2 Munshi Ram son of Roop Singh has stated that parties are known to him and he has also seen the suit land. He has stated that tenants were Fata, Tulsi, Gokul and Rula since ancestral time. He has stated that land was cultivated jointly. He has stated that co-defendant No.1 Sada Nand did not cultivate land independently. He has stated that in consolidation proceedings it came to the knowledge that co-defendant No.1 Sada Nand is in excess possession of 12 kanals of land. He has stated that he is also one of the co-owner of the suit land. He has stated that Fata and Tulsi used to reside separately. He has stated that both have died. He has stated that he did not take rent from tenants. He has stated that his ancestral used to take rent from tenants. He has stated that his father had died 30 to 35 years ago.

9.3. PW3 Beli Ram son of Sahano Ram has stated that parties are known to him. He has stated that parties are joint tenants over the suit land. He has stated that initially the suit land was in the tenancy of Gokul. He has stated that Sada Nand is the son of Fata. He has stated that he took rent in the year 1970. He has stated that Fata has died. He has denied suggestion that he has inimical relation with co-defendant No.1 Sada Nand.

9.4. PW4 Jai Ram son of Tulsi co-plaintiff has stated that co-defendant No.1 Sada Nand did not file any correction application relating to suit land. He has stated that Field Kanungo and Tehsildar did not visit suit land. He has stated that initially the suit land was in the name of his father and in the name of father of co-defendant No.1 Sada Nand. He has stated that plaintiffs did not leave joint possession of suit land at any point of time. He has stated that half portion of the suit land is in the possession of plaintiffs and half portion of suit land is in the possession of defendants. He has stated that his father died 15 years ago. He has stated that Fata had died 10 years ago. He has stated that suit land is measuring 12 ½ kanals. He has stated that separate khatauni has been prepared during consolidation proceedings. He has stated that he has filed application before consolidation department for correction of wrong entries in revenue record. He has stated that consolidation department told him to file civil suit. He has denied suggestion that plaintiffs did not remain in possession of the suit land. He has denied suggestion that plaintiffs have no title in the suit property.

9.5 PW5 Dhani Ram son of Sukhdayal has stated that parties are known to him and he has seen the suit land. He has stated that half portion of suit land is in possession of plaintiffs and half portion of suit land is in possession of defendants. He has stated that plaintiffs did not leave the possession of suit land at any point of time. He has stated that area of suit land is 10-12 kanals. He has stated that suit land is comprised of 5 to 6 fields. He has stated that co-defendant No.1 Shamboo Ram has kept oxen. He has denied suggestion that he has deposed falsely in the court in collusion with plaintiffs.

9.6. DW1 Sada Nand son of Fata Ram co-defendant No.1 has stated that suit land was cultivated by his father. He has stated that his father was tenant of the suit land and thereafter he became owner of suit land. He has stated that his father died in the year 1978. He has stated that after the death of his father he is in cultivating possession of the suit land. He has stated that plaintiffs did not remain in possession of suit land at any point of time. He has denied suggestion that plaintiffs are in cultivating possession of the suit land. He has stated that Tulsi did not remain in possession of suit land at any point of time. He has admitted that Tulsi was his uncle. He has denied suggestion that Tulsi had inherited tenancy right from his father Gokal. He has denied suggestion that Gokal was original tenant of suit land. He has denied suggestion that after death of Gokal his son Tulsi and Fata used to cultivate suit land jointly. He has denied suggestion that L.Rs of Tulsi are in settled possession of suit land.

9.7. DW2 Sher Singh son of Roop Singh has stated that parties are known to him and he has seen the suit land. He has stated that Fata had cultivated the suit land. He has stated that after the death of Fata Sada Nand has cultivated the suit land. He has stated that L.R's of Tulsi did not cultivate the suit land. He has stated that Tulsi and Fata used to reside separately. He has stated that co-defendant No.1 Sada Nand had cultivated suit land. He has stated that Sada Nand has not kept oxen. He has stated that Sada Nand used to cultivate suit land through Longoo Ram with payment of labour charges. He has denied suggestion that Tulsi and Fata during their life time used to cultivate suit land jointly. He has denied suggestion that after death of Tulsi and Fata their L.R's are jointly cultivating suit land.

9.8. DW3 Dila Ram son of Ranoo has stated that parties are known to him. He has stated that suit land was cultivated by Fata and after the death of Fata the suit land is cultivated by Sada Nand co-defendant No.1. He has stated that Tulsi did not cultivate the suit land. He has stated that Fata and Tulsi were real brothers and were sons of Gokal.

10. Submission of learned Advocate appearing on behalf of appellant that plaintiffs have filed suit for declaration that plaintiffs and defendants No.2 to 6 are owner in possession of 3/8th shares and are tenant of 1/8th share under Chinti over suit land and revenue entries to the contrary are wrong and unauthorized and Smt. Chinti Devi or in alternative her legal representatives are necessary parties in the present case is accepted for the reasons hereinafter mentioned. Plaintiffs have filed suit relating to suit land comprised in khata No.1 khatauni No.5, khasra Nos. 650/15, 652/15, 28, 200, 291 and 302 kita 6 measuring 12 kanals 9 marlas as per jamabandi for the year 1984-85. Court has carefully perused entries of jamabandi 1984-85 Ext P5 placed on record. In possession column of suit land Ext P5 placed on record it has been specifically mentioned in revenue record i.e. jamabandi for the year 1984-85 that Sada Nand co-defendant No.1 son of Sh Fata son of Gokul is owner to the extent of 3/4th shares and is tenant under Smt. Chinti to the extent of 1/4th share qua suit land. Court is of the opinion that Smt. Chinti Devi who is the owner of suit land and under whom plaintiffs are seeking tenancy right is necessary party in the present civil suit in order to dispose of civil suit properly and effectively. At the time of institution of suit Chinti is recorded as owner of 1/4th share in suit property as per jamabandi 1984-85 Ext P5 placed on record. Both parties have sought tenancy rights qua share of Chinti in present suit. Tenancy rights are in dispute inter se parties qua 1/4th share of Chinti in suit land. It is held that Chinti ought to have been joined as co-defendant in present suit at the time of institution of suit being necessary party. It is held that Chinti is necessary party in present suit in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in present civil suit and to pass effective decree of declaration as sought in relief clause of plaint.

11. Submission of learned Advocate appearing on behalf of respondents that Chinti is not necessary parties in the present suit is rejected being devoid of any force for the reasons hereinafter mentioned. Plaintiffs have sought relief of tenancy right qua 1/4th share of Chinti recorded in record of rights prepared under H.P. Land Revenue Act. Court is of the opinion that name of persons recorded in latest record of rights prepared as per H.P. Land Revenue Act 1954 in ownership column or possession column are necessary parties in civil suit of declaration. Entries of possession column of suit land recorded in jamabandi for year 1984-85 relied at the time of institution of suit Ext P5 is quoted:

> "Sada Nand son of Fata son of Gokal owner of 3/4th shares and non-occupancy tenant under Smt. Chinti qua 1/4th share.

In the present case plaintiffs have claimed tenancy right under Chinti Devi. It is well settled law that tenancy is a bilateral agreement between landlord and tenant and same should be proved in civil suit in accordance with law. It is well settled law that jamabandi entries are only for fiscal purpose and jamabandi entries did not create any title. See: AIR 1994 Apex Court 227 DB titled Guru Amarjit Singh Vs. Rattan Chand and others. Also see SLJ 1994 (1) page 68 Apex Court titled Jattu Ram Vs. Hakam Singh and others. Also see 2015 AIR SCW page 3482 Apex Court titled H.Lakshamaiah Reddy Vs. L.Venkatesh Reddy. It is also well settled law that where tenancy is disputed inter se parties then jurisdiction of civil court is not barred. See AIR 1963 Apex Court 361 titled Raja Durga Singh Vs. Tholu and others. Hence it is held that Smt. Chinti Devi or in the alternative her legal representatives are necessary parties in the present suit in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in present suit and to pass effective decree of declaration. It was held in case reported in ***AIR 2012 SC 2925 titled Vidur Impex and Traders Pvt. Ltd and others vs. Tosh Apartments Pvt. Ltd and others*** that Court can at any stage of proceedings either on application made by parties or otherwise direct impleadment of any person as party who ought to have been joined as plaintiff or defendant or whose presence before the Court is necessary for effective and complete adjudication of issue involved in the suit. It is further held that a necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by Court. ***(See AIR 2010 SC 3109 titled Mumbai International Airport Pvt. Ltd. vs. Regency Convention Centre and Hotels Pvt. Ltd. and others. See AIR 2005 SC 2209 titled Amit Kumar Shaw and another vs. Farida Khatoon and another. See AIR 2004 SC 173 titled Bibi Zubaida Khatoon vs. Nabi Hassan Saheb and another. See AIR 2001 SC 2552 titled Dhurandhar Prasad Singh vs. Jai Prakash University and others. See AIR 1999 SC 976 titled Savitri Devi vs. District Judge, Gorakhpur and others. See AIR 1983 SC 124 titled Khemchand Shankar Choudhary and another vs. Vishnu Hari Patil and others. See AIR 1973 SC 569 titled Jayaram Mudaliar vs. Ayyaswami and others. See AIR 1973 SC 2537 titled Rajendar Singh and others vs. Santa Singh and others. See AIR 1956 SC 593 titled Nagubai Ammal and others vs. B. Shama Rao and others)***

12. Finding upon other substantial questions of law is not given. Court is of the opinion that if finding is given upon other substantial questions of law framed by High Court of HP then grave miscarriage of justice will be caused to the parties at this stage of the case. Concept of lis pendens as mentioned in section 52 of Transfer of property Act 1882 will apply in present case.

13. In view of above stated facts judgment and decree passed by learned trial Court and learned first appellate Court are set aside and present civil suit is remanded back to learned trial Court having jurisdiction to try civil suit for limited purpose only with direction to implead Smt. Chinti Devi or in the alternative her legal representatives in present suit as co-defendant and thereafter issue notice to Smt. Chinti Devi or her L.R's in accordance with law and thereafter dispose of present suit afresh expeditiously within three months after receipt of civil suit file. Evidence already recorded will form part and parcel of evidence except legal rights of Chinti or her L.R's if contested by Chinti or her L.R's. Parties are directed to appear before learned trial Court on 16.10.2015. No order as to costs. File of learned trial Court and learned first appellate Court be transmitted forthwith along with certify copy of limited remand order. Appeal is disposed of. Pending applications if any also disposed of.

****

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

FAO (MVA) No. 436 of 2008 a/w CO NO. 169 of 2009 and FAO No. 461 of 2008 a/w CO No. 174 of 2009.
Date of decision: 18th September, 2015

FAO No. 436 of 2008.	
Sunita and others	.....Appellants.
Versus	
Self Help Group village Panesh and others	...Respondents
FAO No. 461 of 2008.	
Lata Sharma	.....Appellant.
Versus	
Self Help Group village Panesh and others	...Respondents

Motor Vehicles Act, 1988- Section 166- Respondents contended that vehicle belongs to Self Help Group- they are neither owners nor possessors of the same- respondents have executed a Power of Attorney admitting that they are members of the Group, that they are running the offending vehicle and are in possession of the same- they have power to ply the vehicle and to appoint driver and conductor and to deposit taxes- held, that in view of these circumstances, the plea of the respondents that they are not owners cannot be accepted.

(Para-3)

For the appellant(s): Mr. Anil Kumar, proxy Advocate.

For the respondent(s): Mr.K.D. Sood, Sr. Advocate with Mr. Mukul Sood, Advocate, for respondent No. 1 (i) to (viii) in both the appeals.
Mr. Ravinder Singh Jaswal, Advocate, for espondents NO. 1 ((ix) (x) and (xi) in both the appeals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

By the medium of FAO No. 436 of 2008, the claimants have invoked the jurisdiction of this Court under Section 173 of the Motor Vehicles Act, for short the Act, against the judgment and award dated 6.5.2008 made by the Motor Accident Claims Tribunal, Solan in MAC Petition No. 28-S/2 of 2006 titled *Smt. Sunita versus Self Help Group village Panesh and others*, for short the impugned award, on the grounds taken in the memo of appeal.

2. Respondents have filed cross-objections.

3. The learned counsel for the respondents argued that the vehicle belongs to Self Help Group village Panesh and they are neither owners nor possessors of the vehicle. The argument is not tenable for the reasons that they have executed a power of attorney consisting of two pages which is at page 95-96 of the record file which do disclose that the respondents have admitted that they are the members of the said group and are manning Self Help Group Village Panesh and are in possession of the offending vehicle and running the same and they have also power to ply the said vehicle, appoint driver and conductor

and also deposit taxes whichever is payable. The learned counsel was not able to deny the same.

4. I have gone through the record and perused the impugned award right from paras 8 to 18. The Tribunal has rightly made the discussion and saddled the owner with the liability. The Tribunal has also discussed the evidence and held that the driver of the offending vehicle has driven the vehicle rashly and negligently. The rash and negligent driving is not in question because the insurer has not disputed the rashness and negligence of the driver. Having said so, the findings returned on issue No. 1 are upheld.

5. Issues No. 3 and 4. Respondents have failed to prove these issues. Even otherwise, claimants are within their rights to file claim petition being the victims of the vehicular accident. Having said so, findings returned on issue No. 3 are upheld.

6. It was for the respondents to prove that the claim petition suffers from non-joinder of necessary parties, has not led any evidence. Even otherwise, the police report can be treated as claim petition. The procedural technicalities cannot be a ground to defeat the clam petition. Thus, findings returned on issue No. 4 are also upheld.

7. Issue No. 2. The Tribunal has made discussion in paras 12, 14 and 16 of the impugned award and held that the deceased was 50 years of age and the claimants have lost source of dependency to the tune of Rs.1,50,000/- per year and income from the hotel business has been assessed as Rs.73100/- and that from the agriculture as Rs.1,00,000/- and after making deduction, the claimants are held to have lost source of dependency to the tune of Rs.86,000/-. It is apt to reproduce para 16 of the impugned award herein.

> *"16.So far as the loss of income from the agriculture pursuits is concerned, it can only be with regard to the supervision/labour which deceased used to put as with the death, the land has not been destroyed and the agricultural work now can be got done from the labourers by the dependents who will inherit this land. This loss, therefore, can be taken as Rs. 5000/- a month or say Rs. 60,000/- per annum. Taking the income of the deceased from hotel business as given in the income tax return Ext. PD and adding the amount of Rs. 60,000/- to the income from the hotel business, the total income of the deceased would come to Rs. 1,33,000/- per annum or day Rs. 1,30,000/-. To find out the annual loss of income to the petitioners, 1/3rd of it which approximately comes to Rs. 44,000/- is to be deducted towards the expenses which the deceased would have spent on himself for his upkeep. Thus, the annual loss of dependency to the petitioners would come to Rs. 1,20,000- Rs.44,000 = Rs.86,000/-. To arrive at the total loss of dependency a suitable multiplier has to be applied. Keeping in view the age of the deceased and that of the petitioners as one of them has been stated to be minor, application of multiplier of 9 would be just and reasonable. Applying this multiplier the total loss of dependency of the petitioners would come to Rs. 86,000 X 9 = Rs. 7,74,000/-. Apart from it the petitioners are also entitled to a sum of Rs. 15,000/- as conventional charges, loss of love and affection and loss of consortium to petitioner No. 1 and Rs. 5,000/- for funeral and other incidental expenses. Therefore, the*

petitioners are held entitled to a sum of Rs. 7,94,000/- in all as compensation."

8. Having said so, the Tribunal has rightly assessed the compensation, cannot be said to be either excessive or inadequate in any way. Accordingly the impugned award is upheld and the appeal as well as the cross objections are dismissed.

FAO No. 461/2008.

9. By the medium of FAO No. 461 of 2008, the claimant has invoked the jurisdiction of this Court under Section 173 of the Motor Vehicles Act, for short the Act, against the judgment and award dated 6.5.2008 made by the Motor Accident Claims Tribunal, Solan in MAC Petition No. 55-S/2 of 2006 titled Ms. Lata Sharma versus Self Help Group Village Panesh and others on the grounds of adequacy of compensation, for short the impugned award, on the grounds taken in the memo of appeal.

10. Respondents have filed cross-objections.

11. Issues No. 1, 3 and 4 stand decided in terms of the discussions made in paras 4 to 6 supra.

12. Issue No. 2. The Tribunal has made discussion in paras 12 to 17 of the impugned award and held that the claimant is entitled to Rs.75,000/- as compensation in all with costs assessed at Rs.1,000/ and interest @ 9% per annum. The amount awarded is too meager, cannot be said to be excessive, in any way.

13. Accordingly the impugned award is upheld and the appeal as well as the cross objections are dismissed.

14. The Registry is directed to release the amount in favour of the claimant(s), strictly, in terms of the conditions contained in the impugned award, through payee's cheque.

15. Both the appeals and the cross objections are dismissed accordingly.

16. Send down the record, forthwith, after placing a copy of this judgment.

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J

Taj Ali ... Appellant/plaintiff.
Versus
Charag Deen & others ... Respondent/defendants

RSA No. 6 of 2002
Judgment Reserved on : 9.9.2015
Date of Decision : September 18, 2015

Limitation Act, 1963- Article 54- Mutation showing incorrect revenue entries and incorrect name of the father of the plaintiff was attested in the year 1949- suit filed after 1990 claiming that cause of action accrued on 22.10.1990 when A.C. 2nd Grade dismissed the application for correction of record and advised the party to approach the Civil Court- First Appellate Court held the suit to be barred by limitation- held, the approach of First Appellate Court is erroneous as cause of action does not arise on account of wrong revenue entries

but from the date when plaintiff in fact feels aggrieved – in this case, cause of action accrued to the plaintiff on 22.10.1990 when his prayer for correction was rejected by A.C. 2nd Grade and he was directed to approach the Civil Court. (Para-12 to 15)

Specific Relief Act, 1963- Section 34- Plaintiff sought declaration that he is son of 'A' and is wrongly shown as son of 'C' in the revenue record, whereas one 'B' is son of 'C'- Consequential relief of correction of revenue record was also sought – suit decreed by trial Court holding the plaintiff to be son of 'A' and not 'C' - first appellate Court reversed the findings on the plea of limitation and in view of the fact that longstanding revenue entries were not rebutted by the plaintiff- held, that it is an admitted case of the defendants in the written statement that plaintiff is son of 'A' – secondly, plaintiff has produced on record the service record of one 'B' showing him to be son of 'C'- this evidence has gone unchallenged- and establishes that 'B' is son of 'C-thus, the plaintiff is proved to be the son of 'A'- further held, that first appellate Court wrongly concluded that the plaintiff's case not proved and plaintiff not proved to be a son of 'A' but son of 'C- plaintiff entitled for declaration as prayed for. (Para-7 to 10)

Cases referred:

Durga Das vs. Collector & others, (1996) 5 SCC 618

Suman Verma vs. Union of India & others, (2004) 12 SCC 58

Balwant Singh & another vs. Daulat Singh (Dead) by LRs & others, (1997) 7 SCC 137

Mahila Bajrangi (dead) through LRs & others vs. Badribai w/o Jagannath & another, (2003) 2 SCC 464

Shiam Singh & others vs. Chaman Lal & others, 2011 (2) Shim. LC 1

Daya Singh & another vs. Gurdev Singh (Dead) by LRs & others, (2010) 2 SCC 194

Bolo vs. Koklan, (1929-30) 57 IA 325: AIR 1930 PC 270

C. Mohammad Yunus vs. Syed Unnissa, AIR 1961 SC 808

Board of Trustees of Port of Kandla vs. Hargovind Jasraj & another, (2013) 3 SCC 182

For the appellant : Mr. G. D. Verma, Sr. Advocate, with Mr. B. C. Verma, Advocate, for the appellant.

For the respondent : Mr. R. K. Bawa, Sr. Advocate, with Mr. Amit Dhumal, Advocate, for respondents No. 1, 3 and 5 to 8.

The following judgment of the Court was delivered:

Sanjay Karol, J.

This is the plaintiff's Regular Second Appeal filed under Section 100 of the Code of Civil Procedure.

2. Plaintiff's Civil Suit No. 130/1 of 91, titled as Shri Taj Ali vs. Shri Rashid Ali & others, stands decreed by the learned Sub Judge, Theog, District Shimla, H.P., in terms of judgment and decree dated 23.9.1998. Aggrieved thereof, defendants namely Charag Din, Hanif, Mahboob, Rasida, Gulab Singh, Mastana, Multana, Nurjhan and Munni filed an appeal which stands allowed in terms of judgment and decree dated 13.9.2001, passed by the learned District Judge, Shimla, H.P., in Civil Appeal No. 217-S/13 of 1998, titled as Shri Charag Din & others vs. Shri Taj Ali & others.

3. Barkat Ali had two sons namely Sher Ali and Abdulla @ Dulla. Sher Ali was married to Sahabi and Abdulla was married to Kresha. Through the loins of Sher Ali, Sahabi gave birth to Taj Ali (plaintiff) and Rashid Ali (defendant No. 1). Through the loins of Abdulla, Kresha gave birth to Bhadar Ali (defendant No. 3), Nazir Ali (predecessor in interest of defendants No. 4 to 15), Shaffi (predecessor in interest of defendants No. 16 to 20) and Taj Deen (predecessor in interest of defendants No. 21 to 25). After death of Abdulla, Sher Ali married Kresha and through her gave birth to Saraju Din and Punni.

4. Vide mutation No. 58, dated 9.11.49 estate of Sher Ali stood mutated in the names of Taj Din, Rashid Ali and Saraju Din. Revenue record reflected Taj Ali to be son of Abdulla and Taj Din to be son of Sher Ali. According to the plaintiff, such entries reflecting parentage are factually incorrect. Resultantly plaintiff filed a suit praying for the following relief:

> "It is thus prayed that it be kindly be declared that plaintiff is son of shri Sher Ali and not son of Abdulla and shri Taaj Din deceased was son of Abdulla and not son of shri Sher Ali and thus entry in the column of ownership in the jamabandi of Taj Din s/o Sher Ali be kindly held to be wrong and contrary to facts. Decree of Declaration to that effect may kindly be passed in favour of the plaintiff and against the defendants. The defendants be further be restrained by decree of perpetual Injunction from making the wrong Revenue entries as the basis of any right or title. The costs of the suit be awarded to the plaintiff. Such other relief as the court may deem fit be granted to the plaintiff."

5. Contesting defendants No. 3, 21 and 24 filed a joint written statement, admitting parentage of Taj Ali, born to Sahabi through Sher Ali. However, Taj Din also pleaded to be born through Sher Ali and not Abdulla.

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

> "1. Whether Taj Deen is son of Abdula @ Dulla, as alleged, if so its effect? OPP
>
> 2. Whether the suit is not maintainable as alleged? OPD
>
> 3. Whether the plaintiff is estopped to file the suit as alleged ? OPD
>
> 4. Whether the suit is time barred as alleged? OPD
>
> 5. Relief."

7. Based on the evidence led by the parties, trial Court decided issued No. 1, holding plaintiff Taj Ali to be born through Sher Ali and Taj Deen to be born through Abdulla. Issues No. 2 and 3 were decided against the contesting defendants for want to evidence. Similarly Issue No. 4 was also decided for the reason that (i) entries of mutation were not effected in the presence of the plaintiff (ii) having learnt about the same, prompt action was taken. Hence suit was filed within the period of limitation. Thus decree was passed in the following terms:-

> "16. In view of my findings and observations given under aforementioned issued, the suit of the plaintiff is decreed. It is declared that deceased Sh. Taj Din was the son of Sh. Abdula and not the son of Sh. Sher Ali and accordingly, revenue entries showing Sh. Taj Din as the son of Sher Ali in the land comprised in khata No. 35 Khatauni No. 50 Kitas 16 measuring 44 bighas and 9 biswas situated in chak Hulli Pargna Chagaon, Tehsil Kotkhai

Distt. Shimla are declared wrong, illegal and void. Similarly, mutation Ext. DB attested in Sambat 25.1.88 showing Sh. Taj Ali as the son of Sh. Abdula and mutation Ext. PH1 dated 13.10.49 regarding Taj-Ul-Din as the son of Sh. Shar Ali are also declared wrong and illegal. Decree sheet be prepared accordingly. The file after completion be consigned to the record room."

8. In terms of the impugned judgment, while reversing such findings, judgment and decree, the lower appellate Court dismissed the suit holding that: (i) There is presumption of correctness attached to the order of mutation (Ext. PH/1), pertaining to the estate of Sher Ali; (ii) such presumption stood unrebutted; and (iii) Since in para – 9 of the plaint challenge to the order of attestation of mutation, so effected on 9.11.1949 was laid only in the year 1990, suit was hopelessly barred by limitation.

9. Hence the present appeal, filed by plaintiff Taj Ali stands admitted on the following substantial questions of law:-

"1. Whether the findings, as recorded by the learned District Judge are vitiated, on account of misreading or mis-appreciation of the pleadings of the parties and material on record.

2. Whether the ld. District Judge has mis-construed and mis-interpreted and has failed to appreciate oral, as well as, documentary evidence on record, especially the service record of late Taj Deen Ex. PW-5/A to Ex. PW-5/C, Pariwar Register Ex. PA and copies of the Voter Lists Ex. PD to Ex. PH-1, wherein the deceased, Taj Deen is shown as son of Abdulla alias Dulla.

3. Whether in view of the admissions, as contained on behalf of Taj Deen in his affidavit Ex. PW-6/A, joining report of Taj Deen son of Abdulla, Ex. PW-5/B and medical report Ex. PW-5/C, the deceased has admitted that he was son of late Sh. Abdulla.

4. Whether the voter Lists Ex. PD, Ex. PE, Ex. PI and Ext. PG, being public documents and Pariwar Register Ex. PA have wrongly been ignored from consideration by the learned District Judge below.

5. Whether the suit having been found within limitation by the trial court and in the absence of any challenge in the grounds of appeal, the suit could not have been held to be barred by the limitation by the Lower Appellate Court and the conclusions, as drawn by the Lower Appellate Court about the claim of the appellant are vitiated on account of wrong approach.

6. Whether the presumption of truth attached to the revenue entries in the revenue record, as relied upon by the Lower Appellate Court are amply rebutted on the basis of the oral, as well as, documentary evidence on record, as produced by the appellant."

Substantial Questions of Law No. 1 to 4 and 6:

10. Substantial questions of law No. 1 to 4 and 6 essentially pertain to the paternity of Taj Ali and Taj Deen and as such are being considered and decided accordingly.

11. Record reveals that in the order of mutation, Taj Deen is shown as son of Sher Ali and Taj Ali is shown as son of Abdulla. In the written statement, contesting defendants themselves admit Taj Ali to have been born through Sher Ali. In this view of the matter, the lower appellate Court erred in holding that there was presumption of correctness of entries of mutation. That apart, perusal of the impugned judgment reveals that even

though it noticed self serving documents revealing paternity of Taj Deen, relied upon by the trial Court, yet, it ignored to consider the same.

12. It cannot be disputed that Taj Deen was employed with the Government, at least w.e.f. 1980. His letter of appointment (Ext. PW-5/A) indicates name of his father to be Abdulla. Not only that, in his joining report (Ext. PW-5/B), he himself stated such fact. Crucially he also filed an affidavit (Ext. PW-6/A) to this effect. Now all this evidence stands ignored by the lower appellate Court. Also there is no discussion as to why reasoning adopted by the trial Court was illegal, erroneous or findings returned not borne out from the record. Presumption of long standing revenue entries is rebuttable, which in the given facts and circumstances, stood rebutted by the plaintiff.

13. It is a settled position of law that entries of mutation in the revenue record do not confer any title to the property. It is only an entry for collection of land revenue from the person in possession. The title to the property has to be on the basis of the title with regard to the acquisition of land and not by mutation entries. Unless contrary is established, entries of mutation are taken to be correct. [See: *Durga Das vs. Collector & others,* (1996) 5 SCC 618 {relied upon in *Suman Verma vs. Union of India & others,* (2004) 12 SCC 58}; *Balwant Singh & another vs. Daulat Singh (Dead) by LRs & others,* (1997) 7 SCC 137; *Mahila Bajrangi (dead) through LRs & others vs. Badribai w/o Jagannath & another,* (2003) 2 SCC 464]

14. In this view of the matter findings returned by the lower appellate Court cannot be said to borne out from the record and as such are reversed and that of the trial Court affirmed. Substantial questions of law are answered accordingly.

Substantial Question of Law No. 5:

15. While deciding the issue of limitation, the lower appellate Court heavily relied upon para-9 of the plaint which reads as under:-

> "9. That the cause of action has arisen to the plaintiff on 22-10-90 when the Assistant Collector 2nd Grade dismissed the application of the plaintiff for correction and directed the parties to file civil suit to get the entry corrected and also on such dates when the wrong entry in favour of Taaj Din as son of Shri Sher Ali has been incorporated."

16. Significantly the appellate Court ignored para-8 of the plaint which reads as under:-

> "8. The plaintiff came to know of this wrong entry in 1986 and then filed an application under section 37 of H.P. Land Revenue Act before the Assistant Collector, 2nd Grade, Kot-Khai on 26-6-1986 and the said application was dismissed and decided by the Assistant Collector 2nd Grade Kot-Khai on 22-10-90 on the ground that party aggrieved by the wrong entry should seek redress in the civil court under section 46 of the H.P. Land Revenue Act, hence this suit."

17. It cannot be disputed that the entry of mutation dated 9.11.1949 was assailed for the first time only in the year 1986. But then plaintiff has explained of having learnt about the same, immediately prior to initiation of action under the provisions of the H.P. Land Revenue Act. While rejecting such application, liberty was reserved, enabling the plaintiff to institute appropriate proceedings before a Civil Court. It was for this reason that in the year 1991 suit came to be filed.

18. This Court in *Shiam Singh & others vs. Chaman Lal & others,* 2011 (2) Shim. LC 1, has held that for a suit for declaration, limitation would begin to run not from the date of the entry affecting the right of the person concerned, but from the date when he feels aggrieved by the entry and it is the satisfaction of such person as to when does he feel aggrieved. Defendant cannot be heard to say that the plaintiff would have felt aggrieved by the entry at some earlier point of time or when it was actually made. The Court further held that:-

> "15. Learned counsel for the appellants submitted that the plaintiffs-respondents were out of possession of the suit land and, hence, their suit was not covered by the provision of Section 46 of H.P. Land Revenue Act. Submission is misconceived. Section 46 does not speak of physical possession of the subject matter or the land with respect to the entry of which a person is aggrieved, but the right of the plaintiff. The person should be in possession of the right and not the land, with respect to the entry of which he is aggrieved. ... ..."
>
> ... ...
>
> "16. It is well settled proposition of law that possession of a co-sharer is the possession of all. A co-sharer in exclusive possession holds the property for himself and also on behalf of the co-sharers not in physical possession. Such a co-sharer is an agent of other co-sharers, who are out of possession, in regard to their shares in the joint property. In view of this legal position, plaintiffs are to be presumed to be co-sharers with the defendants. This is especially so when the defendants-appellants have not taken the plea of ouster of the plaintiffs-respondents. Question is answered accordingly."

19. In *Daya Singh & another vs. Gurdev Singh (Dead) by LRs & others,* (2010) 2 SCC 194, Hon'ble the Supreme Court of India had the occasion to deal with a case where challenge to the entries reflected in the revenue record was laid after a period of 18 years. Upholding such action initiated by the aggrieved party, the Court framed a question to itself as to whether mere existence of an adverse entry in the revenue records would give rise to cause of action, as contemplated under Article 58 or would accrue when such right stood infringed or threatened to be infringed. Answering the same, relying upon *Bolo vs. Koklan,* (1929-30) 57 IA 325: AIR 1930 PC 270 and *C. Mohammad Yunus vs. Syed Unnissa*, AIR 1961 SC 808 the Court held that cause of action, would accrue only when the right asserted in the suit is infringed or there is at least a clear and unequivocal threat to infringe that right. The Court further held that mere existence of an adverse entry in the revenue records would not give rise to cause of action.

20. The view stands reiterated in *Board of Trustees of Port of Kandla vs. Hargovind Jasraj & another,* (2013) 3 SCC 182.

21. Now in the instant case also, plaintiff categorically pleaded and proved through his testimony of having acquired knowledge of incorrect entries, immediately prior to initiating action in the year 1986. In this view of the matter, the lower appellate Court erred in holding the plaintiff's suit to be barred by limitation. As such, findings are reversed. Suit filed by the plaintiff cannot be said to be barred by limitation. Substantial question of law is answered accordingly.

22. Consequently the appeal is allowed and the findings of the trial Court are affirmed. Appeal stands disposed of accordingly, so also pending application(s), if any.

****

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

FAOs (MVA) No. 287 and 288 of 2014.
Judgment reserved on 4.9.2015
Date of decision: 18. 09.2015.

FAO No. 287/2014.

Tulsi Ram .....Appellant
Versus
Smt. Veena Devi and others ...Respondents.

FAO No. 288/2014.

Tulsi Ram .....Appellant
Versus
Smt. Mohinder Kaur & others ...Respondents.

Motor Vehicles Act, 1988- Section 173- Tribunal held that vehicle involved in the accident was being driven by one 'D' and not by driver alleged in the claim petition- tribunal saddled the insurer with the liability with a right of recovery- findings challenged by the owner of the offending vehicle- held, that while determining the claim petition, prima facie proof is required and the Tribunal fell in error while expecting the owner to prove the case beyond reasonable doubt- owner had led sufficient evidence that vehicle was being driven by the driver pleaded in the claim petition and not by one 'D'- findings of the Tribunal holding otherwise set aside – award modified and insurer saddled with the entire liability without right of recovery. (Para-7 to 13)

For the appellant(s): Mr.J. L. Bhardwaj, Advocate,
For the respondent(s): Mr.Kunal Verma, Advocate, for respondents No. 1 to 4.
Mr. Sanjeev Bhushan, Sr. Advocate with Ms. Abhilash Kaundal, Advocate, for respondent No.5.
Respondent No. 6 ex parte.
Mr. Deepak Bhasin, Advocate, for respondent No.7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Both these appeals are arising out of the same accident and the issue involved is also the same, hence taken up together for disposal.

2. In fact, the Motor Accident Claims Tribunal Bilaspur, hereinafter referred to as "the Tribunal" for short, had made two separate awards on the same date i.e. on 1.4.2006 in MAC Case No. 42 of 2002, which became subject matter of FAO No. 215 of 2006 titled *Tulsi Ram Thakur versus Smt. Mohinder Kaur and others* and MAC case No. 43 of 2002 titled *Smt. Veena Rani and others versus Man Mohan and others,* which became subject matter of FAO No. 216 of 2006 before this Court. Both these appeals alongwith Cross objections No. 137 of 2007 filed in FAO No. 215 of 2006 were taken up by this Court for hearing on 7.3.2014 and after hearing the parties, both the appeals were remanded to the Tribunal. It is

apt to reproduce paras 6 to 9 of the judgment dated 7.3.2014 passed in FAOs No. 215 and 216 of 2006, herein.

> *"6.In the given circumstances, I deem it proper to remand the case only for the purpose of providing two opportunities to the appellant herein to lead evidence in rebuttal and in support of the pleadings contained in para 24 of the reply/objections and it is for the Tribunal to determine whether driver, namely, Deep Ram @ Kala was driving the offending vehicle at the relevant point of time or Sh. Manmohan Singh, particulars of whom have been given in para 24 of the reply/objections, filed to the claim petitions. It is further for the Tribunal to determine whether owner, after leading evidence has committed any willful breach in terms of the provisions of Sections 147 and 149 of the Motor Vehicles Act and whether right of recovery is to be granted to the insurer National insurance Company/respondent No. 6 herein."*
>
> *7.As a consequence, both the appeals are remanded to the Tribunal below on this limited issue. The Tribunal is directed to conclude the trial of both the cases within three months from today and pass appropriate orders.*
>
> *8.The impugned awards, so far as these relate to holding driver Deep Ram @ Kala, has caused the accident, and the right of recovery, are set aside and shall remain subject to the outcome of the findings returned by the Tribunal, in terms of the time frame already mentioned above. It is made clear that the recovery proceedings, already drawn by the insurance Company, as stated by the learned counsel for the insurer, shall remain under eclipse till the decision of the Tribunal.*
>
> *9.Parties are directed to cause appearance before the Tribunal, Bilaspur, HP on* ***31st March, 2014.*** *Both the appeals along with cross-objections are disposed of accordingly."*

3. The claim petitions, after remand, came up for consideration before the Tribunal. Owner Tulsi Ram and driver Manmohan Singh Thakur, before the Tribunal stepped into the witness-box and got recorded their statements. After examining the pleadings and the statements of the parties, the Tribunal held that it was Deep Kumar who was driving the vehicle and not Manmohan Singh Thakur respondent No.5 herein.

4. The issue to be determined is whether the findings recorded by the Tribunal are correct? The answer is in negative for the following reasons.

5. The Tribunal, while examining the pleadings and scanning the evidence has held that respondent No. 1 Man Mohan Singh Thakur had not contested the claim petitions and chosen to remain *ex parte*. The ground taken by the owner-appellant herein that the vehicle was being driven by driver respondent No. 1 Man Mohan Singh Thakur, is afterthought, in order to avoid the liability. It is not known what was the material before the Tribunal to record such a finding.

6. The provisions of the Code of Civil Procedure, for short "CPC are not applicable in the claim petitions. Prima facie findings are to be recorded. The claim petitions were filed in the year 2002 and on 14.1.2005, the appellant has filed the reply and

specifically pleaded in para 24 of the reply that the vehicle was being driven by respondent No. 1 Man Mohan Singh Thakur and not Deep Ram. It is apt to reproduce para 24 of the reply herein:

> *"24.The contents of para No. 24 of the claim petition are wrong hence denied. It is wrong that on 10.3.2002, Truck No. HP-51-2274 was being driven by respondent No. 2 It is submitted that replying respondent is quite unknown about respondent No.2 In fact, Sh. Man Mohan Singh Thakur son of Tulsi Ram Thakur R/o Summer Hill, Shimla was deployed as Truck Driver on Truck No. HP-51-2274 and not the respondent No.2. Respondent Man Mohan Singh Truck Driver was having a valid and effective driving licence to drive the heavy vehicle and he was driving the truck No. HP-512274. It is submitted that the accident took place due to rash and negligent driving by the motor cyclist who were overtaking some another vehicle and the Truck driver Man Mohan Singh immediately after this accident went to inform the replying respondent being the owner of vehicle about this accident. In fact, the accident had taken place due to rash and negligent driving by motor cyclist who were descending whereas the truck was fully loaded and ascending in a slow speed. The income shown in the petition is wrong, false and baseless, hence denied……."*

7. Deep Ram driver -respondent No. 2 in the claim petition has also filed reply and stated in para 8 of the reply that he has not caused the accident and it was caused by driver Man Mohan Singh Thakur. He has filed the reply in the year 2005.

8. FIR nowhere contains the name of the driver. Had there been name of the driver in the FIR, the question would have been different. Owner Tulsi Ram and driver Deep Ram have admitted that it was Man Mohan Singh Thakur, who was driving the vehicle at the relevant point of time.

9. It was for the insurer to lead evidence to prove that Man Mohan Singh Thakur was not driving the vehicle and the vehicle was being driven by Deep Ram. No such evidence was led by the insurer. How can the insurer be exonerated from the liability.

10. Having said so, the Tribunal has fallen in an error in determining the issue in such a manner. The Tribunal has determined the issue as if it was determining a criminal case or the civil suit. In civil cases, proof of preponderance of probabilities is required and in criminal cases, proof beyond reasonable doubt is required.

11. In the instant case, while determining the claim petition, prima facie proof is required and when there is pleadings by owner and driver Deep Ram, how can it be said that the defence taken is after thought.

12. Thus, the findings recorded by the Tribunal are set aside and it is held that the owner has not committed any breach. The insurer is saddled with the liability and right of recovery granted by the Tribunal is set aside.

13. Accordingly, the impugned awards are modified and the insurer is saddled with the entire liability without right of recovery.

14. Both the appeals are disposed of alongwith pending applications, if any, and the impugned awards are modified, as indicated hereinabove.

15. The insurer is directed to deposit the entire amount, if not already deposited, within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, after proper verification.

16. Send down the record forthwith, after placing a copy of this judgment.

****

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

United India Insurance Co. Ltd. .....Appellant.

Versus

Smt. Meena Devi and others ...Respondents

FAO (MVA) No. 374 of 2008.
Date of decision: 18th September, 2015

Motor Vehicles Act, 1988- Section 173- Award challenged by the Insurer on the ground that claimants had not proved rashness and negligence of the driver of the offending vehicle- FIR lodged against the driver and challan presented against him- oral evidence also led to prove rashness and negligence of the driver- held, that lodging of FIR is sufficient proof to hold the rashness and negligence of the driver- insurer did not lead any evidence to contrary- finding qua rashness and negligence of the driver of the offending vehicle is the result of the proper appreciation of evidence - appeal dismissed. (Para-6 and 7)

For the appellant: Mr. Ashwani K. Sharma, Sr. Advocate with Ms. Monika Shukla, Advocate..

For the respondents: Ms. Anita Jalota, proxy counsel for respondents No. 1 and 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award dated 27.3.2008, made by the Motor Accident Claims Tribunal, Fast Track Court, Kangra at Dharamshala, in MACP RBT No. 42-K/11/2005, titled *Meena Devi and another versus Desh Raj and others,* for short "the Tribunal", whereby compensation to the tune of Rs.1,80,000/- was awarded in favour of the claimants and insurer came to be saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. Claimants, owner and drivers have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. The learned counsel for the appellant argued that the claimants have not proved the rash and negligent driving by the driver of the offending vehicle thus, the insurer was not liable to pay the compensation and the claim petition was to be dismissed and also that the driver was not having a valid and effective driving licence. Both these grounds are devoid of any force for the following reasons.

5. It is apt to reproduce the issues framed by the Tribunal herein:

1. *Whether the petitioner received injuries due to rash and negligent driving of respondent No. 1? OPP*

2. *If issue No. 1 is decided in favour of the Petitioner, to what amount of compensation the petitioner is entitled and from whom? OPP*

3. *Whether the vehicle involved in the accident was driven in violation of the terms of the insurance Policy at that time and insurance company is not liable to pay the compensation? OPR-3.*

4. *Relief.*

6. It was for the claimants to plead and prove that the driver of the offending vehicle was rash and negligent and have proved the same. The Tribunal has recorded the findings while determining issue No. 1 in paras 9 and 10 of the impugned award.

7. It is apt to record herein that FIR No. 27/2005 under Sections 279, 337 and 304-A of Indian Penal Code was registered at police station Kangra and challan was presented against the driver. Thus, it is sufficient proof to hold that the driver was driving the offending vehicle rashly and negligently. Thus, the findings returned by the Tribunal are upheld.

8. Before I deal with issue No. 2, I deem it proper to deal with issue No. 3 first. It was for the insurer to prove that the owner has committed willful breach, has not led any evidence. Thus, it can be safely held that the insurer has failed to prove that the owner has committed willful breach and cannot seek exoneration. However, I have gone through the driving licence. The driver is competent to drive the light motor vehicle, as discussed by the Tribunal in paras 17 of the impugned award. Even otherwise the offending vehicle falls within the definition of light motor vehicle, as discussed in so many cases by this Court and also by the apex Court.

9. Having said so, the findings returned by the Tribunal are upheld.

10. Viewed thus, the impugned award is upheld and the appeal is dismissed.

11. The Registry is directed to release the amount in favour of the claimants, strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

12. Send down the record forthwith, after placing a copy of this judgment.

****

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

United India Insurance Company .....Appellant
Versus
Palvi & another ..... Respondents

FAO No.428 of 2008
Date of decision: 18.09.2015

Motor Vehicles Act, 1988- Section 173- Insurer had challenged the award on the ground that claimant has not proved the negligence of the driver, and that amount awarded was excessive- record shows that FIR was lodged against the driver of the offending vehicle- claimant has also specifically pleaded and proved the rashness and negligence on the part of the driver of the offending vehicle- no evidence was led by the insurer/appellant to the contrary- insurer had also failed to prove that driver of the offending vehicle was not having a valid and effective driving licence at the relevant time or there was collusion between the claimant and owner- held, that the award passed by the Tribunal is based upon proper appreciation of evidence- appeal dismissed. (Para-4 to 9)

For the appellant: Mr. Sanjeev Kuthiala, Advocate.
For the respondents: Ms. Anjali Soni Verma, Advocate, and Mr.Vivek Singh Thakur, for respective respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 4th April, 2008, passed by the Motor Accident Claims Tribunal-II, Kangra at Dharamshala (for short, "the Tribunal") in M.A.C.P. No.70-K/2005, titled Miss Palvi vs. Arun Kumar & another, whereby a sum of Rs.1,50,000/- alongwith interest at the rate of 7½% per annum, came to be awarded as compensation in favour of the claimant and the insurer was saddled with the liability, (for short the "impugned award").

2. The claimant and the owner/insured have not questioned the impugned award on any count. Thus, the same has attained finality so far it relates to them.

3. Only the insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. The learned counsel for the appellant argued that the impugned award suffers from illegality on two counts - (i) the claimant has not been able to prove that the driver of the offending vehicle had driven the vehicle rashly and negligently; and (ii) the amount awarded by the Tribunal is excessive.

5. The Tribunal, after examining the pleadings, framed the following issues:

"1. Whether the respondent No.1 was driving his motorcycle in a rash and negligent manner on 9.9.02 on the public road and it struck against the petitioner causing grievous injuries to her? OPP

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

3. Whether the respondent No.1 was not holding valid and effective driving licence to drive the vehicle at the time of accident as alleged? If so, its effect? OPR-2

4. Whether the petition is collusive between the petitioner and respondent No.1 as alleged? If so its effect OPR-2

5. Whether the petition is not maintainable in the present form as alleged? OPR-2.

6. Relief."

6. The claimant, in order to prove her case, has examined as many as four witnesses, while the respondents have not led any evidence. Thus, the evidence led by the claimant remained un-rebutted.

7. The claimant has specifically pleaded in the claim petition and also led evidence to the effect that the driver of the offending motorcycle was driving the same in a rash and negligent manner on 9.9.2002, at about 9.30 A.M., at a place known as Balana, Police Station, Chowari, District Chamba, hit the claimant, who sustained injuries and suffered disability. FIR was also lodged against the driver of the offending motorcycle. Thus, the findings on issues No.1 & 2 were correctly recorded by the Tribunal and accordingly, the same are upheld.

8. Before I deal with issue No. 2, I deem it proper to determine issues No.3 and 4.

9. It was for the insurer to plead and prove that the owner had committed willful breach. However, as has been observed above, the insurer has not led any evidence to that effect. The insurer has failed to prove that the driver of the offending vehicle was not having a valid and effective driving licence at the relevant point of time or there was collusion between the claimant and the owner. Thus, issues No.3 and 4 were rightly decided by the Tribunal against the insurer and in favour of the owner. Even, the findings recorded on these issues have not been questioned by the learned counsel for the appellant during the course of hearing. Accordingly, findings returned by the Tribunal on the said issues are upheld.

10. Coming to issue No.2, the claimant was a minor girl, who sustained fracture and disability, which has shattered her physical frame and which would affect her life throughout and also marital prospects. The amount of compensation awarded by the Tribunal, by no stretch of imagination, can be said to be on the higher side. On the contrary, the compensation awarded is too meager. Unfortunately, the claimant has not questioned the adequacy of compensation, therefore, the impugned award is reluctantly upheld.

11. Having said so, no interference is required in the impugned award. Hence, the appeal is dismissed. The Registry is directed to release the award amount in favour of the claimant, strictly as per the terms and conditions contained in the impugned award, after proper identification.

12. Send down the record after placing copy of the judgment on the Tribunal's file.

****

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

United India Insurance Company Ltd. .....Appellant
Versus
Puran Chand & others ..... Respondents

FAO No.338 of 2008
Date of decision: 18.09.2015

Motor Vehicles Act, 1988- Section 149- Insurer contended that owner had committed willful breach as the driver of the offending vehicle was not having valid and effective driving licence- held, that no evidence was led by the insurer to prove this plea- hence, appeal dismissed. (Para-4 to 6)

Cases referred:
National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant:	Mr. Ashwani K. Sharma, Senior Advocate with Ms. Monika Shukla, Advocate.
For the respondents:	Nemo for respondents No.1 and 3. Mr. Sanjay Dutt Vasudeva, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 5th April, 2008, passed by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala (for short, "the Tribunal") in M.A.C. P. No.14-B/11-2006, titled Puran Chand vs. Mehar Chand & others, whereby compensation to the tune of Rs.46,500/- alongwith interest at the rate of 7½% per annum, came to be awarded in favour of the claimant and the insurer was saddled with the liability, (for short the "impugned award").

2. The owner, the driver and the claimant have not questioned the impugned award on any count. Thus, the same has attained finality so far it relates to them.

3. Only the insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. The learned counsel for the appellant has argued that the driver of the offending vehicle was not having a valid and effective driving licence and thus, the owner has committed willful breach.

5. It is apt to reproduce the issues framed by the Tribunal herein:

"1. Whether the petitioner suffered injuries due to rash and negligent driving of the tractor No.HP-68-0634 by respondent No.2? OPP

2. Whether the accident took place due to contributory negligence of petitioner while driving vehicle No.DL-1YA-0476 and respondent No.2 driver of tractor No.HP-68-0634? OPR-3

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

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

5. Whether the petition is not maintainable? OPR 1& 2

6. Whether the tractor in question was being driven in contravention of the terms and conditions of the insurance policy, at the time of accident? OPR-3.

7. Relief."

6. Issues No.4 and 6 deal with the argument advanced by the learned counsel for the appellant. It was for the insurer to lead evidence and prove the said issues. I have gone through the impugned award and am of the considered view that the Tribunal has rightly made the discussion in paragraphs 13 and 14 thereof and accordingly decided both the issues correctly. Even the insurer has not led any evidence to prove that the owner has committed the willful breach in terms of the mandate of the Apex Court in **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531** and **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217.**

7. Having said so, no interference is required. Hence the appeal is dismissed and the impugned award is upheld. The Registry is directed to release the award amount in favour of the claimant, strictly as per the terms and conditions contained in the impugned award, after proper identification.

8. Send down the record after placing copy of the judgment on the Tribunal's file.

****

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

United India Insurance Co. Ltd. .....Appellant.

Versus

Smt. Vidya and others ...Respondents

FAO (MVA) No. 375 of 2008.
Date of decision: 18th September, 2015

Motor Vehicles Act, 1988- Section 173- Insurer challenged the award on the plea that ownership of the offending vehicle was transferred by the owner and alleged purchaser was not party to petition- hence, owner had committed willful breach, secondly, claimants had not proved that offending vehicle was being driven rashly and negligently- held, that since intimation of the alleged sale of offending vehicle was not given to Insurance Company, therefore, liability of the insurer does not cease in case of third party- further, held, that claimants have led sufficient evidence to prove that offending vehicle was being driven rashly

and negligently by proving FIR - challan was also filed against the erring driver - no evidence to counter this evidence led by the Insurance Company- owner and driver did not step into witness box to dislodge the evidence led by the claimants- grounds taken in appeal sans merit and findings of the Tribunal upheld- appeal dismissed. (Para-8 to 10)

Case referred:
Ashok Kumar and another versus Smt. Kamla Devi and others, I L R 2014 (IX) HP 1192

For the appellant:	Mr. Ashwani K. Sharma, Sr. Advocate with Ms. Monika Shukla, Advocate.
For the respondents:	Ms. Jyotsna Rewal Dua Sr. Advocate with Ms. Amrita Messie, Advocate, for respondents No. 1 to 4. Mr. Rajinder Dogra, Advocate, for respondents No. 5 and 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award dated 7.6.2008, made by the Motor Accident Claims Tribunal, Sirmaur District at Nahan, in MAC Petition No. 12-N/2 of 2005, titled *Smt. Vidya and others versus Jasvinder Singh and others,* for short "the Tribunal", whereby compensation to the tune of Rs.3,80,000/- along with interest @7.5 per annum was awarded in favour of the claimants and insurer came to be saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. Claimants being the victims of a vehicular accident caused by driver, namely, Indraz while driving vehicle No. HR-24-F-0151 rashly and negligently on 8.12.2003 at about 8 p.m. on National Highway No. 11 near Babri Stand in District Sekar Rajasthan, filed claim petition for the grant of compensation, as per the break-ups given in the claim petition.

3. The claim petition was resisted and contested by the respondents and following issues were framed.

1. *Whether late Shri Chet Ram (deceased) had died on account of the injuries sustained by him on 8.12.2003 at about 8.00 p.m. at place on National Highway No. 11 near Babri stand in District Sekar Rajasthan due to the rash and negligent driving of Car No. HR-24-F-0151 being driven by respondent No. 2 (Indraz) as alleged? OPP.*
2. *If issue No. 1 is proved in affirmative to what amount of compensation the petitioners are entitled to and from whom? OPP*
3. *Whether the petition is bad for non-joinder of necessary parties? OPR-3.*
4. *Whether the offending vehicle was being pled in contravention of terms and conditions of the insurance policy at the relevant time? OPR-3.*
5. *Whether this petition is not maintainable? OPR-3.*
6. *Relief.*

4. Claimants led evidence and respondents have not led any evidence except respondent No. 2 driver, who stepped into the witness-box as RW1.

5. The Tribunal, after scanning the evidence, held that the claimants have proved that the driver has driven the offending vehicle rashly and negligently and the owner has not committed any willful breach, the factum of insurance was admitted and saddled the insurance with the liability.

6. The learned counsel for the appellant has questioned the impugned award on two grounds *(i) that the owner was not party before the Tribunal and the vehicle was transferred to the purchaser by the owner namely, Jasvinder Singh, thus, the owner has committed willful breach (ii) that the claimants have not proved that the driver has driven the offending vehicle rashly and negligently.*

7. Both the arguments are devoid of any force, for the following reasons.

8. The insurance policy was subsisting at the time of the accident. The factum of transfer of the vehicle is not a ground to claim exoneration unless the said fact is recorded by the insurer and the insurance policy is cancelled. This Court has held and disused this issue in FAO No. 7 of 2007 titled ***Ashok Kumar and another versus Smt. Kamla Devi and other***s decided on 5.9.2014. It is apt to reproduce paras 13 to 22 of the said judgment herein.

> *"13. Insurance Policy, (Mark-B) was valid from 18th December, 1999 to 17th December, 2000 and the registered owner of the vehicle was Anupam Hardware Store, i.e. respondent No. 3-A in the claim petition.*
>
> *14.The Tribunal has fallen in error in holding that the insurer has not to indemnify, which is an eye opener for the said Presiding Officer, how casually he has dealt with the case.*
>
> *15.Section 157 of the Act reads as under:*
>
> ***"Transfer of certificate of insurance.***
>
> *(1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter transfers to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer.*
>
> *[Explanation.—For the removal of doubts, it is hereby declared that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.]*
>
> *(2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his*

favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance."

While going through the aforesaid provision, one comes to an inescapable conclusion that transfer of a vehicle cannot absolve insurer from third party liability and the insurer has to satisfy the award.

16. Admittedly, on the date of accident, i.e. 05.06.2000, the offending vehicle was not transferred in the name of appellant-Ashok Kumar. It was transferred in his name w.e.f. 17.06.2000. Thereafter, the appellant-respondent No. 1 Ashok Kumar was supposed to give information regarding transfer of the vehicle to the insurer-Insurance Company. The vehicle was not transferred on the date of accident, thus the question of informing the insurer about the transfer of the vehicle does not arise, at all. If the offending vehicle would have been transferred on the date of accident, i.e. 5th June, 2000, that can not be a ground to defeat the rights of the third party. As per the mandate of the Section (supra), the insurance policy shall be deemed to have been issued in favour of the transferee.

17. My this view is fortified by the Apex Court Judgment in case titled as ***G. Govindan versus New India Assurance Company Ltd. and others,*** *reported in* ***AIR 1999 SC 1398.*** *It is apt to reproduce paras-10, 13 & 15 of the aforesaid judgment herein:*

> *" 10. This Court in the said judgment held that the provisions under the new Act and the old Act are substantially the same in relation to liability in regard to third party. This Court also recognised the view taken in the separate judgment in Kondaiah's case that the transferee-insured could not be said to be a third party qua the vehicle in question. In other words, a victim or the legal representatives of the victim cannot be denied the compensation by the insurer on the ground that the policy was not transferred in the name of the transferee.*
>
> *11. .....*
>
> *12. .....*
>
> *13. In our opinion that both under the old Act and under the new Act the Legislature was anxious to protect the third party (victim) interest. It appears that what was implicit in the provisions of the old Act is now made explicit, presumably in view of the conflicting decisions on this aspect among the various High Courts.*
>
> *14. .....*
>
> *15. As between the two conflicting views of the Full Bench judgments noticed above, we prefer to approve the ratio laid down by the Andhra Pradesh High Court in Kondaiah's case (AIR 1986 Andh Pra 62) as it advances*

the object of the Legislature to protect the third party interest. We hasten to add that the third party here will not include a transferee whose transferor has not followed procedure for transfer of policy. In other words in accord with the well-settled rule of interpretation of statutes we are inclined to hold that the view taken by the Andhra Pradesh High Court in Kondaiah's case is preferable to the contrary views taken by the Karnataka and Delhi High Courts (supra) even assuming that two views are possible on the interpretation of relevant sections as it promotes the object of the Legislature in protecting the third party (victim) interest. The ratio laid down in the judgment of Karnataka and Delhi High Courts (AIR 1990 Kant 166 (FB) and AIR 1989 Delhi 88) (FB) (supra) differing from Andhra Pradesh High Court is not the correct one."

18. The Apex Court in case titled as ***Rikhi Ram and another*** *versus* ***Smt. Sukhrania and others,*** *reported in* ***AIR 2003 SC 1446*** *held that in absence of intimation of transfer to Insurance Company, the liability of Insurance Company does not cease. It is apt to reproduce paras 5, 6 & 7 of the judgment, supra, herein:-*

"5. The aforesaid provision shows that it was intended to cover two legal objectives. Firstly, that no one who was not a party to a contract would bring an action on a contract; and secondly, that a person who has no interest in the subject matter of an insurance can claim the benefit of an insurance. Thus, once the vehicle is insured, the owner as well as any other person can use the vehicle with the consent of the owner. Section 94 does not provide that any person who will use the vehicle shall insure the vehicle in respect of his separate use.

6. On an analysis of Ss. 94 and 95, we further find that there are two third parties when a vehicle is transferred by the owner to a purchaser. The purchaser is one of the third parties to the contract and other third party is for whose benefit the vehicle was insured. So far, the transferee who is the third party in the contract, cannot get any personal benefit under the policy unless there is a compliance of the provisions of the Act. However, so far as third party injured or victim is concerned, he can enforce liability undertaken by the insurer.

7. For the aforesaid reasons, we hold that whenever a vehicle which is covered by the insurance policy is transferred to a transferee, the

liability of insurer does not ceases so far as the third party/victim is concerned, even if the owner or purchaser does not give any intimation as required under the provisions of the Act."

19. The Apex Court in latest judgment titled as ***United India Insurance Co. Ltd., Shimla*** *versus* ***Tilak Singh and others,*** *reported in* ***(2006) 4 SCC 404*** *has held the same principle. It is apt to reproduce paras- 12 & 13 of the said judgment herein:*

"12. In Rikhi Ram v. Sukhrania [(2003) 3 SCC 97 : 2003 SCC (Cri) 735] a Bench of three learned Judges of this Court had occasion to consider Section 103-A of the 1939 Act. This Court reaffirmed the decision in G. Govindan case and added that the liability of an insurer does not cease even if the owner or purchaser fails to give intimation of transfer to the Insurance Company, as the purpose of the legislation was to protect the rights and interests of the third party.

13. Thus, in our view, the situation in law which arises from the failure of the transferor to notify the insurer of the fact of transfer of ownership of the insured vehicle is no different, whether under Section 103-A of the 1939 Act or under Section 157 of the 1988 Act insofar as the liability towards a third party is concerned. Thus, whether the old Act applies to the facts before us, or the new Act applies, as far as the deceased third party was concerned, the result would not be different. Hence, the contention of the appellant on the second issue must fail, either way, making a decision on the first contention unnecessary, for deciding the second issue. However, it may be necessary to decide which Act applies for deciding the third contention. In our view, it is not the transfer of the vehicle but the accident which furnishes the cause of action for the application before the Tribunal. Undoubtedly, the accident took place after the 1988 Act had come into force. Hence it is the 1988 Act which would govern the situation."

20. Having said so, the Tribunal has fallen in error in exonerating the insurer-Insurance Company from liability and saddling owner Ashok Kumar and driver Kalyan Chand with liability.

21. The Tribunal has discussed the Apex Court judgment titled as ***United India Insurance Company Limited Shimla versus Tilak Singh & others****, reported in* ***2006 SCCR, 473,*** *but has wrongly applied it. The Tribunal has also not taken note of the fact that on the date of accident, the vehicle was in the name of registered owner-*

Anupam Hardware Store and was not transferred to Ashok Kumar, son of Shri Kishori Lal.

22. Having said so, it is held that the insurer-Insurance Company has to indemnify. Accordingly, issues No. 1, 3, 4, 5 & 6 are decided against the insurer and in favour of the claimants."

9. Thus, the first point fails.

10. It was for the claimant to plead and prove that the driver was rash and negligent. The claimant has led evidence and proved the same. The insurer/appellant cannot question the same. The owner and driver have not questioned the said findings. However, I have gone through the findings recorded. FIR Ext. PW4/A was lodged against the driver which is on the record and is not in dispute. The challan was presented in the Court against he driver. The claimants have led evidence and the Tribunal has discussed the same in paras 11 and 12 of the impugned award. The insurer has not led any evidence and has failed to prove that there was collusion between the driver owner and the claimants and the driver was not rash and negligent. Even the owner has not led evidence. Driver Indraz, has stepped into the witness-box and has not been able to dislodge the evidence led by the claimants.

11. Having said so, the findings returned by the Tribunal are upheld.

12. Viewed thus, the impugned award is upheld and the appeal is dismissed.

13. The Registry is directed to release the amount in favour of the claimants, strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

14. Send down the record, forthwith, after placing a copy of this judgment.

****

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

Dinesh Kumar ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Criminal Appeal No.4140 of 2013
Reserved on : 24.8.2015
Date of Decision: September 21, 2015

Indian Penal Code, 1860- Sections 363, 366 and 376- Prosecutrix aged 14 years and student of 9th class was enticed by the accused to have sex with him, on the pretext of solemnization of marriage- statement of prosecutrix also supported by her friend - their statements inspire confidence and have remained un-impeached – conviction of the accused proper and sentence imposed is in proportion to the offence committed- no adequate and special reason for imposing of lesser sentence as action of the accused was deliberate and he was not victim of circumstances- accused had acquired age of majority and had no business to play with the sentiments of child and abuse her to satisfy his lust.

(Para-13 to 15 and 23 & 24)

Cases referred:
Parminder alias Ladka Pola v. State of Delhi, (2014) 2 SCC 592
State of Chhattisgarh v. Lekhram, (2006) 5 SCC 736
State of Madhya Pradesh v. Munna Choubey & another, (2005) 2 SCC 710
State of M.P. v. Bablu Natt, (2009) 2 SCC 272

For the Appellant : Mr. Anoop Chitkara, Advocate.
For the Respondent : Mr. Ashok Chaudhary, Mr. V.S. Chauhan, Additional Advocates General and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellants-convict Dinesh Kumar, hereinafter referred to as the accused, has assailed the judgment dated 23.8.2013/26.8.2013, passed by Additional Sessions Judge-I, Shimla, Himachal Pradesh, in Sessions Trial No.19-S/7 of 2012, titled as *State of Himachal Pradesh v. Dinesh Kumar*, whereby he stands convicted of the offence, punishable under the provisions of Sections 376, 363 and 366 of the Indian Penal Code, and sentenced as under:

Offence	Sentence
Section 376 IPC	Rigorous imprisonment for a period of ten years and to pay fine of Rs.5,000/- and in default thereof to further undergo simple imprisonment for a period of one year.
Section 363 IPC	Rigorous imprisonment for a period of three years and to pay fine of Rs.1,000/- and in default thereof to further undergo simple imprisonment for a period of six months.
Section 366 IPC	Rigorous imprisonment for a period of three years and to pay fine of Rs.1,000/- and in default thereof to further undergo simple imprisonment for a period of six months.

All the sentences have been ordered to run concurrently.

2. It is the case of prosecution that prosecutrix (PW-2), a minor, aged 14 years, a student of 9th Class, was enticed by the accused to have sex with him, on the pretext of solemnization of marriage. Sometime in the middle of 2011, he firstly developed intimacy and had sex with her in the jungle near a place known as Chambi. Subsequently, on 21.2.2012, he took the prosecutrix, on the pretext of marrying her, to the house of his paternal aunt in village Dhadi Rawat, where again he subjected her to rape, without fulfilling his promise of marriage. Finding the prosecutrix to be missing, her father Laiq Ram (PW-25) lodged report dated 23.2.2012 (Ex. PW-21/A) with the police, on the basis of which FIR No.23, dated 23.2.2012 (Ex.PW-23/A), for commission of offences under the provisions of Sections 363, 366 of the Indian Penal Code, was registered at Police Station, Theog. On the information so furnished by Ms Santoshi (PW-6), a friend of the prosecutrix, police was able

to reach to the accused and recover the prosecutrix from the house of Sohan Lal (DW-1), situated in village Dhadi Rawat. Prosecutrix was got medically examined from Dr. Nidhi Sharma (PW-19), who issued MLC (Ex.PW-19/A). Accused, who was arrested, made disclosure statement (Ex.PW-9/A), in the presence of HHC Pardeep Singh (PW-9) and Baldev Singh (PW-14) and led the police to the place where he had subjected the prosecutrix to rape and also got recovered incriminating articles. ASI Dev Raj (PW-22) conducted investigation; took on record proof with regard to age of the prosecutrix. Investigation revealed complicity of the accused in the alleged crime; hence, challan was presented in the Court for trial.

3. Accused was charged for having committed offences, punishable under the provisions of Sections 363, 366 & 376 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as 25 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took the following defence:

> "I am innocent. She wanted to be married with my friends Vijay and Arush and I am falsely implicated."

He examined Sohan Lal (DW-1) as his witness.

5. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused of the charged offences and sentenced him as aforesaid. Hence, the present appeal by the accused.

6. Relying upon the decisions of Hon'ble the Supreme Court of India, in *Parminder alias Ladka Pola v. State of Delhi,* (2014) 2 SCC 592; *State of Chhattisgarh v. Lekhram,* (2006) 5 SCC 736; and *State of Madhya Pradesh v. Munna Choubey & another,* (2005) 2 SCC 710, Mr. Anoop Chitkara, learned counsel for the accused, contends that the sentence imposed by the trial Court is much on the higher side.

7. On the other hand, learned Additional Advocate General has supported the judgment of conviction and sentence, for the reasons so assigned therein.

8. Even though, limited submission on behalf of the accused is made before us, however, considering it as our duty, we have minutely examined the testimonies of the witnesses of the parties as also other material on record. Having perused the same, we are of the considered view that no interference is warranted in the present case. It cannot be said that the reasons so adopted or the findings returned by the trial Court are perverse, erroneous or illegal. There is proper and complete appreciation of the testimonies of witnesses. Statutory provisions cannot be said to have been ignored. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

9. Accused wanted the trial Court to believe that no recovery, as alleged by the prosecution, was effected from the house of Sohan Lal (DW-1). But when we peruse the testimony of this witness, we find the fact not to have been, prima facie, established/ proved or probablized at all. In fact, Sohan Lal admits to have signed recovery Memo (Ex.PW-7/A) as also other documents, pertaining to identification and recovery of the incriminating articles, based on the disclosure statement made by the accused. No evidence was led to reflect intent of the prosecutrix of marrying friends of the accused. Hence, defence of the

accused, in no manner, can be said to have been probablized even from the suggestion put to the prosecution witnesses.

10. This now takes us to the testimony of the prosecution witnesses. The fact that on 21.2.2012, prosecutrix was found to be missing from the house of her parents, stands established not only by the prosecutrix but also through the testimonies of Laiq Ram (PW-25), Vikas Mehta (PW-7), Ms Santoshi (PW-6) and Daulat Ram (PW-8). In unequivocal terms, these witnesses have deposed that when prosecutrix was found missing from home, matter was first brought to the notice of Daulat Ram and thereafter to the notice of police by way of complaint dated 23.2.2012 (Ex. PW-21/A), on the basis of which FIR (Ex. PW-23/A) was registered. Recovery of the prosecutrix from the house of Sohan Lal on 29.2.2012, also stands established on record through the testimonies of ASI Dev Raj (PW-22) and Vikas Mehta (PW-7). Police took photographs (Ex.PW-22/C-1 and 22/C-2), which do reveal recovery of the prosecutrix having been effected from the house of Sohan Lal, who also admits correctness of the exhibits.

11. With the recovery having been effected on 29.2.2012, prosecutrix was immediately got medically examined from Dr. Nidhi Sharma (PW-19), who issued MLC (Ex.PW-19/A) and final opinion (Ex.PW-19/B). The Doctor, as is evident from her testimony, was of the view that possibility of recent vaginal penetration could not be ruled out. Hymen was ruptured and vagina could admit two fingers.

12. The fact that prosecutrix, as on the date of the commission of crime, was minor, below 16 years of age, in fact of 14 years, stands established not only through the testimony of Rakesh Kumar (PW-1), Ranjeet Singh (PW-24), but also prosecutrix and her mother Sarita (PW-3). Conjoint reading of testimonies of these witnesses and the documentary evidence (Ex.PW-1/A, 1/C, 1/E, 4/B, 4/C, 24/B, 24/C & CA), so produced on record, establish the prosecutrix to have been born on 28.2.1987. She is the youngest child of Sarita (PW-3) and Laiq Ram (PW-25). FIR (Ex. PW-23/A) with regard to missing of prosecutrix was lodged on 23.2.2012. Hence, prosecution has been able to establish, beyond reasonable doubt, that the age of the prosecutrix, at the time of commission of crime, was below 16 years.

13. The most relevant evidence on record is the testimony of prosecutrix (PW-2), who in no uncertain terms, has deposed that five-six months prior to February, 2012, accused developed intimacy with her. He took her mobile number and would often call her. Once he called her to Kali Mata Temple at Deundar, where she went with her cousin Priyanka. There accused gifted her a cell phone. He continued to talk to her on phone. After a period of one month, he called her to a place known as Chambi, where, behind the bushes, he subjected her to rape. Accused promised that he would marry her and asked her not to report the incident to anyone. On the asking of accused, on 21.2.2012, she again went to Chambi, from where accused took her in his vehicle first to Nerwa and then to Fediz Bridge. Thereafter, he took her in a bus to Kuddu and then to Dhadi Rawat, where she was made to stay in the house of paternal aunt of the accused for five-six days. There also, he disclosed that he was to marry her. She continued to reside in that house till 28.2.2012 and all this while, accused, on the pretext of marrying her, subjected her to rape. Despite promises, accused did not marry her. Prosecutrix admits that first time when she was subjected to rape, her friend Santoshi (PW-6) was also present, but at a distance. Prosecutrix has withstood the test of cross-examination and her version cannot be said to be false, unbelievable or uninspiring in confidence. Her testimony cannot be said to be shaky either or her credit impeached. She is clear and consistent in her version.

14. Ms Santoshi (PW-6) has also deposed that accused used to meet the prosecutrix at the temple. Also accused used to talk with the prosecutrix on cell phone, which he had gifted her. She was informed by one Dinu that prosecutrix had been taken away by the accused from the village.

15. Prosecutrix narrated the incident to her mother, as is evident from the testimony of Sarita (PW-3).

16. From the testimonies of Sarita, Vikas Mehta and Laiq Ram, it is evidently clear that the prosecutrix did not leave her parental house with the consent of her parents. She was recovered from the house of Sohan Lal, as is evident from the testimony of LC Sushma (PW-10), ASI Ashwani Kumar (PW-20) and ASI Dev Raj (PW-22).

17. On the basis of disclosure statement (Ex.PW-9/A), so made in the presence of HHC Pardeep Singh (PW-9) and Baldev Singh (PW-14), police got recovered incriminating articles. Though by way of scientific evidence, prosecution version could not be corroborated, but factum of the accused having taken away the prosecutrix, without the consent and wishes of her parents, stands established on record.

18. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by the unimpeachable testimony of the prosecution witnesses. The guilt of the accused stands proved beyond reasonable doubt to the hilt. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

19. 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.

20. Thus, from the aforesaid discussion, it stands proved, beyond reasonable doubt, that the accused kidnapped the prosecutrix from the lawful guardianship of her father without his consent, knowing it that she would be compelled to marry him or subjected to sexual intercourse on such pretext and thereafter committed rape on her. Hence, the accused stands rightly convicted for the charged offences.

21. The question, which needs to be considered, as is so argued on behalf of the appellant, is as to whether the sentence of punishment, so imposed by the Court below, is on the higher side or not. In the given facts and the circumstances, we do not find it to be so.

22. On the pretext of marriage, prosecutrix was enticed by the accused and subjected to rape. She was removed from the lawful guardianship of her parents, without their consent. Even thereafter, she was subjected to rape on false promise. The promise of solemnization of marriage remained unfulfilled. Quite apparently, there was no intent to fulfill the same. No doubt, at the time of commission of crime, prosecutrix was minor and any such marriage would have been void, but then no endeavour in fulfilling the promise was ever made by the accused, who, being of marriageable age, took a false defence of the prosecutrix desiring of solemnizing her marriage with his friends Vijay and Arush.

23. It is in this backdrop, we do not find the sentence of imprisonment of ten years so imposed by the trial Court, in relation to an offence, punishable under the provisions of Section 376 of the Indian Penal Code, to be on the higher side. Gullible, as she was, prosecutrix was not able to understand the consequences of her actions, but then accused, who had acquired the age of maturity, had no business to play with the sentiments of a child and abuse her to satisfy his lust. Prosecutrix, who was minor, may not have acquired maturity to understand the implications of her actions or for that matter acts of the accused, but then the accused was mature enough to understand the implications of false promise made by him and under the pretext of marrying the prosecutrix repeatedly subjected her to rape.

24. We do notice that accused is a young man, but then he is not a victim of circumstances. His actions are deliberate. We do not find any reason, adequate or special, to impose punishment, lesser than the one so imposed by the Court below.

25. Submission made by Mr. Chitkara that prosecutrix was a consenting party, based on her admission of presence of her friend Ms Santoshi, when she was first subjected to rape, in no manner, can be said to be a mitigating circumstance. Prosecutrix submitted herself to the desire of the accused on the promise of marriage. Such submission was not on a singular occasion.

26. The Hon'ble Supreme Court of India in *Munna Choubey (supra)* has reiterated its earlier views that imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.

27. In *Lekhram (supra)*, the Hon'ble Supreme Court of India was dealing with a case where prosecutrix was found to be a mature girl; married; spent few months at the place of her in-laws; having known the accused for long time and having lived with him in a rented house for long time. The facts here are totally different.

28. Under similar circumstances, as noticed by the Court in *Parminder (supra)*, the apex Court in *State of M.P. v. Bablu Natt,* (2009) 2 SCC 272, set aside the judgment of imposition of sentence of less than seven years. In both the cases, while dealing with the case of a girl aged 14 years, the Court did not find adequate and special reasons for imposition of sentence lesser than the one prescribed under the Act.

29. Thus, the decisions referred to and relied upon by the learned counsel for the accused, in no manner, advance the case of the accused.

30. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

****

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

Pawam Kumar ..... Petitioner.
Versus
State of HP and others .....Respondents

Review Petition No. 122 of 2015.
Date of decision: 21st September, 2015.

Code of Civil Procedure, 1908 - Section 114- Petitioner sought a review of the judgment passed by the Court on the ground that there was an error apparent on the face of the record – record shows that entire lis of the petitioner revolves around the answer keys about which the Court has already delivered the judgment- there is no error apparent on the face of the record- petition dismissed.

For the petitioner: Mr. Amit Singh Chandel, 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.
Ms. Aruna Sharma, Advocate, for respondent No.2.
Mr. J.L. Bhardwaj, Advocate, for respondent No.3.
Nemo for other respondents.

The following judgment of the Court was delivered:

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

CMP(M) No. 1214/2015.

This application has been filed for condonation of delay which has crept-in in filing the present Review Petition. The learned counsel for the respondents have no objection in case, the delay in filing the Review Petition is condoned. Thus, the application is granted and the delay in filing the Review Petition is condoned. The application is disposed of.

Review Petition No. 122 of 2015.

Issue notice. Mr. J.K. Verma, learned Deputy Advocate General waives notice on behalf of respondent No. 1, Ms. Aruna Sharma and Mr. J.L. Bhardwaj, Advocates, waives the same on behalf of respondents No. 2 and 3 respectively.

The Review petition is taken on Board today itself for disposal.

The learned counsel for the petitioner has sought review of judgment dated 25.3.2015 made by this Court in CWP No. 6607 of 2010 alongwith connected matters titled *Pawan Kumar versus State of H.P. and others*, on the ground that the mistake has crept-in, which is apparent on the face of the record.

We have gone though the judgment under review and perused the writ petition. The entire *lis* of the review petitioner revolves on the answer keys about which this Court has already delivered the judgment. No error is apparent on the face of the record. Accordingly, the Review Petition is dismissed, alongwith pending applications, if any.

****

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

LPA No. 104/2015 a/w LPA No. 87 of 2015
Date of decision: 21st September, 2015.

LPA No. 104/2015.

Rajeev Kumar .....Appellant
Versus
State of H.P. and others .....Respondents.

LPA No. 87/2015.

Ranjit Singh Chaudhary .....Appellant
Versus
State of H.P. and others .....Respondents.

Constitution of India, 1950- Article 226- Petitioner had participated in the selection process- he cannot turn around and challenge the process itself- his writ petition was rightly dismissed. (Para-2)

For the appellant(s): Mr. Subhash Sharma, Advocate.

For the respondent(s): Mr. Shrawan Dogra, Advocate General with M/s Romesh Verma and Anup Rattan, Additional Advocate Generals and Mr. J. K Verma, Deputy Advocate General for the respondents-State.
Mr. D.K. Khanna, Advocate, for respondent No.4-Public Service Commission.

The following judgment of the Court was delivered:

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

In both these appeals, challenge is to the judgment dated 9.10.2014 passed in CWP(T) No.3040 of 2008 titled Rajeev Kumar versus State of HP and others and CWP (T) No.3754 of 2008 titled Ranjit Singh and others versus State of HP and others whereby both writ petitions came to be determined, for short the impugned judgment.

2. It is a fact that the appellants-writ petitioners have participated in the selection process and could not make a grade. Thus, cannot make a "U" turn and challenge the selection process.

3. We have gone through the impugned judgment. The learned Writ Court has rightly appreciated the judgment delivered by the apex Court in Prem Singh and others versus Haryana State Electricity Board and others (1996) 4 SCC 319 and other judgments of this Court.

4. The appeal merits to be dismissed on other ground also that much water has flown by now read with the admission made by the learned counsel for the appellants that the appellants are now well settled.

5. Having said so, no interference is called for. Thus, the impugned judgment is upheld and appeals are dismissed.

****

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

Satnam Singh alias Chint Ram .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 76 of 2015
Reserved on: September 18, 2015.
Decided on: September 21, 2015.

Indian Penal Code, 1860- Section 302- Deceased was working in the shop owned by 'R'- he left home but did not return- he made a call to his wife and stated that he would be reaching home soon- he was found in an injured condition near the culvert and was taken to hospital- he had sustained injury by some sharp object on the back of the head and left ankle- he succumbed to the injuries prior to reaching hospital- accused were arrested and weapon of offence was recovered at their instance- prosecution had not examined any independent witness- it was stated by the prosecution that there was some financial dispute but this was not established by the testimony of the wife of the deceased- version of the prosecution that accused was last seen with the deceased was not proved on record satisfactorily- according to the report of FSL, quantity of ethyl alcohol of the blood was 209.81 mg%- thus, deceased was highly intoxicated and possibility of fall in a state of intoxication cannot be ruled out - no examination was conducted to determine the blood group- there was delay in recording the statements of witnesses- held, that in these circumstances, prosecution version was not proved- accused acquitted. (Para-19 to 29)

Cases referred:

Shyamal Saha and another vrs. State of West Bengal, (2014) 12 SCC 321
Parkash vrs. State of Karnataka, (2014) 12 SCC 133

For the appellant: Mr. Adarsh Sharma, Advocate.
For the respondent: Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment and order dated 3.6.2010, rendered by the learned Addl. Sessions Judge, Una, H.P. in Sessions trial No. 13 of 2009, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 302 IPC, was convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs. 20,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of two years.

2. The case of the prosecution, in a nut shell, is that on 14.6.2009 at 00:15 AM, Narinder Pal son of Udham Singh informed telephonically to the Police Station, Gagret that one person was lying near the culvert on Upper Gagret road. The person was unable to speak and was writhing in pain. He was being taken to Gagret Hospital for treatment. SI Mohinder Singh, the then Addl. SHO, PS Gagret alongwith the staff proceeded to the First Referral Unit, Gagret. The statement of Sushma Devi (wife of the deceased) under Section

154 Cr.P.C. vide Ext. PW-1/A was recorded. She disclosed that her husband used to make steel trunks and boxes. He was working in the shop i.e. Sharma Trunk House, Gagret, owned by Sh. Ram Kumar Sharma for the last 14-15 days. Sh. Hussan Lal used to leave the house daily around 8:00 AM in the morning and return home around 8:00 PM. He did not come back to the house as usual on 13.6.2009. At about 8:30 PM, the deceased made a phone call to her. She enquired from him as to why he was late. The deceased remarked that he would be reaching home soon. At about 12 midnight, she was informed by Smt. Reshma Devi, Member, Gram Panchayat, Upper Gagret that her husband was admitted in the hospital. She reached the hospital alongwith the neighbours. She saw injury inflicted with some sharp object on the back of the head of Sh. Hussan Lal. Another injury caused with sharp edged weapon was seen on the left ankle of the deceased. The injured succumbed to his injuries before reaching the hospital. She suspected that her husband had been murdered by some unknown persons by causing injuries with some sharp edged weapon. FIR No. 84 of 2009 was registered on the basis of rukka. The accused made disclosure statement, on the basis of which Tokka/Takua (the weapon of offence) was recovered from the bushes. The clothes of the accused were also taken into possession. The finger prints of the deceased and accused were also forwarded to the Bureau. The Bureau opined that all the prints were either faint, smudged, blurred or superimposed. The same were unfit for comparison. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 21 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused took the plea of total denial simplicitor. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Adarsh Sharma, Advocate for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. Ramesh Thakur, learned Asstt. Advocate General, appearing on behalf of the State, has supported the judgment and order of the learned trial Court dated 3.6.2010.

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

6. PW-1 Sushma Devi deposed that her husband used to earn livelihood by making steel trunks at Gagret. He was working for Ram Kumar Sharma. Her husband used to leave the house at 8:00 AM in the morning and used to return at 8:00 PM in the evening. On 13.6.2009 her husband did not return back even after 8-8:30 PM. He gave her call at around 8:30 PM in the night that he shall come to home soon. At about 12 in the night, Reshma told her that her husband was admitted in the hospital. She immediately rushed to the hospital. She noticed that her husband had incised wound on the back side of the head and a pointed injury on the left ankle. He was dead by the time, she reached the hospital. The police had reached the hospital. Her statement was recorded vide Ext. PW-1/A.

7. PW-2 Ramesh Chand deposed that about 10 months prior to the occurrence, the deceased Hussan Lal had a fight with the accused Satnam outside his shop. He intervened and stopped the fight. He did not know the cause of fight. On 13.6.2009, at about 10:00 PM, one of his villagers, namely, Tilak Raj informed him that his earlier employee, the deceased was lying in the *khad*. He immediately rushed to the spot. About 3-4 people had already reached the spot. Sohan Lal and Ex. Pradhan of the village had also telephonically informed him of the same. Sohal Lal, Tilak Raj, Hazari Lal and other villagers were already present on the spot. The deceased was breathing at that time. He did not,

however, speak. He was immediately rushed to the hospital. Unfortunately, he died after reaching the hospital. He noticed injuries on the back side of his head and on his ankle. In his cross-examination, he admitted that no fist and kick blows were exchanged between the accused and the deceased. It was only a verbal fight. He also admitted that there was no light on the vicinity of the spot of occurrence. He also admitted that it was dark when he reached the spot.

8. PW-3 Narinder Pal deposed that he along with his brother Ram Krishan were going to village Kaloh on a scooter to take part in a religious function. While driving through the khad connecting his village to Gagret, he noticed a person lying by the side of the track. He was blood soaked and he could not recognize him. He, immediately called Sohan Lal (Pradhan). The Pradhan also informed the police. Thereafter, Ramesh and Tilak also reached the spot.

9. PW-4 Kamal Raj was the Pradhan of the Gram Panchayat Panjawar. On 15.6.2009, the police joined him in the investigation of the case. He along with the brother of the deceased Param Jeet thereupon proceeded to the Police Station. The accused made a disclosure statement to the police under Section 27 of the Indian Evidence Act. It was recorded vide memo Ext. PW-4/A. He signed the memo. The accused disclosed that he could get recover the weapon of offence and the clothes which he was wearing at that time. On the basis of disclosure statement, the accused led the police to the place near the site of occurrence and got recovered the Gandasa from the bushes to the left hand side of the spot of occurrence. The Gandasa was at a little distance away from where the body was recovered towards the village of the deceased. The weapon of offence is Ext. P-8. Thereafter, the accused led the police party to his house where he got recovered the blood stained clothes. These were seized vide memo Ext. PW-4/D. In his cross-examination, he admitted that the weapon of offence (Toka/chopper) was ordinarily available for agricultural purposes in the villages. The same was visible in the photographs.

10. PW-5 Manoj Kumar deposed that on 13.6.2009, one person had come to his shop at around 9-9:15 PM, looking for a glass, as he wanted to have liquor. He refused him on the pretext that he could not have a drink in his shop. He thereupon asked only for a glass after giving security of Rs. 10. After some time the accused Satnam came to his shop and purchased a bottle of Limca from him. Thereafter, both the accused and the other person who had taken the glass, left towards Daulatpur road. Till 10:00 PM, no one came back with a glass and thereafter, he closed his shop and left for his house. On 15.6.2009, the police came to his shop and enquired whether someone had taken a glass and cold drink from his shop. When he answered in the affirmative, he was summoned to the Police Station. The police showed him the photographs of the deceased. He recognized him to be the same person who had taken the glass from his shop on 13.6.2009. On 4.9.2009, his statement was recorded in the Court of JMIC, Amb.

11. PW-7 Dharmender Singh deposed that on 13.6.2009 at about 8-8:15 PM, the deceased Hussan Lal came to his shop. He asked him to give phone as he wanted to talk to his wife. He made a call and thereafter he left his shop. At around 9:30 PM, he received a call from his wife. She asked him about the whereabouts of the deceased. He told her that the deceased had left his shop immediately after making the call. He has admitted in his cross-examination that the deceased has come to his shop alone and he also left alone.

12. PW-9 Sohan Lal deposed that on 13.6.2009 at about 10:30 PM, he received a call from one Narender. He informed him that a body was lying in the khad near the bridge. He thereupon informed the police.

13. PW-10 Ram Krishan deposed that he alongwith Narender was going to village Kaloh to attend a religious function. On 13.6.2009 at about 11:00 PM, he was driving the scooter. His brother, Narender was sitting as a pillion. He noticed a person lying about 4 meters away from the main track. He stopped there. The person was lying in a pool of blood. They informed the Ex-Pradhan Sohan Lal and even the police on the phone. Sohan Lal came to the spot and recognized the person lying at the spot.

14. PW-11 Const. Pardeep Kumar deposed that on 18.6.2009, a cycle and a bag was recovered from the house of accused in his presence.

15. PW-12 Naresh Kumar deposed that he did not remember whether accused had come to his shop on 13.6.2009 to buy liquor. He was declared hostile and cross-examined by the learned P.P. He reiterated that on 13.6.2009 at about 8:15, the accused Satnam had not come to the liquor vend to purchase half bottle of Lal Kila.

16. PW-13 Dr. Yugashwer Ram Ravi has conducted the post mortem on the body of the deceased. He issued post mortem report Ext. PW-13/D. According to his opinion, the probable time between injury and death was opined to be within few hours and between death and post mortem within 24 hours. According to him, the deceased died due to the injuries mentioned in the post mortem report. He admitted in his cross-examination that the final opinion was not given by the Board in the post mortem report Ext. PW-13/D.

17. PW-15 Roshan Lal deposed that his daughter had passed away in Delhi. He had gone to make arrangement for money. At about 9:30 PM, he had seen the accused standing by the tract on the river bed near his cycle. Thereafter, he left to his house. In his cross-examination, he admitted that there was no light in the passage in the river bed.

18. PW-20 Insp. Mohinder Singh, deposed that he received a telephonic information on 14.6.2009 at 12:15 AM that one person was lying in the Gagret khad near the bridge. He prepared the inquest reports Ext. PW-13/B and PW-13/C. He handed over the rukka through HC Hoshiar Singh and sent the same for registration of the FIR. FIR Ext. PW-20/A was registered. He visited the spot. The accused has made disclosure statement that he could get recover weapon of offence from the bushes and clothes from his house. He got recovered the weapon of offence and clothes. It transpired in the investigation that accused and deceased had some dispute over some financial transaction between them.

19. There is no witness to the incident dated 13.6.2009. PW-1 Smt. Sushma Devi made statement under Section 154 Cr.P.C. vide Ext. PW-1/A. According to her, some unknown person had killed her husband. Mr. Ramesh Thakur, Asstt. Advocate General has vehemently argued that the motive to kill the deceased by the accused is money matter. It has not come in the statement of PW-1 Sushma Devi made under Section 154 Cr.P.C. vide Ext. PW-1/A or while appearing before the Court as PW-1 that there was some money dispute involved. The I.O. PW-20, Insp. Mohinder Singh has only made the bald assertion that it transpired in the investigation that accused and deceased had some dispute over some financial transaction between them. Who told him about the financial transaction during the course of investigation, has not been divulged by him while appearing as PW-20.

20. Mr. Ramesh Thakur, Asstt. Advocate General has also argued that the deceased was last seen with the accused. He has relied upon the statement of PW-5 Manoj Kumar and PW-12 Naresh Kumar. According to PW-5 Manoj Kumar, a person had come to his shop at about 9-9:15 PM. He was looking for a glass, as he wanted to have liquor. He initially refused him on the pretext that he could not have a drink in his shop but later he asked only for a glass after giving security of Rs. 10. After some time, the accused Satnam

also came to his shop and purchased a bottle of Limca. Thereafter, both the accused and the other person who had taken the glass, left towards Daulatpur road. They did not come back till 10:00 PM and thereafter, he closed his shop and left for his house. The police came to his shop on 15.6.2009 and enquired from him as to whether someone had taken a glass and cold drink from his shop. When he answered in the affirmative, he was summoned to the Police Station. How the police came to know that the deceased and accused came to his shop to buy glass and limca? No disclosure statement has been made by the accused that he had purchased limca from the shop of PW-5 Manoj Kumar. PW-12 Naresh Kumar has not supported the case of the prosecution at all. He did not remember whether the accused came to his shop on 13.6.2009 to buy liquor or not.

21. The case of the prosecution is also that the accused was seen by PW-15 Roshan Lal on the spot. According to Roshan Lal PW-15, on 13.6.2009, his daughter had passed away at Delhi. He had gone to make arrangement for money to Gagret bazar. At about 9:30 PM, he had seen the accused standing by the tract on the river bed near his cycle. PW-2 Ramesh Chand has admitted in his cross-examination that when he reached the spot, it was dark. There was no light in the vicinity of the spot of occurrence. If it was dark, how PW-15 Roshan Lal could see the accused near the spot. His statement does not inspire confidence. He came to know about the death of his daughter at 7:45 PM and he went to Gagret bazaar to collect money at 9:30 PM. Gagret bazaar, as per the evidence is a Notified Area Committee. There the shops were supposed to close at 8:30 PM. Even, he has also admitted that there was no light in the passage of the river bed.

22. According to the medical evidence, the probable time that elapsed between injury and death was within few hours and between death and post mortem was within 24 hours. According to PW-13 Dr. Yugeshwar Ram Ravi, the deceased died due to the injuries mentioned in the post mortem report. In his cross-examination, the doctor has admitted that the final opinion was not given by the Board in the post mortem report Ext. PW-13/D.

23. The glass and bottle of limca were also sent for finger print examination and comparison. The report to this effect is Ext. PY. All the prints were found to be either faint, smudged, blurred or superimposed and did not bear decipherable characteristic details and hence were found to be unfit for comparison. It has come in the opinion of the Board that the deceased died probably due to head injury but final opinion was to be given after the Chemical Examiner's report. The report of the Chemical Examiner is Ext. PW-13/E. Thereafter, the Board was bound to consider the report Ext. PW-13/E and give the final opinion since according to the post mortem report Ext. PW-13/D, the cause of the death was probably head injury.

24. According to Ext. PW-13/E, report of the FSL, the quantity of ethyl alcohol in exhibit P/5 (blood) was 209.81 mg%. A person with blood alcohol concentration of 150-300 mg% would be intoxicated, as per Lyon's Medical Jurisprudence and Toxicology, 11th Edition, page 626. Similarly in Medical Jurisprudence and Toxicology by Dr. K.S.Narayan Reddy, Edition 2004 (Reprint), at page 590, a person who has consumed 150-300 mg %, would be drunk. In Parikh's Text book of Medical Jurisprudence and Toxicology at page 855, it is stated that at a concentration of 0.15 per cent (150 mg %), some are under the influence of alcohol and others decidedly would be drunk. With increasing concentrations the symptoms become more intense. In the instant case, the quantity of ethyl alcohol in exhibit P/5 (blood) was 209.81 mg%. Since the accused had very high concentration of ethyl alcohol in blood, the possibility of receiving the injuries by fall cannot be ruled out, more particularly, when there is no eye witness to the incident and no motive is attributed to the accused for killing the deceased. PW-13 Dr. Yugashwer Ram Ravi, has admitted in his

cross-examination that the injuries mentioned in the post mortem report were possible by way of fall from the height of 10 feet on sharp edged stones.

25. Their lordships of the Hon'ble Supreme Court in the case of ***Shyamal Saha and another vrs. State of West Bengal,*** reported in ***(2014) 12 SCC 321,*** have held that chain of events must be so complete as to leave no room for any other hypothesis except that accused was responsible for commission of offence. It has been held as follows:

> "26. The High Court believed the testimony of Dipak and Panchu and came to the conclusion that they had crossed the river along with Paritosh, Shyamal and Prosanta. However, the High Court did not take into consideration the view of the Trial Court, based on the evidence on record, that it was doubtful if the five persons mentioned above boarded the boat belonging to Asit Sarkar to cross the river as alleged by the prosecution. The High Court also did not consider the apparently incorrect testimony of Animesh who had stated that he had gone to the police station and given his version but despite this, he was not cited as a witness. The version of Animesh was specifically denied by the Investigating Officer.
>
> 27. When the basic fact of Paritosh having boarded a boat and crossing the river with Shyamal and Prosanta is in doubt, the substratum of the prosecution's case virtually falls flat and the truth of the subsequent events also becomes doubtful. Unfortunately, the High Court does not seem to have looked at the evidence from the point of view of the accused who had already secured an acquittal. This is an important perspective as noted in the fourth principle of Chandrappa. The High Court was Crl. Appeal No. 1490 of 2008 Page 16 of 21 Page 17 also obliged to consider (which it did not) whether the view of the Trial Court is a reasonable and possible view (the fifth principle of Chandrappa) or not. Merely because the High Court disagreed (without giving reasons why it did so) with the reasonable and possible view of the Trial Court, on a completely independent analysis of the evidence on record, is not a sound basis to set aside the order of acquittal given by the Trial Court. This is not to say that every fact arrived at or every reason given by the Trial Court must be dealt with – all that it means is that the decision of the Trial Court cannot be ignored or treated as non-existent.
>
> 28. What is also important in this case is that it is one of circumstantial evidence. Following the principles laid down in several decisions of this Court beginning with Sharad Birdhi Chand Sarda v. State of Maharashtra13 it is clear that the chain of events must be so complete as to leave no room for any other hypothesis except that the accused were responsible for the death of the victim. This principle has been followed and reiterated in a large number of decisions over the last 30 years and one of the more recent decisions in this regard is 13 (1984) 4 SCC 116 Crl. Appeal No. 1490 of 2008 Page 17 of 21 Page 18 Majenderan Langeswaran v. State (NCT of Delhi) and Another. 14 The High Court did not take this into consideration and merely proceeded on the basis of the last seen theory.
>
> 29. The facts of this case demonstrate that the first link in the chain of circumstances is missing. It is only if this first link is established that the subsequent links may be formed on the basis of the last seen theory. But the High Court overlooked the missing link, as it were, and directly applied the

last seen theory. In our opinion, this was a rather unsatisfactory way of dealing with the appeal."

26. Mr. Ramesh Thakur, Asstt. AG, during the course of arguments has submitted that on the weapon of offence, blood group 'B' was found as per Ext. PZ, forensic report. The fact of the matter is that in this case accused has not been connected with the offence. Their lordships of the Hon'ble Supreme Court in the case of ***Parkash vrs. State of Karnataka,*** reported in ***(2014) 12 SCC 133,*** have held that when the blood stained clothes are recovered, a serological comparison of blood of deceased and appellant and blood stains on his clothes was necessary and that was absent from evidence of prosecution. In this case, the prosecution has sought to prove that blood group of deceased was AB and blood stains on appellant's seized clothes also belong to blood group AB. This does not lead to any conclusion that bloodstains on appellant's clothes were those of deceased's blood. There are millions of people who have blood group AB and it is quite possible that even appellant had the blood group AB. Thus, merely since clothes of appellant were bloodstained and stains bore same blood group as that of deceased, circumstances could not be used against the appellant. Their lordships have further held that in a case of circumstantial evidence, there has to be some degree of trustworthiness and certainly about existence of circumstances. It has been held as follows:

> "40. The second discrepant statement was that Shivanna stated that the police had kept Prakash's clothes on the table. It was submitted, in other words, that the blood stained clothes were already seized by the police and kept on the table. We are not sure whether the actual statement made by Shivanna has been lost in translation.
>
> 41. In any event, the recovery of the blood stained clothes of Prakash do not advance the case of the prosecution. The reason is that all that the prosecution sought to prove thereby is that the blood group of Gangamma was AB and the blood stains on Prakash's seized clothes also belong to blood group AB. In our opinion, this does not lead to any conclusion that the blood stains on Prakash's clothes were those of Gangamma's blood. There are millions of people who have the blood group AB and it is quite possible that even Prakash had the blood group AB. In this context, it is important to mention that a blood sample was taken from Prakash and this was sent for examination. The report received from the Forensic Science Laboratory [Exh.P-27] was to the effect that the blood sample was decomposed and therefore its origin and grouping could not be determined. It is, therefore, quite possible that the blood stains on Prakash's clothes were his own blood stains and that his blood group was also AB.
>
> 45. We are not satisfied with the conclusion of the High Court that since the clothes of Prakash were blood stained and the stains bore the same blood group as that of Gangamma, the circumstance could be used Prakash. A serological comparison of the blood of Gangamma and Prakash and the blood stains on his clothes was necessary and that was absent from the evidence of the prosecution."

27. The incident is dated 13.6.2009 but the statement of PW-12 Naresh Kumar was recorded only on 18.6.2009. It is settled law that the statements under Section 161 Cr.P.C. should be recorded promptly. The statement of PW-5 Manoj Kumar under Section 164 Cr.P.C. was also got recorded on 4.9.2009 though the incident is of 13.6.2009. The statement recorded under Section 164 Cr.P.C. is not a substantive piece of evidence.

28. The prosecution has also tried to establish that the accused at one point of time had a quarrel with deceased on the basis of the statement of PW-2 Ramesh Chand. Ramesh Chand PW-2 has deposed that 10 months prior to the incident, deceased Hussan Lal had fight with accused outside his shop. He intervened but he did not know as to why they quarreled with each other. He has also admitted in his cross-examination that no fist or kick blows were exchanged between the parties but it was only a verbal dual. It was too remote an incident to be linked to the present incident. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

29. Accordingly, the appeal is allowed. Judgment and order of conviction and sentence dated 3.6.2010, rendered by the learned Addl. Sessions Judge, Una, H.P., in Sessions trial No. 13 of 2009 under Section 302 IPC 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.

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

LPA No. 119 of 2010 along with connected matters.
Date of decision: 21st September, 2015.

LPA No. 119/2010.	
State of H.P. and others	.....Appellants
Versus	
Sh. Prem Chand and others	.....Respondents.
LPA No. 330/2010.	
State of H.P. and others	.....Appellants
Versus	
Nirmal Kumar and another	.....Respondents.
LPA No. 337/2010.	
Prem Chand and others	.....Appellants
Versus	
State of H.P. and others	.....Respondents.
LPA No. 41/2011.	
State of HP and others	.....Appellants
Versus	
Lekh Raj and others	.....Respondents.
CWP No. 9426/2013.	
Suresh Kumar and another	.....Appellants
Versus	
State of H.P. and others	.....Respondents.

Constitution of India, 1950- Article 226- Petitioner had made a prayer to quash the rules, office orders dated November 3, 2001 and November 22, 2001- Writ Court had not discussed the grounds on which the rules were held to be violative of the Service Jurisprudence and the mandate of the Constitution of India- it had also not discussed how the writ petitioners were affected and which of their rights were taken away- Writ Court had not taken into account the pleadings of the parties particularly the defence of the respondents- Court had not made any discussion and had failed to marshal out the facts and merits of the case- judgment set aside and the case remanded to Administrative Tribunal. (Para-6 to 12)

Case referred:
Syed Abdul Qadir and others versus State of Bihar and others (2009) 3 SCC 475

For the appellant(s)Petitioner: Mr. Shrawan Dogra, Advocate General with M/s Romesh Verma and Anup Rattan, Additional Advocate Generals and Mr. J. K Verma, Deputy Advocate General for the appellants in LPA No. 119 and 330 of 2010.
Mr. Dilip Sharma, Sr. Advocate with Ms. Nishi Goel, Advocate, for appellants in LPAs No. 337 of 2010 and LPA No. 41 of 2011.
Mr. Ankush Dass Sood, Sr. Advocate with Ms. Sheweta Joolka, Advocate, for the petitioners ion CWP No. 9426 of 2013.

For the respondent(s): Mr. Dilip Sharma, Sr. Advocate with Ms. Nishi Goel, Advocate, for respondents in LPA No. 119 and 330 of 2010.
Mr. Shrawan Dogra, Advocate General with M/s Romesh Verma and Anup Rattan, Additional Advocate Generals and Mr. J. K Verma, Deputy Advocate General for the respondents in LPAs No. 337 of 2010, LPA No. 41 of 2011 and for respondents No. 1 to 3 in CWP No. 9426 of 2013.
Mr. Ashok Sharma, Assistant Solicitor General of India with Mr. Nipun Sharma, Advocate, for respondent NO. 4 in CWP No. 9426 of 2013.

The following judgment of the Court was delivered:

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

LPA No. 119 of 2010 and LPA No. 337 of 2010 are directed against the judgment and order dated 23.3.2010, passed by the learned Single Judge of this Court in CWP(T) No. 8112 of 2008 titled ***Shri Prem Chand and others versus State of HP and others*** and LPA No. 330 of 2010 and LPA No. 41 of 2011 are directed against the judgment and order dated 28.4.2010 passed in CWP(T) No. 11688 of 2008 titled ***Nirmal Kumar and others versus State of HP,*** for short "the impugned judgments".

2. The impugned judgment in LPAs No. 330 of 2010 and LPA No. 41 of 2011 is outcome of the judgment impugned in LPA No. 119 of 2010 and LPA No. 337 of 2010. Thus, we deem it proper to dispose of all these appeals by this common judgment.

3. The question is whether the judgment made by the Writ Court in CWP(T) No. 8112 of 2008 is legally correct? The answer is in negative for the following reasons.

4. The writ petitioners, by the medium of CWP(T) No. 8112/2008, had filed writ petition mainly with the following prayers, on the grounds taken in the writ petition:

(i) That the HP Civil Services (Revised Pay) (First Amendment) Rules, 1998 (Annexure A-7) may be quashed and set aside.

(ii) That the office order dated November 03,2001 Annexure A-8 issued by the Government of Himachal Pradesh may be quashed and set aside.

(iii) That the office order dated November 22, 2001 (Annexure A-9) may also be quashed and set aside.

(iv) That the respondents may be directed not to effect any recoveries from the applicants."

5. Heard.

6. The learned Single Judge has not discussed what were the grounds which could be made basis for declaring that the HP Civil Services (Revised Pay) (First Amendment) Rules, 1998 are violative of the Service Jurisprudence and the mandate of the Constitution of India. It is also not discussed how it has adversely affected the writ petitioners and which rights have been taken away.

7. The learned Single Judge, without taking into account the pleadings of the parties, particularly the defence of writ respondents-appellants herein, in an arbitrary manner, quashed annexure A7.

8. Annexure A8 is office order dated 3.11.2001 issued by the Government of HP and Annexure A9 flows from the said order. It is worthwhile to mention herein that the learned Single Judge has quashed Annexure A9 without quashing Annexure A8.

9. It is worthwhile to record herein that the learned Single Judge has recorded in the judgment that State-respondents have issued Annexure A2 by virtue of which, pay scales of Rs.1500-2700 was revised to Rs.5000-8100 and has also made mention of Annexures A-3 to A7 in terms of which the petitioners were placed in the higher pay scales and the amendment was carried out in Annexure A7. Thereafter, it has reproduced Annexure A7 and paras 55 to 60 of the judgment delivered by the apex Court in ***Syed Abdul Qadir and others versus State of Bihar and others (2009) 3 SCC 475*** and in operative para has allowed the writ petitions. It is apparent on the face of it that the Writ Court has not made any discussion and has failed to marshal out the facts and merits of the case, not to speak of discussing the law that what was the foundation for quashing the said Annexures A7 and A9.

10. The learned Senior Counsel Mr. Dilip Sharma, was asked to defend the judgment and also indicate whether the reasons are contained in the impugned judgment. He frankly conceded that the judgment is bereft of reasons and that constrained the writ petitioners to file cross-appeals, i.e, LPAs No. 337 of 2010 and LPA No. 41 of 2011.

11. Having said so, the impugned judgment merits to be quashed and consequently judgments impugned in other appeals also merit to be quashed.

12. Viewed thus, the appeals are allowed and the impugned judgments are quashed. Writ petitions are revived and remanded to the HP State Administrative Tribunal.

13. The parties are directed to cause appearance before the Tribunal on **26.10.2015**.

14. We hope and trust that the writ petitions will be decided by the HP State Administrative Tribunal as early as possible, preferably within eight weeks from today. Registry is directed to send down the files. Indexes be maintained and consigned to records.

****

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

State of Himachal Pradesh .....Appellant.

Vs.

Surjan Singh son of Shri Hari Nand and others ...Respondents.

Cr. Appeal No. 254 of 2009
Judgment reserved on: 21st July 2015
Date of Judgment: 7, September, 2015

Indian Penal Code, 1860- Sections 148, 341, 447, 452, 323, 325, 436, 506 read with Section 149- **Indian Arms Act 1959**- Section 27- Accused visited the house of 'P' and pointed gun towards his parents- father of 'P' was injured- a blow with lever (Jhabbal) was given on his foot- accused 'R' inflicted a blow on the head with gun while other accused put chilli powder in his eye – accused demolished the house of 'P' and set it on fire – it was duly proved that 'P' and co-accused had purchased different parcels of land- injured had sustained four injuries- testimonies of the witnesses were corroborated by medical evidence- accused 'R' had pointed gun towards the parents of 'P'- gun was recovered from his possession- Court had also issued an injunction order which was violated by the accused- testimonies of the prosecution witnesses were corroborating each other- mere lapse of time is not sufficient to doubt the testimonies of prosecution witnesses - accused 'R' was convicted of the commission of offences punishable under Section 325 of IPC and Section 27 of Arms Act. (Para-11 to 23)

Cases referred:

Jose vs. State of Kerala (Full Bench), AIR 1973 SC 944
State of H.P. vs. Om Prakash and others, HLJ 2003(1) H.P. page 541
C. Muniappan and others vs. State of Tamil Nadu, (2010)9 SCC 567
Sohrab and another vs. The State of Madhya Pradesh AIR 1972 SC 2020
State of U.P. vs. M.K. Anthony AIR 1985 SC 48 titled
Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat AIR 1983 SC
State of Rajasthan vs. Om Parkash AIR 2007 SC 2257
Prithu alias Prithi Chand and another vs. State of Himachal Pradesh, (2009)11 SCC 588
State of Uttar Pradesh vs. Santosh Kumar and others (2009)9 SCC 626
Appabhai and another vs. State of Gujarat AIR 1988 SC 696
Rammi alias Rameshwar vs. State of Madhya Pradesh AIR 1999 SC 3544
State of H.P. vs. Lekh Raj and another (2000)1 SCC 247 titled
Laxman Singh vs. Poonam Singh and others (2004) 10 SCC 94 titled
Kuriya and another vs. State of Rajasthan, (2012)10 SCC 433
Bhee Ram vs. State of Haryana, AIR 1980 SC 957
Rai Singh vs. State of Haryana, AIR 1971 SC 2505

Dalbir Singh Vs. State of Punjab, AIR 1987 S.C. 1328
Dalbir Singh vs. State of Haryana and others, AIR 2000 SC 1677
State of Gujarat vs. V.A.Chauhan, AIR 1983 SC 359
State of M.P. vs. Surendra Singh, AIR 2015 SC 398

For the Appellant: Mr. Ashok Chaudhary Additional Advocate General with Mr. V.S.Chauhan, Additional Advocate General and Mr.J.S.Guleria, Assistant Advocate General.
For the Respondents: Mr. Lalit K. Sharma, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, J.

Present appeal is filed against the judgment passed by learned Additional Sessions Judge Shimla Camp at Rohru in Sessions Trial No. 24-R/7 of 2007 titled Surjan Singh and others vs. State of H.P. decided on dated 18.10.2008.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that Partap Singh son of Kalgi Ram purchased immovable land comprised in Khasra No. 127, 132 and 133 situated in village Haunchali Tehsil Chirgaon District Shimla H.P. from one Bahadur Singh by way of registered sale deed. It is alleged by prosecution that in December 2006 Partap Singh had constructed a house and shed on the land so purchased and thereafter his parents started living in the house and shed. It is alleged by prosecution that on dated 19.3.2007 at 9 AM all accused persons arrived at land purchased by Pratap Singh by way of sale deed. It is alleged by prosecution that co-accused Rakeshwar was having a gun and he pointed out the gun at Partap Singh's father namely Kalgi Ram injured aged 70 years. It is alleged by prosecution that thereafter wife of Kalgi Ram started to proceed to inform Partap Singh her son about arrival of accused persons and when she was proceeding from residential house co-accused Rakeshwar @ Rakesh pointed the gun at her. It is alleged by prosecution that thereafter accused persons tied Kalgi Ram injured aged 70 years with ropes and gave lever (Jhabbal) blow on foot of Kalgi. It is alleged by prosecution that thereafter co-accused Rakeshwar had given a blow on head of Kalgi injured aged 70 years with butt of gun. It is alleged by prosecution that other accused persons put chilli powder in eyes of injured Kalgi aged 70 years. It is alleged by prosecution that accused persons have also dismantled the house and shed constructed by son of injured Kalgi. It is alleged by prosecution that accused persons have also put Kalgi injured's son house on fire. It is alleged by prosecution that thereafter Kalgi Ram reported the marrter to Amar Singh Pardhan and his neighbour Shakti Lal. It is alleged by prosecution that Kalgi Ram injured 70 years was advised to report the matter to police station and police officials were informed telephonically. It is alleged by prosecution that FIR Ext.PW1/A was filed and Kalgi Ram injured aged 70 years was medically examined and his MLC Ext.PW8/B was obtained. It is alleged by prosecution that Partap Singh produced photographs of house and shed Ext.PW1/A and Ext.PW4/B and also produced copy of application filed to SDM Ext.PW1/E and also placed on record the order of Civil Court Ext.PW1/D, copy of daily diary report No. 29 dated 8.7.2006 Ext.PW1/F and also produced jamabandi Ext.PW1/K which were took into possession vide seizure memo Ext.PW1/D. It is alleged by prosecution that Investigating agency took into possession 14 burnt iron sheets vide memo Ext.PW13/A and I.O. also took photographs Ext.PW16/B-1 to

Ext.PW16/B-5 and negatives of which are Ext.PW16/B-6 to Ext.PW16/B-10. It is alleged by prosecution that I.O. also prepared site plan Ext.PW16/A. It is alleged by prosecution that co-accused Surjan and co-accused Rakeshwar identified the place of incident. It is alleged by prosecution that I.O. also took coal, ash etc from the spot vide memo Ext.PW1/C. It is alleged by prosecution that I.O. also took into possesison burnt utensils from the spot vide memo Ext.PW1/B. It is alleged by prosecution that co-accused Rakeshwar produced two ropes which were took into possession vide seizure memo Ext.PW1/M. It is alleged by prosecution that co-accused Surjan produced 12 bore gun and its licence which were took into possession vide seizure memo Ext.PW1/N. It is alleged by prosecution that kata (Sharp edged weapon) Ext.P16, jhabbal (Sharp edged weapon) Ext.P13 and gas lighter were took into possession vide seizure memo Ext.PW1/P. It is alleged by prosecution that on dated 22.3.2007 co-accused Brijeshwar produced Kilwari Ext.P14 which was took into possession vide memo Ext.PW1/Q. It is alleged by prosecution that demarcation report of Khasra Nos. 127, 132 and 133 was conducted by Naib Tehsildar on dated 16.6.2006 and he submitted his report Ext.PW1/H. It is alleged by prosecution that Civil Court in case titled Partap Singh vs. Surjan Singh passed the order for demarcation of land bearing Khasra Nos. 127, 132 and 133 and demarcation report is Ext.PW1/R.

3. Charge was framed against the accused persons by learned trial Court on dated 10.12.2007 under Sections 148, 341, 447, 452, 323, 325, 436, 506 read with Section 149 IPC and under Section 27 of Arms Act 1959 read with Section 149 of Indian Penal Code. Accused persons did not plead guilty and claimed trial.

4. Prosecution examined the following oral witnesses in support of its case:-

Sr.No.	Name of Witness
PW1	Partap Singh
PW2	Kalgi Ram injured aged 70 years
PW3	Amar Nath
PW4	Ashok Kumar
PW5	Ram Lal
PW6	Raj Bahadur
PW7	Dinesh Kumar
PW8	Dr.Rakesh Malhotra
PW9	Bhadur Singh
PW10	Jia Lal
PW11	Ramesh Kumar
PW12	Prem Chand
PW13	Vinod Kumar
PW14	Rajeev Chauhan
PW15	HC Tenzen Chhering
PW16	Ramesh Chand
PW17	SI/SHO Pritam Singh
DW1	Surjan Singh accused
DW2	Jai Chand
DW3	Brijeshwar accused

DW4	Rajeshwar accused
DW5	Rakeshwar accused
DW6	Surat Ram
DW7	Deepak Kumar

4.1 Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	Description:
Ex.PW1/A	Copy of FIR No. 45 dated 19.3.2007.
Ext.PW1/B	Recovery memo of burnt articles of house.
Ext.PW1/C	Recovery memo of ashes, coal, wood
Ext.PW1/D	Recovery memo of documents.
Ex.PW1/E	Copy of criminal complaint dt. 26.6.2006 filed by Pratap against accused persons before SDM Rohru (H.P.)
Ex.PW1/F	Copy of interim injunction passed by Civil Judge (Junior Division) Rohru H.P. in favour of Pratap Singh against accused persons on dated 17.1.2006 relating to Khasra Nos. 127, 132, 133 restraining the accused persons from interference in any manner over land comprised in Khasra Nos. 127, 132 and 133.
Ext.PW1/G	Copy of order passed by Collector for demarcation of land.
Ext.PW1/H	Copy of demarcation given by Naib Tehsildar.
Ext.PW1/J	Copy of DDR No. 21
Ext.PW1/K	Copy of jamabandi qua Khasra Nos. 127, 132 and 133.
Ext.PW1/L	Tatima
Ext.PW1/M	Recovery memos of two ropes
Ext.PW1/N	Recovery memo of 12 bore gun
Ext.PW1/O	Recovery memo of katta plastic
Ext.PW1/P	Recovery memo of gas lighter
Ext.PW1/Q	Recovery memo of kilbari iron.
Ext.PW1/R	Copy of demarcation report given by Naib Tehsildar Rohru.
Ext.PW1/S	Recovery memo
Ext.PW3/A	Memo regarding handing over of burnt tin sheets.
Ext.PW4/A & Ext.PW4/B	Photographs of house and shed.

Ext.PW8/A	Application filed for medical examination of injured Kalgi Ram.
Ext.PW8/B	MLC of Kalgi Ram injured aged 70 years.
Ext.PW11/A	Copy of demarcation report
Ext.PW13/A	Copy of statement of Partap Singh in demarcation proceedings.
Ext.PW13/B	Copy of statement of Kundan Lal in demarcation proceedings.
Ext.PW13/C	Copy of statements of Surjan Singh and Rakeshwar in demarcation proceedings.
Ext.PW15/A	Copy of FIR
Ext.PW16/A	Site plan
Ext.PW16/B-1 to Ext.PW16/B-5	Photographs
Ext.PW16/B-6 to Ext.PW16/B-10	Negatives
Ext.PW17/A	Copy of location shown by accused persons.
Ext.PW17/B	Copy of location shown by accused persons.
Ext.PW17/C	Copy of order dt.14.6.2007 passed by District Magistrate to prosecute accused persons under Arms Act 1959.
Ext.D1 to Ext.D6	Copy of plaint, affidavit of Partap Singh filed in civil suit titled Pratap Singh vs. Surjan Singh

5. Learned trial Court acquitted all accused persons on dated 18.10.2008. Feeling aggrieved against the judgment passed by learned trial Court dated 18.10.2008 State of H.P. filed present appeal under Section 378 of Code of Criminal Procedure.

6. We have heard learned Additional Advocate General appearing on behalf of the State of H.P. and learned Advocate appearing on behalf of accused persons and also perused the entire record carefully.

7. Point for determination in present appeal is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had caused miscarriage of justice to the State of H.P.

8. ***ORAL EVIDENCE ADDUCED BY PROSECUTION:***

8.1. PW1 Pratap Singh has stated that he has six and half bighas of land in Mandloch which is near village Haunchali. He has stated that he constructed a single storyed house in the month of December 2006. He has stated that after construction of house his parents started living in the house. He has stated that on dated 19.3.2007 Amar Nath telephonically informed that some persons were removing the sheets of roof of house at

Mandloch. He has stated that he and his wife moved to Mandloch and when they were proceeding to Mandloch on the way his mother met him and told him not to proceed further because accused persons Rakesh, Rajesh, Brijeshwar and their servant Bandhu were hiding themselves in bushes. He has stated that his mother also told that co-accused Rakeshwar @ Rakesh pointed out gun towards his mother and asked his mother to leave the land. He has stated that his mother told that accused persons threatened his mother to kill her in case she would not leave the place. He has stated that thereafter he and his wife went to police station and lodged the report. He has stated that FIR Ext.PW1/A bears his signatures. He has stated that when he was still in police station his injured father reached and his injured father had narrated entire incident to police. He has stated that his injured father was medically examined by investigating Agency. He has stated that investigating Agency also visited the spot and when they reached at the spot they saw that residential house alongwith articles were gutted in fire. He has stated that there were bedding, utensils, trunks and other valuable articles amounting to Rs.80-90 thousands in the residential house. He has stated that police officials also took into possession the pieces of tins sheets, burnt ashes etc. vide seizure memos Ext.PW1/B and Ext.PW1/C. He has stated that civil suit is also pending and civil Court has granted ad-interim injunction in favour of complainant and against accused persons. He has stated that he produced the copy of ad-interim injunction order, copy of demarcation report and copy of registered sale deed and copy of jamabandi to the Investigating Agency. He has stated that documents which he produced to Investigating Agency are Ext.PW1/E to Ext.PW1/H and Ext.PW1/J, Ext.PW1/K and Ext.PW1/L. He has stated that his father had also suffered injuries. He has stated that on dated 22.3.2007 co-accused Rakesh produced to Investigating Agency the lighter and jhabbal (Lever). He has stated that co-accused Brijeshwar produced Kilwari. He has stated that co-accused Rajeshwar produced two ropes and co-accused Surjan produced gun along with licence to investigating Agency. He has stated that copy of demarcation report is Ext.PW1/R which was took into possession by police officials. He has stated that coal is Ext.P1 and trunk is Ext.P2 and household articles are Ext.P3 to Ext.P10 and further stated that rope is Ext.P11 and lighter is Ext.P12 and lever is Ext.P13, Kilwari is Ext.P14, gun licence is Ext.P15 and plastic bag is Ext.P16. He has stated that he had purchased the land from Bahadur Singh through registered sale deed on dated 19.11.2005 and further stated that Khasra numbers are 127, 132 and 133. He has stated that possession was also handed over to him by vendor. He has stated that he does not know that Bahadur Singh had delivered the possession of above said Khasras to co-accused Surjan Singh in the year 1977. He has denied suggestion that since 1977 co-accused Surjan was raising the plants. He has denied suggestion that possession was took forcibly at the spot during the time when accused persons were in police custody. He has denied suggestion that possession of land was with co-accused Surjan till 19.3.2007.

8.2 PW2 Kalgi Ram injured has stated that his son had purchased the land at Haunchali from Bahadur Singh and house was constructed. He has stated that he and his wife were living in the house. He has stated that co-accused Rakeshwar alias Rakesh, Brijeshwar and Gorkha Bandhoo came. He has stated that accused co-accused Surjan and Daropdi were hiding themselves in bushes. He has stated that co-accused Rakesh was in possession of gun. He has stated that co-accused Rakeshwar @ Rakesh pointed out the gun at him. He has stated that when his wife came then co-accused Rakeshwar @ Rakesh also pointed out gun at her. He has stated that thereafter co-accused Brijeshwar directed co-accused Bandhu to bring ropes from the bag and thereafter he was tied with two ropes by four persons namely Rakeshwar @ Rakesh, Rajeshwar, Brijeshwar and Bandhu and thereafter blow was given upon his feet with jhabbal (Sharp edged weapon). He has stated

that co-accused Rakeshwar @ Rakesh had given the blow on his head with butt of gun. He has stated that thereafter accused persons dismantled his house and co-accused Rakeshwar @ Rakesh tried to throw chilli powder on his eyes. He has stated that residential house was put on fire. He has stated that thereafter he went to Pardhan and told him about incident. He has stated that Pardhan told him to file criminal complaint in police station. He has stated that thereafter he came to police station. He has further stated that when he came to police station his son was already present in police station. He has stated that due to fire in residential house all household articles were burnt and damaged. He has stated that he had sustained injuries on his feet and head and he was medically examined. He has stated that police also took into possession the ashes and burnt and damged household articles and police also took into possession rope, jhabbal (Sharp edged weapon) and kilwari from accused persons. He has stated that rope Ext.P11 is same through which he was tied. He has stated that jhabbal (Sharp edged weapon) Ext.P13 is the same through which blow was given on his feet. He has stated that residential house was dismantled with jhabbal (Sharp edged weapon). He has denied suggestion that land was in possession of co-accused Surjan Singh for the last 30-31 years. He has denied suggestion that false FIR was filed against accused persons. He has denied suggestion that his eye sight was weak and he could not identiy the persons standing at the distance of 6-7 feet.

8.3 PW3 Amar Nath Ex-Pardhan of Gram Panchayat has stated that parties are known to him and on dated 19.3.2007 at about 8.30/9 AM he heard the sound of throwing of tin sheets. He has stated that Shakti is his neighbourer and he was called. He has stated that in the meanwhile he saw that some smoke was rising. He has stated that persons throwing the tin sheets were also visible but they could not be identified from the distance. He has stated that at about 10.30 to 11 AM Kalgi Ram came to his house in injured condition. He has stated that Kalgi Ram told that he was tied by accused persons. He has stated that Kalgi Ram told that his house was dismantled by accused persons and was put on fire. He has stated that Kalgi Ram also disclosed that accused persons had a gun and thereafter he contacted the telephone call to Partap son of Kalgi Ram and thereafter he advised Kalgi Ram to file the criminal report in police station. He has stated that in the evening police arrived and he and Shakti were asked to accompany them to spot. He has stated that on spot police handed over the burnt tin sheets to Kalgi Ram and memo Ext.PW3/A was prepared and memo bears his signatures. He has stated that Partap also produced some documents to police regarding which memo Ext.PW1/D was prepared. He has stated that land was in shape of barren and he could not state in whose possession the land was since 1977.

8.4 PW4 Ashok Kumar has stated that Partap Singh is his cousin. He has stated that Partap son of Kalgi Ram had purchased the land near Haunchalli and constructed residential house and shed in the month of February or March 2007. He has stated that residential house was put on fire about 15-20 days or about month after completion. He has stated that he also worked as labourer during construction of residential house. He has stated that residential house was put on fire and iInvestigating Agency visited the spot and took into possession ashes and some burnt household articles. He has denied suggestion that he did not work during construction of residential house.

8.5 PW5 Ram Lal has stated that on dated 22.3.2007 he was present and residential house of Partap complainant was gutted in fire. He has stated that police also took into possession burnt articles of residential house. He has stated that police also took into possession two ropes and co-accused Surjan produced a gun. He has stated that plastic bag, jhabbal (Sharp edged weapon), gas lighter and Kilwari were also took into possession

vide seizure memo. He has denied suggestion that wife of complainant Partap is his real niece. He has stated that he was directed by police to come at the spot.

8.6 PW6 Raj Bahadur has stated that he had constructed residential house of Partap at place near Haunchali. He has stated that five Nepali labourers and three local labourers were employed for construction of residential house. He has stated that Partap complainant paid him Rs.200/- per day. He has stated that residential house and shed which were constructed are visible in photographs Ext.PW4/A and Ext.PW4/B. He has stated that complainant Partap told that land belonged to him. He has denied suggestion that he had raised construction in March 2007.

8.7 PW7 Dinesh Kumar has stated that Partap is known to him. He has stated that in the month of November/December 2006 he and some labourers extracted stones for complainant Partap Singh and carried them upto the place where he was constructing residential house. He has stated that complainant Partap Singh had paid labour charges and he worked for 20 days. He has stated that complainant Partap is originally belonged to Rohal. He has denied suggestion that he did not extract any stone for complainant Partap Singh.

8.8 PW8 Dr. Rakesh Malhotra has stated that he was working as medical officer in CHC Chirgaon at Sandasu since January 2005 and he medically examined Kalgi Ram aged 70 years injured on dated 19.3.2007 at 2.15 PM. He has stated that patient was beaten by one co-accused Rakesh and his associate on dated 19.3.2007. He has stated that on examination he found the following injuries. (1) There was tenderness over the right shoulder joint (Dorsal aspect) and there was no mark of external injury. He advised X-ray of right shoulder. (2) There was haematoma over left medio lateral aspects occiput about 3.0 cm diametre and there was swelling. (3) There was tenderness over left gastronemia muscles left leg and swelling positive was found all over the muscels. (4) There was painfull swelling over the ventral aspect right foot extending laterally to the lateral malleolus. He advised X-ray of right foot and right ankle. He has stated that as per radiologist report there was a fracture of lower end of fibula and injury No. 3 was found grievous. He has stated that he has issued MLC Ext.PW8/B. He has stated that injury No. 3 was possible when some object like a stone fall on one's foot and further stated that injury Nos. 1, 2 and 4 are possible by fall.

8.9 PW9 Bahadur Singh has stated that about three years back he sold his land in Chak Haunchali to Partap Singh for consideration amount of Rs. 40,000/- (Rupees forty thousand only). He has stated that sale deed was registered at Chirgaon and he handed over the possession to Partap Singh complainant. He has admitted that about 30-35 years back he also sold land to co-accused Surjan Singh. He has stated that he sold separate parcel of land to co-accused Surjan. He has stated that land sold to co-accused Surjan is situated at far away distance from the land which was sold to Partap complainant. He has stated that co-accused Surjan did not plant apple trees on land at Mandloch.

8.10 PW10 Jia Lal Naib Tehsildar Chirgaon has stated that SDM Rohru appointed him as local commissioner and directed him to demarcate the land comprised in Khasra No. 127, 132 and 133. He has stated that he demarcated the land and sent his demarcation report to SDM Rohru and his demarcation report is Ext.PW1/H. He has denied suggestion that at the time of demarcation khasra numbers 127, 132 and 133 were found in possession of co-accused Surjan Singh. He has stated that land was barren. He has denied suggestion that there were some apple plants. He has stated that he had recorded statements of Belmu,

Partap Singh, Rajesh Kumar and Rakesh Kumar at the time of demarcation. He has stated that copies of same are Ext.DX, Ext.DY and Ext.DZ.

8.11 PW11 Ramesh Kumar has stated that he is working as office Kanungo in Tehsil Chirgaon since March 2006. He has stated that he received the order from Civil Judge Court Rohru to demarcate the land bearing Khasra No. 868, 869 and 725 in Chak Haunchali. He has stated that he demarcated the land at the spot and submitted the report to Civil Judge Court Rohru and demarcation report is Ext.PW11/A.

8.12 PW12 Prem Chand Negi has stated that he is working as Naib Tehsildar Rohru since August 2003. He has stated that as per court order he visited spot at village Haunchali on dated 5.5.2007 and conducted the demarcation of disputed land. He has stated that thereafter he presented the demarcation report to Civil Court. He has stated that copy of demarcation report is Ext.PW1/R. He has stated that demarcation was conducted as per instructions issued by Financial Commissioner and Secretary Revenue and demarcation report is correct as per factual position at spot.

8.13 PW13 Vinod Kumar has stated that he is working as Civil Ahalmad in Court No.1 Rohru since 2007. He has stated that he has brought the file of civil suit titled Partap Singh vs. Surjan Singh and local commissioner was appointed in the suit and report is Ext.PW1/R. He has staqted that local commissioner also recorded statements of persons and Ext.PW13/A to Ext.PW13/C are copies of statements of Partap Singh, joint statement of Kundan Lal and Sohan Dass and joint statement of Surjan Singh and Rakeshwar Singh. He has stated that Court had issued ad-interim injunction order on dated 17.1.2006 and copy of order is Ext.PW1/F. He has stated that documents Ext.D1 to Ext.D6 are placed on summoned file.

8.14 PW14 Rajeev Chauhan has stated that he is working as Civil Ahalmad in Court No. 2 Rohru since 2004 and he has brought the case file of suit titled as Surjan Singh vs. Bahadur Singh No. 227/1 of 2006. He has stated that original demarcation report is on file and same is Ext.PW11/A. He has stated that demarcation report is not exhibited in evidence and civil suit was dismissed as withdrawn on dated 28.8.2007.

8.15 PW15 HC Tanjen Cherring has stated that he is working as MHC in P.S. Chirgaon since 2006 to June 2008 and on dated 19.3.2007 Partap Singh arrived at police station and lodged report Ext.PW1/A which is in his hand and bears his signatures. He has stated that in the year 2006 Ropti Devi lodged FIR No. 38 of 2006 Ext.PW15/A. He has denied suggestion that police did not take any action in FIR No. 38 of 2007. Self stated that after investigation cancellation report was prepared on dated 25.6.2006 and cancellation report was accepted in Judicial Court on dated 19.4.2007.

8.16 PW16 Ramesh Chand has stated that during the year 2007 he was working as I.O. in P.S. Chirgaon and on dated 19.3.2007 file was handed over to him for investigation. He has stated that he went to spot and prepared spot map Ext.PW16/A. He has stated that he took photographs of spot with help of police camera and photographs are Ext.PW16/B-1 to Ext.PW16/B-5 and negatives of photographs are Ext.PW16/B-6 to Ext.PW16/B-10. He has stated that he took into possession 14 iron sheets and seizure memo Ext.PW3/A was prepared. He has stated that iron sheets were handed over to Kalgi Ram on supurdari. He has stated that complainant Partap Singh produced the documents i.e. order of SDM, jamabandi, mussabi, copy of rapat and photographs etc. which were took into possession vide seizure memo Ext.PW1/D. He has stated that he recorded statements of witnesses at the spot and accused persons Surjan and Rajeshwar were arrested on dated

30.3.2007 and thereafter he further handed over the file to SHO for further action. He has stated that disputed land is near village Haunchali and there are 35-40 families in village Haunchali. He has stated that disputed land is at walking distance of 15-20 minutes from village Haunchali. He has admitted that near disputed land there is house of Belmu in which he lived with his family. He has denied suggestion that he recorded statements of prosecution witnesses as per his own version. He has denied suggestion that it came to his notice that disputed land remained in possession of co-accused Surjan Singh since 1977 till 20.3.2007.

8.17 PW17 SI/SHO Pritam Singh has stated that during the year 2006-2007 he remained posted as SHO P.S. Chirgaon and on dated 21.3.2007 he arrested Ropti Devi, Rakeshwar, Brijeshwar and Bandhu. He has stated that on dated 22.3.2007 on the identification by accused persons Surjan Singh and Rajeshwar he prepared identification memo Ext.PW17/A and from place of occurrence he took into possession ashes, coal and pieces of burnt wood vide memo Ext.PW1/C. He has stated that he took into possession the burnt trunk, utensils vide seizure memo Ext.PW1/B and rope used at the time of offence was produced by co-accused Rajeshwar and same was took into possession vide memo Ext.PW1/M. He has stated that gun used for commission of offence was produced to him by co-accused Surjan along with gun licence. He has stated that co-accused Rakeshwar and Brijeshwar identified the place of incident. He has stated that Brijeshwar produced to him Kilwari which was used for commission of offence. He has stated that co-accused Rakeshwar produced jhabbal (Lever) and gas lighter. He has stated that instruments which were used for commission of offence were brought in a bag. He has stated that after completion of investigation he prepared challan and filed the same in Court. He has stated that dispute was about three khasra Nos. 127, 132 and 133. He has stated that disputed khasra numbers of immovable land are situated at one place and their boundaries are adjoining with each other. He has admitted that co-accused Ropti Devi had lodged FIR No. 38 of 2006 and same was cancelled because co-accused Ropti was not found owner of disputed land. He has stated that Haunchali village is situated at a distance of 3 K.m. from the disputed land. He has denied suggestion that during investigation it came to his notice that Partap took possession of disputed land when accused were arrested. He has denied suggestion that during investigation it was observed that on dated 19.3.2007 co-accused Surjan and Ropti were in their house throughout the day as they had engaged Jai Chand and Vijay Nand as carpenters for construction of their house. He has stated that co-accused Brijeshwar is a teacher in middle school Mangauri. He has denied suggestion that co-accused Rajeshwar was at his shop on dated 19.3.2007 throughout the day. He has denied suggestion that all proceedings were conducted by him while sitting in police station.

9. Statements of accused recorded under Section 313 Cr.P.C. Accused have stated that land is in their possession and complainant party wanted to snatch possession of the land forcibly and they have filed a false case.

10. Defence evidence adduced by accused persons

10.1. DW1 Surjan Singh co-accused had apeared as witness under Section 315 of Code of Criminal Procedure. DW1 has stated that he purchased the land from Bahadur Singh in the year 1977 at Haunchali Chak and Bahadur Singh had handed over the possession of land known as Mandloch. He has stated that thereafter he raised the plants upon the land from time to time and he used to grow wheat and sometime barley on the land. He has stated that in the year 2005 Bahadur sold disputed land to Partap Singh complainant. He has stated that thereafter complainant Partap filed civil suit against him restraining accused persons from cultivating disputed land. He has stated that he filed

application for appointment of local commissioner to ascertain factual position of possession of disputed land. He has stated that thereafter B.C. Negi Naib Tehsildar Rohru was appointed as local commissioner and local commissioner told them that he would visit spot on dated 22.3.2007. He has stated that before Local Commissioner could arrive at the spot complainant Partap Singh filed a false complaint against him and he was arrested. He has stated that thereafter complainant Partap Singh forcibly took the possession of land on dated 20.3.2007. He has stated that on dated 19.3.2007 he and his wife were present at home throughout the day as Jai Chand carpenter was working in his house. He has stated that his son Rakeshwar, Bandhu Nepali and Surat Ram on that day were planting apple plants in village Maktot. He has stated that his son co-accused Rajeshwar is running a shop at Chirgaon and on that day he was at Chirgaon and further stated that he lived in Chirgaon itself. He has stated that his another son Brijeshwar co-accused is employed as teacher in the school. He has further stated that he lived in Mangiari in rented premises of Amar Singh. He has stated that on that day he was at Mangiari. He has stated that complainant Partap Singh had filed false case against him. He has denied suggestion that there was residential house over disputed land prior to incident. He has stated that he visited the disputed land lastly on 17.3.2007. He has admitted that civil suit is pending qua disputed land between complainant and accused persons. He has admitted that complainant Partap got demarcated the land in the month of June 2006. He has admitted that in the year 2007 Naib Tehsildar Rohru had demarcated the land as local commissioner. He has admitted that he is owner of gun and gun was took into possession by police in connection with present case. He has stated that he retired on dated 31.12.2006 and after retirement he resides in his home. He has denied suggestion that residential house of Partap Singh complainant was set on fire by accused persons. He has denied suggestion that he had given beatings to parents of Partap Singh complainant. He has denied suggestion that he received ad-interim injunction order from civil Court directing him not to enter in suit land.

10.2 DW2 Jai Chand has stated that he knows co-accused Surjan Singh and last year he did some repair work in the house of co-accused Surjan. He has stated that he used to reach at work site at 9 AM and used to remain there till 5 PM. He has stated that during that whole day co-accused Surjan and his wife were present with him. He has stated that he worked for 15-20 days. He has stated that he worked on contract and not on daily wages. He has admitted that on contract the working hours are not fixed.

10.3 DW3 Brijeshwar co-accused has appeared as witness under Section 315 of Code of Criminal Procedure. DW3 has stated that he is working as TGT in Mangiari school since September 2006 and Mangiari is 10-12 K.m. away from his village Maktot. He has stated that he has taken the house on rent from Amar Singh in village Mangiari. He has stated that from 18.3.2007 to 20.3.2007 he was in village Mangiari. He has stated that he asked from Headmaster of school to issue certificate about his presence but Headmaster refused to issue the certificate. He has stated that he was arrested on dated 21.3.2007 and he did not move application in Court for production of attendance register. He has denied suggestion that he remained absent from school without obtaining leave. He has denied suggestion that allegations levelled against him are true. He has denied suggestion that shed and residential house of complainant Pratap visible in photographs Ext.PW4/A were set on fire by accused persons.

10.4 DW4 Rajeshwar co-accused has appeared as witness under Section 315 of Code of Criminal Procedure 1973. DW4 has stated that he is running a shop of insecticides in Chirgaon for the last 3-4 years. He has stated that in building there are two shops, one shop is possessed by him and another shop is in possession of Deepak Thakur. He has

stated that building adjoining to his shop is that of Mohan Singh Thakur in which he runs his own shop. He has stated that his residence is situated in village Chirgaon in the house of one Deepak Surian. He has stated that Maktot is about 10-12 K.m. away from Chirgaon and upto a distance of 6 Kms. there is a road from Chirgaon and thereafter one has to travel on foot upto Maktot. He has stated that entire market in Chirgaon remains open on Sunday and in March of 18th, 19th and 20th 2007 he was present in Chirgaon and on dated 20.3.2007 he was called to police station from his shop and thereafter he was arrested. He has stated that allegations levelled against him were that he set on fire residential house and shed of Partap Singh complainant. He has stated that his neighbour shopkeepers knew that on 18th and 19th March 2007 he was present at his shop at Chirgaon. He has stated that he does not know about dispute with Partap Singh complainant. He has stated that dispute is relating to land. He has stated that he did not see any residential house or shed over disputed land. He has stated that his father is owner of gun. He has denied suggestion that on dated 19.3.2007 he accompanied his brother, father and one Bandhu Nepali and set the residential house and shed of Partap Singh complainant on fire and also pointed gun towards Kalgi Ram father of Partap complainant. He has denied suggestion that he deposed falsely in order to save himself and his family members.

10.5 DW5 Rakeshwar Singh alias Rakesh co-accused has also appeared as witness under Section 315 of Code of Criminal Procedure 1973. DW5 has stated that he is horticulturist and agriculturist and on dated 19.3.2007 he was planting apple plants at place Mathal which is at a walking distance of about 15 minutes from village Maktot. He has stated that Bandhu Nepali servant and Surat Ram labourer of village Hatgaon were with him. He has stated that he proceeded at 7 AM from Maktot and returned home at 5/6 PM. He has stated that his parents were at village Maktot as carpenter was employed. He has stated that co-accused Rajeshwar was at Chirgaon at his shop and co-accused Brijeshwar was at Mangiari in school. He has stated that on dated 21.3.2007 he was arrested and when he inquired about grounds of arrest he was informed that he had set on fire residential house of Partap Singh complainant. He has stated that disputed land is seen by him and further stated that accused persons have planted apple trees in the year 2005 and also planted apple trees prior to 2005. He has stated that in the year 2006 some pits were dug for plantation of apple trees. He has stated that during the year 2005 land was cultivated. He has stated that Partap Singh complainant is not in possession of land in dispute and Partap Singh has no residential house and shed upon the land in dispute. He has stated that allegations levelled against him are false. He has admitted that land was demarcated by Tehsildar Chirgaon on dated 8.6.2006. He has stated that again the land was demarcated by Naib Tehsildar Rohru in the month of May 2007. He has stated that he visited the disputed place lastly on dated 14/15th March 2007. He has stated that there was no residential house or shed on disputed land. He has stated that co-accused Bandhu had died. He has denied suggestion that accused persons have set on fire residential house and shed belonging to Partap complainant. He has denied suggestion that he is deposing falsely in order to save accused persons.

10.6 DW6 Surat Ram has stated that co-accused Surjan is known to him. He has stated that apple trees were planted and he dug pits. He has stated that he worked from 15th March upto 20th of March and Rakeshwar and Bandhu used to be at work along with him every day. He has stated that they used to come to spot at 8 AM and used to return after 5 PM. He has stated that on 19th March Bandhu and Rakeshwar were with him at the place of work. He has stated that they dug about 150 pits. He has stated that he used to come to the house of accused persons in the morning and after consuming breakfast he used to go to the fields. He has stated that in those days a carpenter was also at work in the house of

accused and carpenter remained at work till 20th March. He has denied suggestion that on dated 19.3.2007 he, co-accused Rakeshwar and Bandhu were not in the fields of co-accused Surjan.

10.7 DW7 Deepak Kumar has stated that co-accused Rajeshwar is known to him as he is running the shop at Chirgaon. He has stated that co-accused Surjan is also known to him and on dated 19.3.2007 co-accused Rajeshwar opened his shop at about 8-30 AM and closed his shop at 7-30 PM and throughout the day co-accused Rajeshwar was present at his shop. He has stated that even on dated 20.3.2007 he was present at his shop. He has stated that at 5.30 PM police officials arrived at his shop and took him. He has stated that later on co-accused Rajeshwar told him by way of telephone that one Partap had filed criminal case against him and his family members. He has denied suggestion that on dated 19.3.2007 co-accused Rajeshwar was not present at village Chirgaon at his shop. He has denied suggestion that in order to save co-accused Rajeshwar he is deposing falsely.

11. Submission of learned Additional Advocate General appearing on behalf of the State that criminal offence against co-accused Rakeshwar @ Rakesh son of Surjan Singh under Section 325 IPC is proved on record beyond reasonable doubt is accepted for the reasons to be recorded hereinafter. It is proved on record that complainant Partap Singh and co-accused Surjan Singh have purchased the land from one vendor namely Bahadur Singh. It is proved on record that co-accused Surjan had purchased the land from vendor Bahadur Singh in the year 1977 and complainant Partap Singh had purchased the land from Bahadur Singh vendor in the year 2005. It is proved n record that complainant Pratap and co-accused Surgan have purchased different plots from same vendor Bahadur Singh by way of registered sale deeds. We have perused the copy of jamabandi Ext.PW1/K placed on record carefully for the year 2003-2004. There is positive entry in copy of jamabandi for the year 2003-04 placed on record that Partap Singh son of Kalgi Ram complainant had purchased Khasra Nos. 127, 132 and 133 by way of sale deed and mutation No. 135 was sanctioned on dated 19.11.2005 in favour of Partap Singh son of Kalgi Ram complainant qua Khasra No. 127, 132 and 133. Names of accused persons did not figure in ownership column or in possession column of Khasra No. 127, 132 and 133 as per jamabandi Ext.PW1/K which is record of right prepared by reveneu agency as per H.P. Land Revenue Act 1954. As per sale deed Ext.D6 placed on record it is proved beyond reasonable doubt that co-accused Surjan Singh son of Hari Nand had purchased the land from vendor Bahadur Singh comprised in Khasra Nos. 325 and 468 on dated 21.11.1977 in consideration amount of Rs.1000/- (Rupees one thousand only). Sale deed Ext.D6 placed on record remains unrebutted. Dispute inter se the complainant and accused persons are relating to land comprised in Khasra Nos. 127, 132 and 133. Co-accused Surjan did not purchase land comprised in Khasra Nos. 127, 132 and 133 which is in dispute in present case. PW2 injured Kalgi Ram has specifically stated when he appeared in witness box in positive cogent and reliable manner that his son namely Partap Singh complainant had purchased the land at Hanchauli from vendor Bahadur Singh and thereafter residential house was built. PW2 Kalgi Ram has specifically stated in positive manner that he and his wife Pusmi Devi were living in residential house and co-accused Rakeshwar alias Rakesh came with possession of a 12 bore gun and he pointed 12 bore gun at PW2 Kalgi Ram injured aged 70 years. He has stated that when his wife Pusmo Devi came down co-accused Rakeshwar @ Rakesh also pointed gun at her. PW2 Kalgi Ram injured has stated in positive manner that co-accused Rakeshwar @ Rakesh had given a blow on his head with butt of 12 bore gun. PW2 has specifically stated in positive manner that co-accused Rakeshwar @ Rakesh tried to put chilli powder in his eyes.

12. Testimony of PW2 injured aged 70 years is also corroborated by medical officer Dr. Rakesh Malhotra PW8 who has stated in positive manner that injured Kalgi Ram had sustained four injuries. (1) There was tenderness over the right shoulder joint (Dorsal aspect). (2) There was haematoma over left medio lateral aspects occiput about 3.0 cm diametre and there was swelling. (3) There was tenderness over left gastronemia muscles left leg and swelling positive was found all over the muscels right foot which was grievous in nature. (4)There was swelling over ventral aspect. It is proved beyond reasonable doubt that PW2 Kalgi Ram injured had sustained four injuries cited supra out of which injury No. 3 was grievous in nature. In present case incident took place on dated 19.3.2007 at 9 AM and medical examination of injured Kalgi Ram aged 70 years was conducted on dated 19.3.2007 at 2.15 PM. Testimony of medical officer is also corroborated by medical certificate Ext.PW8/B. Testimony of PW2 is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW2 injured Kalgi Ram aged 70 years who is senior citizen of India. It is held that co-accused Rakeshwar @ Rakesh had caused grievous hurt to injured Kalgi Ram aged 70 years with 12 bore gun.

13. Another submission of learned Additional Advocate General appearing on behalf of State that offence under Section 27 of Arms Act 1959 is also proved against co-accused Rakeshwar @ Rakesh son of Surjan is accpeted for the reasons to be recorded hereinafter menioned. PW2 injured has specifically stated in positive manner that co-accused Rakeshwar @ Rakesh was in possession of 12 bore gun and he pointed gun towards Kalgi Ram. PW2 injured has specifically stated in positive manner that co-accused Rakeshwar @ Rakesh has also pointed out 12 bore gun towards his wife Pusmo Devi. PW2 has specifically stated in positive manner that thereafter co-accused Rakeshwar @ Rakesh had given a blow on head of Kalgi Ram with butt of 12 bore gun. Testimony of PW2 to this effect is trustworty reliable and inspires confidence of Court. It is proved on record beyond reasonable doubt that co-accused Rakesh Kumar @ Rakeshwar had used arm in commission of criminal offence and committed offence under Section 27 of Arms Act 1959.

14. Even recovery of 12 bore armed gun is also proved beyond reasonable doubt as per seizure memo Ext.PW1/N. PW1 Partap Singh has specifically stated in positive manner when he appeared in witness box that 12 bore armed gun was recovered as per seizure memo Ext.PW1/N placed on record. PW5 Ram Lal another witness of seizure memeo of recovery of 12 bore gun also stated in positive manner that 12 bore gun No. HPM 14902 was recovered in his presence. Testimonies of PW1 Partap Singh and PW5 Ram Lal qua recovery of gun are trusworthy reliable and inspire confidence of Court.

15. Another submission of learned Additional Advocate General appearing on behalf of State that criminal offence against other accused persons is also proved beyond reasonable doubt as alleged by prosecution is rejected being devoid of any force for the reasons hereinafter mentioned. PW2 injured has specifically stated that co-accused Surjan and Ropti were hiding themselves in the bushes. As per testimony of PW2 co-accused Surjan and Ropti Devi did not come at the spot but they were hiding themselves in bushes on the date of incident. It is proved on record that co-accused Rajeshwar was running the shop of insecticides at Chirgaon. DW7 Deepak Kumar has specifically stated that co-accused Rajeshwar is running the shop at Chirgaon adjoining to his shop. DW7 has specifically stated in positive manner that on dated 19.3.2007 co-accused Rajeshwar opened his shop at Chirgaon at about 8.30 AM and closed his shop at about 7.30 PM. DW1 has stated in positive manner that co-accused Rajeshwar throughout the day was present at the shop. DW3 Brijeshwar has stated in positive manner that w.e.f. 18.3.2007 to 20.3.2007 co-accused Brijeshwar had attended the school and had resided in the rented house of Amar

Singh at village Mangiari. Prosecution did not examine any official from school in order to prove that co-accused Brijeshwar was not in school during the period w.e.f. 18th to 20th March 2007. Even prosecution did not examine Amar Singh owner of house in order to prove that co-accused Brijeshwar was not present at village Mangiari w.e.f. 18.3.2007 to 20.3.2007.

16. Submission of learned Additional Advocate General appearing on behalf of State that it is proved on record that house and shed constructed by vendee Partap Singh over immovable land comprised in Khasra No. 127, 132 and 133 situated in Chak Hanchauli Tehsil Chirgaon District Shimla was destroyed which was used as a human dwelling place and on this ground accused persons be convicted under Section 436 IPC is rejected being devoid of any force for the reasons hereinafter mentioned. There is no positive cogent and reliable evidence on record in order to prove that which of the co-accused had destroyed residential house and shed constructed by PW1 Partap Singh over the land comprised in Khasra Nos. 127, 132 and 133 and on this ground we acquit all accused persons relating to offence punishable under Section 436 IPC by way of giving them benefit of doubt.

17. Submission of learned Advocate appearing on behalf of co-accused Rakeshwar @ Rakesh that civil case is pending between complainant and accused persons relating to Khasra No. 127, 132 and 133 before civil Court and on this ground co-accused Rakeshwar @ Rakesh cannot be convicted qua criminal offence under Section 325 IPC and under Section 27 of Arms Act 1959 is rejected being devoid of any force for the reasons hereinafter mentioned. We are of the opinion that pendency of civil suit does not give the licence to co-accused Rakeshwar @ Rakesh to commit criminal offence with 12 bore gun despite ad-interim injunction passed by civil Court against co-accused Surjan Singh and his family members. It is well settled law that proceedings of civil Court and proceedings of criminal Court are independent proceedings.

18. Submission of learned Advocate appearing on behalf of co-accused Rakeshwar @ Rakesh that co-accused Surjan Singh had purchased the land from vendor Bahadur Singh in the year 1977 and w.e.f. 1977 Surjan Singh along with his family members was in settled possession of Khasra No. 127, 132 and 133 and on this ground no criminal offence is proved against co-accused Rakeshwar @ Rakesh son of Surjan Singh under Section 325 IPC and under Section 27 of Arms Act 1959 is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the sale deed Ext.D6 executed in favour of co-accused Surjan placed on record. As per sale deed Ext.D6 Surjan Singh co-accused father of Rakeshwar @ Rakesh did not purchase land from Khasra Nos. 127, 132 and 133 on dated 21.11.1977 but purchased the land from Khasra No. 325 and 468 kita 2 situated in Chak Haunchali Tehsil Chirgaon District Shimla H.P. which is different plot and is situated at far distance from Khasra Nos. 127, 132 and 133. In present case dispute is not relating to Khasra No. 325 and 468 but dispute is relating to Khasra Nos. 127, 132 and 133 which was purchased by Partap Singh complainant son of Kalgi Ram from vendor Bahadur Singh. Even names of accused persons did not record in ownership as well as in cultivation column of Khasra No. 127, 132 and 133 at any point of time in record of rights prepared under H.P. Land Revenue Act 1954 by public official in discharge of official duty.

19. Another submission of learned Advocate appearing on behalf of co-accused Rakesh @ Rakeshwar that vendor Bahadur Singh had shown wrong location of Khasra number purchased by co-accused Surjan Singh vide sale deed dated 21.11.1977 and on this ground co-accused Rakeshwar @ Rakesh cannot be convicted under Section 325 IPC and under Section 27 of Arms Act 1959 is also rejected being devoid of any force for the reasons

hereinafter mentioned. PW9 Bahadur Singh vendor had entered in witness box in present case and Bahadur Singh has specifically stated when he appeared in witness box that he had had sold his land comprised in Khasra Nos. 127, 132 and 133 to Partap Singh complainant situated in Chak Hanchauli in consideration amount of Rs.40,000/- (Rupees forty thousand only). He has stated that he had sold separate land to co-accused Surjan Singh at Hanchauli. PW9 has specifically stated in positive manner that land which he had sold to Surjan Singh co-accused is situated far away from land comprised in Khasra Nos. 127, 132 and 133. We are of the opinion that vendee is under legal obligation to locate the actual immovable land purchased by vendee through the assistance of halqua patwari and field kanungo. In present case it is proved on record that civil suit relating to Khasra Nos. 127, 132 and 133 titled Partap Singh vs. Surjan Singh is pending before Civil Judge (Junior Division) Rohru and Civil Judge (Junior Division) Rohru had passed ad interim injunction Ext.PW1/F restraining Surjan Singh and his family members from interference in any manner over suit land comprised in Khasra Nos. 127, 132 and 133 situated in Chak Haunchali Tehsil Chirgaon District Shimla till further order. Ex-parte ad-interim order was passed by learned Civil Judge (Junior Division) Rohru on dated 17.1.2006 prior to the incident. It is well settled law that ad-interim injunction passed by learned Civil Judge was operating against accused persons even on dated 19.3.2007. There is no evidence on record that ad-interim injunction dated 17.1.2006 was modified or set aside by any competent Court of law. In view of the fact that Civil Court had also restrained the accused persons from interfering over suit land comprised in Khasra Nos. 127, 132 and 133 situated in Chak Haunchali Tehsil Chirgaon District Shimla on dated 17.1.2006 we are of the opinion that accused persons cannot be allowed to flout ad-interim injunction passed by Civil Court. We are of the opinion that if ad-interim injunction of Civil Court is allowed to be flouted then anarchy shall prevail in the society. It is well settled law that all persons are under legal obligation to comply the directions of Civil Courts in order to maintain majesty of law and in order to maintain harmony in the society. In the present case there is no oral or documentary evidence on record in order to prove that Surjan or his family members have acquired title over immovable land comprised in Khasra Nos. 127, 132 and 133. On the contrary title of immovable land comprised in Khasra Nos. 127, 132 and 133 is in favour of complainant Pratap as per oral as well as documentary evidence placed on record. Even FIR No. 38 of 2006 Ext.PW15/A filed by co-accused Ropti Devi wife of co-accused Surjan Singh against Pratap Singh complainant relating to Khasra Nos. 127, 132 and 133 was not proved to be true and cancellation report was filed by investigating agency on dated 25.6.2006 which was accepted by learned Judicial Magistrate on dated 19.4.2007.

20. Another submission of learned Advocate appearing on behalf of co-accused Rakesh @ Rakeshwar that conviction cannot be given to co-accused Rakeshwar @ Rakesh under Section 325 IPC and under Section 27 of Arms Act 1959 on testimony of injured PW2 in present case is rejected being devoid of any force for the reasons hereinafter mentioned. We are of the opinion that testimony of injured PW2 is trustworthy reliable and inspires confidence of Court relating to co-accused Rakeshwar @ Rakesh. Testimony of injured PW2 Kalgi Ram is also corroborated with MLC placed on record. As per Section 59 of Indian Evidence Act 1872 facts can be proved by way of oral evidence. It is well settled law that conviction could be based on honest and trusworthy evidence of a single witness in criminal case if it inspires confidence of Court. ***(See AIR 1973 SC 944 titled Jose vs. State of Kerala (Full Bench)*** It was held in case reported in ***HLJ 2003(1) H.P. page 541 titled State of H.P. vs. Om Prakash and others*** that conviction can be based on sole testimony of injured if it inspires confidence of Court. It was held that injured cannot be said to be interested witness requiring corroboration.

21. Another submission of learned Advocate appearing on behlaf of co-accused Rakesh @ Rakeshwar that there is material contradiction and improvement in prosecution case and on this ground co-accused Rakeshwar @ Rakesh could not be convicted under Section 325 IPC and under Section 27 of Arms Act 1959 is also rejected being devoid of any force for the reasons hereinafter mentioned. In present case incident took place on dated 19.3.2007 at 9 AM and prosecution witnesses were recorded on dated 10.3.2008, 11.3.2008, 12.3.2008, 13.3.2008, 17.7.2008 and 18.7.2008. It is well settled law that minor contradictions are bound to come in criminal case when testimonies of prosecution witnesses are recorded after a gape of sufficient time. We are of the opinion that in present case learned Advocate appearing on behalf of co-accused Rakeshwar @ Rakesh did not point out any material contradiction which goes to the root of case. It was held in case reported in ***(2010)9 SCC 567 titled C. Muniappan and others vs. State of Tamil Nadu that*** even if there are some omissions contradictions and discrepancies then entire evidence would not be discarded. It was held that undue importance should not be given to omissions, contradictions and discrepancies which do not go to the root of the case. ***(See: AIR 1972 SC 2020 titled Sohrab and another vs. The State of Madhya Pradesh, See: AIR 1985 SC 48 titled State of U.P. vs. M.K. Anthony; See: AIR 1983 SC 753 titled Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat; See: AIR 2007 SC 2257 titled State of Rajasthan vs. Om Parkash; See: (2009)11 SCC 588 titled Prithu alias Prithi Chand and another vs. State of Himachal Pradesh; (2009)9 SCC 626 titled State of Uttar Pradesh vs. Santosh Kumar and others; See:AIR 1988 SC 696 titled Appabhai and another vs. State of Gujarat; See: AIR 1999 SC 3544 titled Rammi alias Rameshwar vs. State of Madhya Pradesh; See: (2000)1 SCC 247 titled State of H.P. vs. Lekh Raj and another; See: (2004) 10 SCC 94 titled Laxman Singh vs. Poonam Singh and others; See: (2012)10 SCC 433 Kuriya and another vs. State of Rajasthan)***

22. Another Advocate appearing on behalf of co-accused Rakeshwar @ Rakesh that testimony of PW2 injured does not inspire confidence of Court and on this ground co-accused Rakeshwar @ Rakesh be acquitted under Section 325 IPC and under Section 27 of Arms Act 1959 is also rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that concept of *falsus in uno falsus in omnibus* is not applicable in criminal cases. ***(See AIR 1980 SC 957 titled Bhee Ram vs. State of Haryana. Also See AIR 1971 SC 2505 titled Rai Singh vs. State of Haryana)*** It was held in case reported in ***AIR 1987 S.C. 1328 Dalbir Singh Vs. State of Punjab*** that there is no hard and fast rule which could be laid down for appreciation of evidence and it is a question of fact and each case has to be decided on the fact as they proved in a particular case.

23. In view of above stated facts appeal is partly allowed. We modified judgment of learned trial Court relating to co-accused Rakeshwar @ Rakesh son of Surjan Singh. We convict co-accused Rakeshwar @ Rakesh under Sections 325 IPC and under Section 27 of Arms Act 1959. Acquittal of other co-accused by learned trial Court is affirmed by way of giving them benefit of doubt and acquittal of Rakeshwar @ Rakesh son of Surjan Singh qua other criminal offences is also affirmed by way of giving him benefit of doubt. Now convict co-accused Rakeshwar @ Rakesh be heard on quantum of sentence under Sections 325 IPC and under Section 27 of Arms Act 1959 on 21.9.2015. Convict Rakeshwar @ Rakesh be produced before us.

****

Cr. Appeal No. 254 of 2009

21.09.2015

Present: - M/s Ashok Chaudhary, V.S. Chauhan, Additional Advocates General and Mr. Kush Sharma, Deputy Advocate General for the State-appellant.
Mr. Lalit K. Sharma, Advocate, for the respondent-convict.
Convict Rakeshwar @ Rakesh is in custody of C.Sandeep No. 1441 of P.S. Chirgaon.

24. We have heard learned Additional Advocate General appearing on behalf of the State and learned defence counsel appearing on behalf of convict person upon quantum of sentence.

25. Learned Additional Advocate General appearing on behalf of the State submitted before us that convict namely Rakeshwar @ Rakesh had used 12 bore gun for commission of criminal offence and deterrent punishment be awarded to the convict person in order to maintain majesty of law in the society. On the contrary learned defence counsel appearing on behalf of convict person submitted before us that convict person is first offender and he has family to support and he be released on Probation of Offenders Act 1958 in view of rulings reported in ***AIR 2000 SC 1677 titled Dalbir Singh vs. State of Haryana and others, AIR 1983 SC 359 titled State of Gujarat vs. V.A.Chauhan.***

26. We have considered the submissions of learned Additional Advocate General appearing for the State and learned defence counsel appearing on behalf of convict person carefully.

27. In view of the fact that convict had used 12 bore gun for commission of criminal offence under Section 325 IPC we are of the opinion that it is not expedient in the ends of justice to release the convict by way of giving him benefit of Probation of Offenders Act 1958. In order to maintain majesty of law and keeping in view the *modus operandi* used for commission of criminal offence and keeping in view the ruling given by Hon'ble Apex Court of India reported in ***AIR 2015 SC 398 titled State of M.P. vs. Surendra Singh*** that sentence should be commensurate with gravity of offence we sentence the convict as follow:-

Sr. No.	Nature of Offence	Sentence imposed
1.	Offence under Section 325 IPC	Convict is sentenced to undergo simple imprisonment for three years and to pay fine to the tune of Rs.5,000/- (Rupees five thousand only). In default of payment of fine convict shall further undergo simple imprisonment for one month.
2.	Offence under Section 27 of Arms Act 1959	Convict is sentenced to undergo simple imprisonment for three years and to pay fine to the tune of Rs.5,000/- (Rupees five thousand only). In default of payment of fine convict shall further undergo simple imprisonment for one month.

28. Both sentences shall run concurrently. Period of custody during investigation, inquiry and trial will be set off. Certified copy of this judgment and sentence be supplied to convict person forthwith free of cost. Case property will be confiscated to State of H.P. after the expiry of period of filing further legal proceedings before the competent Court of law. The Registrar (Judicial) will issue warrant of commitment forthwith strictly in accordance with judgment and sentence for compliance. File of learned trial Court along with certified copy of judgment and sentence will be sent back forthwith. Criminal appeal No. 254 of 2009 stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

****

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

Changa Ram .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 73 of 2015
Reserved on: September 16, 2015.
Decided on: September 22, 2015.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 4 kg. 600 gms cannabis – there were houses and shops near the place where the accused was apprehended – no independent witness was associated- no action was taken against the person who had refused to be a witness- accused was asked whether he would like to searched before Magistrate, Gazetted Officer or Police Officials present at the spot- this was violative of Section 50 of N.D.P.S. Act as the option to be searched before Magistrate and Gazetted officer has to be given- held, that in these circumstances, case of prosecution was not proved beyond reasonable doubt- accused acquitted. (Para-14 to 19)

Cases referred:
Suresh and others vrs. State of Madhya Pradesh, (2013) 1 SCC 550
State of Rajasthan v. Parmanand, (2014) 5 SCC 345

For the appellant: Mr. Vikas Rathore, Advocate.
For the respondent: Mr. M.A.Khan, Addl. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 26.12.2014, rendered by the learned Special Judge (II), Chamba, H.P, in Sessions Trial Filing No. NDPS Act/195/2014 (regd. No. NDPS Act/26/2014), whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Sections 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous

imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 12.1.2014 at about 8:00 AM, ASI Rajesh Kumar, I.O., ASI Bhupinder Singh, HHC Surinder Kumar, Const. Shaukat Ali, Const. Gargesh Kumar, Const. Avnish Kumar and Lady Const. Asha Kumar with the I.O. kit were present near Lilah Pranehrui. They saw a person coming from Lilah side and he was going towards Dharwala. He was holding a green and light brown coloured bag in his hand. The accused after seeing the police party tried to run away from the spot. He was apprehended. The Investigating Officer had suspicion that the accused might be possessing some contraband and asked the accused person as to whether he wanted to give his search in the presence of the Magistrate or Gazetted Officer or to the police official present on the spot. Memo Ext. PW-1/A to this effect was prepared in the presence of ASI Bhupinder Singh and Const. Shaukat Ali. It was also signed by the accused. No independent witnesses could be associated as the place was isolated and there was no *abadi* near the place of occurrence. The bag of the accused was searched and inside the bag, there was black coloured hard substance in the form of slides and it was found to be cannabis. It weighed 4 kg. 600 gms. Cannabis was put in the same bag and it was sealed in a white coloured *pulinda* with six seal impressions of "T". It was taken into possession vide seizure memo Ext. PW-1/F in the presence of witnesses ASI Bhupinder Singh and Const. Shaukat Ali. Rukka was faxed to the Police Station, CID Bharari. The copy of rukka is Ext. PW-6/A. NCB forms in triplicate vide Ext. PW-8/C were filled in at the spot and seal impression "T" was also put on the NCB forms. The FIR was registered. The investigation was completed and the challan was put up after completing all the codal formalities.

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

4. Mr. Vikas Rathore, Advocate, appearing on behalf of the accused, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, Addl. Advocate General for the State has supported the judgment of the learned trial Court dated 26.12.2014.

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

6. PW-1 ASI Bhupinder Singh deposed that on 12.1.2014, he alongwith other police officials was on the spot at 8:00 AM alongwith the IO kit. In the meantime, accused came from Lihal carrying a bag in his left hand. The accused was asked that he might have some contraband in the bag and his search was to be conducted. The option was given in writing to the accused as to whether his search be conducted before a Magistrate of Gazetted Officer. To this effect consent memo Ext. PW-1/A was prepared by the IO on the spot. The accused gave his consent to the I.O that he wanted to give his personal search to the police officials present on the spot. He gave his consent in writing vide Ext. PW-1/B. NCB forms in triplicate were filled up by the I.O. on the spot and seal impression "T" was also affixed on the NCB forms. The rukka was prepared. In his cross-examination, he admitted that they have not associated any independent witnesses. He also admitted that at Dharwala, there are about 20 shops and 40-50 residential houses. He admitted that Paniharu is at a distance of 4 kms from Dharwala and 3 kms from Lihal. There were 4-5 tea shops situated near the bridge.

7. PW-2 Const. Shaukat Ali, also deposed the manner in which the accused was apprehended, contraband was seized and sealing proceedings were completed on the spot. In his cross-examination, he admitted that there were 20 shops and 40 residential houses situated at Dharwala. He also admitted that at 8:00 AM, vehicles use to ply on the way. He also admitted that Chamba Bharmour road is busy road though he denied that Dharwala Lihal road is a busy road. He also admitted that construction work of Hydro Projects was in progress between Lihal to Dharwala.

8. PW-3 LHC Asha Kumari has admitted in her cross-examination that there was no receipt annexed with the challan by which the fax was sent to the Police Station Bharari.

9. PW-5 Const. Ajay Singh deposed that ASI Rajesh Kumar had handed over to him one cloth parcel sealed with seal impression "T" (six in number) containing 4 kg. 600 gms. with seal impressions, NCB forms in triplicate for resealing the same. He handed over the same to SHO Varinder Chauhan, PS Bharari, Shimla.

10. PW-6 HC Prakash Chand, deposed that on 12.1.2014, copy of rukka was received through fax. On the basis of rukka, FIR Ext. PW-6/B was registered. He prepared the case file. On the same day at about 8:30 AM, the SHO deposited with him one sealed parcel with seal impression "T" (six in numbers) and of "N" (six in number) containing 4 kg. 600 grams cannabis alongwith sample of seal "T" and "N", NCB forms in triplicate, copy of seizure memo and reseal certificate Ext. PW-6/C. He entered the same in malkhana register at Sr. No. 158. The charas alongwith seal impressions, NCB forms in triplicate, copy of seizure memo, copy of FIR, reseal certificate and docket were sent to FSL Junga vide RC No. 9/14 through HHC Bhagat Ram.

11. PW-8 Insp. Varinder Chauhan, deposed that on the basis of rukka, he registered case vide FIR Ext. PW-6/B. In the presence of MHC Prakash Chand, he resealed the parcel with seal impression "N" (six in number) and filled up the relevant columns of NCB forms vide Ext. PW-8/C. He handed over the same to MHC Prakash Chand alongwith the sample seals, NCB forms in triplicate, copy of FIR and seizure memo. In his cross-examination, he admitted that no fax number was mentioned in rukka Ext. PW-6/A.

12. PW-9 HHC Bhagat Ram has carried the parcel to FSL, Junga. He deposited it on the same day at FSL, Junga i.e. 13.1.2014.

13. PW-10 ASI Rajesh Kumar was the I.O. He also deposed the manner in which the accused was apprehended, contraband was seized and sealing proceedings were completed on the spot. In his cross-examination, he admitted that about 40 residential houses and near about 20 shops are situated at village Dharwala. He also admitted that at 8:00 AM, traffic starts moving. He also admitted that there was Hydro project at Bagga. He made efforts to associate independent witnesses but none was ready for the same. He has not initiated any action against those persons during the course of the investigation.

14. It has come in the evidence that the place where the accused was nabbed, there were houses and shops nearby. The police has not made any sincere efforts to associate independent witnesses to give credence to the seizure, search and sealing proceedings. It is not one of those places which was isolated and secluded. The traffic had also started plying on the road. The statement of PW-10 ASI Rajesh Kumar to the effect that he has tried to associate independent witnesses but none come forward is not worth credence. There is a detailed procedure, the manner in which the I.O can always ask the persons to be associated as witnesses. The I.O. has admitted in his cross-examination that

he has not taken any action against the persons who had refused to be associated with him during the course of investigation.

15. The charas was recovered from the bag but the personal search of the accused was also undertaken as per Ext. PW-1/A. We have gone through memo Ext. PW-1/A. The accused was asked whether he wanted to be searched before the Magistrate, Gazetted Officer or Police Officials present on the spot. In Section 50 of the ND & PS Act, the person has to be apprised of his legal right to be searched either before the Magistrate or the Gazetted Officer but not before the police officer. There are only two options. However, in the instant case, the accused has been given 3rd option also to be searched before the police officer present on the spot. It was in violation of Section 50 of the ND & PS Act.

16. Their lordships of the Hon'ble Supreme Court in the case of ***Suresh and others vrs. State of Madhya Pradesh,*** reported in ***(2013) 1 SCC 550,*** have held that the accused were merely asked as to whether they would offer their personal search to the police officer concerned or to gazetted officer. Thus, Section 50(1) was not complied with in respect of recovery of contraband from the person of appellants. It has been held as follows:

> "16. The above Panchnama indicates that the appellants were merely asked to give their consent for search by the police party and not apprised of their legal right provided under Section 50 of the NDPS Act to refuse/to allow the police party to take their search and opt for being searched before the Gazetted officer or by the Magistrate. In other words, a reading of the Panchnama makes it clear that the appellants were not apprised about their right to be searched before a gazetted officer or a Magistrate but consent was sought for their personal search. Merely asking them as to whether they would offer their personal search to him, i.e., the police officer or to gazetted officer may not satisfy the protection afforded under Section 50 of the NDPS Act as interpreted in Baldev singh's case.
>
> 17. Further, a reading of the judgments of the trial Court and the High Court also show that in the presence of Panchas, the SHO merely asked all the three appellants for their search by him and they simply agreed. This is reflected in the Panchnama. Though in Baldev Singh's case, this Court has not expressed any opinion as to whether the provisions of Section 50 are mandatory or directory but "failure to inform" the person concerned of his right as emanating from sub-section (1) of Section 50 may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law. In Vijaysinh Chandubha Jadeja's case (supra), recently the Constitution Bench has explained the mandate provided under sub-section (1) of Section 50 and concluded that it is mandatory and requires strict compliance. The Bench also held that failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. The concept of substantial compliance as noted in Joseph Fernadez (supra) and Prabha Shankar Dubey (supra) were not acceptable by the Constitution Bench in Vijaysinh Chandubha Jadeja, accordingly, in view of the language as evident from the panchnama which we have quoted earlier, we hold that, in the case on hand, the search and seizure of the suspect from the person of the appellants is bad and conviction is unsustainable in law.

> 18. We reiterate that sub-section (1) of Section 50 makes it imperative for the empowered officer to "inform" the person concerned about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate, failure to do so vitiate the conviction and sentence of an accused where the conviction has been recorded only on the basis of possession of the contraband. We also reiterate that the said provision is mandatory and requires strict compliance."

17. Their Lordships of the Hon'ble Supreme Court in **State of Rajasthan v. Parmanand** reported in (2014) 5 SCC 345, have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their lordships have also held that Section 50 does not provide for third option. Their lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable. Their lordships have held as under:

> "15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs,Section 50 of the NDPS Act will have application.
>
> 16. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh, it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No.2 – Surajmal is stated to have signed for himself and for respondent No.1 – Parmanand. Respondent No.1 Parmanand did not sign.
>
> 17. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer

> or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval.
>
> 18. It bears repetition to state that on the written communication of the right available under Section 50(1) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parnanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.
>
> 19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.
>
> 20. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed."

18. The non-compliance with mandatory procedure under Section 50 of the N.D & P.S. Act, in the present case, has vitiated the entire proceedings initiated against the accused.

19. In the instant case, the prosecution has not associated the independent witnesses at the time of search, seizure and sealing proceedings, though available from the nearby bazaar and village or project site. It was early morning. The police could also easily associate independent witnesses to associate the driver/passengers of the vehicles plying on the road at 8:00 AM. The personal search of the accused has been carried out in violation of mandatory provisions of Section 50 of the ND & PS Act.

20. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 26.12.2014, rendered by the learned Special Judge (II), Chamba, H.P., in Sessions trial filing No. NDPS Act/195/2014 (regd. No. NDPS Act/26/2014), is set aside. Accused is acquitted of the charges framed against him. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

National Insurance Company Ltd. .....Petitioner.

Versus

Priya and others .....Respondents.

CWP No.3776 of 2010
Decided on: 22.09.2015.

Motor Vehicles Act, 1988- Section 166- Deceased was earning Rs. 15,000/- per month- Tribunal had rightly assessed monthly income of the deceased as Rs. 10,000/- and after deducting 1/3rd amount towards personal expenses had assessed the loss of dependency to the claimants as Rs. 6,700/- - Tribunal had applied multiplier of '17', whereas multiplier of '15' was applicable – thus, claimants are entitled to Rs. 6,700/- x 12 x 15 = Rs. 12,06,000/- + Rs. 10,000/- under the head 'loss of love and affection'+ Rs. 10,000/- under the head 'funeral expenses' + Rs. 10,000/- under the head 'loss of estate' + Rs. 10,000/- under the head loss of consortium= Rs. 12,46,000/- with interest - litigation costs of Rs. 20,000/- also to be borne by the petitioner. (Para-6 to 8)

Cases referred:

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and anr, (2009) 6 SCC 121
Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

For the Petitioner: Ms.Devyani Sharma, Advocate.
For the respondents: Mr.Paresh Sharma, Advocate, for respondents No.2 to 5.
Nemo for respondents No.6 and 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

This writ petition has been filed by the petitioner-Insurance Company against the award, dated 1st January, 2010, passed by the Motor Accident Claims Tribunal-II, Solan, H.P. in MAC Petition No.9-S/2 of 2008, filed by the claimants (respondents No.2 to

5 herein), whereby compensation to the tune of Rs.14,70,000/-, with interest at the rate of 12% per annum, was granted in favour of the claimants and the petitioner was saddled with the liability, (for short, the impugned award).

2. It is a moot question – Whether the writ petition is maintainable. When the writ petition was filed, at that point of time, the awards passed by the Tribunal under the Motor Vehicles Act, 1988, (for short, the Act), were being questioned by the medium of the writ petition. Now, the law has gone sea change and Section 173 of the Act provides for filing of appeal against the award passed by the Tribunal under the Act.

3. Granting of compensation in Claim Petitions is a social legislation and is for the benefit of the claimants. Procedural laws, wrangles and tangles, technicalities and niceties have no role to play. Therefore, we deem it proper to determine the writ petition without going into the maintainability thereof.

4. The learned counsel for the petitioner argued that the impugned award is on the higher side and deserves to be reduced considerably. On the other hand, the learned counsel for the claimants supported the impugned award for the reasons mentioned therein.

5. Heard. We have gone through the impugned award. The Tribunal has held that the deceased was 35 years of age at the time of accident, which finding of the Tribunal has not been questioned by the claimants. Thus, it is held that the deceased was 35 years of age, when he died in the accident.

6. It was pleaded in the claim petition that the deceased was earning Rs.15,000/- per month. Having regard to the mandate of the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** the Tribunal has rightly assessed the monthly income of the deceased as Rs.10,000/- and after deducting 1/3rd amount towards his personal expenses, the Tribunal has assessed the loss of dependency to the claimants as Rs.6666/-, rounded off Rs.6,700/-. However, it appears that the Tribunal has fallen in error in applying the multiplier of 17.

7. Keeping in view the dictum of the Apex Court in Sarla Verma's case supra and Schedule 2 appended with the Act, we are of the considered view that the multiplier of 15 is just and appropriate.

8. Thus, the claimants are held entitled to Rs.6700 x 12 x 15 = Rs.12,06,000/-. In addition to it, the claimants are also held entitled to Rs.10,000/- each under the heads 'loss of love and affection' 'funeral expenses', 'loss of estate' and 'loss of consortium'. Thus, the total amount of compensation comes to Rs.12,06,000 + Rs.40,000/- = Rs.12,46,000/- with interest as awarded by the Tribunal. We also deem it proper to award Rs.20,000/- as litigation costs to be borne by the petitioner-Company.

9. The Registry is directed to release the amount in favour of the claimants strictly in terms of the impugned award and the excess amount, if any, be released in favour of the petitioner-Company through payee's account cheque.

10. The writ petition stands disposed of accordingly, so also the pending CMPs, if any.

****

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

Rajinder .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 53 of 2015
Reserved on: September 16, 2015.
Decided on: September 22, 2015.

N.D.P.S. Act, 1985- Section 20- One bed sheet was found in the dicky which was containing two plastic packets wrapped with the tape- charas weighing 10.02 kg was found inside the packets- it had come in evidence of PW-1 that there was a heavy tourist season and the National Highway remained busy- PW-2 admitted that Badanu was located at a distance of 150 meters from the place of incident- no police official was sent to call any witness from the Badanu – no vehicle was stopped by the I.O to associate independent witness- there were houses and shops on both the side of the road but no witness was associated – accused was not given any option to be searched before the Magistrate or Gazetted Officer- personal search of the accused was also conducted – therefore, it was necessary to comply with the provisions of Section 50 of N.D.P.S. Act- held, that in these circumstances, prosecution version was not proved beyond reasonable doubt- accused acquitted. (Para-13 to 16)

For the appellant: Mr. G.R.Palsra, Advocate.
For the respondent: Mr. P.M.Negi, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 3.9.2014, rendered by the learned Special Judge (III), Mandi, H.P, in Sessions Trial No. 5 of 2013, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Sections 20-61-85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 28.7.2012, Inspector Dulo Ram, Insp. Krishan Lal, ASI Pratap Singh, HHC Krishan Kumar, HHC Maan Singh and LHC Sanjay Kumar were on duty at Gharahn Badanu, link road on NH 21, at about 11:30 PM. In the meantime, a Santro car bearing No. HR-29W-9333 came from Kullu side. It was being driven by the accused. The accused was asked to stop the vehicle. He tried to run away but he was apprehended at the spot. In the presence of the police officials the vehicle of the accused was searched by the I.O. One bed sheet was found in the dicky of the vehicle under stepney (spare tyre). On opening this bed sheet, two plastic packets wrapped with tape were recovered. From these packets, stick shaped chapatti and round shaped charas was recovered. It weighed 10.02 kg. The bulk was sealed in a parcel and seal was taken

separately on cloth. NCB form in triplicate was filled in. The case property alongwith the vehicle and documents was taken into possession by the police. Rukka was sent to the Police Station and FIR was registered. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 15 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused has denied the prosecution case. The learned trial Court convicted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. G.R.Palsra, Advocate, appearing on behalf of the accused, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. P.M.Negi, Dy. Advocate General for the State has supported the judgment of the learned trial Court dated 3.9.2014.

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

6. PW-1 Insp. Krishan Lal Beri has deposed that he alongwith Insp. Dolu Ram, CID Crime Branch Mandi, ASI Pratap Singh, HHC Krishan Kumar, HHC Maan Singh and LHC Sanjay Kumar was present at place Link road Grahan-Badanu at about 11:30 PM, in connection with detection of cases pertaining to secret intelligence. One vehicle bearing No. HR-29-W-9333, Santro Car came from Kullu towards Mandi side. It was stopped. He disclosed his identity to the accused. The accused tried to run away. He was apprehended. The search was conducted by Insp. Dulo Ram in their presence. One bed sheet having printed flower on it was recovered kept under the Stepney (spare tyre) of the vehicle from the Dicky of the vehicle. Bed sheet was opened. 20 light yellow coloured polythene packets wrapped with plastic tape were recovered. Each packet was opened and checked. Charas was found in each packet. Recovery memo Ext. PW-1/A was prepared. It weighed 10 kg and 25 gms. The charas alongwith the bed sheet and polythene packet as well as tape was taken into a cloth parcel sealed with 20 seals of "H". Separate seal was taken on cloth vide Ext. PW-1/B. NCB forms in triplicate were prepared by the IO. Case property alongwith the Car and documents was taken into possession vide memo Ext. PW-1/C. IO prepared rukka mark "A" and it was sent to the Police Station through HHC Krishan Kumar. There was no *abadi* around the place. In his cross-examination, he admitted that the seal was with him but it was lost on the way. He admitted that the places such as Bhiuli, Sauli Khad, Bindra Bani, Kawari and Panch Meel fall on the way while going from Mandi to Bhadanu. He also admitted that places such as Pandoh Bazar, Dam site, Jaral fall on the way while going from Bhadanu to Hanogi Mata Temple. He also admitted that these paces are thickly populated. The spot of alleged occurrence was situated at NH 21. It was month of July and it was tourist season. The National Highway is busy in day time but not in night time. They did not check any vehicle on the spot. They did not meet any informer. The IO did not send any of the officials to call for the witnesses from the locality. The IO did not stop any vehicle on the way in order to associate any independent witnesses.

7. PW-2 ASI Pratap Singh also deposed the manner in which the accused was apprehended, contraband was seized and sealing proceedings were completed on the spot. In his cross-examination, he admitted that while going to the spot, Bhiuli, Souli Khad, Bindrabani and Five meel come on the way. There were houses situated while moving from Mandi to Hanogi Mata temple. He also admitted that in the month of July, there was tourist season in Himachal. The licence was checked first. While checking the vehicle, accused was outside the vehicle and dicky of the vehicle was got opened through him. Insp. Dulo

Ram entered the vehicle from left side door of the vehicle. Personal search of the accused was conducted later on. Consent of the accused was not taken for searching the vehicle. The I.O. did not give his personal search to the accused. The I.O. did not send any police official to call local witnesses from Badanu after opening the Dicky. No other vehicle was stopped on the spot by the I.O to associate witnesses.

8. PW-3 HC Prakash Chand deposed that SHO deposited with him one sealed parcel sealed with 20 seals of "H" and 10 seals of "R" stated to contain 10 kg 25 gms. cannabis alongwith the sample seal "H" and "R", NCB form in triplicate, copy of seizure memo and resealed certificate. He entered the case property at Sr. No. 96 in the malkhana register. He filled column No. 12 of the NCB form in triplicate. On 30.7.2012, he sent parcel containing charas alongwith sample seals "H" and "R", NCB form in triplicate, copy of seizure memo, resealed certificate, copy of FIR and docket to FSL, Junga through Const. Kewal krishan vide RC No. 67/12. On 23.8.2012, case property alongwith the result Ext. PA was brought from the FSL Junga by Const. Bir Singh. He made entry regarding the same in the malkhana register.

9. PW-6 LHC Sanjay Kumar, also deposed the manner in which vehicle No. HR-29W-9333 was intercepted, contraband was seized and sealing proceedings were completed on the spot. He took photographs on the spot under the instructions of Insp. Dulo Ram. Rukka was scribed by Insp. Dulo Ram and sent to the Police Station through HHC Krishan Kumar. In his cross-examination, he admitted that no one was sent to Badanu for arranging witnesses from the locality. No vehicle was stopped by IO for associating witnesses.

10. PW-9 Insp. Tanzin Shashni deposed that he received rukka through Fax, Mark-B. On the basis of said rukka, he registered FIR Ext. PW-9/A. He made endorsement on rukka mark A. At 6:00 PM, HHC Krishan Kumar deposited with him case property, one sealed parcel sealed with 20 seals of "H" alongwith NCB form in triplicate, copy of seizure memo, sample seal "H". The parcel contained 10 kg 25 grams of charas. He resealed the case property with seal "R" at 10 places. Sample seal was also taken separately on cloth. He filled in column Nos. 9 to 11 of NCB form Ext. PW-3/B and also embossed seal "R" on it. He prepared reseal certificate Ext. PW-9/D.

11. PW-12 Insp. Dulo Ram has also deposed the manner in which the accused was apprehended, contraband was seized and sealing proceedings were completed on the spot. According to him, the place was secluded one and thus, no independent witnesses could be associated. Therefore, Insp. Krishan Kumar, ASI Pratap Singh and HHC Krishan Kumar were associated as witnesses. The vehicle was searched. Rukka Ext. PW-12/A was prepared and sent to the Police Station for registration of the case through HHC Krishan Kumar. The case property, NCB forms in triplicate, sample seals, copy of seizure memo and the fax was also sent to the Police Station CID Bharari, Shimla. Spot map was also prepared. The statements of the witnesses were recorded. In his cross-examination, he admitted that they have checked about 15 vehicles on the spot. He also admitted that Badanu was 200 meters ahead from the spot on NH-21. He also admitted that it was a busy highway. They had gone to the spot in connection with traffic checking and detection of narcotic cases etc. They first checked the front seats of the vehicle. He also checked the accused by frisking. He did not give any option to the accused to produce him either before a Magistrate or a Gazetted Officer before frisking. The accused was standing outside when vehicle was checked. He did not try to send any police official to call for local witnesses from nearby places Badanu and Bindra Bani. He did not stop any passengers of the vehicles in the investigation.

12. PW-13 HHC Krishan Kumar also deposed the manner in which the accused was apprehended, contraband was seized and sealing proceedings were completed on the spot. He took rukka in original to Police Station Bharari. They did not deposit any case property at PS Bharari. He admitted that during the month of July, due to tourist season, vehicles were plying on National Highway continuously. He also admitted that at Badanu, there were many shops on both sides of the NH. Nobody from the raiding party was sent to Badanu or nearby places to call witnesses on the spot. No written consent of the accused was taken for checking his vehicle, however, verbal permission was taken. The team had not given personal search to the accused before checking the vehicle.

13. The accused was apprehended on 28.7.2012 at 11:30 PM. The vehicle was intercepted on NH 21. It has come in the statement of PW-1 Krishan Lal that there was tourist season in the month of July and the National Highway remains busy. PW-2 ASI Pratap Singh has also admitted that in the month of July, there was tourist season. Badanu was situated at a distance of 150 meters away from the spot of occurrence on the road. The I.O. did not send any police officials to call for local witnesses from Badanu. PW-6 LHC Sanjay Kumar has also admitted that Badanu was situated at a distance of 150-200 meters from the spot. It was a National Highway. He also admitted that there were houses and shops on both sides of the road. No one was sent to Badanu for arranging witnesses of the locality. No vehicle was stopped by the I.O. to associate witnesses. PW-12 Insp. Dulo Ram has also admitted that they have checked 15 vehicles on the spot. He also admitted that Badanu was 200 meters away from the spot on the NH. He has also admitted that it is a busy highway. He did not try to send any police officials to call for independent witnesses from the nearby places like Badanu and Bindra Bani. Similarly, PW-13 HHC Krishan Kumar has also admitted that Badanu is on a National Highway. It was 100 meters away from the spot. He also admitted that there are many shops on both sides of the National Highway. It was tourist season and they had checked 5-6 vehicles on the spot.

14. The accused was apprehended on the National Highway. Though shops were situated near the place of occurrence, but no independent witness was associated at the time of apprehending the accused, search and sealing proceedings. It was not secluded or isolated place. The I.O. should have made sincere efforts to associate independent witnesses. He himself has admitted that no police official was sent to call for independent witnesses. They were on patrolling duty. They have checked many vehicles. They could easily associate either driver or passengers of the vehicles plying on the National Highway. If the IO had stopped the vehicles, the occupants of the vehicle were bound to witness the proceedings to give credence to seizure, search and sealing proceedings. PW-13 HHC Krishan Kumar has categorically admitted that nobody from the raiding party was sent to Badanu or nearby places to call witnesses on the spot.

15. PW-12 Insp. Dulo Ram has admitted in his cross-examination that accused was searched but he was not given any option to be searched either before the Magistrate or the Gazetted Officer. The I.O, ought to have apprised the accused of his legal right to be searched either before the Magistrate or the Gazetted Officer as per Section 50 of the ND & PS Act. It was not obligatory for the I.O. to search the accused since the contraband was recovered from the vehicle but despite that he has carried out the personal search of the accused without complying with Section 50 of the ND & PS Act. Section 50 of the ND & PS Act is mandatory. The non-association of independent witnesses, though available on the spot and non-compliance of Section 50 of the ND & PS Act, has vitiated the entire proceedings.

16. Thus, the prosecution has failed to prove the case against the accused for the commission of offence under Section 20-61-85 of the N.D & P.S., Act.

17. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 3.9.2014, rendered by the learned Special Judge (III), Mandi, H.P., in Sessions trial No. 5 of 2013, is set aside. Accused is acquitted of the charges framed against him. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

18. The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

****

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

State of Himachal Pradesh ...Appellant.
Versus
Jai Ram ...Respondent.

Criminal Appeals No.594 of 2008
Reserved on : 1.9.2015
Date of Decision: September 22, 2015.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 700 grams of charas concealed in a wooden box of his house- independent witnesses had not supported the prosecution version - elected representatives of the area were also not associated- independent witnesses were not even the local residents of the area- no reason was assigned as to why the local residents were not associated- there were contradictions in the testimonies of the police officials- testimonies of the police officials were also vague- held, that in these circumstances, accused was rightly acquitted by the trial Court.

(Para-16 to 22)

Cases referred:

Prandas v. The State, AIR 1954 SC 36
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
Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

For the State : Mr. Mr. Ashok Chaudhary, Mr. V.S. Chauhan, Additional Advocates General and Mr. J.S. Guleria, Assistant Advocate General.

For the Respondent : Ms Leena Guleria, Advocate, vice Mr. G.R. Palsara, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

State has appealed against the judgment dated 31.5.2008 of the Presiding Officer (Special Judge), Fast Track Court, Mandi, Himachal Pradesh, passed in Sessions Trial No.3/2007, titled as *State of Himachal Pradesh v. Jai Ram,* challenging the acquittal of respondent Jai Ram (hereinafter referred to as the accused) of the offence, punishable under the provisions of Section 20-61-85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act).

2. It is the case of prosecution that on 17.2.2006, SI Shamsher Singh (PW-9), who was posted as SHO of Police Station, Aut, District Mandi, Himachal Pradesh, was on patrol and nakabandi duty towards Nagwain, alongwith HC Balak Ram (PW-10), Constable Ranjeet Singh (PW-5), Constable Sanjay Kumar (PW-4). At about 4.30 a.m., he received secret information that accused was dealing in the business of Charas. Accordingly, report (Ex.PW-9/A), prepared by him, was sent through Constable Ranjeet Singh, which was received in the Office of Additional Superintendent of Police, Mandi. Thereafter, on foot, police proceeded to village Silh and by associating two independent witnesses Shri Kuldeep Singh (PW-2) and Shri Durga Ram (PW-3) and after informing the accused of his statutory rights and obtaining his consent (Ex. PW-2/A), searched his house, from where 700 grams of Charas, concealed in a wooden box, was recovered. Two samples, each weighing 25 grams, were drawn. Samples as also bulk parcel were sealed with seal impression 'T'. Constable Sanjay Kumar took Rukka (Ex. PW-8/A), on the basis of which FIR No.23/06, dated 17.2.2006 (Ex.PW-8/B), for commission of offence, punishable under the provisions of Section 20-61-85 of the Act, was registered at Police Station, Aut, District Mandi, Himachal Pradesh. NCB form (Ex. PW-9/C) was filled up on the spot; accused was arrested; and with the completion of necessary formalities on the spot, contraband substance was deposited with MHC Raj Kumar (PW-8), who, through HC Malkiat Singh (PW-1), sent the samples for chemical analysis to CTL, Chandigarh. Report (Ex.PW-9/K) was taken on record. With the completion of investigation, which, prima facie, revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence, punishable under the provisions of Section 20-61-85 of the Act, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as ten witnesses and statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which he took plea of innocence and false implication.

5. Based on the testimonies of witnesses and the material on record, trial Court acquitted the accused of the charged offence. Hence, the present appeal by the State.

6. We have heard Mr. Ashok Chaudhary, Mr. V.S. Chauhan, learned Additional Advocates General, and Mr. J.S. Guleria, Assistant Advocate General, on behalf of the State as also Ms Leena Guleria, Advocate, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is

based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

7. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish essential ingredients so required to constitute the charged offence.

8. In *Prandas v. The State*, AIR 1954 SC 36, Constitution Bench of the apex Court, has held as under:

> "(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417, Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:
>
> > "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." "

9. In the instant case, we find that independent witnesses Shri Kuldeep Singh and Shri Durga Ram have not supported the prosecution case at all. They are not local residents of the area. They are also not persons of standing in society. They are also not the elected representatives of the area. Prosecution has failed to explain as to why they were associated in carrying out search and seizure operations. It is the case of SI Shamsher Singh that in the village of the accused, 10-15 families reside. Noticeably, Naaka was set up on a motorable road, from where elected representatives or respectable persons could have been associated. It is not the case of the prosecution that on account of urgency, out of fear of the accused fleeing away, only Shri Kuldeep Singh and Shri Durga Ram could be associated for carrying out search and seizure operations. Unanimously, both the independent witnesses have deposed that no recovery was effected in their presence. In fact, Shri Durga Ram did not visit the village of the accused. He has categorically deposed that his signatures were obtained by the police in Police Station, Aut.

10. Shri Durga Ram states that he was called by the son of the accused to the village. Through the uncontroverted testimony of this witness, it stands established that accused has three sons, who are married and the entire family reside together in the same house. None has come forward to establish that the house was exclusively owned or possessed by the accused. Possibility of involvement of other members of the family of the accused could not be ruled out. Be that as it may, through the testimony of independent witnesses, version other than the one which the prosecution wants the Court to believe, has emerged.

11. 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.

12. 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.

13. 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].

14. 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."

15. In view of the aforesaid statement of law, we shall now examine the testimonies of police officials present on the spot.

16. Even otherwise, when we peruse the testimonies of Constable Sanjay Kumar, SI Shamsher Singh and HC Balak Ram, we do not find the prosecution case to have been established, beyond reasonable doubt. Version so deposed by the police officials is absolutely uninspiring in confidence. Witnesses cannot be said to be wholly reliable. Contradictions, which are glaring, render the genesis of the prosecution story to be doubtful, if not false. Presence of some of the police officials itself appears to be in doubt.

17. SI Shamsher Singh states that he received information of the accused dealing in Charas. Accordingly, he prepared report (Ex. PW-9/A) and through Constable Ranjeet Singh sent it to the Office of concerned Additional Superintendent of Police. He is categorical that only he received secret information. We find this fact to have been controverted by Constable Sanjay Kumar, according to whom it was he who received the secret information.

18. Constable Sanjay Kumar states that he was present at the time when search and seizure operations were carried out by the police party. Significantly, he does not even remember the distance of the house of the accused from Nagwain. Whether it was 1 km, 5 kms or 10 kms, this he is not able to disclose even by guess work. He is not even aware of the villages, which the police party crossed, while reaching the house of the accused. He is not even aware of the timing, when the search and seizure operations were conducted. We find the witness to be confronted with his previous statement, recorded under the provisions of Section 161 of the Code of Criminal Procedure, for proving the exaggerations and embellishments in his statement. His version of having received secret information or having reached the spot sometime in the early hours of the morning or the accused was found to be alone in his house, not to have been recorded earlier. What we find is that the statement of this witness was recorded three months after the incident and no explanation for the delay is forthcoming from the Investigating Officer. To us, it appears that the witness was not present and as such his testimony is not worthy of credence.

19. SI Shamsher Singh states that after sending information to the Superior Officer, by associating independent witnesses, he walked to the village of the accused and from the ground floor of his house recovered contraband substance, which upon weighment was found to be of 700 grams. He drew two samples, which were sealed. He prepared NCB form and sent Rukka for registration of the FIR. With the receipt of the file, he arrested the accused. Case property was handed over to MHC Raj Kumar.

20. Police party left the Police Station for setting up a Naaka, in a private jeep. This was at 2.30-3 a.m. Witness does not even remember the number of such private vehicle. There is no entry of the police having left in a private jeep. Why would a police party leave the Police Station in a private jeep? has not been explained. What was the make of the vehicle? Who was the driver? Who was the owner? Was any fare paid? All this remains unexplained by the prosecution. According to SI Shamsher Singh, police reached

Nagwain within half an hour and stayed there for four hours, which means police would have left Nagwain, for the house of the accused, only at about 7 a.m., but the witness contradicts himself by saying that Shri Durga Ram met them at 5.30 a.m. Significantly, he also admits that from Nagwain, police party went to village Silh in a vehicle and thereafter walked on foot to the house of the accused, which was at a distance of 2½ kms.

21. Now this version of his stands materially contradicted by Constable Sanjay Kumar, according to whom police party reached the spot at about 6 a.m. Difference in time acquires significance in view of version of HC Balak Ram, according to whom, police party did not leave Nagwain in a jeep, but walked up to the house of the accused. He further states that it was at about 6 a.m. that SI Shamsher Singh associated him as a member of the raiding party and only thereafter they walked, on foot, and covered a distance of 5½ kms.

22. There is yet another material contradiction, which we find to have emerged in his testimony. Constable Balak Ram states that only two police officials, i.e. SI Shamsher Singh and he, formed the raiding party, which version stands contradicted not only by SI Shamsher Singh but also Constable Sanjay Kumar. Further, this witness also admits that the accused has got three sons, who also reside with him.

23. Thus, we do not find testimony of the police officials to be inspiring in confidence.

24. From the material placed on record, prosecution has failed to establish that the accused is guilty of having committed the offence, he has been charged with. The circumstances cannot be said to have been proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused does not stand proved beyond reasonable doubt to the hilt. The chain of events does not stand conclusively established, leading only to one conclusion, i.e. guilt of the accused. Circumstances when cumulatively considered do not fully establish completion of chain of events, indicating to the guilt of the accused and no other hypothesis other than the same.

25. Hence, it cannot be said that prosecution has been able to prove its case, by leading clear, cogent, convincing and reliable piece of evidence so as to prove that the accused was found in conscious and exclusive possession of 700 grams of Charas.

26. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence so placed on record by the parties.

27. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94*, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged. Appeal stands disposed of, so also pending application(s), if any.

****

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

Criminal Appeals No.315 of 2008 and 379 of 2014
Reserved on : 25.8.2015
Date of Decision: September 22, 2015

Cr.A No.315 of 2008
State of H.P. ...Appellant.
Versus
Suraj Mal ...Respondent.
Cr.A No.379 of 2014
Suraj Mal ...Appellant.
Versus
State of H.P. ...Respondent.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.250 kg. of charas- testimony of police official cannot be doubted on the ground that he is interested in the success of his case- accused got afraid on seeing the police and was apprehended on the basis of suspicion – there was no evidence that the place from where accused was apprehended was motorable road - the place was in the middle of the jungle and no person could have been associated during search and seizure – testimonies of the police officials were corroborating each other- there was no reason with the police to falsely implicate the accused- defence evidence was not satisfactory- held, that in these circumstances, accused was rightly convicted. (Para-9 to 35)

Cases referred:
Govindaraju alias Govinda v. State by Srirampuram Police Station & anr, (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
Dharampal Singh v. State of Punjab, (2010) 9 SCC 608
Madan Lal and another vs. State of H.P., 2003 (7) SCC 465
Dehal Singh v. State of Himachal Pradesh, (2010) 3 SCC (Cri) 1139)
Sunil Kumar v. State of H.P., HLJ 2010 HP 207
State of H.P. v. Mehboon Khan, Latest HLJ 2014 (HP) (FB) 900

For the State : Mr. Ashok Chaudhary, Mr. V.S. Chauhan, Additional Advocates General, and Mr. J.S. Guleria, Assistant Advocate General.
For the Respondent/ Accused : Mr. Anil Chauhan, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Since both these appeals arise out of the very same impugned judgment, they are being considered and disposed of together.

2. Appellant-convict Suraj Mal, hereinafter referred to as the accused, has filed Criminal Appeal No.379 of 2014, assailing the judgment dated 23.2.2008/25.2.2008, passed by Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, Himachal Pradesh, in NDPS Act case No.02 of 2006, titled as *State v. Suraj* Mal whereby he stands convicted of the offence punishable under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) and sentenced to undergo rigorous imprisonment for a period of three years and pay fine of `10,000/- and in default thereof to further undergo simple imprisonment for a period of six months.

3. State has filed Criminal Appeal No.315 of 2008, seeking enhancement of the sentence so imposed by the trial Court.

4. It is the case of prosecution that on 16.10.2005, HC Tain Singh (PW-7), HHC Jia Lal (PW-1), Constable Puran Chand (PW-2) and Constable Mukesh Kumar were on patrol and traffic checking duty at Kot Nallah. At 2.15 p.m., they saw one person come towards Darog side. Noticing unusual behaviour, on suspicion, police party apprehended him. On query, he disclosed his name (Suraj Mal) and particulars. He was carrying a polythene bag, which, on suspicion, after apprising him of his statutory rights and obtaining his consent, was searched. From the same, charas weighing 1.250 kg was recovered. Two samples, each weighing 25 grams, were drawn, which were sealed with seal impression 'H'. Remaining bulk parcel was also packed and sealed separately with the same seal. Specimen of the seal (Ex. PW-1/D) was also drawn. NCB form was filled up in triplicate on the spot. Ruka (Ex.PW-2/A) was sent through Puran Chand (PW-2), on the basis of which FIR No.76, dated 16.10.2005 (Ex.PW-3/A), for offence under the provisions of Section 20 of the Act, was registered at Police Station, Ani, District Kullu, Himachal Pradesh. Accused was arrested. With the completion of proceedings on the spot, case property was entrusted to SI Bhup Ram (PW-3), who resealed the same with his own seal of seal impression 'X' and deposited it in the Malkhana, which was kept in safe custody by MHC Hem Raj (PW-5). Sealed samples were taken for analysis to the CTL, Kandaghat and report (Ex. PW-7/E) taken on record. Special report (Ex. PW-4/B) was received in the Office of Dy.S.P. by HC Prakash (PW-4). 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.

5. Accused was charged for having committed an offence, punishable under the provisions of Section 20 of the Act, to which he did not plead guilty and claimed trial.

6. In order to establish its case, prosecution examined as many as 8 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took plea of false implication. He also examined one witness in his defence.

7. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused of the charged offence. After considering the decision rendered by this Court in Criminal Appeal No.190 of 2004, titled as *Ram Lal v. State of H.P.* and report (Ex. PW-7/E) of the Chemical Examiner, which proved the resin content to be only 27.07% and taking the quantity recovered from the accused to be small and not commercial, sentenced him as aforesaid.

8. Thus, State has filed Criminal Appeal No.315 of 2008 for enhancement of sentence and accused has filed Criminal Appeal No.379 of 2014, assailing his conviction and sentence.

9. Accused has assailed the judgment on the ground that (1) no independent witnesses were associated by the prosecution, which renders the prosecution case to be fatal; (2) number of the FIR so mentioned in the consent and recovery memos only establishes preparation of documents at the Police Station, rendering the prosecution case to be false; (3) in the absence of recovery of any other articles, including money, from the possession of the accused, recovery of the contraband substance also is rendered doubtful; (4) defence taken by the accused stands probablized through the testimony of defence witness.

10. Having heard Mr. Ashok Chaudhary, Mr. V.S. Chauhan, learned Additional Advocates General, and Mr. J.S. Guleria, learned Assistant Advocate General, on behalf of the State as also Mr. Anil Chauhan, Advocate, on behalf of the accused, we are of the considered view that the judgment of conviction does not require any interference. However, insofar as question of imposition of sentence is concerned, in view of the changed position in law, appeal filed by the State needs to be allowed.

11. 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.

12. 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.

13. 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].

14. 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."

15. Uncontrovertedly, HC Tain Singh (PW-7) states that on 16.10.2005, he was on patrol and traffic checking duty at Kot Nallah. At that time police officials HHC Jia Lal (PW-1), Constable Puran Chand (PW-2) and Mukesh Kumar were with him. At about 2.15 p.m., police party saw the accused coming towards Darog at Kot Nallah. Seeing the police party, accused got afraid, but however, on suspicion, was apprehended. On query, accused disclosed his name as Suraj Mal, resident of village Kalwa (Haryana). Accused was carrying a polythene bag with him. Suspecting that he may be carrying some contraband substance, police sought to search him. Accused, who was informed of his statutory right of being searched before a Magistrate or Gazetted Officer, consented (vide Memo Ex. PW-1/A) to be searched by the police officials present on the spot. From the polythene bag, charas in the shape of candles and balls, wrapped in a newspaper, was recovered. Upon weighment, it was found to be 1.250 kg. Two samples, each weighing 25 grams, were drawn. Samples as also bulk parcel were sealed with seal impression 'H' and taken into possession vide seizure memo (Ex.PW-1/C). Specimen impression (Ex.PW-1/D) of the seal was taken separately. Ruka (Ex. PW-2/A) was sent through Constable Puran Chand (PW-2) to the Police Station, on the basis of which FIR (Ex.PW-3/A) registered. With the receipt of the case file, after registration of the FIR, further proceedings were conducted. Accused was arrested and information of such arrest was furnished to his brother-in-law Sanjeev Kumar vide memo (Ex.PW-7/C). Accused was brought to the Police Station and produced before SHO Bhup Ram (PW-3), who also resealed the case property with his own seal of impression 'X' and filled up the NCB form. Special Report (Ex.PW-4/B) was sent through Constable Sunder Singh (PW-6) to the Office of Dy.S.P., Ani. Report of the Chemical Examiner (Ex.PW-7/E) was taken on record. The witness has proved bulk parcel (Ex.P-1), polythene bag (Ex.P-2) and sample (Ex.P-3). From the cross-examination part of his testimony, one cannot say that the credit of this witness stands impeached in any manner. He is cogent, clear and consistent in his version. His version cannot be said to be false, unbelievable or uninspiring in confidence. His testimony is also not shaky in any manner.

16. We find his version to have been corroborated, on all material points, by Jia Lal and Puran Chand.

17. Undoubtedly, no independent witness has been associated by the police, in carrying out the search and seizure operations. The issue as to whether in every case, and under the all circumstances, police must associate independent witnesses, while carrying out search and seizure operations, is no longer res integra.

18. Witnesses do state that the place where the accused was apprehended, was a motorable road, but then they have clarified that even though prior to the accused being apprehended, they had checked some vehicles, but however, no vehicle passed at the time when search and seizure operations were going on. Ruka (Ex. PW-2/A) clearly records the fact that Kot Nallah is in the middle of jungle and no independent witness could have been associated for carrying out search and seizure operations. It is a case of chance recovery. In one voice, all the witnesses have deposed that no other person was present on the spot, who could have been associated as an independent witness.

19. In this backdrop, non-association of independent witnesses, reason whereof stands sufficiently explained, cannot be a factor rendering the prosecution case to be fatal. Thus, the prosecution case solely rests upon the testimonies of the police officials, which we find to be fully inspiring in confidence.

20. by way of corroboration and link evidence, we find the prosecution to have also established version of the police party, who carried out search and seizure operations.

21. Bhup Ram states that on receipt of Rukka, he registered FIR (Ex.PW-3/A) and on 16.10.2005 itself, Tain Singh handed him three parcels sealed with seal impression 'H'; NCB form in triplicate and sample seal. The sealed parcels were resealed with seal impression 'X', impression of which was also embossed on NCB form. The parcels, as also sample seal, were handed over to MHC Hem Raj (PW-5). The witness has produced sample seal (Ex.PW-3/B).

22. MHC Hem Raj further states that the case property was entered in the Malkhana register (Ex.PW-5/A). The sample was handed over to Constable Puran Chand, vide Road Certificate (Ex.PW-5/B). The witness has clarified that so long as the case property remained with him, it was not tampered with.

23. Constable Puran Chand has clarified that he took the case property to the CTL, Kandaghat and so long as it remained with him, it was not tampered with. This witness has explained that after registration of the FIR, he took the case file to the spot and handed it over to HC Tain Singh. Thus number of the FIR being recorded on the documents of search and seizure operations, stands explained. There is no difference in the ink or the handwriting. In any case, it is not the suggested case of the accused that the police had forged the documents.

24. Contraband substance was recovered from the polythene bag carried by the accused. Hence, there is no question of the police having recovered any money or other material from the possession of the accused. Thus, contention only merits rejection.

25. There was no reason for the police to have falsely implicated the accused. It is not the case of the accused that police harboured any animosity resulting into false implication. He claims to be a resident of Haryana, a far of place. His presence on the spot remained unexplained by him. Had there been any intention of the Investigating Officer to plant the contraband substance on the accused, then he might have planted small quantity of Charas.

26. It is true that the accused is only to probablize his defence and not prove his case beyond reasonable doubt.

27. In *Dharampal Singh v. State of Punjab,* (2010) 9 SCC 608, the Hon'ble Supreme Court of India, held that the initial burden of proof of possession lies on prosecution and once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but

what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence.

28. Offences under the Act being more serious in nature, higher degree of proof is required to convict an accused. It needs no emphasis that the expression possession is not capable of precise and completely logical definition of universal application in context of all the statutes. Possession is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18/20 of the Act once possession is established, the accused who claims that it was not a conscious possession has to establish it because it is within his special knowledge. Section 54 of the Act raises presumption of possession of illicit articles.

29. The Act creates legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the accused has not been able to account for satisfactorily, the possession of Charas. Once possession is established, the Court can presume that the accused had culpable mental state and had committed the offence.

30. In somewhat similar facts, the Hon'ble Supreme Court of India, had the occasion to consider this question in *Madan Lal and another vs. State of H.P.*, 2003 (7) SCC 465, wherein it has been held that once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. (See also: *Dehal Singh v. State of Himachal Pradesh,* (2010) 3 SCC (Cri) 1139).

31. In the present case, not only possession but conscious possession stands established. It has not been shown by the accused that possession was not conscious in the logical legal backdrop of Sections 35 and 54 of the Act.

32. Thus, the accused has failed to discharge the statutory burden.

33. Accused wants the Court to believe that on the day of the incident, he was travelling a bus, which was checked at Luhri and the police made him deboard the same on the pretext that Charas found in the polythene bag belonged to him. This was witnessed by Dinesh Kumar (DW-1), who states that accused had twice travelled in his taxi. He wants the Court to believe that he knew the accused. He states that on 16.10.2005, accused, who was travelling in Karana-Chandigarh Bus, was made to deboard the same at Luhri. Accused was saying that the polythene bag so carried by the police did not belong to him.

34. His version of the accused having travelled in his taxi does not inspire confidence. He does not even know the accused. He is not familiar with his name, parentage or address. He is not aware the dates of such travel. He is neither his associate or regular client. Accused hails from the State of Haryana. This witness is a resident of Ani and at the relevant time what was he doing at Luhri remains unexplained by him. Testimony of the witness cannot be said to be worthy of credence and inspiring in confidence; hence, not believable.

35. In this view of the matter, we do not find findings of conviction returned by the trial Court to be perverse, illegal or erroneous. Hence, the appeal filed by the accused, assailing his conviction and sentence only merits dismissal.

36. While sentencing the accused, trial Court referred to and relied upon the decision rendered by this Court in *Ram Lal (supra).* Similar view was taken by this Court in *Sunil Kumar v. State of H.P.,* HLJ 2010 HP 207. However, correctness of ratio of law laid down therein, came up for consideration before the Full Bench of this Court in *State of H.P. v. Mehboon Khan,* Latest HLJ 2014 (HP) (FB) 900. While taking note of various decisions rendered by the Courts of the land, as also reports of the United Nations Office on Drugs and Crime, including Single Convention on Narcotic Drugs, 1961, the Bench held such view not to be legal and sustainable. The Court categorically held that there is no legal requirement of the presence of particular percentage of resin to be there in the sample and the presence of the resin in purified or crude form is sufficient to hold that the sample is that of Charas. The law laid down by the Division Bench in Sunil's case to the effect that 'for want of percentage of tetrahydrocannabinol or resin contents in the samples analyzed, the possibility of the stuff recovered from the accused persons being only Bhang i.e. the dried leaves of cannabis plant, possession of which is not an offence, cannot be ruled out', was not held to be a good law and any such interpretation being legally impossible. The percentage of resin contents in the stuff analyzed is not the determinative factor of the nature of quantity, small or commercial. The Court further held that if in the entire stuff recovered from the accused, resin of cannabis is found to be present on scientific analysis, whole of the stuff is to be taken for determining the quantity to be small, above small but less than commercial/or commercial.

37. In view of the declaration of law, it cannot be said that the contraband substance, which was recovered from the accused, was not of commercial quantity.

38. Under these circumstances, appeal filed by the State for enhancement of sentence requires to be allowed. Ordered accordingly. Hence, the accused is sentenced to undergo rigorous imprisonment for a period of ten years, which is minimum punishment prescribed under the Act, and to pay fine of Rs.1,00,000/- which is minimum amount specified under the Act. Failure to pay the amount of fine shall further entail simple imprisonment for a period of one year.

39. Accused has already served the sentence, so imposed by the trial Court and may not be in judicial custody. He is directed to forthwith surrender to serve the remaining sentence and pay fine. Both the appeals stand disposed of, so also pending application(s), if any.

****

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

Jumla Jamindaran Village Pangi & others ...Petitioners

Versus

Jumla Jamindaran Village Telangi & others ... Respondents

CMPMO No. 94 of 2015
Judgment Reserved on : 18.9.2015
Date of Decision : September 23, 2015

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiffs filed a suit seeking declaration that the order passed by the Settlement Collector, Kinnaur is void- defendant filed an

application seeking amendment of the written statement to take a plea regarding the suit being barred by limitation and existence of alternative passage- trial Court allowed the application- however, it was not discussed as to how the amendment is clarificatory in nature - the basis of forming an opinion that no prejudice is going to be caused was not specified in the order – objections raised by the plaintiffs were not considered by the Court – therefore, order set aside and the case remanded to the trial Court with a direction to decide the application afresh. (Para-9 to 14)

Cases referred:

Voltas Limited vs. Rolta India Limited, (2014) 4 SCC 516

Mashyak Grihnirman Sahkari Sanstha Maryadit vs. Usman Habib Dhuka & others, (2013) 9 SCC 485

J. Samuel & others vs. Gattu Mahesh & others, (2012) 2 SCC 300

Baldev Singh & others vs. Manohar Singh & another, (2006) 6 SCC 498

Usha Balashaheb Swami & others vs. Kiran Appaso Swami & others, (2007) 5 SCC 602

North Eastern Railway Administration, Gorakhpur vs. Bhagwan Das (Dead) by LRs. (2008) 8 SCC 511

Krishna Swami vs. Union of India, (1992) 4 SCC 605 (Five Judges)

Kanti Associates Private Limited & another vs. Masood Ahmed Khan & others, (2010) 9 SCC 496

For the petitioner	:	Mr. Suneet Goel, Advocate, for the petitioner.
For the respondent	:	Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Janesh Gupta, Advocate, for respondents No. 1 and 2.
		Mr. R. S. Verma, Addl. Advocate General with Mr. R. M. Bisht, Dy. A.G. for respondent No. 3.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Plaintiffs – petitioners herein, are aggrieved of the order dated 25.2.2015, passed by Civil Judge (Senior Division), Kinnaur at Reckong Peo, District Kinnaur, H.P. in Case No. 11-R/1 of 1999/2014, titled as *Jumla Jamindaran Village Pangi & others vs. Jumla Jamindaran Village Telangi & others*, whereby defendants'/respondents' application, filed under Order 6 Rule 17 C.PC., seeking amendment of the written statement, stands allowed.

2. Reasons for allowing the same are reproduced herein under:

> "I have heard the ld. Counsel for the parties and have gone through the record file carefully. It is admitted fact that the State of H.P. arrayed as party after passing the order by the Hon'ble High Court and defendant moved the present application to take the legal objection as the suit is time barred and want to make some amendment in para No. 3 of the plaint that the Khewatdarans have customary rights of the passage having construct by them by cutting rocks and kucha dhank and using the same from the time immemorial. The present suit has been filed for declaration that the land comprised in khata khatauni No. 70 min/138 min, Khasra Nos. 1, 3, 7, 7/2 and 8 falls within the area of Check Pangi and the Right holders of Pangi have been exercising their customary rights of collecting newza, fuel wood,

> grass and grazing cattle from time immemorial, openly, peacefully, continuously and without any interruption and the order of the revenue Settlement Collector dated 2.9.1983 is voild, illegal, and against the law and defendants interfering in their rights of the aforesaid land. The defendant No. 1 want to amend his written statement to the fact that there is passage which is being used by the inhabitants of village Telangi from the time immemorial, though, the amendment is belated stated, but it is settled law that amendment can be made even in the appeal and moreover, the amendment is in the shape of legal objection and explanation in nature and I am of the opinion that no prejudice is going to be caused to the right of the plaintiff as they claimed independent right over the aforesaid khasra Nos. Even other party can compensate by way of cost. Thus, the application stand allowed subject to cost of Rs. 1000/-. Amended written statement is taken on record. Let file be put up for replication and framing of issues if any for 10.3.2015."

3. In the year 1999 plaintiffs filed a suit for declaration seeking order dated 2.9.1983 passed by the Settlement Collector, Kinnaur to be void, illegal, arbitrary, unjust, without jurisdiction and that the entries with respect to the suit land stands wrongly reflected in the territories of Up-Mohal Telangi in place of Mohal Pangi.

4. Plaint reflects the parties to have been litigating since the year 1984. In para – 3 of the plaint, plaintiffs pleaded that prior to the year 1962, the entire area falling between the Old Hindustan Tibet Road and Satluj Road was a compact block with a natural boundary of *kacha dhank* and that village Telangi was situated on the other side with its residents having no access to the suit land. Whereas in response, defendants pleaded the boundary of village Pangi and Telangi to be *Bokhdhar* and not *kacha dhank*.

5. The chequered history of this case reveals that the judgments and decrees passed by the courts below stood reversed by this Court and eventually with the impleadment of the State of Himachal Pradesh as a party/defendant, on remand, the matter is now pending before the trial Court. At such stage, on 25.9.2014, defendants filed the application in question, seeking the following amendments to their written statement:

> (i). "That the suit of the plaintiffs is hopelessly time barred since the plaintiffs are challenging the order of settlement Collector decided on 02.09.1983 in the suit being filed on 23rd day of October, 1999, hence same is liable to be dismissed on this score only."
>
> (ii) "There is a passage having constructed by cutting rocks through *Kacha Dhank* which have been used since time immemorial for to and fro to the suit land by khewatdarans of village Telangi for exercising their customary rights."

6. Application stood vehemently opposed *inter alia* on the ground that the issue of access through the *kucha dhank* stood adjudicated by the District Judge, hence such plea being already in the knowledge of the defendants, cannot be allowed to be incorporated after a period of more than fifteen years. The endeavour was only to delay the proceedings.

7. Mr. Suneet Goel, learned counsel for the petitioners assails the order on the grounds that: (i) amendment sought to be incorporated is hopelessly delayed; (ii) alleging the same would change the nature of the controversy between the parties; (iii) which, in any case, is not necessary for determining the controversy in issue; (iv) plea sought to be

incorporated was well within the knowledge of the parties, hence amendment of the written statement is unwarranted; and (v) in any event, order which is unreasoned, is based on conjectures and surmises. He seeks reliance upon the decisions rendered by Hon'ble the Supreme Court of India in *Voltas Limited vs. Rolta India Limited,* (2014) 4 SCC 516; *Mashyak Grihnirman Sahkari Sanstha Maryadit vs. Usman Habib Dhuka & others,* (2013) 9 SCC 485; *J. Samuel & others vs. Gattu Mahesh & others,* (2012) 2 SCC 300 as also a Coordinate Bench of this Court in Civil Revision No. 3 of 2015, titled as *Raj Kumar Mehra & another vs. Surinder Mohan,* decided on 23.4.2015.

8. On the other hand Mr. Bhupinder Gupta, learned Senior Counsel, ably assisted by Mr. Janesh Gupta, Advocate, defends by stating that the order being self explanatory, cannot be said to be unreasoned. As is held by the Court, amendment being clarificatory in nature does not prejudice the plaintiffs in any manner. In support, he relies upon the decisions rendered by Hon'ble the Supreme Court of India in *Baldev Singh & others vs. Manohar Singh & another,* (2006) 6 SCC 498; *Usha Balashaheb Swami & others vs. Kiran Appaso Swami & others,* (2007) 5 SCC 602; *North Eastern Railway Administration, Gorakhpur vs. Bhagwan Das (Dead) by LRs.* (2008) 8 SCC 511.

9. Having considered rival contentions, Court is of the considered view that the impugned order lacks reasons. There is no discussion as to how the amendment is clarificatory in nature. The basis of forming an opinion that "no prejudice is going to be caused" cannot be inferred from the order. The objections raised by the plaintiffs in their response have also not been dealt with in any manner.

10. A Constitution Bench of Hon'ble the Supreme Court of India has laid down in *Krishna Swami vs. Union of India,* (1992) 4 SCC 605 (Five Judges) that if a statutory or public authority/functionary does not record reasons, its decision would be rendered arbitrary, unfair, unjust and violative of Articles 14 and 21 of the Constitution. Reasons are links between the material, the foundation for their erection and the actual conclusions, demonstrative of the mind of the maker, activated and actuated with the rational nexus and synthesis with the facts considered and the conclusions reached. The proposition would apply with a greater vigour to judicial orders.

11. In the light of decision rendered in *Raj Kumar Mehra (supra)*, Court is of the considered view that the impugned order needs to be quashed and set aside. In the said decision, relying upon the decision rendered by Hon'ble the Supreme Court of India in *Kanti Associates Private Limited & another vs. Masood Ahmed Khan & others,* (2010) 9 SCC 496, Court held that the judgment/order without reasoning causes prejudice to the person against whom it is pronounced, as the litigant is unable to know the ground which weighs with the Court in rejecting or accepting the claim of the party. It also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to the same.

12. In the instant case, it cannot be said that interest of justice stands advanced with the application being allowed without assigning any reasons.

13. Hence the impugned order dated 25.2.2015, passed by Civil Judge (Senior Division), Kinnaur at Reckong Peo, District Kinnaur, H.P. in Case No. 11-R/1 of 1999/2014, titled as *Jumla Jamindaran Village Pangi & others vs. Jumla Jamindaran Village Telangi & others*, is set aside with a direction to the Court below to consider and decide the application afresh in accordance with law.

14. Needless to add, this Court has not expressed any opinion on the merits of the matter and has also not gone into the binding effect of the decisions referred to above, leaving it open for the Court below to consider and decide the application on its own merits.

15. Parties are directed to appear before the Court below on 14.10.2015. An endeavour shall be made to dispose of the matter expeditiously. Trial expedited. Be completed within one year. Parties to fully cooperate. Records be immediately sent back. Petition stands disposed of accordingly, as also pending applications, if any.

****

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

Parkash Chand son of Jagan Nath. ...Revisionist.

Vs.

Sh. Ajay Sharma and another. ...Non-Revisionists.

Civil Revision No.77 of 2015.
Order reserved on: 17.9.2015.
Date of Order: 23.9.2015.
Next date of hearing: 16.10.2015.

Code of Civil Procedure, 1908- Order 32 Rule 15- Eviction of the tenant was ordered on the ground of arrears of rent, that building had become unfit and unsafe for human habitation and the premises was required for re-building and re-construction which cannot be carried out without vacating the same- an appeal was preferred- an application under Order 32 Rule 15 was filed- application was sent to the Rent Controller for conducting inquiry- rent controller held that revisionist may be suffering from mental illness but there is no material on record to hold that revisionist was incapacitated to protect his interest because of mental illness – there was no necessity to appoint a legal guardian- revisionist was impleaded through his son with the allegation that revisionist is suffering from mental illness- held, that Court had not declared the revisionist to be suffering from mental illness- litigant cannot declare a person to be of unsound mind suo moto without the permission of the Court- non-revisionist was also not served, he is ordered to be served by way of affixation. (Para-5 and 6)

For the revisionist: Mr. G.C.Gupta, Sr. Advocate with Ms.Meera Devi, Advocate.
For Non-revisionist No.1. Mr.Ajay Kumar Sr. Advocate with Mr.Dheeraj Vashishat, Advocate.

The following order of the Court was delivered:

P.S.Rana Judge.

BRIEF FACTS OF THE CASE

Sh. Ajay Sharma landlord filed petition under Section 14 of H.P Urban Rent Control Act 1987 before learned Rent Controller Court No.2 against tenants. Learned Rent Controller passed eviction order against tenants on dated 31.5.2012 in R.C. No. 1-2 of 2009 titled Sh Ajay Sharma Vs. Parkash Chand and another on following grounds (1) Arrears of

rent to the tune of Rs.30,714.81/- w.e.f. 1994 till date. (2) That building in question has become unfit and unsafe for human habitation. (3) That suit premises is bonafidely required for rebuilding and reconstruction which cannot be done without vacating the premises.

2. Thereafter tenants filed appeal under Section 24 of HP Urban Rent Control Act 1987 against eviction order which is pending before learned District Judge Shimla exercising the power of appellate authority under HP Urban Rent Control Act as of today for disposal. During the pendency of first appeal before appellate authority Shimla HP application under Order 32 Rule 15 read with Section 151 of the Code of Civil Procedure was filed and learned appellate authority directed learned Rent Controller to hold inquiry into the allegations as contained in the application as per provision of Order 32 Rule 15 read with Section 151 CPC relating to Parkash Chand. Thereafter learned Rent Controller conducted inquiry under Order 32 Rule 15 read with Section 151 CPC. Learned Rent Controller held on dated 29.5.2015 that though Parkash Chand revisionist may be suffering from mental illness but there is no material on record to hold that he was incapacitated to protect his interest because of his mental illness. Learned Rent Controller (2) Shimla held that there is no necessity to appoint guardian ad-litem of Parkash Chand. Inquiry report submitted by learned Rent Controller is challenged before High Court of HP by way of present revision petition. Enquiry report submitted by learned Rent Controller to appellate authority i.e. learned District Judge Shimla HP is listed for consideration before learned District Judge Shimla HP.

3. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionist No.1. Court also perused entire record carefully.

4. Following points arise for determination in the present interim order.

(1) Whether Messrs Harlal Jagan Nath proforma co-revisionist No.2 should be served as per Order XXX Rule 3 CPC in civil revision No.77 of 2015 titled Parkash Chand Vs. Ajay Sharma or in alternative by way of affixation?

(2) Final order.

Reasons for findings upon Point No.1.

5. Before learned Rent Controller non-revisionist No.2 Messrs Harlal Jagan Nath was served through Sh Parkash Chand @ Ram Parkash. Even before appellate authority i.e. District Judge Shimla H.P Messrs Harlal Jagan Nath was impleaded as co-appellant through Sh Parkash Chand son of Sh. Jagan Nath. Thereafter when revision petition was filed before High Court Sh Parkash Chand @ Ram Parkash was impleaded through his son Sh Raman Shandil resident of 4/4 Prime Rose Cart Road Shimla with the allegation that Sh Parkash Chand @ Ram Parkash is suffering from mental illness. Till date Court has not declared Sh Parkash Chand @ Ram Parkash as person of unsound mind. It is held that party cannot declare a person as unsound mind during pendency of case suo moto without permission of Court when matter of unsound mind of Sh. Parkash Chand is lis pendens before competent authority of law. Court is of the opinion that in present civil revision Messrs Harlal Jagan Nath has been impleaded as proforma non-revisionist No.2 in the capacity of firm. It is well settled law that Messrs is plural of Mr. It is ordered that Messrs Harlal Jagan Nath proforma non-revisionist No.2 in present civil revision No. 77 of 2015 will be served as per order XXX rule 3 CPC 1908 and in alternative will be served by way of affixation. Point No.1 is decided accordingly.

Point No.2(Final order).

6. Service upon Messrs Harlal Jagan Nath proforma non-revisionist No.2 will be effected in the following manners under order XXX rule 3 CPC. (1) Upon any one or more of the partners or at the principal place at which the partnership business is carried on within India upon any person having at the time of service the control or management of partnership business there. Service of proforma non-revisionist No.2 Messrs Harlal Jagan Nath Top Floor, Fay Lodge Cart Road Shimla (H.P) will be effected for 16.10.2015. If the service upon proforma non-revisionist No.2 i.e. Messrs Harlal Jagan Nath will not be effected as per order XXX rule 3 CPC then in alternative service upon proforma non-revisionist No.2 i.e. Messrs Harlal Jagan Nath will be effected by way of affixation strictly in accordance with law. Be listed on 16.10.2015.

****

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

Pawan Kumar and another. ...Appellants.

Versus

The Rajput Kalyan Sabha, H.P. and others. ...Respondents.

RSA No. 533 of 2004
Reserved on: 22.9.2015
Decided on: 23.9.2015

Code of Civil Procedure, 1908- Section 100- Plaintiff claimed damages on account of demolition of the double storeyed structure raised on the land of Rajput Kalyan Sabha on the plea that Sabha had leased the land in favour of Municipal Committee, where after Municipal Committee created permanent lease in his favour and construction was raised- defendants pleaded that lease in favour of Municipal Committee was cancelled and possession of the land was handed over to Sabha and the land was being fenced when the residents of town and private bus operators attacked the members of the Sabha- further pleaded that land and Sabha Bhawan were owned and possessed by the Sabha- suit was dismissed by the trial Court- First appeal was also dismissed- held, that plaintiff had failed to lead tangible evidence to establish creation of permanent lease in his favour- no registered lease deed to prove permanent lease was placed on record- plaintiff also failed to prove that defendants had caused any damage to his property – no person can confer better right than he actually possesses, hence, question of permanent lease by Municipal Corporation in favour of plaintiff does not arise- both the Courts have correctly appreciated the evidence so led on the record and had come to a right conclusion- appeal dismissed. (Para-9, 16 and 18)

Case referred:

Vareed vs. P.C. George, AIR 1971 Kerala 31

For the Appellants : Mr. Amit Jamwal, Advocate vice Mr. Ajay Sharma, Advocate.

For the Respondents : Mr. Ashwani K. Sharma, Sr. Advocate with Ms. Monika Shukla, Advocate for respondent Nos. 1 to 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 3.12.2003 rendered by the District Judge, Kangra at Dharamshala in Civil Appeal No. 32-K/XIII/2002.

2. "Key facts" necessary for the adjudication of this appeal are that predecessor-in-interest of appellants, namely, Prem Chand (hereinafter referred to as the 'original plaintiff' for convenience sake) instituted a suit for recovery of Rs. 1,95,000/- with interest @ 12% per annum against the respondents-defendants (hereinafter referred to as the defendants" for convenience sake). According to the averments made in the plaint, defendant No.1 Rajput Kalyan Sabha was recorded as owner and Municipal Committee, Kangra was recorded in possession as tenant of land comprising Khata No. 179, Khatauni No. 329, Khasra No. 1235. According to the Jamabandi for the year 1988-89, the land was classified as Gair-Mumkin-Motor Adda. The land under bus stand was under lease of Municipal Committee Kangra. It created further permanent lease in favour of the plaintiff. The plaintiff was allowed to raise double storeyed structure. The building was used as store-cum-office-cum-small workshop for minor repairs. On 29.8.1993, defendants through their agents got the building of the plaintiff demolished and destroyed all the structure. The plaintiff has suffered loss of Rs. 3.00 lakh.

3. Defendant contested the suit. According to them, plaintiff was never authorized by the defendants to construct the structure on the suit land. Rajput Kalyan Sabha Kangra had leased out the Sabha Bhawan building and the land attached thereto, to the Municipal Committee, Kangra through its Administrator for a period of five years. The new Bus Stand was inaugurated on 27.11.1992. The Administrator, Municipal Committee, Kangra vide letter dated 6.3.1993 cancelled the lease in respect of the Sabha and handed over the possession of the suit land in favour of the Sabha with effect from 6.3.1993. The members of the Sabha tried to barricade the premises. However, the residents of Kangra town and private bus operators attacked the members of the Sabha and pelted stones on the members of the Sabha. The suit land and the Sabha Bhawan were owned and possessed by Rajput Kalyan Sabha, Himachal Pradesh since 6.3.1993. The possession of the same was delivered to it by the Municipal Committee, Kangra.

4. Replication was filed by the plaintiff. Issues were framed by the Senior Sub Judge, Kangra at Dharamshala. He dismissed the suit on 28.11.2001. The original plaintiff Prem Chand died during the pendency of appeal and his legal heirs were brought on record. Judgment and decree dated 28.11.2001 was challenged by the present appellants before the District Judge, Kangra at Dharamshala. He dismissed the same on 3.12.2003. Hence, the present appeal. It was admitted on the following substantial questions of law:

> "1**. Whether both the learned Courts below misread and mis-appreciated the evidence specifically the statement of PW-4 and documents ex. PW-4/A to Ex. PW-4/L, thereby vitiating the impugned judgments and decrees?**
>
> **2. Whether termination of lease deed vide Ex. D-2 is contrary to the provisions of Sections 106 and 107 of the Transfer of Property Act and as both the courts below have not looked this aspect of the matter, the impugned judgments and decrees stand vitiated?"**

5. Mr. Amit Jamwal, Advocate, for the appellant, on the basis of the substantial questions of law framed, has vehemently argued that both the courts below have misread the documents Ext. PW-4/A to Ext. PW-4/L. He has also argued that the termination of lease vide Ex.D-2 dated 6.3.1993 was contrary to the provisions of sections 106 and 107 of the Transfer of Property Act.

6. Mr. Ashwani K. Sharma, learned Senior Advocate for the respondents has supported the judgments and decrees passed by both the courts below.

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

8. Since both the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid repetition of discussion of evidence.

9. It is admitted case of the parties that Rajput Kalyan Sabha was the owner of the suit land. Rajput Kalyan Sabha had leased out the same in favour of Municipal Committee, Kangra only for a period of five years for running/operating bus stand. In the Jamabandi for the year 1988-89 Ex.P-1, Rajput Kalyan Sabha has been recorded as owner and Municipal Committee, Kangra is recorded in possession thereof as tenant.

10. PW-1 Constable Onkar Singh has proved copy of report No.22 dated 29.8.1993 Ex.PW-1/A.

11. Original plaintiff Prem Chand has appeared as PW-2. According to him, the suit land was given to him on lease by Municipal Committee, Kangra on a rent of Rs. 20/- per year. The plaintiff had constructed three storeyed shops, value of which was more than Rs. Two lakhs. Members of the Rajput Kalyan Sabha dismantled the building.

12. PW-3 Partap Chand Bhandari has deposed that plaintiff has constructed the building. On 29.8.1993, when he was at New Bus Adda, he came to know that huge mob dismantled the building of the plaintiff situated at old bus stand.

13. PW-4 Ravinder Kumar has proved Ex.PW-4/A to Ex.PW-4/L. These are receipts of rent of building given on lease to the plaintiff by Municipal Committee, Kangra. PW-5 Bharti Punni has deposed that the plan Ex.PW-5/A of the building of plaintiff situated at Bus Adda was prepared by him.

14. DW-1 Tek Chand Rana has deposed that the land of Rajput Kalyan Sabha was leased out in favour of the Municipal Committee, Kangra for five years for operating Bus Adda. The lease was not renewed after five years. The Administrator, Municipal Committee, Kangra vacated and cancelled the lease vide Ex.D-2. When the members of the Sabha tried to dig pits for erecting angle iron, a violent mob came from Kangra side, they started pelting bricks on the members of the Sabha. Few members of the Sabha were injured. 9-10 vehicles of the members of the Sabha were set on fire. Some of the structures were also burnt.

15. DW-2 K.S. Thakur has deposed that Sabha Bhawan and the land attached thereto was leased out in favour of the Municipal Committee, Kangra for operating a Bus Adda. The Municipal Committee, Kangra cancelled the lease on 6.3.1993. A huge mob attacked the members of the Rajput Kalyan Sabha when they tried to fence the land. The termination of the lease Ex.D-2 vide letter dated 6.3.1993 was in conformity with the provisions of the Transfer of Property Act.

16. It is evident from the contents of Ex.D-2 that Municipal Committee, Kangra terminated the lease and handed over the possession of the suit land and Sabha Bhawan in favour of the Rajput Kalyan Sabha on 6.3.1993. Ex.PW-4/A to Ex.PW-4/L are the receipts issued by the Municipal Committee, Kangra in favour of the plaintiff amounting to Rs. 30/- only as rent of the site. Plaintiff has not led any tangible evidence on record to establish

permanent lease or sub-lease created in his favour by the Municipal Committee, Kangra. Plaintiff has also not placed on record any registered instrument to prove permanent lease in his favour. Possession, as noticed hereinabove, was handed over to Rajput Kalyan Sabha by Municipal Committee, Kangra. Plaintiff has filed to prove that the defendants have caused damage to the property of the plaintiff. Plaintiff has also failed to prove that permanent lease was made in his favour and he had constructed building thereon.

17. Division Bench of Kerala High Court in ***Vareed*** vs. ***P.C. George***, AIR 1971 Kerala 31 has held that a lease of immovable property being a transfer of right to enjoy such property, the person granting the lease must possess an interest therein. Division Bench has held as under:

> **"[7] A lease of immovable property being a transfer of a right to enjoy such property, the person granting the lease must possess an interest therein. A lease may be in respect of corporeal hereditaments or in respect of incorporeal hereditaments. The words [Extract in Malyalam Script] in Clause 4 of Ext. P1 make it clear that the testator did not intend to create a life-estate in favour of Iltianam in respect of the properties but he intended to confer on her a restricted right of enjoyment of the usufruct only for her maintenance. The object of the bequest in favour of Ittianam is to provide her maintenance and for this purpose to give her a personal right to appropriate the profits of the properties. It is significant to find a provision in Ext. P1 to the effect that if on account of illness Ittianam had to incur any additional expenditure she could encumber the properties to the extent of Rs. 500. This shows that the properties set apart for the maintenance of Ittianam were yielding only an income sufficient for her maintenance. It is no doubt an indication that what was granted was only a right to appropriate the profits of the properties which will not exceed a reasonable maintenance for her. In view of the decisions in Lachhmeshwar v. Moti Rani, AIR 1939 PC 157 and Lal Mohan v. Onkar Mall, AIR 1946 Pat 55 it may be possible to hold that the interest in favour of Ittianam under Ext. P1 was an interest restricted in its enjoyment to the owner personally within the meaning of Clause (d) of Section 6 of the Transfer of Property Act. But this finding will not in any way assist the plaintiff since Section 6 (d) has no application to the case. It has therefore to be examined whether Ext. P1 created an interest in land in favour of Ittianam. We think it unnecessary to decide this question as we are of the view that even assuming that Ittianam was competent to execute Ext, P3, the defendant is not entitled to the benefit of the proviso to Section 3 (1) (i) to (vii) of Act I of 1964. According to the learned counsel for the defendant though Ittianam got only a life-interest in the plaint properties under Ext. P1, the defendant who claims under Ext. P3 acquired fixity of tenure under Section 4 of the Cochin Verumpattomdars Act (VIII of 1118) and the said right is preserved by the proviso to Clauses (i) to (vii) of Sub-section (1) of Section 3 of Act 1 or 1964."**

18. In the instant case, the suit land was leased in favour of the Municipal Committee, Kangra. It is settled law that a person cannot confer any higher rights other than what he himself possesses. Even if it is taken hypothetically that sub-lease was

created, the same would have come to an end after the termination of the lease between Rajput Kalyan Sabha and Municipal Committee, Kangra.

19. Both the courts below have correctly appreciated the oral as well as documentary evidence led by the parties, including Ex.PW-4/A to Ex.PW-4/L and there is no need to interfere with the well reasoned judgments and decrees passed by both the courts below.

20. The substantial questions of law are answered accordingly.

21. In view of the analysis and discussion made hereinabove, there is no merit in the present appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

****

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

Saraswati Devi & ors ...Appellants

Vs

State of HP & ors ...Respondents.

LPA No. 53 of 2008
Reserved on 16.09.2015
Decided on: 23.9.2015

H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971- Section 54- Consolidation scheme was prepared in consultation with and on the advice of land owners and the committee constituted under the Act- no objection was raised by the private respondent but a complaint was made regarding the obstruction of his path- his dispute was resolved and the path was again blocked on which a fresh complaint was made, which was sent to SDO (Civil) for further action- Director Consolidation modified the consolidation scheme- a writ petition was filed against this modification- order was upheld on the ground that no objection was raised to the report of the Consolidation Officer and the petitioners were estopped from questioning the same- Section 54 of the Act does not provide for a period of limitation but the power should be exercised in a reasonable time- in the present case, consolidation proceedings were completed in the year 1988 and revision was filed after 18 years- remedy for removing the obstruction in the path lies elsewhere and not under the Act- Further, Director Consolidation had not given any opportunity to the parties to raise objection, therefore, order set aside. (Para-8 to 16)

Cases referred:

Joint Collector Ranga Reddy District & anr Vs. D.Narsing Rao and others (2015) 3 SCC 695

Ramesh Chand & anr Vs. Director of Consolidation & ors 2008 (2) SLC 176

For the Appellant : Mr. K.D.Sood, Senior Advocate with
Mr. Sanjeev Sood, Advocate, for the appellants.

For the Respondents : Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma Deputy Advocate General for the respondents No. 1 to 3.

Mr.B.C. Negi, Senior Advocate with Mr. Narender Thakur, Advocate, for respondent No.4.

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 petition filed by the appellants challenging the orders passed by Director (Consolidation of Holdings) came to be dismissed.

Facts, in brief, may be noticed.

2. The appellants are residents of village Phalwara, Tehsil Dehra, District Kangra, HP which came under Consolidation in the year 1988. Consolidation scheme was prepared in consultation and advice of land owners and the committee constituted under Section 22 of the H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971(for short the 'Act').

3. The private respondent kept mum and raised no dispute till 22.7.2006, when for the first time, he made a complaint to the Panchayat regarding obstruction of his path. At one stage, this dispute was resolved. However, later it appears that the path was again blocked by the appellants, constraining the private respondent to again approach to the Gram Panchayat, who in turn referred the matter to Sub Divisional Officer (C), Dehra for further action. Thereafter, nothing fruitful appears to have been done, constraining the private respondent to file a revision petition under Section 54 of the Act.

4. The Director, Consolidation called for the report from the Consolidation Officer and immediately on receipt thereof and basing his decision on such report, modified the consolidation scheme. This constrained the appellants to approach this Court by way of writ petition, wherein apart from other grounds, appellants had specifically raised the question of violation of principles of natural justice and the proceedings before the Director being time barred.

5. The official respondents filed reply and supported the order passed by them and in addition thereto, it was claimed that as per Section 54 of the Act, a revision petition could be filed at any time as there is no prescribed period of limitation. It was further averred that after receiving of the report from the Consolidation Officer, both the parties were heard and it was after perusing the record, that the order was passed which was strictly in accordance with the provisions of the consolidation scheme.

6. The private respondent contested the petition by filing reply, wherein it was stated that the appellants had illegally blocked his path constraining him to file the revision petition. It was further averred that the order passed by the official respondents was in conformity with the well settled norms of principles of law and natural justice and, therefore, deserved to be upheld.

7. The learned writ Court did not advert to the question of limitation and upheld the impugned order by observing that since the appellants had not raised any

objection to the report of the Consolidation Officer, therefore, having accepted the report they were estopped from questioning the same.

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

9. Section 54 of the Act reads thus:

> *"**Power of the State Government to call for proceedings**.- The State Government may at any time for the purpose of satisfying itself as to the legality or propriety of any order passed, scheme prepared or confirmed or repartition made by any officer under this Act call for and examine the record of any case pending before or disposed of by such officer and may pass such orders in reference thereto as it thinks fit:*
>
> *Provided that no order, scheme or repartition shall be varied or reversed without giving the parties interested notice to appear and opportunity to be heard except in cases where the State Government is satisfied that the proceedings have been vitiated by unlawful consideration."*

It is evident from the perusal of the aforesaid provision that no particular period of limitation infact has been prescribed for filing of revision and the expression "may at any time" has been used. Therefore, the first and foremost question which will require our consideration is as to whether in absence of any period of limitation having been prescribed for the exercise of powers of revision, can the period be extended to infinity and the order remain open for challenge for ever ?. Can it be assumed that the legislature has conferred an everlasting and interminable power in point of time for exercising the powers of revision by not specifically providing for any period of limitation?

10. These issues are no longer *res integra* and have been elaborately dealt with by the Hon'ble Supreme Court in its recent decision in case titled **Joint Collector Ranga Reddy District & anr** Vs. **D.Narsing Rao and others (2015) 3 SCC 695,** where Hon'ble Justice T.S. Thakur, J, in his Lordships separate though concurring judgment has held that where no limitation period is prescribed under the statute, the power should be exercised within a reasonable period. It was further observed that reasonableness of the period is to be determined having regard to lapse of time between the knowledge of the order and exercise of power. It was held as under:

> *"25 The legal position is fairly well-settled by a long line of decisions of this Court which have laid down that even when there is no period of limitation prescribed for the exercise of any power revisional or otherwise such power must be exercised within a reasonable period. This is so even in cases where allegations of fraud have necessitated the exercise of any corrective power. We may briefly refer to some of the decisions only to bring home the point that the absence of a stipulated period of limitation makes little or no difference in so far as the exercise of the power is concerned which ought to be permissible only when the power is invoked within a reasonable period.*
>
> *26. In one of the earlier decisions of this Court in S.B. Gurbaksh Singh v. Union of India 1976 (2) SCC 181, this Court held that exercise of suo motu power of revision must also be within a reasonable time and that any unreasonable delay in the exercise may affect the validity. But what would constitute reasonable time would depend upon the facts of each case.*

27. To the same effect is the decision of this Court in Ibrahimpatnam Taluk Vyavasaya Coolie Sangham V. K. Suresh Reddy and Ors. (2003) 7 SCC 667 where this Court held that even in cases of fraud the revisional power must be exercised within a reasonable period and that several factors need to be kept in mind while deciding whether relief sooner be denied only on the ground of delay. The court said (SCC p.677, para 9)

> "9....In cases of fraud, this power could be exercised within a reasonable time from the date of detection or discovery of fraud. While exercising such power, several factors need to be kept in mind such as effect on the rights of the third parties over the immovable property due to passage of considerable time, change of hands by subsequent bona fide transfers, the orders attaining finality under the provisions of other Acts (such as the Land Ceiling Act)."

28. To the same effect is the view taken by this Court in Sulochana Chandrakant Galande. v. Pune Municipal Transport and Others (2010) 8 SCC 467 where this Court reiterated the legal position and held that the power to revise orders and proceedings cannot be exercised arbitrarily and interminably. This Court observed: (SCC p.476, para 28)

> *"28. The legislature in its wisdom did not fix a time-limit for exercising the revisional power nor inserted the words "at any time" in Section 34 of the 1976 Act. It does not mean that the legislature intended to leave the orders passed under the Act open to variation for an indefinite period inasmuch as it would have the effect of rendering title of the holders / allottee(s) permanently precarious and in a state of perpetual uncertainty. In case, it is assumed that the legislature has conferred an everlasting and interminable power in point of time, the title over the declared surplus land, in the hands of the State/allottee, would forever remain virtually insecure. The Court has to construe the statutory provision in a way which makes the provisions workable, advancing the purpose and object of enactment of the statute".*

29. In State of H.P. and Ors. v. Rajkumar Brijender Singh and Ors. (2004) 10 SCC this Court held that in the absence of any special circumstances a delay of 15 years in suo motu exercise of revisional power was impermissible as the delay was unduly long and unexplained. This Court observed (SCC pp.588-89, para-6)

> *"6.We are now left with the second question which was raised by the respondents before the High Court, namely, the delayed exercise of the power under sub-section (3) of Section 20. As indicated above, the Financial Commissioner exercised the power after 15 years of the order of the Collector. It is true that sub-section (3) provides that such a power may be exercised at any time but this expression does not mean there would be no time-limit or it is in infinity. All that is meant is that such powers should be exercised within a reasonable time. No fixed period of limitation may be laid but unreasonable delay in exercise of the power would tend to undo the things which have attained finality. It depends on the facts and circumstances of each case as to what is the reasonable time within which the power of suo motu action could be exercised. For example, in this case, as the appeal had been withdrawn but the Financial Commissioner had taken up the matter in*

exercise of his suo motu power, it could well be open for the State to submit that the facts and circumstances were such that it would be within reasonable time but as we have already noted that the order of the Collector which has been interfered with was passed in January 1976 and the appeal preferred by the State was also withdrawn sometime in March 1976. The learned counsel for the appellant was not able to point out such other special facts and [pic]circumstances by reason of which it could be said that exercise of suo motu power after 15 years of the order interfered with was within a reasonable time. That being the position in our view, the order of the Financial Commissioner stands vitiated having been passed after a long lapse of 15 years of the order which has been interfered with. Therefore, while holding that the Financial Commissioner would have power to proceed suo motu in a suitable case even though an appeal preferred before the lower appellate authority is withdrawn, maybe, by the State. Thus the view taken by the High Court is not sustainable. But the order of the Financial Commissioner suffers from the vice of the exercise of the power after unreasonable lapse of time and such delayed action on his part nullifies the order passed by him in exercise of power under sub-section (3) of Section 20".

30. We may also refer to the decision of this Court in M/s Dehri Rohtas Light Railway Company Ltd. V. District Board, Bhojpur and Ors. (1992) 2 SCC 598 where the Court explained the legal position as under: (SCC pp.602-03, para 13)

"13. The rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own [pic]facts. It will all depend on what the breach of the fundamental right and the remedy claimed are and how delay arose. The principle on which the relief to the party on the grounds of laches or delay is denied is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence. The test is not as to physical running of time. Where the circumstances justifying the conduct exist, the illegality which is manifest cannot be sustained on the sole ground of laches. The decision in Tilok chand case relied on is distinguishable on the facts of the present case. The levy if based on the net profits of the railway undertaking was beyond the authority and the illegal nature of the same has been questioned though belatedly in the pending proceedings after the pronouncement of the High Court in the matter relating to the subsequent years. That being the case, the claim of the appellant cannot be turned down on the sole ground of delay. We are of the opinion that the High Court was wrong in dismissing the writ petition in limine and refusing to grant the relief sought for. We however agree that the suit has been rightly dismissed".

> 31. *To sum up, delayed exercise of revisional jurisdiction is frowned upon because if actions or transactions were to remain forever open to challenge, it will mean avoidable and endless uncertainty in human affairs, which is not the policy of law. Because, even when there is no period of limitation prescribed for exercise of such powers, the intervening delay, may have led to creation of third party rights, that cannot be trampled by a belated exercise of a discretionary power especially when no cogent explanation for the delay is in sight. Rule of law it is said must run closely with the rule of life. Even in cases where the orders sought to be revised are fraudulent, the exercise of power must be within a reasonable period of the discovery of fraud. Simply describing an act or transaction to be fraudulent will not extend the time for its correction to infinity; for otherwise the exercise of revisional power would itself be tantamount to a fraud upon the statute that vests such power in an authority."*

11. In addition to the aforesaid judgment, we at this stage, may also take note of a Division Bench judgment rendered by a Coordinate bench of this court in **Ramesh Chand & anr** Vs. **Director of Consolidation & ors 2008 (2) SLC 176** where, like in the present case, this court was dealing with a case where the revision under Section 54 of the Act had been preferred after more than 17 years and after relying upon some of the judgments of the Hon'ble Apex Court, cited above, it was observed that the delay of 17 years to adjudicate upon the revision was not reasonable and it was held ;

> *2. The private respondents herein had preferred the above mentioned writ petition assailing the order dated 2.2.2006 of the Director, Consolidation of Holdings, Himachal Pradesh under Section 54 of the H. P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 (in short called 'Act 1971') in case No. 122/2004, whereby the revision petition of the appellants (respondents No. 2 & 3) before Ld. Single Judge, was accepted.*
>
> *3. It appears that at the instance of the appellant herein, the Director, Consolidation of Holdings, Himachal Pradesh had exercised the powers of revision after a period of more than17 years under Section 54 of the 'Act, 1971'. The learned Single Judge has allowed the CWP No. 283/2006 of the writ petitioners/ private respondents, namely, Jagar Nath & Others as indicated above.*
>
> *4. The issue was as to whether the Director, Consolidation of Holdings, Himachal Pradesh has exercised his powers under Section 54 of the 'Act 1971' within reasonable time or not. Such issue has already been adjudicated upon by the Supreme Court in Chairman, Indore Vikas Pradhikaranv. Pure Industrial Coke & Chemicals Ltd. & Others (2007(8) SCC 705). The term 'reasonable time' used under Section 54 of the 'Act 1971' by the Director, Consolidation of Holdings shall be deemed to be settled in terms of the decision of the Supreme Court in State of H. P. and others v. Raj Kumar Brijender Singh and others (2004(10) SCC 585), whereby, the Hon'ble Supreme Court while expressing its view under Section 20(3) of H. P. Ceiling on Land Holdings Act, 1972 has observed that reasonable time as indicated in Section 20(3) of the said Act would depend upon the facts and circumstances of each case. For convenience, relevant paragraph 6 of the decision Raj Kumar Brijender Singh(supra) is quoted as below:-*

> *"We are now left with the second question which was raised by the respondents before the High Court, namely, the delayed exercise of the power under subsection (3) of Section 20. As indicated above, the Financial Commissioner exercised the power after 15 years of the order of the Collector. It is true that sub-section (3) provides that such a prayer may be exercised at any time but this expression does not mean there would be no time limit or it is in infinity. All that is meant is that such powers should be exercised within a reasonable time. No fixed period of limitation may be laid but unreasonable delay in exercise of the power would tend to undo the things which have attained finality. It depends on the facts and circumstances of each case as to what is the reasonable time within which the power of suo motu action could be exercised. For example, in this case, as the appeal had been withdrawn but the Financial Commissioner had taken up the matter in exercise of his suo motu power, it could well be open for the State to submit that the facts and circumstances were such that it would be within reasonable time but as we have already noted that the order of the Collector which has been interfered with was passed in January 1976 and the appeal preferred by the State was also withdrawn sometime in March, 1976. The learned counsel for the appellant was not able to point out such other special facts and circumstances by reason of which it could be said that exercise of suo motu power after 15 years of the order interfered with was within a reasonable time. That being the position in our view, the order of the Financial Commissioner stands vitiated having been passed after a long lapse of 15 years of the order which has been interfered with. Therefore, while holding that the Financial Commissioner would have power to proceed suo motu in a suitable case even though an appeal preferred before the lower appellate authority is withdrawn, may be, by the State. Thus the view taken by the High Court is not sustainable. But the order of the Financial Commissioner suffers from the vice of the exercise of the power after unreasonable lapse of time and such delayed action on his part nullifies the order passed by him in exercise of power under sub section (3) of Section 20."*

5. The view taken by the Supreme Court in Raj Kumar Brijender Singh(supra) has subsequently been reiterated by the Supreme Court in Chairman, Indore Vikas Pradhikaran(supra).

6. We have heard the learned counsel for the parties and have perused the documents. We are of the considered view that in view of the settled proposition of law for the term the reasonable time prescribed under Section 54 of the 'Act 1971'and in respect of Section 20(3) of H.P. Ceiling on Land Holdings Act, 1972, the issue of making analysis about the reasonable time prescribed in different statutes and Acts, is no more resintegra as to assess it would depend upon the facts and circumstances of each case. In the present case, the learned Single Judge has truly found that the delay of Seventeen years to adjudicate upon the revision by the Director, Consolidation of Holdings in exercise of his powers under Section 54 of the 'Act 1971' was not reasonable, therefore, in our considered view, there is no scope of any interference in the said impugned order dated 10.7.2007 passed in CWP No.

283 of 2006. The appeal is accordingly dismissed, so also the pending application."

12. Adverting to the facts of the instant case, it would be noticed that there is no dispute that the consolidation proceedings were completed in the year 1988, when the consolidation scheme came to be framed and finalized and remained unchallenged. It is only after 18 years in the year 2006 that the private respondent filed the revision petition before the competent authority.

13. The only explanation offered by learned senior counsel for the private respondent for filing the revision petition so belatedly is that it was only in the year 2006 that the appellants blocked his path constraining him to file the revision petition.

14. We are not at all impressed by this argument for the simple reason that in case the private respondent was seeking removal of the obstruction, as alleged, then definitely his remedy lay elsewhere and not before the revisional court, who admittedly was neither competent nor was vested with jurisdiction to remove such obstruction. That apart, in case the respondent No.4 was only seeking removal of the obstruction, then how the consolidation scheme which is "*magna-carta*" between the parties came to be modified by the Director that too after 18 years, is not forthcoming.

15. Respondent No.4, under the garb of seeking removal of the obstruction could not have sought modification and alteration of the consolidation scheme, that too, after a lapse of 18 long years, which period by no means, could be considered to be 'reasonable' more particularly when all these facts were well within the knowledge of the private respondent. That being the position, the order passed by the Director stands vitiated having been passed after a long lapse of 18 years of the order which has to be interfered with.

16. Further it is not in dispute that the Director, Consolidation immediately after on receipt of the report from the Consolidation Officer had without affording any opportunity to either of the parties to file objections to the same, decided the case on the same very day solely on the basis of this report. Evidently, there has been denial of reasonable opportunity and thus the findings to the contrary rendered by the writ Court are not sustainable.

17. In view of the aforesaid discussion, the appeal succeeds and consequently the order passed by the learned writ Court affirming the order of the Director, Consolidation is set aside, leaving the parties to bear their costs.

****

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

FAOs No.84 & 85 of 2015
Reserved on : 31.8.2015
Date of Decision: September 23, 2015

1. **FAO No.84/2015**
Shriram General Insurance Company ....Appellant.
Versus
Amarjeet Singh and others ...Respondents.

2. **FAO No.85/2015**
Smt. Mamta Devi and others ...Appellants
Versus
Pappu and others ...Respondents

Motor Vehicles Act, 1988- Section 166- Deceased was driving a motorcycle which met with an accident – deceased was aged 20 years and 11 months on the date of accident- it was averred in the petition that deceased was employed as Accountant-cum-Store Assistant and was pursuing his studies in B.Com from Sikkim Manipal University, Gangtok- his record of appointment was proved by authorized representative of the last employer- his gross salary was Rs.9,500/- - he was sole bread earner of the family and the entire family was dependent upon him- 50% of the amount was to be added towards future prospectus- thus, monthly income of the deceased would be Rs.14,250/- (Rs.9,500/-+ 4,750/-) or Rs.1,71,000/- per year- deceased was bachelor and, therefore, 50% amount was to be deducted towards personal expenses - annual income of the deceased would be Rs. 85,500/- - multiplier of '18' would be applicable and the claimants are entitled to compensation of Rs. 15,39,000/- (Rs.85,500 x 18 = Rs.15,39,000/-) for loss of dependency- amount of Rs. 30,000/- awarded towards funeral expenses and amount of Rs. 25,000/- awarded towards loss of estate and the claimants held entitled to Rs. 15,94,000/-. (Para-11 to 31)

Cases referred:

Govind Yadav v. New India Insurance Company Limited, (2011) 10 SCC 683
Munna Lal Jain and another v. Vipin Kumar Sharma and others, (2015) 6 SCC 347
Sarla Verma (Smt) and others v. Delhi Transport Corporation and anr, (2009) 6 SCC 121
Rajesh and others v. Rajbir Singh and others, (2013) 9 SCC 54
Reshma Kumari and others v. Madan Mohan and another, (2013) 9 SCC 65
Kalpanaraj & others v. Tamil Nadu State Transport Corporation, (2015) 2 SCC 764; and
Sanjay Verma v. Haryana Roadways, (2014) 3 SCC 210

For the Appellants:		Mr. Jagdish Thakur, Advocate, in FAO No.84 of 2015. Mr. Suneet Goel, Advocate, in FAO No.85 of 2015.
For the Respondents	:	Mr. Suneet Goel, Advocate, for respondents No.2 to 4; Mr. Vinod Thakur, Advocate, for respondent No.5; and Mr. Vijay Chaudhary, Advocate, for respondent No.6, in FAO No.84 of 2015. Mr. Vinod Thakur, Advocate, for respondent No.1; Mr. Vijay Chaudhary, Advocate, for respondent No.2; and Mr. Jagdish Thakur, Advocate, for respondent No.3, in FAO No.85 of 2015.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

These appeals arise out of the same award, hence, are being disposed of together.

2. Petition, filed under the provisions of Section 166 of the Motor Vehicles Act, 1988, stands allowed by Motor Accident Claims Tribunal-II, Hamirpur, Himachal Pradesh (hereinafter referred to as the Tribunal), and in Claim Petition No.1-NL/2 of 2011, titled as *Amarjeet Singh and others v. Pappu and others*, claimants have been held entitled to compensation as under:

> "Rs.9,37,000/- alongwith interest @9% per annum from the date of filing the petition till deposit of the awarded amount. Out of the total awarded amount petitioners No.3 and 4 shall be entitled to collect amount of Rs.50,000/- each while petitioner No.1 who is father of the deceased shall be entitled to

collect an amount of Rs.1.0 lac. The remaining awarded amount shall be collected by the petitioner No.2 who is mother of the deceased."

3. The Tribunal, while adjudicating the petition, framed the following issues:

"Issue No.1: Whether Lucky Arora died in a motor vehicle accident which took place on 25.10.2010 at about 5:45 p.m. Near Annapurna Hotel (Bhud Barrier) due to rash and negligent driving of respondent NO.1? OPP

Issue No.2: If Issue No.1, is answered in affirmative, whether the petitioners being the legal heirs of the deceased are entitled for the grant of compensation if so, to what amount and from which of the respondents? OPP

Issue No.3: Whether the driver of the offending vehicle was not holding a valid and effective driving licence at the time of accident? OPR-3

Issue No.4: Relief."

4. Facts necessary for adjudication of the present appeals being that vehicle bearing No.HR-68-0368, owned by Kamaal Din (owner), driven by Pappu (driver), insured with Shriram General Insurance Company Limited, met with an accident on 25.10.2010. The driver being at fault as his actions were rash and negligent. In the said accident, Lucky Arora, who was driving Motorcycle No.HP-12C-4121, died. FIR No.146/10, dated 25.10.2010, for commission of offences under the provisions of Sections 279 and 304-A of the Indian Penal Code, was also registered at Police Station, Baddi.

5. Tribunal found the deceased to have died as a result of (i) rash and negligent act on the part of the driver of the offending vehicle, i.e. the Tipper, (ii) claimants being dependents were entitled for compensation, (iii) taking the annual income of the deceased, for the purpose of dependency to be Rs.57,000/-, by applying a multiplier of 16, compensation on account of loss of dependency was determined to be Rs.9,12,000/-. In addition, claimants were also held entitled to Rs.15,000/- towards funeral expenses and Rs.10,000/- towards loss of estate.

6. Mr. Jagdish Thakur, assails the award on the following grounds: (i) deceased, who was pursuing his studies in B.Com, was unemployed, hence claimants are entitled to compensation as per ratio of law laid down by the Hon'ble Supreme Court of India in *Govind Yadav v. New India Insurance Company Limited,* (2011) 10 SCC 683**,** (ii) in any event, income of the deceased, as per salary certificate, cannot be said to have been proven in accordance with law.

7. On the other hand, Mr. Suneet Goel, learned counsel for the claimants, assails the award, for the reasons that (i) the Tribunal wrongly applied the multiplier of 16. It should have been 18, in view of law laid down by the Hon'ble Supreme Court of India in *Munna Lal Jain and another v. Vipin Kumar Sharma and others,* (2015) 6 SCC 347; and *Sarla Verma (Smt) and others v. Delhi Transport Corporation and another,* (2009) 6 SCC 121, (ii) inadequate compensation stands awarded towards funeral expenses, loss of estate, in view of the law laid down by the Hon'ble Supreme Court of India in *Rajesh and others v. Rajbir Singh and others,* (2013) 9 SCC 54. Further, rebutting the contentions of the Insurer, it is argued that proceedings being summary in nature, claimants called the Accountant of the Employer/ Organization, who has proved the salary certificate and deceased being the only son, compensation determined by the Tribunal is highly inadequate.

8. Certain facts are not in dispute. Offending vehicle, i.e. Tipper bearing No.HR-68-0368, owned by Kamaal Din, driven by Pappu, met with an accident on 25.10.2010, near Annapurna Hotel on National Highway No.21-A on Pinjore-Swarghat Road. The vehicle had hit Motorcycle No.HP-12C-4121, driven by Lucky Arora, who died, as a result of the accident. FIR No.164/10, dated 25.10.2010 also stood registered, for commission of offences under the provisions of Sections 279 & 304-A of the Indian Penal Code.

9. There is no plea or proof of contributory negligence.

10. The accident stands proved on record through the testimony of Shri Jagan Nath (PW-4).

11. That Lucky Arora was born on 14.11.1989 stands established, not only through the ocular version as also documentary evidence, i.e. the Matriculation Certificate (Ex. PW-2/H) and Driving Licence (Ex.PW-2/F). Thus, as on the date of the accident, age of the deceased was 20 years and 11 months.

12. Through the testimony Smt. Mamta Devi (PW-2), mother of the deceased, it stands proved that deceased was the sole bread earner of the family and as such all the claimants, being parents and sisters, were dependent upon him. Father of the deceased remains ill and sisters are studying in a college. Claimants have no source of income either by way of agriculture or otherwise.

13. In the petition, it clearly stands averred that deceased was employed as an Accountant-cum-Store Assistant with M/s Rannesh Gas Agency, Sai Road, Baddi. He was also pursuing his studies in B.Com (Information and System) from Sikkim Manipal University, Gangtok. He had cleared his 5th Semester and also subsequently undergone Computer Examination (Tally).

14. Since the early age of 19 years, deceased had started working. Initially, in the year 2008, he was employed as an Office Assistant with M/s Borkar Packaging Private Ltd. Nalagarh, on a monthly salary of Rs.5,175/- and thereafter employed as an Accounts-cum-Store Assistant with Jagdish Chand Gupta, Engineers and Contractors on a monthly salary of Rs.8,500/-. For better prospects, he changed his job and with effect from 1.9.2010 started working with M/s Rannesh Gas Agency, on a monthly salary of Rs.9,500/-. Smt. Mamta Devi (PW-2) has testified such facts. She has also proved documents (Ex. PW-2/B, 2/C, 2/D, 2/E, 2/F & 2/H). Noticeably, there has been considerable increase in the salary.

15. Shri Ijender Singh (PW-3), an authorized representative of the last employer, has proved record of appointment dated 24.8.2010 (Ex.PW-3/B), indicating gross salary of the deceased to be Rs.9,500/-. Deceased joined and was discharging his duties as an Accountant-cum-Store Assistant can not be disputed. Such fact becomes evidently clear.

16. From the cross-examination part of his testimony, there does not appear to be any challenge to the correctness of the contents of letter of appointment. No doubt, record of disbursement of salary ought to have been produced in Court, but then keeping in view the nature of proceedings, which are summary in nature, prima facie, appointment of the deceased on a monthly salary of Rs.9,500/- stands proved on record. It be also observed that deceased joined on 1.10.2010 and the accident took place on 25.10.2010. As such, there may not have been any disbursement of the salary in favour of the deceased.

17. It is also not the suggested case of any of the parties that the documents were fabricated only for the purpose of establishing employment or income of the deceased.

18. It appears that deceased was an intelligent and industrious person. After completing his schooling, he not only completed his studies in Graduation, but also undertook courses in computer training (Tally) from the Institute of Certified Bookkeepers and CDEC. He kept on changing his jobs, for better prospects and grew in life. Despite being employed, he continued to pursue his studies in B.Com, though by way of distant learning.

19. It would not be right to contend that deceased was only a student and not working or that claimants have not been able to establish the factum of employment and salary of the deceased. It be also observed that deceased was the only son and bread earner as such, the entire family was dependent upon him. Also sisters, who were studying, had to be married in future.

20. In a case where the deceased was self-employed or was employed on a fixed salary, even without any annual increment, as to whether addition in income for future prospects is required to be made or not, there was divergence of opinion by Hon'ble the Supreme Court of India.

21. In *Rajesh (supra)*, the apex Court allowed the same whereas in *Reshma Kumari and others v. Madan Mohan and another,* (2013) 9 SCC 65, it was disallowed. Noticeably, both the decisions are of three-Judge Bench.

22. For the reasons that decision in *Rajesh (supra)* is not only subsequent in point in time, but also followed and reiterated in *Munna Lal Jain (supra)*; *Kalpanaraj & others v. Tamil Nadu State Transport Corporation*, (2015) 2 SCC 764; and *Sanjay Verma v. Haryana Roadways,* (2014) 3 SCC 210, claimants have made out a case for grant of compensation on account of future prospects.

23. Uniformly, the Court has adopted a thumb rule of addition of 50 per cent of the actual salary, to the actual salary income of the deceased, towards future prospects. 50 per cent is where deceased has a permanent job and is below 40 years of age. However, if age is between 40 and 50 years, it has to be 30 per cent.

24. In the instant case, I find the deceased to be a bright, young and an enterprising person. While pursuing his studies, he was gainfully employed and drawing a salary of Rs.9,500/-. He was just 20 years and 11 months of age. Not only his job profile improved, but so also did his salary.

25. In view of aforesaid discussion, reliance placed on *Govind Yadav (supra)* is misconceived.

26. It is the duty of the Tribunal to award compensation, which is just, equitable, fair and reasonable.

27. As such, keeping in view the overall attending circumstances, interest of justice would be met, if an amount equivalent to 50 per cent of the last drawn salary is added to the actual salary of the deceased for. Thus, taking the income of the deceased to be Rs.9,500/- per month, as computed by the Tribunal, and adding 50% of the income to it, monthly income of the deceased comes to Rs.14,250/- (Rs.9,500 + 4750 = Rs.14,250) per month, or Rs.1,71,000/- per year. Since deceased was a bachelor at the time of his death,

deduction of 50% of the amount is required to be made from the total annual income. Hence, after deduction of 50%, the annual income of the deceased comes to Rs.85,500/-.

28. In view of law laid down in *Munna Lal Jain (supra)* and *Sarla Verma (supra)*, Mr. Suneet Goel is right in contending that the Tribunal ought to have applied a multiplier of 18, for the age of the deceased, at the time of death, was between 20 and 25 years.

29. As such, by applying the multiplier of 18, claimants are held entitled to a compensation of Rs.15,39,000/- (Rs.85,500 x 18 = Rs.15,39,000/-) for loss of dependency.

30. Noticeably, accident took place not in the home town of the deceased but at a distant place. So, in view of the law laid down in *Rajesh (supra),* funeral expenses are enhanced to Rs.30,000/- from Rs.15,000/-. Also, compensation on account of loss to estate is enhanced from Rs.10,000/- to Rs.25,000/-.

31. Thus, the claimants are held entitled for a total sum of Rs.15,94,000/-. They are also entitled for interest, as ordered by the Tribunal. Out of the total awarded amount, Ms Bharti and Ms Savita shall be entitled for a sum of Rs.1,00,000/- each, while Shri Amarjeet Singh, who is father of the deceased, shall be entitled for an amount of Rs.1.25 lac and Smt. Mamta Devi, mother of the deceased, shall be entitled for the remaining amount.

With the aforesaid modification in the award, so passed by the Tribunal, both the appeals stand disposed of, so also the pending application(s), if any.

****

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

State of H.P. ...Appellant.

Versus

Amrik Singh ...Respondent.

Cr. Appeal No. 4191 of 2013
Judgment reserved on: 08.09.2015
Date of Decision: September 23, 2015

Indian Penal Code, 1860- Sections 363, 376 and 506- Prosecutrix aged about 18 years had left home on the pretext of undergoing training of tailoring course- PW-3 also left home for Paonta Sahib- matter was reported to police and the missing girls were found in the premises owned by PW-2- an FIR was lodged at the instance of prosecutrix that accused had enticed her on the pretext of marriage and had raped her. Accused had also threatened the prosecutrix – record regarding the date of birth of the prosecutrix was not satisfactory – prosecutrix had voluntarily travelled with her friends to Chandigarh where accused made them to stay in a Gurudwara- prosecutrix had not made any complaint of sexual intercourse to the police initially – even she had not disclosed this fact to her friends and the parents- prosecutrix was aged more than 18 years- she was mature enough to understand the implication of her action as well as action of the accused- she had travelled with the accused and had stayed at different places- accused had not kidnapped the prosecutrix- held, that in

these circumstances, version of the prosecutrix did not inspire confidence and the accused was rightly acquitted by the trial Court.

Cases referred:
Prandas v. The State, AIR 1954 SC 36
Rajesh Patel Versus State of Jharkhand, (2013) 3 SCC 791
State of Rajasthan Versus Babu Meena, (2013) 4 SCC 206
Narender Kumar Versus State (NCT of Delhi), (2012) 7 SCC 171
Vinod Kumar Versus State of Kerala, (2014) 5 SCC 678
Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

For the Appellant: Mr. Ashok Chaudhary, Additional Advocate General and Mr.J.S. Guleria, Assistant Advocate General.
For the Respondent: Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Assailing the judgment dated 04.06.2013, passed by the Additional Sessions Judge, Sirmaur, District at Nahan, H.P., in Sessions Trial No.12-N/7 of 2011, titled as *State of Himachal Pradesh Versus Amrik Singh*, State has filed the present appeal under the provisions of Section 378 of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that on 15.02.2010, Smt. Surto Devi (PW.2) lodged a report at Police Station, Paonta Sahib to the effect that her daughter i.e. the prosecutrix (PW.1) aged about 18 years had left home on the pretext of undergoing training of tailoring course. Same day, Niranjan Singh also reported that his daughter Kuldeep Kaur (PW.3) had also left home for Paonta Sahib. ASI Jeet Singh (PW.13) searched the missing girls and found them to be staying in the premises owned by Surtu Devi (PW.2) at Kala Amb. Initially girls did not disclose anything to the police or their parents, but however on 05.04.2010 prosecutrix lodged FIR No.112/2010 dated 05.04.2010 (PW.1/A) under the provisions of Sections 363 and 376 of the Indian Penal Code, against the accused at Paonta Sahib, District Sirmaur, H.P., stating that the accused enticed her on the pretext of marriage, which he did not solemnize but subjected her to rape. Investigation further revealed that prosecutrix had stayed with the accused at different places, including Chandigarh and Kala Amb. Prosecutrix was got medically examined from Dr.Daljeet Kaur (PW.11), who issued MLC (Ex.PW.11/B). Certificate regarding age of the prosecutrix (Ex.PW.8/A) was taken on record. Accused threatened the prosecutrix not to disclose the incident to anyone, else she be killed. With the completion of investigation, which *prima facie* revealed complicity of the accused in the alleged crime, *Challan* was presented in the Court for trial.

3. Accused was charged for having committed offences punishable under the provisions of Sections 363, 376 (1) and 506(II) of the Indian Penal Code, to which he did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as sixteen witnesses. Statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he took the plea of false implication.

5. Trial Court, after appreciating the testimony of the prosecution witnesses acquitted the accused. Hence the present appeal.

6. We have heard Mr. Ashok Chaudhry, learned Additional Advocate General, assisted by Mr. J.S. Guleria, learned Assistant Advocate General on behalf of the State as also Mr. Suneet Goel, Advocate, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

7. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish the essential ingredients so as to constitute the charged offence.

8. In *Prandas v. The State*, AIR 1954 SC 36, Constitution Bench of the apex Court, has held as under:

> "(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417, Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:
>
> > "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." "

9. It is settled principle of law that testimony of prosecutrix is sufficient enough to convict the accused if it inspires confidence. (See: *Rajesh Patel Versus State of*

Jharkhand, (2013) 3 SCC 791 and *State of Rajasthan Versus Babu Meena,* (2013) 4 SCC 206).

10. The Court is duty bound to appreciate the evidence in totality of the background of the entire case. It is also settled proposition of law that in case evidence read in its totality and the story projected by the prosecutrix is found to be improbable, her version is liable to be rejected. The apex Court in *Narender Kumar Versus State (NCT of Delhi),* (2012) 7 SCC 171, has held as under:-

> "20. It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.
>
> 21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony. (Vide: *Vimal Suresh Kamble v. Chaluverapinake Apal S.P. & Anr.*, (2003) 3 SCC 175; and *Vishnu v. State of Maharashtra,* (2006) 1 SCC 283.
>
> 22. Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence. (Vide: *Suresh N. Bhusare & Ors. v. State of Maharashtra*, (1999) 1 SCC 220.
>
> 23. In *Jai Krishna Mandal & Anr. v. State of Jharkhand*, (2010) 14 SCC 534, this Court while dealing with the issue held:
>
> "4....the only evidence of rape was the statement of the prosecutrix herself and when this evidence was read in its totality, the story projected by the prosecutrix was so improbable that it could not be believed."
>
> 24. In *Rajoo & Ors. v. State of Madhya Pradesh*, (2008) 15 SCC 133, this Court held: (SCC p. 141, para 10)
>
> "10....that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on par with that of an injured witness and if the evidence is reliable, no corroboration is necessary."
>
> The court however, further observed:

"11.....It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication..... there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

25. In *Tameezuddin @ Tammu v. State (NCT of Delhi)*, (2009) 15 SCC 566, this Court held has under:

"9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter."

26. Even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference of the victim being a woman of "easy virtues" or a women of "loose moral character" can be drawn. Such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. She has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. Merely because a woman is of easy virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated. (Vide: *State of Maharashtra & Anr. v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57; *State of Punjab v. Gurmit Singh & Ors.,* (1996) 2 SCC 384; and *State of U.P. v. Pappu @ Yunus & Anr.*, (2005) 3 SCC 594.

27. In view of the provisions of Sections 53 and 54 of the Evidence Act, 1872, unless the character of the prosecutrix itself is in issue, her character is not a relevant factor to be taken into consideration at all.

28. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.

29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by

reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide: *Tukaram & Anr. v. The State of Maharashtra*, (2979) 2 SCC 143; and *Uday v. State of Karnataka*, (2003) 4 SCC 46.

30. The prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.

31. The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtue/unchaste woman that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of."

11. Prosecutrix states that she was born on 15.04.1995. She further states that she had left her school in the year 2010 and studied only upto 8th Class. She failed in her class. She admits that she was born in the State of Haryana and is not sure as to whether her date of birth was recorded anywhere in the Panchayat or with any Authority in that State. She categorically does not deny having been born on 11.01.1991. She does not know the basis on which Sub Divisional Magistrate, Paonta Sahib, recorded her date of birth. She admits to have been employed gainfully, having disclosed her age to be more than 18 years.

12. Surto Devi (PW.2) states that prosecutrix was 17 years of age. She also does not deny her daughter to have been born on 01.11.1991. She admits that only on the basis of her affidavit, the date of birth of the prosecutrix was recorded in the Shivpur Panchayat, under order of SDM, Paonta Sahib.

13. As per Pariwar Register (Ex.PW.7/A), prosecutrix was born on 15.04.1995. This evidence in our considered view is legally inadmissible, for Baal Mukand Aggarwal (PW.7), who proved the same has categorically deposed that the entry was recorded only with the passing of order by the SDM, Paonta Sahib, which we find, undisputedly, not to have been produced on record. Also witness admits cuttings at various pages in the Pariwar Register rendering serious doubt about its authenticity. The register produced in Court is a new register and not the old one where initial entries were recorded. Where is this register? Why it was not produced? are Unanswered queries. Witness admits that at the place where date of birth of the prosecutrix is recorded, there is cutting and as per the certificate, mother of the prosecutrix is Harijan by caste, whereas, in Court prosecutrix states that she is Rajput.

14. Mam Raj Tomar (PW.8) has proved on record school certificate (Ex.PW.8/A) recording age of the prosecutrix to be 15.04.1995, but then even this certificate cannot be said to have been proven, in accordance with law, for the reason that the Principal, who entered and verified such entries, was not examined, also entries recorded are based on the school leaving certificate of primary school, which was neither produced nor proved on record.

15. Even Surto Devi (PW.2) states that no record with regard to registration of birth of the prosecutrix was maintained at a place where she was born. According to her, the date of birth was recorded on the order passed by the SDM, Paonta Sahib, but no such order has been placed on record. Even the Investigating Officer Geeta Ram (PW.15) admits that medical record estimated the age of the prosecutrix to be between 15 to 19 years. Thus, there is no conclusive proof with regard to the exact age of the prosecutrix. Prosecution cannot be said to have established, beyond reasonable doubt, the fact that as on the date of commission of the alleged crime, prosecutrix was below 18 years of age. We find the evidence to be otherwise.

16. In Court, prosecutrix (PW.1) states that in the year 2010, she was studying in Class 8th at Government Senior Secondary School, Paonta Sahib. She admits that she developed intimacy with the accused and became friends. On 13.02.2010, accused telephonically contacted her and asked her to come to Chandigarh, where their marriage would be solemnized. With her friend Kuldeep Kaur (PW.3) she travelled to Chandigarh in a bus, where accused gave Rs.1000/- to Kuldeep Kaur and then made them stay in a Gurudwara for two days. After three days, accused took them to Moginand, where they started residing in a rented accommodation. There accused got them employed. Only after 2-3 days when accused returned to Moginand she was subjected to sexual intercourse on the promise of marriage. After some time, she shifted to Kala Amb and started residing with Kuldeep Kaur. After 2-3 days, accused came to Kala Amb and stayed with her. Though Kuldeep Kaur got married to Sachin, but accused did not solemnize his marriage. However, he continued to sexually assault her. Later on, on telephone accused informed her that he would not be marrying her. On 14.04.2010, she was recovered by the police. Under threat extended by the accused, she did not disclose the incident to anyone. Later on with her mother went to Police Station, Paonta Sahib and lodged the FIR.

17. We do not find this version of the prosecutrix to be truthful or inspiring in confidence. Prosecutrix admits that she developed intimacy with the accused. It is not that accused took her away, forcibly or otherwise, from her village. She voluntarily travelled with her friend to Chandigarh, where accused made them stay in a Gurudwara and also got them employed. Admittedly till that time, accused had not subjected her to sexual intercourse. Prosecutrix admits that she had informed the Deputy Superintendant of Police, Paonta Sahib, of having gone to Chandigarh and stayed at Kala Amb “out of our own sweet will” and that “no bad act was done with me by the accused”. She tries to clarify that this was so done under pressure of the accused, but then she forgets that having returned home, after a period of two months, she was in no contact with him. Noticeably she admits that her love affair with the accused lasted for four years and significantly, he never had any sexual intercourse with her during this period. She admits that wherever she resided there were neighbours. Even after learning that the accused would not be solemnizing marriage, she never protested or informed anyone about the same. She continued to work at Kala Amb till the time she was recovered, when also she did not disclose the incident to anyone. At that time accused had no influence over her. It appears that only when police exerted some pressure that a case was registered. It is not her case that he was either staying with her or was in constant touch.

18. We notice her friend Kuldeep Kaur (PW.3) to have admitted that accused never committed any sexual intercourse with the prosecutrix. All that she states is that accused used to talk to her on phone. She admits having left the village with the prosecutrix; taken employment; hired independent accommodation both at Moginand and Kala Amb; and worked in a Factory. She admits that both were adult and aware of

consequences of their actions. In fact, uncontrovertedly she states that prosecutrix knew that accused already stood engaged with another woman. This witness was not declared hostile or cross-examined by the prosecution. Otherwise shaky and untrustworthy version of the prosecutrix, which we find to be an afterthought, perhaps prompted by her mother, stands contradicted by this witness.

19. Surto Devi (PW.2), mother of the prosecutrix states that on 15.02.2010, she lodged a report with the police. On 14.04.2010, police informed her of the whereabouts of her daughter. She went to the Police Station and found her daughter and Kuldeep Kaur to be there. On inquiry, her daughter started weeping and did not tell anything. Only next day i.e. 15.04.2010 FIR was lodged. Witness admits that her daughter and Kuldeep Kaur had told the police that they left their houses of their own will and started working in a Factory at Kala Amb. Significantly she records presence of Dy.S.P., Paonta Sahib. Crucially no pressure could have been exerted by the accused at that point in time. Prosecutrix was free to disclose whatever she had desired, but did not do so. Why so stands unexplained. It appears that only when she went home, as an afterthought, on the asking of her mother, following day, she lodged the complaint. It is in this backdrop, we find the prosecution not to have established its case.

20. Significantly SI Geeta Ram (PW.15) and other police officials Jeet Singh (PW.13) and Daleep Singh (PW.14) admit that prosecutrix and her friend were voluntarily working in a Factory at Kala Amb. They did not find either of them to be under any pressure, threat or intimidation.

21. We find version of the prosecutrix of having sex with the accused on the promise of marriage not to be inspiring in confidence at all. At no point in time she disclosed such fact either to her friend or her parents. She admits that before police reached her, accused had already disclosed his intent of not marrying her. Yet she did not take any action.

22. Hon'ble the Supreme Court of India in *Vinod Kumar Versus State of Kerala,* (2014) 5 SCC 678, has held as under:-

> "*Finally,* the law has been succinctly clarified in *Kaini Rajan Versus State of Kerala,* (2013) 9 SCC 113. The Court is duty-bound when assessing the presence or absence of consent, to satisfy itself that both the parties are ad idem on essential features; in the case in hand that the prosecutrix was led to believe that her marriage to the appellant had been duly and legally performed. It is not sufficient that she convinced herself of the existence of this factual matrix, without the appellant inducing or persuading her to arrive at that conclusion. It is not possible to convict a person who did not hold out any promise or make any misstatement of the facts or law or who presented a false scenario which had the consequence of inducing the other party into the commission of an act. There may be cases where one party may, owing to his or her own hallucinations, believe in the existence of a scenario which is a mirage and in the creation of which the other party has made no contribution. If the other party is forthright or honest in endeavouring to present the correct picture, such party cannot obviously be found culpable. The following paragraph from *Deelip Singh Versus State of Bihar,* (2005) 1 SCC 88, is extracted (SCC p. 99, para 19)

> "19. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology"."

23. In the given facts and circumstances, the aforesaid ratio is squarely applicable. Prosecutrix was more than 18 years of age. She was mature enough to understand implication of her actions, as also actions of the accused. Undoubtedly she was in love with him. Voluntarily she left her parents' house with her friend and got gainfully employed. For more than two months she stayed at different places and freely moved and travelled from place to place at public places and through public transport. She rented accommodation and started residing. Even according to her, she had sex with the accused much after she had left her house and was employed in a Factory. Quite apparently accused had no intent of deceiving her or else from the very first day, he would have subjected her to sexual intercourse. Also prosecutrix immediately did not disclose anything either to the police or her mother. Witness cannot be said to be reliable and her version to be inspiring in confidence.

24. Thus, to our mind, prosecution has not been able to establish by leading clear, cogent, convincing and reliable piece of evidence so as to prove that accused kidnapped the prosecutrix from the lawful guardianship of her mother, raped her and criminally intimidated the prosecutrix to do away with her life.

25. The Court below, in our considered view, has correctly and completely appreciated the evidence so placed on record by the prosecution. It cannot be said that judgment of trial Court is perverse, illegal, erroneous or based on incorrect and incomplete appreciation of material on record resulting into miscarriage of justice.

26. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Mohammed Ankoos and others* versus *Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94*, since it cannot be said that trial Court has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice, no interference is warranted in the instant case. For all the aforesaid reasons, present appeal, being devoid of merit, is dismissed, so also the pending application(s), if any. Bail bonds furnished by the accused are discharged. Record of the trial Court be immediately sent back.

****

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

Vijay Kumar ...Petitioner
Versus
State of Himachal Pradesh & others ...Respondents

CWP No. 9144 of 2014
Judgment Reserved on 18.9.2015
Date of decision: 23.9.2015

Constitution of India, 1950- Article 226- Petitioner working as Panchayat Sahayak - he failed to supply information sought under the Right to Information Act- a show cause notice was issued to him as to why his contract should not be rescinded under rule 8 (5) of the H.P. Panchyati Raj (Appointment and Condition of Service of Panchyat Sahayak) Rules, 2008- reply was considered and contract was rescinded- appeal was also dismissed – both the orders challenged through a writ petition- held, that under aforesaid rule, the District Panchayat Officer was to satisfy himself that the petitioner had failed to perform his duties assigned to him and then to pass a speaking order- the order passed by the District Panchayat Officer showed that aforesaid rule has not been followed in letter and spirit by him – hence, order passed by District Panchayat Officer and Appellate Authority both quashed with liberty to proceed against the petitioner strictly in accordance with law.

(Para- 3 to 6 and 11 & 12)

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

For the Respondents: Ms.Meenakshi Sharma, Mr. Rupinder Singh, Additional Advocate Generals with Ms.Parul Negi, Deputy Advocate General, for respondents No. 1 to 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

This writ petition has been filed seeking following reliefs:-

"It is, therefore, respectfully prayed that this petition may kindly be allowed. The order dated 13.3.2012, Annexure P-16 and order dated 21.10.2014 Annexure P-20 may kindly be quashed and set aside by issuance of appropriate writ, order or direction as may be deemed necessary in the facts and circumstances of the case."

Facts in brief may be noticed.

2. The petitioner was working as Panchayat Sahayak and is alleged to have failed to supply certain information sought for by private respondent under the Right to Information Act, (for short the 'Act") which ultimately culminated in show cause notice asking him why his contract should not be rescinded under Rule 8 (5) of the H.P. Panchyati Raj (Appointment and Condition of Service of Panchyat Sahayak) Rules, 2008 (for short the 'Rules'). The petitioner filed a detailed reply, but despite that his contract was rescinded vide order dated 13.3.2013 (Annexure P-16), constraining him to file an appeal before the Appellate Authority i.e. Deputy Commissioner, Hamirpur, who too dismissed the same vide

order dated 21.10.2014 (Annexure P-20). Both these orders have been assailed on number of grounds, as taken in the petition.

3. The official respondents have filed the reply justifying their action in rescinding the contract on the ground that the petitioner had been working as Panchayat Sahayak for the last 13 years and therefore, was well aware of the provisions of the 'Act' and was, therefore, duty bound to have supplied the information sought for by the private respondent within the time frame as envisaged under the Act and having failed to do so, the provisions of Rule 8(5) of the Rules have been rightly invoked to rescind the contract of service of the petitioner.

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

4. Rule 8(5) of the Rules reads as under:-

> *"(5) Notwithstanding anything contained in these rules, if it comes to the notice of the Rural Development or Panchyat Raj Department that there has been gross misutilization or embezzlement of funds by the Panchyat Sahayak or he has been guilty of misconduct in the discharge of his duties or has failed to perform the duties assigned to him by the Panchyat Samiti or any authority of the above departments and in pursuance thereof his continuance in the office of the Gram Panchyat is undesirable and the Panchyat Samiti fails to disengage his services by terminating his contract, in that event the Director of Panchyati Raj may direct the District Panchyat Officer concerned or any other officer to conduct an inquiry against such Panchyat Sahayak and the District Panchyat Officer on the basis of inquiry report, after scrutinizing the material on record and satisfying himself may issue the order for termination of contract of the Panchyat Sahayak concerned."*

5. It would be evident from the perusal of the aforesaid rule that District Panchyat Officer is obliged to satisfy himself that there has been a gross misutilization or embezzlement of funds by the Panchyat Sahayak or he has been guilty of misconduct in the discharge of his duties or has failed to perform the duties assigned to him by the Panchyat Samiti or any authority of the Rural Development or Panchyati Raj Department and in pursuance thereof his continuance in the office of Gram Panchyat is undesirable and in case the Panchyat Samiti fails to disengage his services by terminating his contract, in that event the Director of Panchyati Raj may direct the District Panchyat Officer concerned or any other officer to conduct an inquiry against such Panchyat Sahayak and the District Panchyat Officer after scrutinizing the material on record and satisfying himself may issue order for termination of contract of the Panchyat Sahyak concerned.

6. The rule clearly envisages the District Panchyat Officer to perform an affirmative act of satisfying himself and therefore, reasons have to be recorded indicating satisfaction and absence of recording of satisfaction is contrary to the mandate/command of law and makes the decision sensitively susceptible. The District Panchyat Officer is legally obliged to record that he is satisfied after scrutinizing the material on record and after going through the inquiry report that the order of termination of contract of the Panchyat Sahayak is absolutely necessary. The said satisfaction has to be reached before ordering the termination of contract of the Panchyat Sahayak. It would not be an exaggeration to state that the abdication of said power tantamounts to breach of Rule of Law because it not only gives a go by to the warrant of law, but also creates a dent in the basic index of law. Therefore, in case the rule is not followed both in letter and spirit, the action would be

vitiated and can never come within the realm of curability for there has been statutory non-compliance from the very inception.

7. In this background, in case the order of recession of contract passed by respondent No. 4 is perused, it is evidently clear that the same is bereft of any reasons. In fact, respondent No. 4 after reproducing the allegations against the petitioner and reply submitted thereto, has recorded only the following findings to rescind the contract of the petitioner.

> *"That after deep inquiry into the statement made by Shri Vijay Kumar, inquiry report of District Audit Officer-cum-Panchyat Inspector and the reply submitted by him to the Show Cause Notice the allegations of dereliction in discharge of duties, unsuccessful in upkeep of Panchyat record time and again and interpolation in the Panchyat records without codal formalities have been proved against the employee.*
>
> *Therefore, on the basis of above facts the undersigned hereby orders the rescission of contract of Shri Vijay Kumar Panchyat Sahayak (Contract) Gram Panchyat Jamli with immediate effect after completion of required formalities under H.P. Panchyati Raj (Appointment and Conditions of Service of Panchayat Sahayak) Rules 2008."*

8. How respondent No. 4 came to the aforesaid conclusion is not at all forthcoming. Indisputably, the order passed by respondent No. 4 has resulted in civil and evil consequences upon the petitioner. The recording of reasons, therefore, in such case was not an empty formality.

9. Now in case the order passed by the Appellate Authority is perused, it would be noticed that it inturn formulated three points for determination, which are as under:-

> *"i) Has proper opportunity of being heard been provided to Appellant?*
>
> *ii) Is there a case of double jeopardy i.e. being punished for the same mistake twice?*
>
> *iii) Is the punishment disproportionate to the mistake committed?"*

10. After formulating the aforesaid points, it was observed that since the petitioner had been afforded opportunity to explain his position at different stages of the proceedings, therefore, he could not be heard to complain that he had not been afforded an opportunity to be heard. Likewise, the finding regarding double jeopardy was negated by observing that no case was made out since the proceedings had been conducted by two different authorities. Lastly, the issue regarding the punishment being disproportionate was answered against the petitioner by observing that since the petitioner had tempered/misplaced/destroyed the record, no leniency in the matter could be shown.

11. It would be noticed that even this order does not disclose any reasons on the basis of which the Appellate Authority came to the conclusion that the petitioner in fact had committed breach of Rule 8(5) of the Rules, resulting in rescinding of his contract.

12. In absence of any satisfaction having been recorded by the District Panchyat Officer at the first stage, it was incumbent upon the Appellate Authority to have firstly reached a conclusion on the basis of record that the misdemeanor/misconduct etc. on the part of the petitioner in fact falls within sub rule 5 of Rule 8 and it is only thereafter that the points of determination could be framed.

13. It is trite that right of appeal under the statute is a valuable and substantive right conferred by the statute, i.e. H.P. Panchyati Raj Act and Rules framed there under, wherein all questions of law and fact are open for adjudication. Indisputably, both the authorities have failed to record any reasons before drawing their conclusions regarding breach of rules. It is the reasons that have to precede the conclusion and not the other way around.

14. Having said so, both the impugned orders cannot be sustained and accordingly quashed and set aside. Since the action of the respondents is being quashed only on account of procedural technicalities, it shall be open to the respondents, if they so choose to proceed against the petitioner strictly in accordance with law.

With these observations, the petition is allowed as aforesaid, leaving the parties to bear their costs.

****

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

Des Raj ..Appellant

Versus

State of H.P. …Respondent

Cr.A. No. 395/2014
Reserved on: 23.9.2015
Decided on: 24.9.2015

Indian Penal Code, 1860- Sections 363 and 376- **Protection of Children from Sexual Offences Act, 2012-** Section 4- Prosecutrix was student of 9th class- she did not reach home from the school on 14.5.2013- it was found on inquiry that she was seen with the accused- she was found in the room of the accused – prosecutrix stated that accused had told her that she was called by her grand-mother- she was taken to the room where she was raped- testimony of the prosecutrix was corroborated by the witnesses- report of FSL also corroborated the version of the prosecutrix – held, that accused was rightly convicted.

(Para-19 to 21)

For the appellant: Mr. Satyen Vaidya, Sr. Advocate (Legal Aid Counsel) with Mr. Vivek Sharma, Advocate.

For the Respondent: Mr. M.A. Khan, Addl. A.G.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 14.8.2014 rendered by the Special Judge, Kinnaur at Rampur in Sessions Trial No. 26 of 2013 whereby the appellant-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offences punishable under sections 363 and 376 IPC and section

4 of the Protection of Children from Sexual Offences Act, has been convicted and sentenced as under:

a) For offence under section 363 IPC, he is sentenced to simple imprisonment for a period of three years and fine of Rs. 5,000/-. In default, he is to suffer simple imprisonment for a period of three months;

b) For offence punishable under section 376 IPC, he is sentenced to rigorous imprisonment for a period of 10 years and fine of Rs. 10,000/-. In default of payment of fine, he shall suffer rigorous imprisonment for a period of three months; and

c) For offence punishable under section 4 of the Protection of Children from Sexual Offences Act, he is sentenced to rigorous imprisonment for a period of 10 years and fine of Rs. 10,000/-. In default of payment of fine, he shall suffer rigorous imprisonment for a period of three months.

All the sentences were ordered to run concurrently.

2. Case of the prosecution, in a nutshell, is that the prosecutrix was student of 9th class of local Government School. On 14.5.2013, she did not reach home from the school at usual time. Her parents started making search and during this process, came across Sahil son of their neighbour, who told that he had seen the victim going with one non-tribal boy towards upper side. The parents of victim straightway went to the house of landlady Prem Bhagti. Accused was standing there. On inquiry, he feigned ignorance about the victim. However, parents of the victim found her school bag lying in the verandah of the house. They loudly called their daughter. She came out of the room of the accused. Accused fled away towards forest side. FIR was registered. Victim as well as accused were got medically examined at different hospitals. Samples prepared by the medical officers at the time of examination including FTA cards were got examined in F.S.L. Junga. The police investigated the case and the challan was put up in the Court after completing all the codal formalities.

3. Prosecution examined as many as 23 witnesses to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. He has admitted that he was residing as a farm labourer in the village. The prosecutrix was studying in 9th Class in a local school. He has also admitted that parents of the victim had come to him and inquired about her, on which he told that she has gone towards upper side. He has also stated that victim wanted to marry him. He was coming to shop when she met him on the way and asked him to tell another girl to come to school early in the morning as cleaning was to be done in the school. He returned to his home from the shop. Victim was standing near his house. She came to his room and told that she wanted to marry him otherwise she would commit suicide by taking poison. Thereafter, he committed that act. Learned trial Court convicted and sentenced the accused as noticed hereinabove. Hence, this appeal.

4. Mr. Satyen Vaidya, learned Senior Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. M.A. Khan, learned Additional Advocate General has supported the judgment passed by the trial Court.

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

7. PW-1 Dandup Dorje has deposed that the prosecutrix was student of 9th Class in Government High School, Thangi. On 14.5.2013, she did not return home from the school at normal time. He went in search of her and asked the school girls about his daughter and they told that prosecutrix had already come. He went towards Rest House, Thangi. One old lady, whose house was adjoining to the Rest House, advised him to make search of his daughter. His wife also went in search of his daughter. When he was coming back towards his house, Bhag Chand was in his house. He was in the verandah. PW-1 told him that his daughter has not come from the school. He told that his son Sahil has seen the prosecutrix going with one non-tribal boy near Rest House, Thangi. He then went in search of his daughter. They straightway went to the house of Prem Bhagti. When he reached the house of Prem Bhagti, he saw accused in the verandah. He asked the accused whether he has seen his daughter. He told that his daughter has gone towards upper side. He went to the house of Raj Kapoor and asked about his daughter. She told that prosecutrix has not come. He came back. In the meanwhile, his wife also came. They went with accused to his verandah. They saw a school bag lying in the verandah. They asked the accused about their daughter. His wife slapped the accused. In the process, his daughter came out of the room of accused. He asked his wife to ask his daughter what has happened with her. His wife asked his daughter and told him that it was not a case where accused should be let off and the matter should be reported to the police. He filed complaint Ex.PW-1/A. Police came over the spot. Accused and prosecutrix were taken for medical examination.

8. PW-2 Vidya Bhagti has corroborated the statement of PW-1 Dandup Dorje. According to her, the prosecutrix was 13 years and few months old on 14.5.2013.

9. PW-3 Sujata Kumari has deposed that on 14.5.2013 in the evening, parents of prosecutrix called her telephonically and informed that their daughter was missing. She was recovered from the room of Prem Bhagati. They had called the police. She went to the spot. I.O. lifted one mattress and one bed sheet from the room where the prosecutrix was raped. The same were taken into possession vide memo Ex.PW-3/A.

10. PW-4 prosecutrix (name withheld) has deposed that she was studying in Government High School, Thangi in 9th Class. She was 14 years old at that time. On 14.5.2013, after school, she was returning to her house with her friends. Accused was present near Rest House, Thangi. He called her and she went near that road. Accused told that she was called by her grandmother Prem Bhagti. She thought that she must have been called by her grandmother. She went to the house of Prem Bhagti. Accused took her to the room. There was none else in the room. He bolted the door from inside and put her on the bed. Accused then committed rape with her. He put her on the mattress on the floor and again committed rape with her. He committed rape with her 5-6 times. He kept her there for one hour. She heard the voice of her parents at about 5.30 P.M. and came out of the room. Police also came there. She was also taken for medical examination.

11. PW-5 Prem Bhagti has deposed that she had given a separate room to the accused. On 14.5.2013, she had come to Reckong Peo to take medicines. She reached her house at about 9.30 P.M. Her house was locked. Pradhan of Panchayat visited her house with police. Police lifted one mattress and one bed sheet from the room of accused. These articles were taken into possession vide memo Ex.PW-3/A.

12. PW-6 Dr. Manjeet Kumar has examined the accused and issued MLC Ex.PW-6/A.

13. PW-7 Rajwansh Negi has produced the birth certificate of prosecutrix Ex.PW-7/A. It was correct as per the original record. The prosecutrix was admitted in the school on 6.4.2013 and her date of birth was 5.1.2000.

14. PW-8 Chander Kumar has proved the Pariwar register Ex.PW-8/A and birth certificate Ex.PW-8/B.

15. PW-16 Sahil though minor was examined on oath. According to him, he was student of 8th class of Government High School, Thangi. Prosecutrix also used to study in his school. On 14.5.2013, he and prosecutrix were returning to their houses. Prosecutrix was ahead of him. He saw her talking to accused. He went to his house whereas accused and prosecutrix were talking to each other.

16. PW-21 ASI Raj Kumar has deposed that videography of the building was done. Photographs were also taken. The mattress was also taken into possession. Site plan of the room Ex.PW-21/C was prepared.

17. PW-22 Dr. Anupam Gupta has examined the prosecutrix. The age of prosecutrix was 13 years. She has proved MLC Ex.PW-22/A. According to her, sexual activity had occurred with the patient.

18. PW-23 Dula Ram has deposed that the accused was taken to R.H. reckong Peo on 31.5.2013 for taking blood sample for the purpose of DNA. The victim was also called on 1.6.2013 and taken to PHC Mooran for taking blood sample for DNA.

19. The prosecution has proved its case beyond reasonable doubt on the basis of statements of PW-1 Dandup Dorje, PW-2 Vidya Bhagti and PW-4 prosecutrix against the accused. The prosecutrix had gone to school on 14.5.2013. Accused accosted her. He took her to his room rented to him by PW-5 Prem Bhagti. Accused had told her that she was called by her grandmother. She went with the accused. Accused raped her. PW-1 Dandup Dorje and PW-2 Vidya Bhagti went in search of her. The school bag was found lying in the verandah of the room of accused. The incident was narrated by the prosecutrix to her mother. Police was informed. Police came to the spot. Case property was taken into possession. Accused was also medically examined. It has come in the statement of PW-22 Dr. Anupam Gupta that sexual activity had occurred with the prosecutrix. Blood samples of the accused and prosecutrix were also taken for DNA examination vide Ex.PW-23/C and Ex.PW-23/D. According to Ex.PX, one DNA profile completely matched with the DNA profile of the prosecutrix while the other DNA profile completely matched with the DNA profile of the accused. It is also evident from the report of State Forensic Science Laboratory, Junga Ex.PA that human semen and human blood was detected on Ex.-1 (Salwar of prosecutrix), human semen was detected on Ex.-2 (pubic hair of prosecutrix) and blood and human semen was detected on Ex.-3 (vaginal slides of prosecutrix). Human semen was detected on Ex.-6a (trouser of accused). The prosecutrix at the time of incident on 14.5.2013 was a minor.

20. Accordingly, there is no occasion for us to interfere with the well reasoned judgment dated 14.8.2014. The trial court, after correct appreciation of the prosecution evidence, has rightly convicted and sentenced the accused for the offences charged against him.

21. Consequently, in view of the analysis and discussion made herein above, there is no merit in the appeal and the same is dismissed.

****

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

Pamwi Tissue Ltd. ....Petitioner
Versus
Universal Sales Corporation & others. ....Non-Petitioners.

CMPMO No. 355 of 2014
Decided on 24.09.2015

Code of Civil Procedure, 1908- Order 21- Executing Court had closed the right of J.D to file the objections on the ground that sufficient opportunities had been granted to file objections but objections were not filed- one more opportunity granted to the J.D to file objections subject to costs of Rs.1,000/-.

For petitioner : Mr. Diwan Singh Negi, Advocate, vice Counsel.
For Non-Petitioners : None.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Heard. Petition filed under Article 227 of the Constitution of India against the order dated 16.8.2014 passed by learned executing Court i.e. Civil Judge (Sr. Division) Nalagarh District Solan H.P. in Execution Petition No. 4/10 of 2013 titled Universal Sales Corporation & others vs. Chairman-cum-Managing Director Pamwi Tissue Ltd. None appeared on behalf of the non-petitioners despite service. Learned Executing Court has closed the right of JD to file objections on the ground that enough opportunities granted to the JD to file objections but despite enough opportunities granted to JD objections not filed. Learned Advocate appearing on behalf of the petitioner submitted that one more opportunity be granted to the JD to file objections. One more opportunity is granted to the JD to file objections subject to costs of Rs. 1000/- (Rupees one thousand). Order of learned Executing Court dated 16.8.2014 is modified to this extent only. Petitioner is directed to appear before the learned Executing Court on 26.10.2015. If objections are filed before the Executing Court by the JD then learned Executing Court will dispose of the objections expeditiously strictly in accordance with law. No order of costs of litigation. Petition is disposed of. Pending applications if any also disposed of. Dasti copy.

****

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

Parkash Chand & ors. .....Appellants.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 4252 of 2013
Reserved on: September 23, 2015.
Decided on: September 24, 2015.

N.D.P.S. Act, 1985- Section 20- A car was checked which was containing 26 kg 150 grams of charas- accused were travelling in the vehicle- independent witnesses had not supported

the prosecution version- personal search of the accused were conducted in the police station- however, no option was given to the accused to be searched before Magistrate or Gazetted Officer - independent witnesses were drivers by profession- no local residents were associated- held, that in these circumstances, prosecution version was not proved- accused acquitted. (Para-16 to 22)

Cases referred:
Dilip and another vrs. State of M.P., (2007) 1 SCC 450
State of Delhi vrs. Ram Avtar alias Rama, (2011) 12 SCC 207

For the appellants: Mr. G.R.Palsra, Advocate.
For the respondent: Mr. P.M.Negi, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment and order dated 21.11.2013 and 28.11.2013, respectively, rendered by the learned Special Judge, Ghumarwin, Distt. Bilaspur, (Camp at Bilaspur), H.P. in Sessions Trial No.4/3 of 2013, whereby the appellants-accused (hereinafter referred to as accused) who were charged with and tried for offences punishable under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act), have been convicted and sentenced to undergo rigorous imprisonment for twenty years each and to pay fine of rupees two lac each and in default of payment of fine they were ordered to suffer further simple imprisonment for two years each for the commission of offence punishable under Section 20(b) (ii) (C) of the ND & PS Act. They were also convicted and sentenced to undergo rigorous imprisonment for twenty years each and to pay fine of rupees two lac each and in default of payment of fine they were ordered to suffer further simple imprisonment for two years each, for the commission of offence punishable under Section 29 of the ND & PS Act.

2. The case of the prosecution, in a nut shell, is that ASI Sewa Singh (PW-31), alongwith other police personnel had set up a Naka on 6.11.2012 near Hilltop Hotel, Swarghat during day time. The secret information was received during the nakabandi to the effect that accused were transporting charas in huge quantity in vehicle No. DL-3CAY-7668 from Mandi towards Delhi. An intimation under Section 42 of the ND & PS Act, Ext. PW-3/A was reduced into writing and sent through Const. Desh Raj (PW-5) to DSP Naina Devi Ji. ASI Sewa Singh also informed DSP Manohar Lal on telephone in that regard. Const. Desh Raj (PW-5) handed over this information to DSP Manohar Lal (PW-3) at Kenchi More and in turn DSP made an endorsement over the same. Witnesses PW-1 Kartar Singh and PW-2 Pyare Lal were associated at the naka and thereafter small vehicles passing by were checked. At about 2:00 PM, a black coloured Skoda Car bearing regn. No. DL-3CAY-7668 came from the Bilaspur side. It was signaled to stop. Accused were sitting in the vehicle. Driver revealed his name as Prakash Chand. The antecedents of accused were verified. The person sitting on the front seat of the vehicle disclosed his name as Krishan Lal and the other person sitting on the back seat disclosed his name as Raj Kumar. The smell of charas was emanating from the vehicle. The vehicle alongwith the accused, witnesses and the police officials was taken to PS Swarghat. There DSP Manohar Lal met them. Search of the vehicle was conducted by ASI Sewa Singh in their presence. Accused were asked to come out of the vehicle. Thereafter, its dicky was opened wherefrom three bags containing

belongings of accused were found. On opening the lock of the back seat, a hole was found there in the middle of the iron sheet. On checking the hole, polythene envelopes being yellowish and transparent were recovered. The polythene envelopes were found to be containing charas on the basis of experience. The recovered polythene envelopes were taken out of the vehicle and separated. Charas in the form of pancakes was found in the envelopes. It weighed 26 kg 150 grams. The polythene envelopes were also separately weighed and found to be 2 kgs, 750 grams. The lot of charas Ext. P-3, weighing 13 kg 850 grams was put in a black coloured bag (Ext. P-2) bearing mark "Perfect" and was sealed in a cloth parcel (Ext. P-1), with 12 impressions of seal "M". The other lot of charas Ext. P-6, weighing 12 kg. 300 grams was put in a light green coloured bag (Ext. P-5), bearing mark "Perfect" and was sealed in a cloth parcel (Ext. P-4), with 12 impressions of seal "M". The empty polythene envelopes (Ext. P-8) and packing tape Ext. P-9, were put in a gunny bag and thereafter sealed in a cloth parcel (Ext. P-7) with 12 impressions of seal "M". The sample of seals was also taken on pieces of plain cloth. The seal after use was handed over to PW-1 Kartar Singh. NCB form Ext. PW-31/A was filled in triplicate. The parcels were marked separately. The parcel containing 13 kg. 850 grams of charas was marked as P-1, the other parcel containing the remaining charas was marked as P-2 and the parcel containing empty polythene envelopes was marked as P-3. Rukka Ext. PW-23/A was prepared and handed over to HHC Pradeep Kumar (PW-24) with the direction to carry the same to Police Station. He handed over the rukka to HC Thakur Dass (PW-23) and on the basis of rukka FIR Ext. PW-23/B was registered. The accused were arrested. The case property was handed over to HC Thakur Dass. He made endorsement in Malkhana register at Sr. No. 35. He sent the parcels, NCB form in triplicate, sample seal "M", copy of seizure memo and FIR to FSL, Junga for analysis through Const. Bal Krishan (PW-16) on 8.11.2012 vide RC No. 51/2012 vide Ext. PW-23/D. The result of the chemical analysis is Ext. PA. According to the analysis, the samples were found to be of charas and contained 38.24% and 38.65% resin in them. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 31 witnesses to prove its case. The accused were also examined under Section 313 Cr.P.C. The accused have denied having committed any offence. According to them, nothing was recovered from them and they were falsely implicated. The learned trial Court convicted the accused, as noticed hereinabove.

4. Mr. G.R.Palsra, Advocate, appearing on behalf of the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. P.M.Negi, Dy. AG, has supported the judgment/order of the learned trial Court dated 21.11.2013/28.11.2013.

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

6. PW-1, Kartar Singh deposed that on 6.11.2012, a naka was put up by the police officials at Swarghat. During day time at around 12-12:30 PM, vehicles were being stopped for checking. A black coloured car was also stopped for checking by the police. He didn't remember its registration number. The vehicle was taken to the Police Station Swarghat. It was checked in his presence. On opening the back seat of the vehicle, three bags containing clothes were found from its dicky. From behind the back seat, polythene envelopes were also recovered but he could not remember as to how many polythenes were recovered. He didn't know as to what was contained there in the polythenes. There were three persons occupying the car. In his presence, the polythene envelopes were neither

checked nor weighed. Many people were present there and thereafter, he went away. He was declared hostile and cross-examined by the learned P.P. In his cross-examination by the learned P.P., he admitted that on checking the back seat of the vehicle, a hole was found in it. He admitted that from inside the hole, polythene envelopes sealed with yellow coloured packing tape were found. He did not know that these packets were emitting smell of charas. He denied that after removing the packing tape, black coloured substance, being charas was recovered from inside the polythene envelopes. He denied that Const. Pawan Kumar was sent to bring a scale. He denied that an electronic scale was brought and on weighing, one ploythene envelope was found containing 13 kgs. 850 grams charas and the other was containing 12 kgs. 300 grams charas. He also denied the suggestion that the charas so recovered was separately sealed in two cloth parcels while the polythene envelopes were separately sealed in another cloth parcels. He also denied that all the three parcels were duly sealed with 12 seal impressions each with seal "M". He admitted that the specimen of seal "M" was taken on a piece of plain cloth. He denied that the seal was handed over to him after use. He denied that parcels were marked as P-1, P-2 and P-3, respectively. He also denied that NCB forms in triplicate were filled in. He admitted that parcel alongwith the vehicle and documents were seized by the police in his presence and in the presence of Pyare Lal, vide memo Ext. PW-1/A. He admitted his signatures on memo Ext. PW-1/A. He denied the suggestion that the accused persons had also appended their signatures on PW-1/A in his presence and in the presence of Pyare Lal. The contents of Ext. PW-1/A were never read over and explained to him. In his cross-examination, by the learned defence counsel, he admitted that he was working as driver for the last 15 years and because of his profession, police officials frequently meet him. He admitted that he being a local, police officials of PS Swarghat are known to him. He also admitted that nearby PS Swarghat, there are number of shops and residences. The bazaar was open on that day. He also admitted that at Swarghat, BDC member, Pradhan and members of the Panchayat also reside. He admitted that neither the naka was put up by the police at 11:00 -12:00 O' Clock nor he was there at that time. He also admitted that in his presence, on checking the vehicle, only three bags filled with clothes were found and nothing else was recovered from inside the vehicle. The seats of the vehicle as well as its dickey were also checked. There was no hole in the back seat of the vehicle. He signed memo PW-1/A in good faith. Const. Pradeep Kumar and DSP had not put their signatures on memo Ext. PW-1/A in his presence. In his further cross-examination, he also admitted that generally, he was associated by the police, being local, at the time of nakabandi.

7. PW-2 Pyare Lal deposed that nothing has happened in his presence. No vehicle was stopped and searched in his presence and no charas was recovered. He was also declared hostile and cross-examined by the learned P.P. He did not know that on 6.11.2012, a naka was put up by the police officials near Hilltop Hotel, Swarghat. He was not present there. He did not know that Kartar Singh (PW-1) was also present there. He denied the suggestion that a vehicle bearing No. DL-3CAY-7668 coming from the side of Bilaspur was stopped by the police officials at the place of naka. He admitted the suggestion that inside the hole, polythene envelopes were kept sealed with cello tape. He did not know that on removing the tape, flat shaped black coloured substance was recovered from them. He admitted that the said substance was charas. He denied the suggestion that charas was weighed in his presence. He also denied that the charas so recovered was sealed in two parcels, while the polythene envelopes were sealed in another parcel. He also denied the sealing proceedings on the spot. He admitted his signatures on memo Ext. PW-1/A.

8. PW-3 DSP Manohar Lal deposed that on 6.11.2012, he was informed on telephone that accused in his vehicle bearing No. DL-CAY-7668 was transporting charas in

huge quantity from Mandi towards Delhi. When he reached Kanchi More at Sri Nina Devi Ji, he had received information. Const. Desh Raj had presented before him information in writing under Section 42(2) of the ND & PS Act. He made endorsement over the same. Thereafter, he brought Constable Desh Raj in his official vehicle to PS Sawarghat. The Skoda car was found at the Police Station. The vehicle was searched. During the search of the vehicle from inside the metal box, a hole was found on the back seat. From the hole a number of packets sealed with packing tape were recovered. These contained charas. It weighed 26 kg150 grams. The sealing proceedings were completed on the spot. In his cross-examination, he has admitted that the personal search of the accused persons was also conducted by the I.O. and thereafter the vehicle was searched at Hilltop Hotel. He did not take personal search of the accused persons. He admitted that there were big shopkeepers at Swarghat.

9. PW-4 Const. Pawan Kumar deposed the manner in which the vehicle was signaled to stop, search, sealing and sampling proceedings were completed on the spot. In his cross-examination, he admitted that during that period thousands of vehicles had crossed. He also admitted that both the independent witnesses were drivers by profession, having their own vehicles with private numbers.

10. PW-5 Const. Desh Raj has taken the information to PW-3 DSP Manohar Lal.

11. PW-16 Const. Bal Krishan deposed that on 8.11.2012, MHC Thakur Dass had handed over to him the case property for depositing at FSL, Junga, vide RC No. 51/12. He was accompanied by Const. Gopal Chand as security, since the contraband was in huge quantity.

12. PW-18 Const. Sarwan Kumar deposed that on 26.11.2012, he was sent by MHC Thakur Dass to FSL, Junga to bring report of the Chemical Examiner and the case property pertaining to case FIR No. 80/2002. He brought the report as well as the case property i.e. parcels P-1 and P-2 containing charas and handed over the same to MHC Thakur Dass.

13. PW-23 HC Thakur Dass deposed that HHC Pardeep brought rukka Ext. PW-23/A to the Police Station, on the basis of which, he registered FIR Ext. PW-23/B. On 6.11.2012, the case property was deposited with him by ASI Sewa Singh. He made entry in this regard in Malkhana register at Sr. No. 35. On 8.11.2012, he sent the case property for its analysis to FSL, Junga through Const. Bal Krishan vide RC No. 51/2012.

14. PW-24 HHC Pardeep Kumar also deposed the manner in which the vehicle was signaled to stop, search, sealing and sampling proceedings were completed on the spot on 6.11.2012. In his cross-examination, he admitted that from 12:45 PM till 2:00 PM, the vehicles were checked. Naka was put by the police officials, who were checking the vehicles. He also admitted that the accused were personally searched at the Police Station at about 2:45 PM by ASI Sewa Singh. He did not remember whether any document was prepared in that regard. The option of the accused was taken. He didn't remember whether any document was prepared or not. The personal search of the accused persons was taken in the presence of local witnesses and Dy. Superintendent of Police. Local witnesses were called on to the spot by ASI Sewa Singh at 1:25 PM.

15. PW-31 ASI Sewa Singh also deposed the manner in which the vehicle was signaled to stop, search, sealing and sampling proceedings were completed on the spot on 6.11.2012. Witnesses Kartar Singh and Pyare Lal were associated in the naka party and the small vehicles passing by were checked. He admitted in his cross-examination that in front

of the Police Station, there were number of shops of big traders and numbers of people reside there. The personal search of the accused was taken only after their arrest at 10:30 PM.

16. The case of the prosecution has not been supported by the independent witnesses PW-1 Kartar Singh and PW-2 Pyare Lal. According to PW-1 Kartar Singh, in his presence, the polythene envelopes were neither checked nor weighed. He also denied that the charas was weighed in his presence and the sealing proceedings were conducted on the spot. In his cross-examination, he admitted that near the Police Station Swarghat, there were number of shops and residences. However, he has identified his signatures on memo Ext. PW-1/A. Similarly, PW-2 Pyare Lal has deposed that nothing was recovered in his presence. Although, he has also identified his signatures on memo Ext. PW-1/A, but has denied the suggestion the manner in which the search, seizure and sealing proceedings were completed on the spot.

17. The accused were travelling in Skoda Car bearing No. DL-3CAY-7668, black in colour. The secret information was sent to PW-3 DSP Manohar Lal vide memo Ext. PW-3/A. It was carried to him by PW-5 Const. Desh Raj. PW-3 DSP Manohar Lal, in his cross-examination, has stated that personal search of the accused persons was also carried out by the I.O. and thereafter the vehicle was searched at Hilltop Hotel, Swarghat. PW-24 HC Pardeep Kumar has also admitted that the accused were personally searched at the Police Station at about 2:45 PM by ASI Sewa Singh. He did not remember whether any document was prepared in that regard and option of the accused was taken. He did not remember whether any document was prepared or not. The personal search of the accused were taken in the presence of local witnesses and DSP and the local witnesses were called on to the spot by ASI Sewa Singh at 1:25 PM. PW-31 ASI Sewa Singh has deposed that the personal search of the accused was taken at 10:30 PM after their arrest. However, the fact of the matter is that as per the statement of PW-3 DSP Manohar Lal, PW-24 HHC Pardeep Kumar, the personal search of the accused persons was undertaken. PW-24 HHC Pardeep Kumar deposed in particular that the option of the accused persons was taken but he did not remember as to any document in this regard was prepared or not. Since the personal search of the accused was undertaken, Section 50 of the ND & PS Act was to be complied with. The accused were required to be apprised of their legal right to be searched before the Executive Magistrate or the Gazetted Officer. The personal search of the accused was not required to be carried out since the contraband was recovered from the vehicle but despite that the personal search of the accused was carried out and that too without following the mandate of Section 50 of the ND & PS Act. Section 50 of the ND & PS Act is mandatory. Thus, the entire trial is vitiated for non-compliance with mandatory provisions of Section 50 of the Act.

18. In the case of ***Dilip and another vrs. State of M.P.,*** reported in ***(2007) 1 SCC 450,*** their lordships of the Hon'ble Supreme Court have held that the provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but, keeping in view the fact that the person of the appellants was also searched, it was obligatory to comply with the said provisions. It has been held as follows:

> "12. Before seizure of the contraband from the scooter, personal search of Appellants had been carried out and, admittedly, even at that time the provisions of Section 50 of the Act, although required in law, had not been complied with.
>
> 16. In this case, the provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned,

but, keeping in view the fact that the persons of the appellants were also searched, it was obligatory on the part of P.W.10 to comply with the said provisions. It was not done."

19. In the case of ***State of Delhi vrs. Ram Avtar alias Rama,*** reported in ***(2011) 12 SCC 207,*** their lordships of the Hon'ble Supreme Court have held that when a safeguard or a right is provided, favouring the accused, compliance thereto should be strictly complied with. The theory of `substantial compliance' would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudices against the suspect. Their lordships have further held that non-compliance of the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial. It has been held as follows:

"27. It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance thereto should be strictly construed. As already held by the Constitution Bench in the case of Vijaysinh Chandubha Jadeja (supra), the theory of `substantial compliance' would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudices against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance thereof must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right. The officer had prior information of the raid; thus, he was expected to be prepared for carrying out his duties of investigation in accordance with the provisions of Section 50 of the Act. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Non-compliance of the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial."

20. PW-1 Kartar Singh in his cross-examination has admitted that near the Police Station Swarghat, there were number of shops and residences. PW-3 DSP Manohar Lal has also admitted in his cross-examination that there were shops at Swarghat. PW-31 ASI Sewa Singh has also admitted in his cross-examination that in front of the Police Station, there were number of shops of big traders and number of people reside there.

21. The prosecution has associated PW-1 Kartar Singh and PW-2 Pyare Lal as witnesses, though on the spot, there were residences and shops in existence. The prosecution, instead of associating PW-1 Kartar Singh and PW-2 Pyare Lal, who are drivers by profession, should have associated independent witnesses from the nearby locality. PW-1 Kartar Singh, in his cross-examination has admitted that he was associated by the police, being a local, at the time of Nakabandi, generally. It was not an isolated or secluded place where the vehicle was intercepted. The independent witnesses, though available, were not associated by the police to inspire confidence, the manner in which the search, seizure and sealing proceedings were completed on the spot. Neither the prosecution has complied with Section 50 of the ND & PS Act, nor were the independent witnesses, though available, associated during the search, sealing and sampling proceedings and thus vitiating the entire trial.

22. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment and order of conviction and sentence dated 21.11.2013 and 28.11.2013, respectively, rendered by the learned Special Judge, Ghumarwin, Distt. Bilaspur, (Camp at Bilaspur), H.P., in Sessions Trial No. 4/3 of 2013, is set aside. Accused are acquitted of the charges framed against them. Fine amount, if any, already deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case.

23. The Registry is directed to prepare the release warrants of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

****

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

Rajesh Kumar Nanda son of Kishan Chand Nanda .....Petitioner.

Vs.

State of Himachal Pradesh. .....Non-petitioner.

Cr.MP(M) No.1355 of 2015.
Order reserved on: 18.9.2015.
Date of Order: September 24, 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the applicant for the 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 the larger interest of the public and State- 43 bags of the fake cement were found in the shop of the applicant- fake cement endangers human life- custodial interrogation is necessary to locate the manufacturer- interest of public and State would be prejudiced by releasing the applicant on bail- petition dismissed. (Para-6 to 9)

Cases referred:

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

The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

For the petitioner: Mr. B.S.Thakur, Advocate.

For non-petitioner. Mr. J.S.Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail relating to FIR No. 96 of 2015 dated 10.7.2015 registered under Sections 420 and 120-B of Indian Penal Code at Police Station Nadaun District Hamirpur H.P.

2. It is pleaded that petitioner is innocent and petitioner has been falsely implicated in the present case. It is further pleaded that other co-accused have already been released on bail and no recovery is to be effected from the petitioner. It is pleaded that petitioner is only bread earner in the family. It is further pleaded that petitioner is the father of two children. It is further pleaded that petitioner will abide by all terms and conditions imposed by the Court and will join investigation as and when required by investigating officer. It is further pleaded that petitioner will not leave India without prior permission of Court. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. As per police report 43 bags of fake cement was found from the shop of petitioner. There is recital in police report that gang is operating in the area which manufactures fake cement. There is further recital in police report that fake cement would endanger human life and would also endanger walls and lintels raised with fake cement. There is further recital in police report that custodial interrogation of petitioner is essential in present case. 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 petitioner and learned Assistant Advocate General appearing on behalf of State and also perused entire record carefully.

Reasons for finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when 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 petitioner that any condition imposed by the Court will be binding upon the petitioner and petitioner will join investigation of the case and on this ground anticipatory bail application be allowed is rejected being devoid of any force for the reason hereinafter. 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 petitioner are heinous and grave in nature qua possession of 43 bags of fake cement in the shop of petitioner. Court is of the opinion that no one can be allowed to gain monetary benefit at the cost of general public. Fake cement is sold to the general public for construction purpose. Fake cement will endanger human life and walls and lintels raised with fake cement would likely to collapse leading to casualties of general public. Court is of the opinion that in order to locate the gang which is manufacturing fake cement custodial interrogation of the petitioner is essential in the present case. Court is of the opinion that it is not expedient in the ends of justice to release the petitioner on anticipatory bail at this stage keeping in view gravity of criminal offence.

Court is of the opinion that if petitioner is released on anticipatory bail at this stage then interest of general public and State will be adversely effected.

8. Submission of learned Advocate appearing on behalf of petitioner that other co-accused already released on bail and on the concept of parity present bail application be allowed is rejected being devoid of any force for the reason hereinafter mentioned. Other co-accused i.e. driver was simply carrying fake cement in the vehicle and there is no allegation against the driver that driver is active member of the gang which is manufacturing fake cement. On the contrary allegations against the petitioner are very heinous and grave in nature that petitioner is active member of the gang which is selling fake cement to general public. There is positive allegation against the petitioner that 43 bags of fake cement were found from the shop of petitioner.

9. Submission of learned Assistant Advocate General appearing on behalf of non-petitioner that custodial investigation of the petitioner is essential in the present case in order to locate all gang members who are manufacturing fake cement is accepted for the reasons hereinafter mentioned. It is held that custodial investigation of the petitioner is essential in present case in order to locate the gang which is manufacturing and supplying fake cement to general public. As per police report owner of factory who is manufacturing fake cement is not arrested till date. In view of above stated facts it is held that it is not expedient in the ends of justice to release the petitioner on anticipatory bail in the present case at the initial stage of investigation keeping in view the gravity of criminal offence. Point No.1 is answered in negative.

Point No.2 (Final Order).

10. 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 petitioner 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. Anticipatory bail application is disposed of. All pending application(s) if any are also disposed of.

****

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

Vijay Kumar .....Petitioner.

Versus

State of H.P. and another ..... Respondents.

Cr.MMO No.283 of 2015.
Date of decision: 24.09.2015.

Code of Criminal Procedure, 1973- Section 482- An FIR under Sections 279, 337 and 201 of IPC and Section 187 of M.V. Act was registered against the petitioner which resulted in initiation of criminal proceedings against the petitioner in the Court of Judicial Magistrate-petitioner stated in the petition that the injured had entered into a compromise with him and FIR was lodged due to some misunderstanding – injured also appeared before the Court and stated that he got perplexed on seeing the motor-cycle and thereby lost his control and fell down on the road, hence, he had no objection for quashing the FIR - held, that taking into account the statement of the injured and the fact that offence is not against the State and

the trial will be a futile exercise, it is a fit case where the FIR can be quashed –FIR and proceedings pending the court of Judicial Magistrate quashed. (Para-3, 4, 6 and 8)

Case referred:
Narinder Singh & Ors. v. State of Punjab & Anr. JT 2014 (4) SC 573

For the Petitioner	:	Mr.N.K.Thakur, Senior Advocate with Mr.Ramesh Sharma, Advocate.
For the Respondents	:	Ms.Meenakshi Sharma and Mr.Rupinder Singh, Additional Advocate Generals with Ms.Parul Negi, Deputy Advocate General, for respondent No.1. Mr.Rohit Bharoll, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

***Tarlok Singh Chauhan, Judge* (Oral).**

This petition under Section 482 of the Code of Criminal Procedure (for short 'Code') has been preferred by the petitioner for quashing FIR No.292 of 2012, dated 15.11.2012, under Sections 279, 337, 201 IPC and Section 187 of the Motor Vehicles Act, registered at Police Station, Una Sadar, and consequent proceedings in criminal case bearing No.57-1-2013 titled as 'State versus Vijay Kumar' pending before the Court of learned Judicial Magistrate Ist Class, Court No.IV, Una.

2. Brief facts are that one Nikhil Raizada lodged the aforesaid FIR with the Police Station Una Sadar on the allegation that when he was coming to 'Thakur Market' with his grand-father Shri Bidhi Chand, his grand-father was hit by a motorcycle bearing No.HP20D-1460 being driven by the petitioner. It is further stated the present case was registered against the petitioner due to some misunderstanding.

3. Today, the petitioner and respondent No.2 are present before this Court and identified as such by their respective counsel(s). It is stated by learned counsel for the parties that they have compromised the matter amicably without any pressure, coercion and undue influence and compromise Annexure P-3 to this effect has been placed on the case file. It is stated by respondent No.2 in the compromise that he got perplexed on seeing the motorcycle bearing No.HP20D-1460 and thereby lost his control and fell down on the road. He has further stated that he has no objection in case the aforesaid FIR is quashed.

4. Though the State has expressed its slight reservation regarding compounding of the offence but I find that this is not such wherein the offences for which the petitioner has been charged can be *stricto sensu* held to be the offences against the State. Even otherwise, once respondent No.2 has compromised the matter, the possibility of conviction is remote and bleak and the continuation of the criminal case against the petitioner would put the petitioner to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case.

5. In ***Narinder Singh & Ors. v. State of Punjab & Anr. JT 2014 (4) SC 573*** the Hon'ble Supreme Court after summing up the legal position has laid down the following guidelines for the High Court in giving adequate treatment to the settlement between the parties and exercising its powers under Section 482 of the Code while accepting the

settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings, which reads thus:-

> *"(I) Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.*
>
> *(II) When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:*
>
> *(i) ends of justice, or*
>
> *(ii) to prevent abuse of the process of any Court.*
>
> *While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.*
>
> *(III)Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.*
>
> *(IV)On the other, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.*
>
> *(V)While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.*
>
> *(VI)Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the*

parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

(VII) While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

6. Keeping in view the aforesaid guidelines, it is not disputed that the parties have reached a settlement and on that basis have preferred the present proceedings seeking quashment of the FIR. Once the respondent No.2 does not want to hold the petitioner responsible, the quashing of such FIR would definitely be to secure the ends of justice and to prevent abuse of process of the Court.

7. The facts of this case otherwise do not in any manner fall within the exceptions laid down by the Hon'ble Supreme Court where compromise cannot be entered into or the proceedings cannot be quashed.

8. Thus, taking holistic view of the matter and looking into all attending facts and circumstances, I find this case to be a fit case to exercise powers under Section 482 of the Code and accordingly FIR No. 292 of 2012, dated 15.11.2012, under Sections 279, 337, 201 IPC and Section 187 of the Motor Vehicles Act, registered at Police Station, Una Sadar, is ordered to be quashed. Since FIR No.292 of 2012, dated 15.11.2012, under Sections 279, 337, 201 IPC and Section 187 of the Motor Vehicles Act, registered at Police Station, Una Sadar, has been quashed, the consequent proceedings in Criminal Case bearing No.57-1-2013 titled as 'State versus Vijay Kumar' pending before the Court of learned Judicial Magistrate Ist Class, Court No. IV, Una, are thereby rendered infructuous. However, the same are expressly quashed so as to obviate any confusion.

9. The petition stands allowed in the aforesaid terms.

****

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

Dinesh Mohan .....Petitioner.
Versus
Kavita alias Kamlesh .....Respondent.

Civil Revision No.75 of 2015.
Judgment reserved on :24.09.2015.
Date of Decision: September 28th, 2015.

Code of Civil Procedure, 1908- Section 115- **Hindu Marriage Act, 1955-** Section 24- Court awarded maintenance pendente lite @ Rs. 7,000/- per month along with litigation expenses of Rs. 10,000/- to the wife - husband feeling aggrieved challenged the order on the ground that his income was meager and, therefore, maintenance was wrongly awarded- held, that husband is able-bodied person and the wife has a child to be looked after and maintained- child was in need of admission fees, tuition fees, school uniform etc., apart from the basic needs- it has to be remembered that when a woman leaves matrimonial home, she is deprived of many comforts- only comfort law can impose is that the husband is bound to give monetary comfort- taking into account the facts and circumstances of the case, the maintenance amount and litigation expenses have rightly been awarded- order does not suffer from any illegality, irregularity or perversity- Revision petition dismissed.

(Para-13 to 17)

Cases referred:

Gangu Pundlik Waghmare versus Pundlik Maroti Waghmare and another AIR 1979 Bombay 264

Nishan Singh versus Bhupendra Kaur 1985 (2) HLR 321

Chander Parkash Bodh Raj versus Smt. Shila Rani Chander Prakash AIR 1968 Delhi 174

Shamima Farooqui versus Shahid Khan (2015) 5 SCC 705

Vipul Lakhanpal versus Smt. Pooja Sharma, I L R 2015 (III) HP 896

For the Petitioner: Mr.Ramakant Sharma, Senior Advocate with Mr. Basant Thakur, Advocate.

For the Respondent : Ms.Anjali Soni Verma, Advocate, legal aid counsel.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This revision petition under Section 115 of the Code of Civil Procedure is directed against the order passed by the learned Additional District Judge-I, Solan, on 23.04.2015 whereby he awarded maintenance pendente lite at the rate of Rs.7,000/- per month alongwith litigation expenses at Rs.10,000/- to the respondent.

2. The relationship between the parties is not disputed and the petitioner has only questioned the basis upon which the learned Court below awarded the maintenance.

3. It is vehemently contended by Shri Ramakant Sharma, Senior Advocate assisted by Shri Basant Thakur, Advocate that before passing the impugned order, it was incumbent upon the Court below to have taken into consideration the pleadings and other material placed on record and only after weighing the same, passed the impugned order.

4. In support of his submissions, reliance has been placed upon the judgment passed by the Bombay High Court in ***Smt.Gangu Pundlik Waghmare*** *versus* ***Pundlik Maroti Waghmare and another AIR 1979 Bombay 264*** and judgment of the Madhya Pradesh High Court in ***Nishan Singh*** *versus* ***Bhupendra Kaur 1985 (2) HLR 321***.

5. I do not think that there could be any quarrel with the submissions made by learned counsel for the petitioner and the proposition of law as contained in the aforesaid judgments. The order of grant of maintenance cannot obviously be passed mechanically and has to be passed only after evaluating the pleadings and other material available on record.

6. The applicant (respondent herein) in her application has averred that she is doing temporary work in 'MNREGA' Scheme which is available only for 90 days in a year and her total income is less than Rs.1,500/- per month which is too meagre to sustain her. That apart, the daughter of the parties is also residing with her and is studying in 4th standard in a Public School. Her admission fee alone is Rs.4,000/- per annum and besides that Rs.650/- per month is being paid as regular fee. That apart, there are other expenses also which are required to be incurred for the purchase of school uniform including shoes, school bags, books etc. It is also averred that the petitioner was earning Rs.50,000/- per month and is having a flourishing business/shop at Main Bus-Stand, Chandi, Tehsil Kasauli and besides this has also kept two goods carrying vehicles and, therefore, his income from all sources was more than Rs.50,000/- per month.

7. The petitioner in reply to the application chose only to deny most of these averments and it was claimed that he had provided to the respondent two rooms space in the ancestral house. Further, the respondent had been managing entire share of agricultural land in the ancestral property by employing labourers and was deriving Rs.10,000/- per month from the same. That apart, she is also selling grass. Lastly, it was contended that the petitioner is providing all the expenses to his daughter in the school. It was also averred that the respondent is employed in the school from where she is earning Rs.5,000/- per month and as such the income of the respondent from all sources is more than Rs.15,000/- .

8. In the matter of making an order of interim maintenance, the Court is to be guided by the criteria provided in the Section itself namely the means of the parties and also after taking into account incidental and other relevant factors like social status, the background from which the parties come from and the economical dependence of the wife/child upon the husband/father. Since an order for interim maintenance by its very nature is temporary, a detailed and elaborate exercise by the Court may not be necessary. But, at the same time, the Court has got to take all the relevant factors into account and arrive at a proper amount having regard to the factors which are mentioned in the statute.

9. A duty is fastened upon the Court to award maintenance pendente lite in such a manner so that spouse and the child can live with dignity according to their social status. Factors which can be culled out as required to be kept in mind while awarding interim maintenance are as under:-

(i) Status of the parties;

(ii) Reasonable wants of the claimant;

(iii) The income and property of the claimant;

(iv) Number of persons to be maintained by the husband;

(v) Liabilities, if any, of the husband;

(vi) The amount required by the wife to live a similar life-style as she enjoyed in the matrimonial home keeping in view food, clothing, shelter, educational and medical needs of the wife and the children, if any, residing with the wife.

10. The learned Court below accorded the following reasons for awarding the maintenance and litigation expenses.

> *"5. Respondent-wife has stated that she has no independent source of income. However, she has stated that she is employed in MNREGA and getting less than* Rs.1,*500/- per month. She has school going minor child with her, who is studying in 4th standard. She is unable to support herself and her child due to this meagre income, which she is earning being employed under MNREGA. Petitioner-husband is stated to have shop at Main Bazar, Chandi and having goods carrying vehicles. This means apparently that husband has sufficient income.*
>
> *6. Thus, having regard to the facts and circumstances of the case, coupled with the discussion aforesaid, it is deemed just and fit to award maintenance pendente lite to respondent-wife @* Rs.*7,000/- per month along with litigation expenses i.e.* Rs.*10,000/-. Accordingly, the petition stands disposed of. Any observations made hereinabove are without prejudice to the merits of the case. The file, after due completion, be tagged with the main file."*

11. No doubt, the findings recorded by the learned Court below are not happily worded, but, this Court cannot ignore the fact that the award of maintenance is not solely for the benefit of the respondent herein, but is also for the benefit of the minor child, who admittedly is studying in a Public School. Even if, the maintenance of Rs.100/- per day is considered as sufficient for the purpose of sustenance alone, even then the maintenance for two persons would work out to Rs.6,000/- per month.

12. That apart, the Court cannot also be oblivious to the fact that apart from sustenance, the respondent and her child would be incurring some other expenses for their upkeep, purchase clothes, shoes, utensils etc. etc. Once the minor child is school going, then there would be additional expenses to be incurred towards admission fees, tuition fees, school uniform etc. and, therefore, the additional amount of Rs.1,000/- per month i.e. roughly Rs.33/- per day for two persons can by no stretch of imagination in the present day cost of living, growing inflation and purchasing power of rupee, be termed to be a luxury. The interim maintenance not only includes educational expenses of the child, but it is also required to ensure that the child is brought up keeping in view the status and life-style of the parents.

13. After-all, the object of providing maintenance is to prevent vagrancy by compelling the husband to support his wife and child unable to support themselves. These provisions are not penal in nature, but are only intended for enforcement of the duty, a default, which may lead to vagrancy. The further object underlying Section 24 is that neither party may suffer by his/her inability to conduct the proceedings for want of money or expenses.

14. It is not in dispute that the petitioner is an able-bodied young man and is, therefore, presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodied person to show to the Court cogent grounds for holding that he is unable for

reasons beyond his control to earn enough to discharge his legal obligation of maintaining his wife and child. This was so held by the Delhi High Court in ***Chander Parkash Bodh Raj*** *versus* ***Smt. Shila Rani Chander Prakash AIR 1968 Delhi 174*** which judgment in turn was upheld by the Hon'ble Supreme Court in ***Shamima Farooqui*** *versus* ***Shahid Khan (2015) 5 SCC 705.***

15. This Court in ***Cr.MMO No.26 of 2015 titled Vipul Lakhanpal*** *versus* ***Smt. Pooja Sharma***, decided on 01.06.2015 noticed both the aforesaid judgments, while dealing with a case relating to payment of maintenance under The Protection of Women from Domestic Violence Act, 2005. Both the aforesaid judgments were noticed in the following terms:-

> "18**.** The next question, which arises for consideration is as to whether employed wife can be refused maintenance only on the ground that the husband is unemployed.
>
> 19. It can never be forgotten that inherent and fundamental principle behind section 12 of the Act is for amelioration of the financial state of affairs as well as mental agony and anguish that woman suffers when she is compelled to leave her matrimonial home. The statute commands that there has to be some acceptable arrangements so that she can sustain herself. Sustenance does not mean and can never allow to mean a mere survival.
>
> 20. A woman, who is constrained to leave the matrimonial home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. She cannot be compelled to become a destitute or a beggar.
>
> 21. Now, I deal with the plea advanced by the husband that he does not have the job and his survival is on the little pension that his father is getting. Similar question came up before the Hon'ble Supreme Court in **Shamima Farooqui** vs. **Shahid Khan JT 2015 (3) SC 576,** wherein it has been held as follows:-
>
> > **"**15. .....Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 CrPC, unless disqualified, is an absolute right. While determining the quantum of maintenance, this Court in Jabsir Kaur Sehgal v. District Judge Dehradun & Ors. [JT 1997 (7) SC 531: 1997 (7) SCC 7] has held as follows:-
> >
> > > "The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of

her case. At the same time, the amount so fixed cannot be excessive or extortionate."

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

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

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

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

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

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

23. It has to be remembered that when the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort. Sometimes the faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her misfortune. At this stage, the only comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm for which she cannot be allowed to resign to

destiny. Therefore, the lawful imposition for grant of maintenance allowance. [Ref: **Shamima Farooqui** vs. **Shahid Khan** (supra)]."

16. At this stage, it may be observed that the proceedings for grant of interim maintenance are summary in nature for compelling a man to maintain his wife and/or children. It provides cheap and speedy remedy for securing a limited degree maintenance for the deserted wife and children. This Court in revision would ordinarily interfere with such orders only if the Court below has failed to exercise its jurisdiction judicially and if substantial justice has not been done.

17. The cumulative effect of the discussion above is that the order passed by the learned Additional District Judge-I is legal and proper one. No illegality, irregularity or perversity can be found in the said order. Consequently, the present petition being devoid of any merit is dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

****

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

Narain Chand & ors. .....Appellants.

Versus

Smt. Bhago and ors. .....Respondents.

RSA No. 478 of 2002.
Reserved on: 28.9.2015.
Decided on: 29.9.2015.

Registration Act, 1908- Section-17- Family arrangement arrived at between the parties does not require registration. (Para-14 to 17)

Specific Relief Act, 1963- Section 38- Plaintiff filed a suit claiming that she is owner in possession of the suit property – Defendant No. 1 had also admitted the plaintiff to be in possession of the suit property in Khangi Panchayat- defendant No. 1 pleaded that a house was given to the plaintiff with a right of residence- no vacant plot or cattle shed was ever given to the plaintiff – defendant No. 1 did not appear in the witness box and an adverse inference was rightly drawn against him- he had specifically admitted in the agreement that possession of the suit property was given to the plaintiff- held, that suit was rightly decreed by the Appellate Court. (Para-19)

Cases referred:

Qabool Singh vrs. Board of Revenue and others, AIR 1973 Allahabad 158
Shyam Sunder and others vrs. Siya Ram and another, AIR 1973 Allahabad 382
Manali Singhal and another vrs. Ravi Singhal and others, AIR 1999 Delhi 156
Bondar Singh and others vrs. Nihal Singh and others, AIR 2003 SC 1905

For the appellant(s): Mr. Ramakant Sharma, Sr. Advocate with Ms. Soma Thakur, Advocate.

For the respondents: Mr. B.C.Verma, Advocate for respondent No.1.
None for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge, Solan, H.P. dated 21.06.2002, passed in Civil Appeal No. 9-NL/13 of 2002.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff), has instituted a suit for permanent prohibitory injunction against the appellants-defendants (hereinafter referred to as the defendants). According to the plaintiff, the property measuring 182 sq. ft. as shown in the site plan Annexure P-1, being part and situated in the area of *abadi deh*, bearing Kh. No. 1086 (1 bighas 14 biswas), comprised in Khewat Khatauni No. 277/371 min, as shown in Annexure P-2, is situated in Village Manpura, Pargana Dharampur, H.B. No. 164, Tehsil Nalagarh, Distt. Solan, H.P. The plaintiff was owner-in-possession of the suit property. She was in the enjoyment of the separate possession and user of the suit property and other property as Proprietor for her residential and cattle purposes, with the knowledge of the all concerned, including defendants who had admitted plaintiff to be in such possession. Defendant No. 1, namely, Rattan Singh was the Karta of the Joint Hindu Family, consisting of defendants No. 2 to 8. The dispute arose between the plaintiff and defendant No. 1. It was settled in Khangi Panchayat on 14.10.1996. Defendant No. 1 has admitted the plaintiff to be in exclusive possession of the suit property.

3. The suit was contested by defendants No. 1 to 8. It was asserted that the house of defendants and others was situated in Kh. No. 1086. The plaintiff was neither owner nor in possession of the suit property. The plaintiff has been given one house built by the defendant No. 1 measuring 40 feet in length and 40 feet in width for her residential purposes in Kh. No. 1083. This house was owned and possessed by defendant No. 1 i.e. Rattan Singh. The plaintiff was given merely right to reside in the said house. The plaintiff in connivance with scribe has wrongly got written compromise that plaintiff had been given vacant plot as well as cattle shed in Kh. No. 1086 and that she would raise construction by 15.6.1997. The defendant No. 1 has never given any vacant plot or cattle shed. Separate written statement was filed by defendant No. 9 i.e. Jeet Ram. It was asserted that he was in enjoyment of the residential house including vacant portion measuring 1990 sq ft. The plaintiff and defendants No. 1 to 8 are having no concern with the same.

4. The replication was filed by the plaintiff. The learned trial Court framed the issues on 24.6.1999. The suit was dismissed vide judgment dated 17.10.2001. The plaintiff, feeling aggrieved, preferred an appeal against the judgment and decree dated 17.10.2001. The learned Addl. District Judge, Solan, partly allowed the same on 21.6.2002. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial questions of law on 29.10.2002:

> "1. Whether the learned lower appellate Court is right in drawing an adverse inference under Section 114(g) of the Indian Evidence Act for non-appearance of one of the defendants Rattan Singh especially when his son appeared as attorney and specifically stated that Rattan Singh is bed ridden and is not mentally fit?

2. Whether the impugned judgment and decree is the result of misreading, misinterpretation as well as mis-appreciation of Ext. P-1 writing dated 14.10.1996?

3. Whether the learned lower appellate court is right in placing reliance upon an unregistered document by ignoring the provisions of Section 17 of the Registration Act as well as that of Transfer of Property Act?

4. Whether the learned lower appellate Court is right in granting an injunction in favour of the plaintiff with respect to an abadi-deh comprised in Khasra number 1086 where the houses of appellants as well as other residents are in existence especially when the plaintiff has failed to show any interest in the land comprised in khasra number 1086?"

6. Mr. Ramakant Sharma, Sr. Advocate, on the basis of the substantial questions of law framed, has vehemently argued that the first Appellate Court has wrongly drawn an adverse inference under Section 114(g) of the Indian Evidence Act, for non-appearance of one of the defendants, namely, Rattan Singh. The first appellate Court has misread and misinterpreted Ext. P-1 dated 14.10.1996. The document Ext. P-1 could not be relied upon by the first appellate Court. He lastly contended that the injunction could not be granted in favour of the plaintiff. On the other hand, Mr. B.C.Verma, Advocate for respondent No. 1 has supported the judgment and decree passed by the learned first appellate Court dated 21.6.2002.

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

8. Plaintiff has appeared as PW-1. She deposed that the suit land was 1 bighas 14 biswas and she was in the possession of the same since her ancestors. She and Rattan Singh used to reside jointly earlier and a document was executed qua the suit land *inter se* the parties. She has proved Ext. P-1, document. She used to tether cattle over the suit land. The defendants threatened to dispossess her from the suit land. She has also proved copy of Jamabandi Ext. P-2.

9. PW-2 Hem Raj deposed that the compromise was executed *inter se* the parties in Khangi Panchayat. He has scribed the compromise. The contents of the compromise were read over to the parties and the parties after admitting the contents of the same to be correct, have marked their thumb impressions. He has proved site plan Ext. P-3.

10. DW-1 Narain Chand is the son of Rattan Singh. He was Special Power of Attorney of his father. He has proved Special Power of Attorney Ext. D-1. Sh. Rattan Singh was not mentally sound. He was treated at Dharampur. Sh. Rattan Singh was the owner-in-possession of the suit land measuring 10 bighas 2 biswas comprised in Kh. No. 1083. He had given room measuring 40 ft x 40 ft. to Smt. Bhago. Smt. Bhago was residing there. Smt. Bhago used to tether her cattle. Kh. No. 1086 is *abadi deh*. The compromise was qua Kh. No. 1083. The plaintiff, in collusion with scribe had written Kh. No. 1086 in the document instead of Kh. No. 1083.

11. DW-2 Jeet Ram deposed that his *abadi* is situated in village Manpura and he the *abadi* of the village has not been partitioned by way of due process of law. Smt. Bhago has not legal right in the *abadi*. Sh. Rattan Singh had given one room to Smt. Bhago in the *abadi deh*.

12. DW-3 Dharam Pal has proved the site plan Ext. D-2.

13. According to the recital Ext. P-1 dated 14.10.1996, the plaintiff has taken over the possession of Kh. No. 1086. The document was scribed by PW-2 Hem Raj. He has read over the contents of the compromise to the parties and thereafter after admitting the contents of the same to be correct, the parties have marked their respective thumb impressions. Sh. Rattan Singh has signed the Khangi compromise document Ext. P-1 and the plaintiff has put her thumb impression. Rattan Singh has signed it in Gurmukhi.

14. The learned Single Judge of the Allahabad High Court in the case of ***Qabool Singh vrs. Board of Revenue and others,*** reported in ***AIR 1973 Allahabad 158,*** has held that the family arrangement already arrived at between the parties does not require registration as it does not create any interest in immovable property by itself. It has been held as follows:

> "5. So far as the question, whether there was a family arrangement between the parties, is concerned. I find that the finding is based upon an appreciation of evidence produced in the case. The trial Court and the Additional Commissioner accepted the evidence and held that there was in fact a family arrangement which had been acted upon. This finding was binding upon the Board of Revenue and it did not err in acting on the basis of that finding. Learned counsel for the petitioner urged that the revenue Court erred in relying upon the document incorporating family settlement as the same had not been registered. It has been pointed out by the Additional Commissioner that the family arrangement set up by the plaintiffs was an oral family settlement which did not require any registration. The compromise filed by the parties before the Court merely stated the fact that a family settlement had already been arrived at between the parties earlier. It was not a document which by itself created an interest in immovable property. In the circumstances, no question of its registration arose. In my opinion the view that as the compromise was merely a memorandum of facts already settled between the parties, it did not require registration is correct. Even if the plaintiffs did not acquire any title to the property in dispute by way of succession, they could still acquire the same by virtue of family settlement."

15. In the same volume, in the case of ***Shyam Sunder and others vrs. Siya Ram and another,*** reported in ***AIR 1973 Allahabad 382,*** the Division Bench has held that a document merely recognizing title or defining a share on the basis of such recognition does not create, declare etc. any right, title or interest in immovable property and requires no registration. It has been held as follows:

> "10. On the other hand, the learned counsel for the respondent has placed reliance upon a large number of cases in support of his contention that notwithstanding non-registration, the compromise between the parties in the instant case can be relied upon as a piece of admission on the part of the appellants, or as a recognition of an antecedent title. The compromise, annexure 4, recites that the parties had come to terms. With regard to Lonapur properties it was recited what specific plots will be held by which party. With regard to the property now in dispute, it was mentioned that the appellants had admitted (Tasleem kiya hai) that the respondent had a half share. There was then a prayer that the mutation case be decided in accordance with the terms of the compromise and necessary entries be made in the village records. The order passed by the S.D.O. has, however, not been

filed to show that the terms regarding the property now in dispute were not incorporated in the order. We are prepared to proceed on the assumption that the terms were not incorporated. The fact, however, remains that before the compromise was filed in the mutation Court, the parties had arrived at a settlement between themselves with regard to both the properties, one the subiect-matter of dispute in that case, and the other not. In respect of the other, now in dispute, the appellants made a categorical admission that the respondent had a half share. It follows, therefore, that what they did was that the appellants recognized the existing title of the respondent and said that their share was half. A recognition of title or definition of a share on the basis of that recognition cannot be treated as creating, declaring assigning limiting or extinguishing, any right, title or interest in immovable property. Such a recognition may be oral or by a document, and if in a document, it would not require registration. Hiren Bibi v. Sohan Bibi, AIR 1914 PC 44; Devi Dayal v. Wazir Chand, (1921) 61 Ind Cas 328 (Lah) and Sailesh Chandra Sarkar v. Bireshwar Chatterjee, AIR 1930 Cal 559 have taken the view that an unregistered document can be relied upon in proof of admission of title. In Hiren Bibi's case, the Privy Council observed that such a compromise can in no sense of the word be an alienation of property but a family settlement in which each party takes a share of the family property by virtue of the independent title which is, to that extent, and by way of compromise, admitted by the other parties.

In Devi Daval's case (Supra) there was a rent deed which stated that one particular property was owned by the members of the family in equal shares end in another particular property one of the executants had a 3/4th share while the rest had a 1/4th share. It was urged that the lease, being for a period of more than one year and not being registered, was not admissible in evidence underSection 49. Registration Act. The Lahore Hish Court held that as a lease or as a document to prove title, it was not admissible, but there was no reason why the admission contained therein cannot be taken in evidence. In Sailesh Chandra's case, a lease was created by a decree based on compromise, which compromise decree was not registered. In addition, it contained a recital that the disputed land did not pertain to the Jama of Rs. 91/-. The Calcutta High Court held that it could not be disputed in view of the decision of the Judicial Committee in Rani Hemanta Kumari Devi v. Midnapur Zamindari Co., AIR 1919 PC 79 that the Sulehnama should have been registered in order to be effective as a lease but at the same time the statement in the Sulehnama, namely, that the lands did not pertain to the Jama of Rs. 91/-might be admitted as evidence as admission made by the parties to the same. As such admission, it would only be a piece of evidence and it would be open to the ,party who made the admission to show that it was made in circumstances which did not make the admission binding on him. The decision in Ram Gopal v. Tulshi Ram, AIR 1928 All 641 (FB) is clear that such a recital can be relied upon as a piece of evidence. In that case, a family settlement was arrived at in a mutation case by which the three parties agreed to mutation to the extent of 1/3rd each. The compromise was not registered. The Full Bench laid down five propositions and the fifth one reads thus:--

> "If the terms were not reduced to the form of a document" registration was not necessary (even though the value is Rs. 100/- or upwards); and, while the writing cannot be used as a document of title, it can be used as piece of evidence for what it may be worth, e.g., as corroborative of other evidence or as an admission of the transaction or as showing or explaining conduct."

It is clear, therefore, that the compromise can be taken into consideration as a piece of evidence. The next case relied upon is Bakhtawar v. Sunder Lal, AIR 1926 All 173. This deals with a compromise arrived at in a mutation case. The compromise recited that the parties had already composed their differences regarding the property and had come to an arrangement between themselves by which their names were to be entered in respect of specific property specified therein. It was held that there was no necessity to have the compromise registered, as it did not create, assign, limit, extinguish or declare any title. It contained merely recital of fact by which the Court was informed that, the parties had come to an arrangement. To sum up, therefore, we are of the view that the compromise could have been relied upon as an admission of antecedent title."

16. The learned Single Judge of the Delhi High Court in the case of ***Smt. Manali Singhal and another vrs. Ravi Singhal and others,*** reported in ***AIR 1999 Delhi 156,*** has held that family settlement between husband and wife for providing maintenance to wife cannot be held to be hit by Section 25 on the ground that it is without consideration. Consideration in such type of settlement is love and affection, peace and harmony and satisfaction to flow therefrom. It has been held as follows:

> "20. Learned counsel for the defendants has then argued that the impugned settlement is without any consideration. Hence the same is hit by Section 25 of the Contract Act. The contention of the learned counsel may be an ingenious one but can be brushed aside without any difficulty. Parties more often than not settle their disputes amongst themselves without the assistance of the court in order to give quietus to their disputes once and for all. The underlying idea while doing so is to bring an era of peace and harmony into the family and to put an end to the discord, disharmony, acrimony and bickering. Thus the consideration in such type of settlements is love and affection, peace and harmony and satisfaction to flow therefrom. I am supported in my above view by the observations of the Hon'ble Supreme Court as reported in Ram Charan Das Vs. Girja Nandini Devi and others, ..." Courts give effect to a family settlement upon the broad and general ground that its object is to settle existing or future disputes regarding property amongst members of a family. The word 'family' in this context is not to be understood in a narrow sense of being a group of persons, who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. ....The consideration for such a settlement, if one may put it that way, is the expectation that such a settlement will result in establishing or ensuring amity and goodwill amongst the persons bearing relationship with one another. That consideration having passed by each of the disputants, the settlement consisting of recognition of the right asserted by each other cannot be permitted to be impeached thereafter". The same view was again reiterated in Maturi Pullaiah and another Vs. Maturi Narasimham and others."

17. In the instant case also, the compromise has been arrived at between the near relations.

18. Their lordships of the Hon'ble Supreme Court in the case of ***Bondar Singh and others vrs. Nihal Singh and others,*** reported in ***AIR 2003 SC 1905,*** have held that though unregistered sale deed is inadmissible in evidence but it can be looked into for collateral purposes such as to see nature of possession of party over the suit property. Their lordships have held as follows:

> "5. The main question as we have already noted is the question of continuous possession of the plaintiffs over the suit lands. The sale deed dated 9.5.1931 by Fakir Chand, father of the defendants in favour of Tola Singh, the predecessor interest of the plaintiff, is an admitted document in the sense its execution is not in dispute. The only defence set up against said document is that it is unstamped and unregistered and therefore it cannot convey title to the land in favour of plaintiffs. Under the law a sale deed is required to be properly stamped and registered before it can convey title to the vendee. However, legal position is clear law that a document like the sale deed in the present case, even though not admissible in evidence, can be looked into for collateral purposes. In the present case the collateral purpose to be seen is the nature of possession of the plaintiffs over the suit land. The sale deed in question at least shows that initial possession of the plaintiffs over the suit land was not illegal or unauthorized. It is significant to note that the sale deed is dated 9.5.1931 and Fakir Chand died somewhere in the year 1949-50. During his lifetime Fakir Chand never disputed plaintiffs' title or possession of the suit land. There is other reliable evidence on record which establishes that the plaintiffs have been in continuous possession of the land in question. There is a notice dated 16.4.1956 Exhibit P.6. The notice was issued on behalf of the defendants and is addressed to the predecessor interest of the plaintiffs. By the notice the defendants called upon the plaintiffs to hand over possession of the suit land to them. According to the notice, the plaintiffs were trespassers on the suit land and were liable to hand over its possession to the defendants. This notice is an admission on the part of the defendants that the plaintiffs were in possession of the suit land at least on the date of the notice i.e. 16th April, 1956. The notice was followed by an application dated 8th May, 1956 (Exhibit P.3). filed by the defendants under Section 58 of the Madhya Bharat Land Revenue and Tenancy Act, 1950 before the revenue authorities. In the said application the defendants admit that the land in question was in possession of the plaintiffs since the lifetime of their father. It is further admitted that the land was being cultivated by the plaintiffs. It was prayed in the said application that the plaintiffs be declared trespassers over the suit land and possession of the land be given to the defendants. In their reply to the application, the present plaintiffs denied the allegation that they were trespassers on the suit land, they refer to the sale deed of 9.5.1931 by Fakir Chand in favour of their predecessor. Thus the plaintiffs were all along asserting that they were in possession of the land in their own right. The Tehsildar vide his order dated 3rd October, 1959 dismissed the said application of the defendants. He relied on an admission on the part of Poonam Chand, eldest son of Fakir Chand that the present plaintiffs were in possession for the last 26-27 years. Relying on the said statement the

revenue authorities held that since possession of the present plaintiffs was continuing for last 26-27 years they could not be dispossessed from the suit land. The application of the defendants was dismissed. The defendant filed an appeal against the said order which was also dismissed on 6.8.1962. A copy of the order of the Tehsildar is Exhibit P.8 while a copy of the order of the appellate authority i.e. S.D.O. is Exhibit P.9. These judgments of the revenue authorities establish that at least till 1962 the plaintiffs were in possession of the suit land. They also totally nullify the assertion of the defendants in their written statement in the present suit that they had taken possession of the suit land in 1957-58. If they had taken possession of the suit land in 1957-58 why were they pursuing the matter before the revenue authority till 1962 when the appeal was contested before the S.D.O. and the decision of the S.D.O. was given on 6.8.1962?"

19. In the instant case, Sh. Rattan Singh has not appeared in the witness box. No tangible evidence has been placed on record by the defendants that Rattan Singh was of unsound mind. No medical certificate to this effect has been placed on record by the defendants. Rattan Singh has also not led any evidence in rebuttal. The first appellate Court has rightly drawn adverse inference against Rattan Singh under Section 114 (g) of the Indian Evidence Act. The agreement has been signed voluntarily by the plaintiff and Rattan Singh. Rattan Singh could not be permitted to wriggle out of the compromise Ext. P-1. Since the plaintiff was in possession of the suit property as per Ext. P-1, the first appellate Court has rightly granted decree of prohibitory injunction against the defendants. The first appellate Court has rightly appreciated the contents of Annexure P-1 as Sh. Rattan Singh has specifically admitted that the possession was given to the plaintiff qua the suit land in Kh. No. 1086. Sh. Rattan Singh was the Karta of the Joint Hindu Family. The substantial questions of law are answered accordingly.

20. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

****

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

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

Criminal Appeals No.158 of 2013
Reserved on : 12.8.2015
Date of Decision: September 29, 2015

Indian Penal Code, 1860- Sections 376 and 354- Accused was working as a Physical Education Teacher (PET) in Government School- prosecutrix was studying in class 8th in that school – accused applied for half day leave and also made the prosecutrix to apply for half day leave and thereafter took her in a car towards an isolated place in a jungle and subjected to her sexual assault- prosecutrix was threatened not to disclose the incident to any one- held, that statement of the prosecutrix is cogent, convincing and trustworthy and also supported by the medical evidence- the prosecutrix has to be treated as victim of the

offence and not an accomplice in the crime – defence of the accused that he was implicated at the instance of the one 'D' due to the fact that 'D' bore grudge against him is highly improbable and cannot be believed- conviction and sentence of the accused is proper- appeal dismissed. (Para10 to 12, 19, 20 and 22)

Cases referred:

Mukesh v. State of Chhattisgarh, (2014) 10 SC 327
State of Haryana v. Basti Ram, (2013) 4 SCC 200
O.M. Baby (Dead) by Legal Representative v. State of Keral, (2012) 11 SCC 362
State of U.P. v. Chhotey Lal, (2011) 2 SCC 550
Puran Chand v. State of Himachal Pradesh, (2014) 5 SCC 689
Radhakrishna Nagesh v. State of Andhra Pradesh, (2013) 11 SCC 688
Mohd. Iqbal v. State of Jharkhand, (2013) 14 SCC 481
Narender Kumar v. State (NCT of Delh), (2012) 7 SCC 171

For the Appellant : Mr. Anup Chitkara, Advocate.
For the Respondent : M/s Ashok Chaudhary, V.S. Chauhan, Additional Advocates General and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Ram Singh, hereinafter referred to as the accused, has assailed the judgment dated 28.3.2013/30.3.2013, passed by Sessions Judge, Mandi, District Mandi, Himachal Pradesh, in Sessions Trial No.19 of 2012, titled as *State of H.P. v. Ram Singh,* whereby he stands convicted for having committed an offence punishable under the provisions of Sections 376 & 354 of the Indian Penal Code and sentenced as under:

Section	Imprisonment
376 IPC	Rigorous imprisonment for a period of ten years and to pay fine of Rs.1,00,000/- (one lac), and in default thereof to further undergo simple imprisonment for a period of six months.
354 IPC	Rigorous imprisonment for a period of two years and to pay fine of Rs.10,000/-, and in default thereof to further undergo simple imprisonment for a period of two months.

Both the sentences have been ordered to run concurrently, and half of the amount of fine, after realization, has been ordered to be paid to the prosecutrix as compensation.

2. It is the case of prosecution that accused was posted as Physical Education Teacher (PET) at Government Middle School, Dahanu, where prosecutrix (PW-2) was studying in Class-8. On 1.12.2010, accused applied for half day leave and also made the prosecutrix apply for half day leave and also after making the prosecutrix do so, took her in his car towards an isolated place. After taking her into the jungle, he sexually assaulted her. Thereafter, he threatened her not to disclose the incident to anyone, lest she be

defamed. However, after reaching home, prosecutrix narrated the incident to her mother, who, in turn, informed her husband. Eventually, the matter was reported to the police, vide complaint (Ex. PW-2/B), on the basis of which FIR No.377, dated 2.12.2010 (Ex.PW-9/A), for commission of offences, under the provisions of Section 376/354 of the Indian Penal Code, was registered at Police Station, Balh, District Mandi, Himachal Pradesh. Inspector Bahadur Singh (PW-9), who conducted the investigation, got the prosecutrix medically examined from Dr. Richa (PW-1), who issued MLC (Ex.PW-1/B). As per the doctor, possibility of sexual assault could not be ruled out. To establish the age of the prosecutrix, Investigating Officer took on record Birth Certificates (Ex.PW-3/C & 6/A), disclosing her date of birth to be 26.8.1998. With the completion of investigation, which, prima facie, revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Sections 354 & 376 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as 9 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took the following defence:

> "I am innocent. When I was posted in Government Middle School Dahanu, Devinder Kumar, who has been cited by the Police as witness was supplying the building material to G.M.S. Dahanu. Since the father of the prosecutrix and Devinder Kumar were working together and I objected the inferior quantity of the building material supplied in the School, they nourished a grudge against me and due to the said grudge they have falsely implicated me in this case."

Accused also examined one witness in his defence.

5. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused of the charged offences and sentenced him as aforesaid. Hence, the present appeal by the accused.

6. We have heard Mr. Anoop Chitkara, learned counsel for the accused, as also Mr. Ashok Chaudhary, Mr. V.S. Chauhan, learned Additional Advocates General, and Mr. J.S. Guleria, Assistant Advocate General, on behalf of the State. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

7. Following facts stand admitted by the accused. That in the month of December, 2012, he was posted as a Physical Education Teacher in Government Middle School, Dahanu; on 1.12.2010, he obtained casual leave for half day; and in very same school, prosecutrix was studying in Class-8.

8. That prosecutrix was born on 26.8.1998 stands proved on record by Shri Joginder Pal (PW-6), Panchayat Secretary of Gram Panchayat, Sidhyani, who proved Birth Certificate (Ex.PW-6/A), and Shri Prem Singh, Head Master, Government Middle School,

Anupali, who proved certificate (Ex.PW-3/C). As on the date of commission of offence, prosecutrix was below 16 years of age.

9. Dr. Richa (PW-1), who examined the prosecutrix on 2.12.2010, on oral examination, found slight swelling and redness over labia majora. Though the hymen was intact, but injuries of hymen at 1 O'clock and 11 O'clock position were found. As per the doctor, such injuries could be caused either by forceful fiddling of fingers or attempts of "penile penetration into genitalia". Evidently, to the doctor, prosecutrix had disclosed that the accused had put his hand inside her *Salwar* and fiddled at her pubic area.

10. Also, it is a settled principle of law that absence of injuries on the external or internal parts of the victim by itself cannot be a reason to disbelieve the testimony of the prosecutrix. (See: *Mukesh v. State of Chhattisgarh,* (2014) 10 SC 327); *State of Haryana v. Basti Ram,* (2013) 4 SCC 200; *O.M. Baby (Dead) by Legal Representative v. State of Keral,* (2012) 11 SCC 362; and *State of U.P. v. Chhotey Lal,* (2011) 2 SCC 550).

11. The Apex Court in *Puran Chand v. State of Himachal Pradesh,* (2014) 5 SCC 689, observed that even non-rupture of hymen itself would be of no consequence and rape could be held to be proved even if there is slight penetration.

12. Mere fact that hymen is intact or that there is no actual wound on the private part of the prosecutrix is not conclusive of the fact that prosecutrix was not subjected to rape. (*Radhakrishna Nagesh v. State of Andhra Pradesh,* (2013) 11 SCC 688).

13. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the Court on facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would do.

14. Reiterating its earlier view in *Mohd. Iqbal v. State of Jharkhand,* (2013) 14 SCC 481; *Narender Kumar v. State (NCT of Delh),* (2012) 7 SCC 171, the Apex Court in *Mukesh v. State of Chhattisgarh,* (2014) 10 SC 327, has held that sole testimony of prosecutrix is sufficient to establish commission of rape, even in the absence of any corroborative evidence.

15. In *Radhakrishna Nagesh v. State of Andhra Pradesh,* (2013) 11 SCC 688, the apex Court held as under:

> "33. It will be useful to refer to the judgment of this Court in the case of O.M. Baby v. State of Kerala, (2012) 11 SCC 362, where the Court held as follows:-
>
> > "17. ….. '16. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no

> more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

18. We would further like to observe that while appreciating the evidence of the prosecutrix, the court must keep in mind that in the context of the values prevailing in the country, particularly in rural India, it would be unusual for a woman to come up with a false story of being a victim of sexual assault so as to implicate an innocent person. Such a view has been expressed by the judgment of this Court in the case *of State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 and has found reiteration in a recent judgment in *Rajinder @ Raju v. State of H.P.*, (2009) 16 SCC 69, para 19 whereof may be usefully extracted:

> '19. In the context of Indian culture, a woman - victim of sexual aggression - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent.' "

16. In *Shyam Narain v. State (NCT of Delhi)*, (2013) 7 SCC 77, the Apex Court held as under:

> "27. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that

> the thought of sullying the physical frame of a woman is the demolition of the accepted civilized norm, i.e., "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court."

17. In *Narender Kumar v. State (NCT of Delhi)*, (2012) 7 SCC 171, the apex Court has cautioned the Court to adopt the following approach:

> "The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of the witnesses which are not of a substantial character."

18. The Apex Court in *Munna v. State of Madhya Pradesh,* (2014) 10 SCC 254, has reiterated the principle that testimony of prosecutrix is almost at par with an immediate witness and can be acted upon without corroboration.

19. In Court, prosecutrix has categorically deposed that on 1.12.2010, during recess, accused called her and asked her to proceed on leave for the remaining day. On his asking, she wrote application (Ex. PW-2/A) and was told by the accused that her leave stood sanctioned. He then directed her to meet him near the Ration Depot, where she went and waited for some time. Accused came in his car and took her towards Sidhyani. After covering a distance of 400 metres, he stopped the car near Hawanu jungle. She was made to alight and the accused parked the car at some distance. Thereafter, he took her into the jungle and at a secluded place, started assaulting her sexually. First, he pressed her breasts and then after opening the string of her *Salwar* and removing his trousers, committed wrong act. She clarifies the "wrong act" to be rape. She states that she felt pain on her private parts. After about five minutes, accused dropped her at a nearby curve. He threatened her not to disclose the incident, lest she be defamed. On reaching home, when her mother enquired the reason for not attending the school for whole day, she disclosed the incident. At about 6 p.m., when her father came, the incident was also disclosed to him. Complaint (Ex.PW-2/B) was lodged with the police and she was got medically examined.

20. The witness, in our considered view, has withstood the test of severe cross-examination. The school in question was small with just about 50 students. None noticed

her write the leave application, which was handed over to the accused. Accused was her teacher and could prevail upon her. She clarifies that even though there is a cowshed of Ganga Ram and tea-stall near the Ration Depot, however, none could see them at the place where the crime stood committed. She states that there was a stone cave like structure. She further clarifies that accused put his private part into her private part only for 1-2 minutes and no blood oozed out at that point in time. She denies having lodged a false complaint, on the asking of contractor Devinder Kumar. She is not even aware of any such dispute between Ram Singh (accused) and Devinder Kumar, with whom her father is employed.

21. Mr. Anoop Chitkara, while drawing the attention of the Court to the statement of the doctor, points out that version of the prosecutrix, with regard to the act of rape, is false and stands belied and contradicted on record. In court, prosecutrix states that accused kept his private part over her private part, whereas according to the doctor she disclosed that accused had put his finger in her private part. With this, we do not find the credit of the witness to have been impeached or her version to be unbelievable and uninspiring in confidence. Prosecutrix was confronted with the version, she narrated to the doctor. Also, doctor observed injury on her private parts. In Court, version of the prosecutrix cannot be said to be an afterthought or exaggeration, for such fact does find recorded in the FIR, which was so done prior to the examination of the prosecutrix by the doctor. It is nobody's case that police prepared false documents.

22. Defence taken by the accused, to say the least, is preposterous, if not false. He wants the Court to believe that purely on account of his animosity with his partner, father of the prosecutrix got a false complaint filed through his daughter. There is nothing on record to establish that father of the prosecutrix was under any obligation, influence or control of Devinder Kumar, who also has not been examined in Court to establish the factum of hostility. For that matter, none else was examined, save and except Girdhari Lal (DW-1), who only states that in the month of November, 2010, heated arguments took place between the accused and Devinder Kumar, on account of supply of inferior quality of material. But then, this witness does not state that Devinder Kumar had extended any threats of getting him falsely implicated in a case. No father would put honour of his minor daughter at stake, and that too, without any reason, on the asking of his employer. It would be a rare co-incidence when both the prosecutrix and the accused would be on leave at the same point in time.

23. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused stands proved beyond reasonable doubt to the hilt. The chain of events stand conclusively established and lead only to one conclusion, i.e. guilt of the accused. Circumstances when cumulatively considered fully establish completion of chain of events, indicating the guilt of the accused and no other hypothesis other than the same. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

24. 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 he assaulted the prosecutrix, with intent to outrage her modesty and also committed rape on her.

25. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

****

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

Smt. Aarti D/o Sh.Raghubir Singh. ..Plaintiff.

Vs.

Lalit Kumar Sharma S/o Panna Lal Sharma. ..Defendant.

CS No.1 of 2014.
Judgment reserved on: 14.8.2015.
Date of judgment: September 30, 2015.

Specific Relief Act, 1963- Section 20- Plaintiff filed a suit for enforcement of agreement against the defendant by way of specific performance, mandatory injunction for directing the defendant to execute the sale deed and permanent injunction for restraining him, his agents and servants from causing interference in the subject matter of agreement- Plaintiff also sought damages- defendant did not contest the suit and remained exparte- plaintiff examined herself and both marginal witnesses to the agreement to sell to speak about the due execution of the agreement- she further proved her willingness and readiness to perform her part of the agreement and inaction on the part of the defendant - held, that plaintiff was entitled to the decree for specific performance of contract, mandatory injunction and permanent injunction as she had succeeded in proving the agreement and her willingness and readiness to perform her part- further held, that since the defendant has not chosen to contest the suit and appear in the witness box to deny the case of the plaintiff, therefore, an adverse inference is to be drawn against him in view of the settled law- suit for specific performance of agreement and injunction decreed, whereas, relief for damages declined in view of terms and conditions of the agreement. (Para-6 to 11)

Cases referred:

Vidhyadhar Vs. Mankikrao, AIR 1999 S.C. 1441
Iswar Bhai C.Patel Vs. Harihar Behera, SLJ 1999 724
Crest Hotel Ltd. Vs. Assistant Superintendent of Stamps, AIR 1994 Bombay 228
Meghmala and others vs. G. Narasimha Reddy and others, 2010 (8) SCC 383

For the appellant: Mr Dushyant Dadwal, Advocate.
For defendant: Ex parte.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present civil suit is filed for decree of specific performance of agreement dated 4.1.2013. In addition decree of mandatory injunction also sought in favour of plaintiff and against defendant directing defendant to execute sale deed and decree of permanent

prohibitory injunction is also sought in favour of plaintiff and against defendant from interfering in the peaceful possession of plaintiff. Additional relief also sought restraining defendant through his legal representative or any authorized person for creating interest in favour of third party and from alienating and changing nature of suit property with costs.

2. It is pleaded that on 4.1.2013 defendant executed agreement of sale with plaintiff relating to suit property comprised in khata No.117 Khatauni No. 226 khasra No.823 measuring 0-44-78 hectare in consideration amount of Rs.2600000/- (Twenty six lacs) in favour of Smt. Aarti plaintiff. It is further pleaded that in total defendant received Rs.1600000/-(Sixteen lacs). It is further pleaded that remaining consideration amount of Rs.1000000/- (Ten lacs) was to be paid at the time of execution of sale deed. It is further pleaded that defendant had also given possession of suit property to the plaintiff at the time of execution of agreement of sale. It is further pleaded that sale deed was to be executed on or before 15.10.2013. It is further pleaded that defendant did not execute sale deed. It is further pleaded that plaintiff is ready and willing to perform her part of the contract. It is further pleaded that defendant did not perform his part of contract. Prayer for decree of suit as mentioned in relief clause sought.

3. Defendant did not appear in court despite service. Defendant was proceeded ex-party.

4. Court heard learned Advocate appearing on behalf of plaintiff and Court also perused entire record carefully.

5.Oral witnesses examined by plaintiff:

5.1 PW1 Puja Gupta, Advocate has stated that agreement of sale Ext PW1/A was drafted by her at the instance of plaintiff and defendant relating to suit property. She has stated that total consideration amount was Rs.2600000/- (Twenty six lacs). She has stated that out of Rs.2600000/- (Twenty six lacs) Rs.1550000/- (Fifteen lacs fifty thousand) were already paid to defendant. She has stated that legal notice Ext PW1/B was issued to defendant. She has stated that Ext PW1/C is registered receipt of legal notice dated 15.11.2013 issued by her.

5.2 PW2 Munshi Lal has stated that agreement Ext PW1/A was executed between plaintiff and defendant relating to suit property. He has stated that total consideration amount of sale was Rs.2600000/- (Twenty six lacs). He has stated that Rs1600000/- (Sixteen lacs) already paid to defendant by plaintiff. He has stated that he has signed agreement of sale as marginal witness. He has stated that scriber and defendant have also signed in his presence. He has stated that sale deed was to be executed on or before 15.10.2013. He has stated that sale agreement was executed on 4.1.2013. He has stated that defendant has also given receipt of Rs.50000/- (Fifty thousand) which is Ext.PW2/A on the back side of Ext PW1/A.

5.3 PW3 Aarti has stated that agreement of sale was executed inter-se the parties on 4.1.2013 at Kullu. She has stated that total sale consideration amount was Rs.2600000/- (Twenty six lacs). She has stated that Rs.1600000/- (Sixteen lacs) was paid to defendant through cheques and in cash. She has stated that Rs.150000/- (One lac fifty thousand) was paid through cheque No.782812 dated 7.5.2012 and Rs.50000/- (Fifty thousand) was paid through cheque No.782813 dated 12.5.2012. She has stated that Rs.400000/- (Four lacs) was paid in cash in Indian currency as earnest money. She has stated that Rs.450000/- (Four lacs fifty thousand) was paid through cheque No.620698 on

28.9.2013. She has stated that Rs.500000/- (Five lacs) was paid through cheque No.620697 in October 2013 from KCC Bank. She has stated that Rs.500000/- (Fifty thousand) in cash was paid on 2.7.2013 to defendant and receipt was issued by defendant on the back of agreement Ext PW2/A. She has stated that sale deed was to be executed on or before 15.10.2013. She has stated that on 15.10.2013 she went to Court of Sub Registrar Theog. She has stated that defendant in spite of several requests and reminders did not execute sale deed. She has stated that she had also issued legal notice Ext PW1/B. She has stated that she would pay remaining consideration amount of Rs.1000000/- (Ten lacs) as directed by Court.

6. Following documentary evidence placed on record. (1) Ext PW1/A agreement of sale dated 4.1.2013. (2) Ext PW3/C application filed by plaintiff Aarti before Tehsildar Theog. (3) Ext PW1/B notice given by plaintiff to defendant for execution of sale deed. (4) Ext PW3/A details of amount deposited and withdrawal from Kangra Central Cooperative Bank Limited. (5) Ext PW3/B statement of accounts for the period 1.4.2012 to 16.5.2012.

7. Submission of learned Advocate appearing on behalf of plaintiff that plaintiff is legally entitled for specific performance of agreement dated 4.1.2013 executed inter se the parties is accepted for the reasons hereinafter mentioned. It is proved on record that defendant had executed sale agreement with plaintiff on 4.1.2013 in the presence of marginal witnesses. Agreement Ext PW1/A is proved by way of testimony of PW1 Puja Gupta Advocate. PW1 Puja Gupta Advocate has specifically stated in positive manner that agreement Ext PW1/A was executed inter se the parties in consideration amount of Rs.2600000/- (Twenty six lacs). Testimony of PW1 Puja Gupta is corroborated by PW2 Munshi Lal who is marginal witness of agreement dated 4.1.2013. Testimony of PW1 Puja Gupta and PW2 Munshi is further corroborated by PW3 Aarti. Testimonies of PW1 Puja Gupta, PW2 Munshi Lal and PW3 Aarti are trust worthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW1, PW2 and PW3. Testimony of PW1, PW2 and PW3 remained un-rebutted on record. Defendant did not appear in the witness box in order to rebut the testimony of PW1, PW2 and PW3. DW1 also did not appear in the witness box for the purpose of cross-examination. Hence adverse inference under Section 114(g) of the Indian Evidence Act 1872 is drawn against defendant. It was held in case reported in **AIR 1999 S.C. 1441** titled **Vidhyadhar Vs. Mankikrao** that if party did not enter into the witness box then Court should draw adverse inference against the parties. Also see **SLJ 1999 724** titled **Iswar Bhai C.Patel Vs. Harihar Behera** and another. It is held that plaintiff is legally entitled for specific performance of agreement of sale.

8. Submission of learned Advocate appearing on behalf of plaintiff that plaintiff is entitled for decree of recovery of Rs.3100000/- (Thirty one lacs) on account of loss and damage suffered by plaintiff on account of non-execution of sale deed and on account of non-registration of sale deed is rejected being devoid of any force for the reasons hereinafter mentioned. There is special recital in agreement that in case defendant would not execute sale deed within stipulated period then plaintiff will be legally entitled to execute sale deed through Court. There is no recital in the agreement that plaintiff would be entitled for the recovery of Rs.3100000/- (Thirty one lacs) on account of loss and damage suffered by plaintiff and on account of non-execution of sale deed. It is well settled law that no party can be allowed to flout terms and conditions of sale agreement. In view of the fact that there is no recital of payment of loss and damage by defendant to plaintiff on account of non-execution of sale deed court is of the opinion that it is not expedient in the ends of justice to grant relief of recovery of Rs.3100000/- (Thirty one lacs) to the plaintiff.

9. Submission of learned Advocate appearing on behalf of plaintiff that decree of prohibitory injunction be passed in favour of plaintiff restraining the defendant, his legal representative, agents, employees and assignees from interfering with the possession of plaintiff is accepted for the reasons hereinafter mentioned. Court has carefully perused agreement Ext PW1/A placed on record. There is special recital in the agreement that possession of the suit land was also given to the plaintiff at the time of execution of agreement of sale deed dated 4.1.2013. In view of the recital of possession of suit land in favour of plaintiff in the agreement itself court is of the opinion that plaintiff is legally entitled for the protection of possession of suit property. Court is of the opinion that it is expedient in the ends of justice to grant decree of prohibitory injunction as prayed.

10. Submission of learned Advocate appearing on behalf of plaintiff that plaintiff is also entitled for decree of mandatory injunction directing the defendant to execute sale deed in favour of plaintiff is also accepted for the reasons hereinafter mentioned. There is special recital in agreement dated 4.1.2013 Ext PW1/A placed on record that in case defendant will not execute sale deed then plaintiff will approach Court for the execution of agreement. In view of positive recital in the agreement court is of the opinion that it is expedient in the ends of justice to grant decree of mandatory injunction as sought by plaintiff. As per jamabandi for the year 2007-2008 placed on record it is proved that defendant Lalit Kumar had purchased suit land through sale deed No. 167 of 2011 dated 29.3.2011. A contract of sale of immovable property is a contract that a sale of property would take place on terms settled between the parties. Contract of sale itself does not create any interest or charge on such property. An agreement of sale is merely a document creating a right to obtain another document of sale on fulfillment of terms and conditions mentioned in the agreement. The ownership transferred to the buyer only on the execution of sale deed by seller. See **AIR 1994 Bombay 228** titled **Crest Hotel Ltd. Vs. Assistant Superintendent of Stamps**. Also see **2010 (8) SCC 383** titled **Meghmala and others vs. G. Narasimha Reddy and others**.

Relief.

11. In view of above stated facts ex party decree is passed partly with costs in favour of plaintiff and against defendant to the effect.(1) That plaintiff will deposit remaining consideration amount of Rs.1000000/- (Ten lacs) in Court within one month and thereafter defendant will execute sale deed in favour of plaintiff Aarti within one month qua 2985/4478 shares measuring 0-29-85 hectares qua immovable land comprised in khata No. 117 khatauni No. 226 khasra No. 823 situated in mohal Dhrach Patwar circle Majhar Tehsil Theog District Shimla HP. Decree of mandatory injunction passed accordingly in favour of plaintiff and against defendant. (2) After execution of sale deed defendant or his legal heirs or agents will not interfere in the peaceful possession of plaintiff over suit property and decree of prohibitory injunction is also passed in favour of plaintiff against defendant. (3) Relief of recovery of amount of Rs.3100000/- (Thirty one lacs) on account of loss and damage suffered by plaintiff declined in view of terms and conditions of agreement Ext PW1/A placed on record. Registrar Judicial will prepare decree sheet in accordance with law. Civil suit No. 1 of 2014 is disposed of. Pending application if any also disposed of.

****

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

Amar Nath & another ....Petitioners

Versus

State of H.P. & others. ....Non-Petitioners.

CWP No. 1103 of 2013
Reserved on 17.9.2015
Date of order 30.9.2015.

Constitution of India, 1950- Article 226- Petitioners were appointed as Laboratory Attendants in Baba Balak Nath College Chakmoh- their services were regularized in the year 1993- they claimed that they became eligible for the post of Junior Laboratory Assistant/Junior Lecturer Assistant after the completion of five years services – they filed representation but they were not regularized – respondents claimed that no funds were provided by the State of Himachal Pradesh for running the college and the college was being run on the basis of offerings made by pilgrims/devotees- there was no post to which the petitioners could be promoted- held, that petitioners do not possess minimum qualification for the posts and they are not entitled for the salary and the emoluments payable to Junior Laboratory Assistant/Junior Lecturer Assistant- petition dismissed. (Para-7 and 8)

Cases referred:

State of Punjab vs. Kuldeep Singh, 2002 (5) SCC 756
Badrinath vs. Government of Tamil Nadu, 2008 (8) SCC Page 395
Ajit Singh vs. State, AIR 1999 SC page 3471
State of Jharkhand vs. Bhadey Munda and another, 2014 (10) SCC 398
Chandra Gupta vs. Secretary Govt. of India Ministry of Environment & Forests, 1995 (1) SCC page 23
R. Prabha Devi vs. Govt of India, AIR 1988 SC 902
Union Public Service Commission vs. Sukanta Kar, 2007 (9) SCC page 555
State of H.P. vs. Surinder Kumar, 1996 (1) SCC page 650
S.B. Bhattacharjee vs. S.D. Majumdar, 2007 (10) SCC 513
State Bank of India vs. Mohd. Mynuddin, AIR 1987 Apex Court page 1889
S.L. Soni vs. State of M.P, AIR 1996 SC page 665
Indian Airlines Corporation vs. Capt. K.C. Shukla, 1993 (1) SCC page 17

For petitioners : Mr. Avneesh Bhardwaj, Advocate.
For Non-Petitioners No. 1 & 2: Ms. Meenakshi Sharma, Additional Advocate General with Mr. J.S. Rana, Assistant Advocate General.
For Non-Petitioners No.3 & 4. Mr. K.D. Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge

Present civil writ petition is filed under Article 226 of the Constitution of India.

Brief facts of case

2. It is pleaded that in the year 1988 petitioners were appointed as Laboratory Attendants in Baba Balak Nath College Chakmoh. It is further pleaded that Baba Balak

Nath Temple Trust was constituted under the Himachal Pradesh Hindu Public Religious Institutions and Charitable Endowment Act, 1984. It is further pleaded that college is affiliated to H.P. University. It is further pleaded that services of petitioners were regularized in the year 1993. It is further pleaded that petitioners after completion of five years of regular service became eligible to the post of Junior Laboratory Assistant/Junior Lecturer Assistant. It is further pleaded that petitioners have filed many representations to non-petitioners to give them due promotion but till date representations filed by the petitioners not disposed of by the competent authority. Petitioners sought following reliefs in the present civil writ petition:- (i) That direction be issued to the non-petitioners to consider the case of the petitioners for promotion to the post of Junior Laboratory Assistant/Junior Lecturer Assistant. (ii) Direct the non-petitioners to revise the pay of the petitioners and give them salary and other emoluments which are applicable to the post of Junior Laboratory Assistant/Junior Lecturer Assistant.

3. Per contra response filed on behalf of non-petitioners pleaded therein that no aid is provided by the State Government or University Grants Commission or H.P. University for running the college. It is further pleaded that offerings made by the pilgrims/devotees are spent by the non-petitioners for maintenance of Baba Balak Nath Temple and also for running the temple affairs and its institutions. It is further pleaded that the income to the tune of Rs. 8.40 crore per annum is spent on salary of the employees out of the income of the Temple. It is further pleaded that petitioners are not government employee and it is further pleaded that there is no vacant post against which the petitioners could be promoted and it is further pleaded that writ petition is not maintainable. It is admitted that petitioners are serving as Laboratory Attendants in Baba Balak Nath Degree College Chakmoh. It is pleaded that petitioners did not fulfill the requisite qualification for the post of Junior Laboratory Assistant/ Junior Lecturer Assistant. It is further pleaded that Amar Nath petitioner No.1 is not even matriculate with science and Sh. Kuldeep Singh petitioner No.2 is B.A. but is not 10+2 with science. It is further pleaded that petitioners could not be promoted as Junior Laboratory Assistant/Junior Lecturer Assistant. It is pleaded that minimum qualification for the post of Junior Laboratory Assistant is 10+2 with science subjects. It is further pleaded that Baba Balak Nath Temple Trust has its own service rules 2001 and Government service rules are not applicable to the employees of the Temple trust and its institutions. It is further pleaded that Baba Balak Nath Temple Trust has its own bye-laws/rules and regulations for managing its affair. Prayer for dismissal of writ petition sought.

4. Per contra separate response filed on behalf of non-petitioner No.2 pleading therein that present writ petition is not maintainable against non-petitioner No.2. It is pleaded that non-petitioner No.2 has no role in the service matter relating to appointment/promotion of staff working in private college. It is further pleaded that petitioners are employees of privately managed trust and it is further pleaded that petitioners are not governed by recruitment & promotion rules notified by the State Government. Prayer for dismissal of writ petition sought.

5. Petitioners also filed rejoinder and reasserted the allegations mentioned in the writ petition.

6. Court heard learned counsel for the petitioners and non-petitioners and also perused the record carefully. Following points arises for determination:-

1) Whether civil writ petition filed under Article 226 of the Constitution of India is liable to be accepted as mentioned in the memorandum of grounds of writ petition?

2) Relief.

Findings upon point No.1 with reasons.

7. Submission of learned Advocate appearing on behalf of the petitioners that petitioners are entitled for promotion to the post of Junior Laboratory Assistant/Junior Lecturer Assistant is rejected being devoid of any force for the reasons hereinafter mentioned. Minimum qualification for the post of Junior Laboratory Assistant/Junior Lecturer Assistant is 10+2 with science subjects. Sh. Amar Nath petitioner No.1 did not possess minimum educational qualification for the post as he is not 10+2 with science subjects. Even co-petitioner No.2 Sh. Kuldeep Singh also did not possess minimum qualification for the post. Sh. Kuldeep Singh has qualified B.A. but not 10+2 with science subjects. It is well settled law that employees who did not possess basic minimum qualification for the post is not legally entitled for promotion as per law. ***See 2002 (5) SCC 756 State of Punjab vs. Kuldeep Singh***. Following principle should be considered in case of promotion. (i) Under Article 16 of the Constitution right to be considered for promotion is a fundamental right. (ii) Consideration for promotion must be fair according to established principles governing service jurisprudence. (iii) Court will not interfere with assessment made by DPCs unless employee establishes that non promotion was bad according to Wednesbury principles or it was malafides. ***See 2008 (8) SCC Page 395 titled Badrinath vs. Government of Tamil Nadu. Also see AIR 1999 SC page 3471 titled Ajit Singh vs. State. Also see 2014 (10) SCC 398 State of Jharkhand vs. Bhadey Munda and another. See 1995 (1) SCC page 23 titled Chandra Gupta vs. Secretary Govt. of India Ministry of Environment & Forests. See AIR 1988 SC 902 titled R. Prabha Devi vs. Govt of India. See 2007 (9) SCC page 555 titled Union Public Service Commission vs. Sukanta Kar. See 1996 (1) SCC page 650 titled State of H.P. vs. Surinder Kumar. See 2007 (10) SCC 513 titled S.B. Bhattacharjee vs. S.D. Majumdar. See AIR 1987 Apex Court page 1889 State Bank of India vs. Mohd. Mynuddin. See AIR 1996 SC page 665 titled S.L. Soni vs. State of M.P. See 1993 (1) SCC page 17 Indian Airlines Corporation vs. Capt. K.C. Shukla.***

8. Submission of learned Advocate appearing on behalf of the petitioners that non-petitioners be directed to revise pay of the petitioners and give them salary and other emoluments which are applicable to the Junior Laboratory Assistant/junior Lecturer Assistant is rejected for the reasons hereinafter mentioned. In view of the fact that the petitioners did not possess basic minimum educational qualification for the post of Junior Laboratory Assistant/Junior Lecturer Assistant it is held that the petitioners are not legally entitled for the salary and emoluments which are applicable for Junior Laboratory Assistant/Junior Lecturer Assistant. Point No.1 is decided against petitioners.

Relief (Point No.2):

9. In view of the findings upon point No.1 writ petition filed under Article 226 of the Constitution of India is dismissed. No order as to costs. Writ petition is disposed of. Pending applications if any also disposed of.

****

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

Smt. Dharamjeet Kaur wife of Sh. Surinder Singh ....Applicant/Plaintiff.
Versus
Smt. Jagiro D/o Sh. Labhu Ram. ....Non-Applicant/Defendant.

OMP No. 134 of 2015
C.S. No. 31 of 2014
Order reserved on OMP 26.8.2015
Order announced on OMP 30.9.2015.
Next date in C.S. 16.10.2015.

Code of Civil Procedure, 1908- Order 10 Rule 2 read with Order 16 Rule 1- Plaintiff filed an application for examination of the parties before framing the issues on the ground that defendant had denied the execution of the agreement - held, that object of examining the parties before framing of issues is to ascertain the matter in dispute and not to take evidence in civil suit- examination of the parties under Order 10 is not a substitute for regular examination on oath- parties are examined in the Court before framing of issues only when there is some ambiguity in the pleadings of the parties- there is no ambiguity in the pleadings in the present case- application dismissed. (Para-7)

Case referred:
Kapil Corepacks Private Limited. vs. Harbans Lal, 2010 (8) SCC page 452

For Applicant. : Mr. B.B. Vaid, Advocate.
For Non-Applicant: Mr. Sanjeev Kuthiala, Advocate.

The following interim order of the Court was delivered:

P.S. Rana, Judge

This order will dispose of application filed under Order X Rule 2 read with Order XIV Rule 1 and Section 151 CPC.

Brief facts of case

2. Applicant Smt. Dharamjeet Kaur filed Civil Suit for specific performance of contract dated 18.1.2014 relating to suit land comprised in khewat-Khatauni No. 48/70 khasra No. 386/125 measuring 0-11 biswas and khewat-khatauni No. 48/70 khasra No. 388/125 measuring 4 bighas 16 biswas total land 5 bighas 7 biswas as entered in the jamabandi for the year 2007-08 situated in village Manguwal Pargana Palasi Tehsil Nalagarh District Solan H.P. In alternative applicant sought relief of compensation to the tune of Rs. 16,00,000/- (Rupees sixteen lacs) with interest at the rate of 18% per annum. Applicant also sought additional relief of permanent perpetual prohibitory injunction against non-applicant restraining non-applicant from transferring the land in favour of any third person or from changing the nature of the suit land.

3. Per contra written statement filed on behalf of the non-applicant pleaded therein that applicant did not come to the Court with clean hands and is guilty of suppressio veri and sugestio falsi. It is pleaded that applicant has no locus standi to file

present suit and has no cause of action to file the present suit against non-applicant. It is further pleaded that applicant had committed fraud and misrepresentation. It is further pleaded that applicant took advantage of old age of the non-applicant. It is further pleaded that no agreement of sale was executed by non-applicant in favour of the applicant as alleged in the civil suit and it is further pleaded that there is no subsisting agreement inter-se the parties. It is further pleaded that applicant brought non-applicant for the purpose of getting widow pension from the Government and it is further pleaded that applicant brought non-applicant to Nalagarh and got certain stamp papers thumb marked from the non-applicant on the pretext of family pension. It is further pleaded that applicant did not pay any earnest money to the non-applicant. It is further pleaded that non-applicant is widow and is uneducated rustic lady and does not know how to sign. It is further pleaded that non-applicant only thumb marked and applicant played fraud upon non-applicant who is old illiterate lady. It is further pleaded that non-applicant is pardanaseen woman and prayer for dismissal of application sought.

4. Admission and denial process conducted by the Court before framing of issues in the civil suit. Applicant filed the present application before framing of issues in the civil suit pleaded therein that non-applicant has denied the execution of agreement dated 18.1.2014. It is pleaded that there is ambiguity in the facts stated in the written statement and in the admission and denial process. It is further pleaded that examination of applicant and non-applicant before framing of issues is essential in the present case. It is further pleaded that in case thumb impression is admitted by non-applicant then controversy would narrow down and it would avoid extra expenditure to prove the thumb impression on the document of agreement by the non-applicant. It is prayed that applicant and non-applicant be examined in person in the Court before framing of issues under Order X Rule 2 read with Order XIV Rule 1 read with Section 151 CPC.

5. Per contra response filed on behalf of the non-applicant to the application filed under Order X Rule 2 read with Order XIV Rule 1 and Section 151 CPC pleaded therein that application is not maintainable. It is further pleaded that there is no ambiguity in the pleadings of the parties and in admission and denial process. It is further pleaded that applicant is under legal obligation to prove the contents of agreement and prayer for dismissal of application sought.

6. Court heard learned counsel for the applicant and non-applicant and also perused the entire record carefully. Following points arises for determination:-

1) Whether application filed under Order X Rule 2 read with Order XIV Rule 1 and Section 151 CPC is liable to be accepted as mentioned in the memorandum of grounds of application?

2) Relief.

Findings upon point No.1 with reasons.

7. Submission of learned Advocate appearing on behalf of the applicant that there is ambiguity in the written statement filed by the non-applicant and in the admission and denial process and in order to avoid expenditure to prove thumb impression of non-applicant upon agreement application filed by the applicant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the pleadings of parties. Non-applicant has denied the contents of agreement before Additional Registrar (Judicial) on 7.10.2014 in the admission and denial process. Object to examine parties before framing of issues under Order X Rule 2 CPC is to ascertain matter in dispute and not to take evidence in civil suit. Examination under Order X Rule 2 CPC is not

substitute for regular examination on oath. It is well settled law that examination under Order X Rule 2 CPC is to illustrate the pleadings which are obscure and vague in nature. It is also well settled law that under Order X Rule 2 CPC the statement of parties is not recorded on oath. It is also well settled law that admission of signature or thumb impression upon document is not admission of contents of document. **See 2010 (8) SCC page 452 titled Kapil Corepacks Private Limited. vs. Harbans Lal.** It is held that parties are examined in the Court before framing of issues only when there is ambiguity between pleadings of the parties. In the present case there is no ambiguity in the pleadings of the parties. Applicant did not issue any notice to the non-applicant for admission of facts as required under Order XII Rule 4 Code of Civil Procedure 1908. In the present application applicant has sought relief of admission of fact of the thumb impression of non-applicant in agreement dated 18.1.2014. It is held that fact of thumb impression in disputed agreement could not be admitted by non-applicant under Order X Rule 2 read with Order XIV Rule 1 and Section 151 Code of Civil Procedure 1908 but could be admitted only under Order XII Rule 4 Code of Civil Procedure 1908 after issuance of notice as mentioned under Order XII Rule 4 Code of Civil Procedure 1908 as per Form No.11 Appendix-C of Code of Civil Procedure 1908. In view of the fact that there is no ambiguity in the pleadings and in admission and denial process Court is of the opinion that it is not expedient in the ends of justice to allow present application before framing of issues in civil suit. Point No.1 is decided against applicant.

Relief (Point No.2):

8. In view of findings upon point No.1 application filed under Order X Rule 2 CPC read with Order XIV Rule 1 and Section 151 CPC is dismissed. Observations made in this order will not affect merits of the case in any manner and will strictly confine for disposal of OMP No. 134 of 2015. OMP No 134 of 2015 is disposed of. No order as to costs.

****

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

Khem Chand son of late Shri Kanshi Ram & others. ....Revisionists/Plaintiffs

Versus

State of H.P. & other. ....Non-revisionists/Defendants

Civil Revision No. 2 of 2015
Order Reserved on 11th September 2015
Date of Order 30th September 2015

Code of Civil Procedure, 1908- Section 115- Order 23 Rule 1(3)- Plaintiff sought declaration qua ownership of suit land on account of adverse possession and prayed for correction of revenue entries and injunction against the defendants not to interfere in his peaceful possession - defendants contested the suit- during the suit, the plaintiff prayed for withdrawal of the suit with permission to file a fresh suit on the ground that mutation was attested during the pendency of suit, and, suit land was reverted to the villagers and the villagers are necessary parties for disposal of the suit- application dismissed by the trial Court- held, that mutation having been effected during the pendency of the suit was hit by doctrine of lis pendens, and secondly, plaintiff could implead the villagers as party in the same suit and suit could be continued further in the same shape- further held, that no

formal defect was apparent from the material and, therefore, permission to withdraw the suit with liberty to file a fresh suit was rightly declined- revision dismissed. (Para-7 to 10)

Cases referred:

Thomson Press (India) Ltd. vs. Nanak Builders and Investors P. Ltd. and others
AIR 2013 SC 2389
A. Nawab John and others vs. V.N. Subramaniyam, (2012)7 SCC 738
Kamal Kumar Agarwal vs. Commissioner of Commercial Taxes, West Bengal and others, JT 2010(3) SC 390
Vidur Impex and Traders Pvt. Ltd. and others vs. Tosh Apartments Pvt. Ltd. and others, AIR 2012 SC 2925
Amit Kumar Shaw and another vs. Farida Khatoon and another, AIR 2005 SC 2209
Bibi Zubaida Khatoon vs. Nabi Hassan Saheb and another, AIR 2004 SC 173
Dhurandhar Prasad Singh vs. Jai Prakash University and others, AIR 2001 SC 2552
Surjit Singh and others vs. Harbans Singh and others, AIR 1996 SC 135

For the Revisionists:	Mr. J.L. Bhardwaj, Advocate
For the Non-revisionists:	Mr. M.L. Chauhan, Additional Advocate General with Mr.J.S.Rana Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision petition is filed under Section 115 of Code of Civil Procedure against order dated 15.9.2014 passed by learned Civil Judge (Junior Division) Solan (H.P.) wherein learned trial Court dismissed the application filed by revisionists under Order 23 Rule 1(3) of Code of Civil Procedure for permission to withdraw civil suit No. 234/1 of 2014/04 titled Kanshi Ram and others vs. State of H.P. with liberty to file fresh suit.

Brief facts of the case

2. Brief facts of the case as pleaded are that Kanshi Ram and Nand Lal filed civil suit No. 234/1 of 2014/04 titled Kanshi Ram and other vs. State of H.P. whereby revisionists sought decree for declaration in favour of revisionists and against the non-revisionists to the effect that revisionists are owners in possession of suit land comprised in Khata No. 8 Khatauni No. 12 Khasra No. 3 min, 25 min kitas 2 measuring 34 bighas 2 biswas situated at mauza Tutuwa Hadbast No. 260 Pargana Haripur Tehsil and District Solan. Revisionists also sought relief that entry in column of owners in the name of State of H.P. is wrong illegal and not tenable and is contrary to the factual position at the spot. Revisionists also sought consequential relief of adverse possession declaring the revisionists as owners in possession of land. Revisionists also sought relief of permanent prohibitory injunction restraining the non-revisionists from interfering in peaceful possession of revisionists.

3. Non-revisionists contested the civil suit by way of filing written statement. Thereafter learned trial Court framed following issues on 5.5.2006:-

1. Whether revenue entries showing defendants as owners of suit land are wrong and illegal? .....OPP

2. Whether plaintiff is entitled for relief of permanent prohibitory injunction as prayed? .....OPP

3. Whether in the alternative plaintiffs have become owners of suit land by way of adverse possession? .....OPP

4. Whether the suit is not maintainable in present form and shape?.....OPD

5. Whether there is no cause of action in favour of the plaintiffs? ...OPD

6. Whether this Court has no jurisdiction? ...OPD

7. Whether the suit is bad for non-joinder of necessary parties?.....OPD

8. Whether the suit is not properly valued for Court fee and jurisdiction? .....OPD

9. Relief.

4. Thereafter revisionists have closed their evidence in affirmative and case was listed for evidence of non-revisionists by learned trial Court. On 19.7.2011 learned trial Court dismissed the civil suit in default. Thereafter revisionists filed application for restoration of civil suit and same was also dismissed in default by learned trial Court on 22.2.2012. Thereafter revisionists again filed another application for restoration of application as well as suit. Learned trial Court on 19.9.2012 restored the civil suit to its original number. Thereafter revisionists filed application No. 117/6 of 2014 under Order 23 Rule 1 (3) for withdrawal of present civil suit with permission to file fresh suit on same cause of action.

5. Court heard learned Advocate appearing on behalf of revisionists and learned Additional Advocate General appearing on behalf of non-revisionists and Court also perused the entire record carefully.

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

Point No.1

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

Point No. 2

Final Order.

Findings upon Point No. 1 with reasons

7. Submission of learned Advocate appearing on behalf of revisionists that learned trial Court had committed grave illegality by way of dismissing the application filed under Order 23 Rule 1(3) of CPC by revisionists is rejected being devoid of any force for the reasons hereinafter mentioned. Revisionists sought the withdrawal of civil suit with permission to file fresh suit on the same cause of action on the ground that suit land has been reverted back to villagers vide muration No. 148 dated 25.5.2009 and State of H.P. has no right title or interest in suit land and persons who have shown as owners on account of reversion of land vide mutation No. 148 dated 25.5.2009 are to be impleaded as parties by the revisionists. Non-revisionists contested the application on the ground that civil suit is pending since 2004 and permission to withdraw the civil suit with liberty to file fresh civil suit on the same cause of action after lapse of eleven years should not be granted as same would cause miscarriage of justice.

8. It is proved on record that mutation No. 148 dated 25.5.2009 was attested during the pendency of suit. It is well settled law that any mutation attested during the pendency of civil suit will be governed by concept of *lispendence* as mentioned in Section 52 of Transfer of Property Act 1882. ***See AIR 2013 SC 2389 titled Thomson Press (India) Ltd. vs. Nanak Builders and Investors P. Ltd. and others. See (2012)7 SCC 738 titled A. Nawab John and others vs. V.N. Subramaniyam. See JT 2010(3) SC 390 titled Kamal Kumar Agarwal vs. Commissioner of Commercial Taxes, West Bengal and others.***

9. It is well settled law that under Order 1 Rule 10 (2) CPC Court is competent to add persons as parties whose presence before the Court is necessary in order to enable the Court effectually and completely adjudicate the matters and to settle all questions involved in suit. Necessary parties can be impleaded at any stage of civil suit. Court is of the opinion that revisionists are at liberty to file application for impleadment of necessary parties before learned trial Court in accordance with law on account of subsequent event. It is also well settled law that under Order XXII Rule 10 CPC suit can be continued against any person upon whom any interest is devolved during pendency of civil suit. Revisionists can also file application under Order XXII Rule 10 CPC 1908 before learned trial Court.

10. It is well settled law that party can withdraw the suit under Order 23 Rule 1 CPC at any stage of case unconditionally. It is well settled law that when plaintiffs intend to withdraw civil suit under Order 23 Rule 3 CPC with liberty to institute a fresh suit on the same cause of action then plaintiffs are under legal obligation to satisfy the Court following conditions. (1) That suit must fail by reasons of formal defect. (2) That there are sufficient grounds for allowing the plaintiff to institute the fresh suit on the subject matter of suit or part of claim. In present case there is no formal defect in suit when suit was instituted in the year 2004 and there are no sufficient grounds to allow the plaintiffs to institute fresh suit on same cause of action because alternative remedy of *lispendence* as provided under Section 52 of Transfer of Property Act 1882 and another alternative remedy of Order 1 Rule 10 (2) CPC and another alternative remedy under Order XXII Rule 10 CPC 1908 are available to revisionists in present civil suit. ***See AIR 2012 SC 2925 titled Vidur Impex and Traders Pvt. Ltd. and others vs. Tosh Apartments Pvt. Ltd. and others. See AIR 2005 SC 2209 titled Amit Kumar Shaw and another vs. Farida Khatoon and another. See AIR 2004 SC 173 titled Bibi Zubaida Khatoon vs. Nabi Hassan Saheb and another. See AIR 2001 SC 2552 titled Dhurandhar Prasad Singh vs. Jai Prakash University and others. See AIR 1996 SC 135 titled Surjit Singh and others vs. Harbans Singh and others.*** In view of above stated facts point No.1 is decided in negative against the revisionists.

Point No. 2(Final Order)

11. In view of findings on point No.1 revision petition is dismissed. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of present revision petition. No order as to costs. Parties are directed to appear before learned trial Court on 26.10.2015. File of learned trial Court along with certified copy of this order be sent back forthwith. Revision petition stands disposed of. Pending miscellaneous application(s) if any also stands disposed of.

****

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

Subhash ...Appellant
Versus
State of Himachal Pradesh ...Respondent

Criminal Appeal No. 189 of 2014
Judgment Reserved on : 8.9.2015
Date of Decision : September 30, 2015

Indian Penal Code- Section 376(2)(f)- Prosecutrix aged about 8 years went to the house of accused to watch television where she was raped by the accused -mother of the prosecutrix on noticing dark spots on the underwear of the child made enquiries from child and came to know that the child was sexually abused by the accused- F.I.R was lodged- accused was tried, convicted and sentenced by the trial court- held that the prosecutrix has consistently deposed that the accused inserted his finger in her private parts and then urinated in her underwear-mother of the prosecutrix also stated categorically that her daughter had disclosed that the accused firstly inserted his finger in her private part and then rubbed his penis in the same- the medical officer while examining the child found tenderness in the vaginal parts of the child and presence of seminal fluid on labia minora- human semen was found on the bed sheet, underwear of the prosecutrix, underwear of the accused as also vaginal swab and vaginal smear slide- Result of DNA profiling revealed the blood and the semen found on the body and the clothes of the prosecutrix and also other clothes/articles to be that of the accused- no reasons available on the record to disbelieve the prosecution case- no reason to interfere with the well reasoned judgment passed by the trial Court- appeal dismissed. (Para 35 to 43)

Cases referred:
Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 23.10.2014, In Re, (2014) 4 SCC 786
Rajkumar v. State of Madhya Pradesh, (2014) 5 SCC 353
Shyam Narain v. State (NCT of Delhi), (2013) 7 SCC 77
Narender Kumar v. State (NCT of Delhi), (2012) 7 SCC 171
Munna v. State of Madhya Pradesh, (2014) 10 SCC 254
Madan Gopal Makkad v. Naval Dubey and another, (1992) 3 SCC 204
Mukesh v. State of Chhattisgarh, (2014) 10 SC 327)
State of Haryana v. Basti Ram, (2013) 4 SCC 200
O.M. Baby (Dead) by Legal Representative v. State of Keral, (2012) 11 SCC 362
State of U.P. v. Chhotey Lal, (2011) 2 SCC 550
Radhakrishna Nagesh v. State of Andhra Pradesh, (2013) 11 SCC 688
Mohd. Iqbal v. State of Jharkhand, (2013) 14 SCC 481; Narender Kumar v. State (NCT of Delh), (2012) 7 SCC 171
Radhakrishna Nagesh v. State of Andhra Pradesh, (2013) 11 SCC 688
Rameshwar v. The State of Rajasthan, AIR 1952 SC 54
State of Punjab versus Jagir Singh (1974) 3 SCC 277
State of Rajasthan versus N. K. THE ACCUSED (2000) 5 SCC 30
State of Maharashtra versus Chandraprakash Kewalchand Jain, (1990) 1 SCC 550

State of Punjab versus Gurmit Singh and others, (1996) 2 SCC 384
Siriya @ Shri Lal vs. State of Madhya Pradesh, (2008) 8 SCC 72
State of M.P. v. Dharkole alias Govind Singh and others, (2004) 13 SCC 308
Dattu Ramrao Sakhare v. State of Maharashtra (1997 (5) SCC 341
Radhu v. State of Madhya Pradesh, (2007) 12 SCC 57
Golla Yelugu Govindu vs. State of AndhraPradesh (2008) 16 SCC 769
State of Himachal Pradesh vs. Suresh Kumar (2009) 16 SCC 697
Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, (1983) 3 SCC 217
State of H.P. v. Asha Ram, (2005) 13 SCC 766

For the appellant : Mr. Lovneesh Kanwar, Advocate, as Legal Aid Counsel for the appellant-accused.
For the respondent : Mr. Ashok Chaudhary, Addl. Advocate General with Mr. J. S. Guleria, Asstt. A.G. for the appellant-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Assailing the judgment dated 21.11.2013/29.11.2013, passed by learned Sessions Judge, Solan, District Solan, H.P., in Sessions Trial No. 18-S/7 of 2011, titled as State of Himachal Pradesh vs. Subhash, whereby accused 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 life and pay fine of Rs.20,000/- and in default thereof to further undergo simple imprisonment for a period of two years, present jail appeal has been preferred by him under the provisions of Section 374 of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that as a tenant of Ram Lal (DW-1), Rinku (PW-3) was residing at Sanwara, P.S. Dharampur, with his wife Sonu Devi (PW-2) and two children i.e. the prosecutrix, aged eight and son aged six. Rinku was running a dhaba at Sanwara. Accused was also a tenant of Ram Lal and residing in the very same building. Rinku was occupying one room and the adjoining room was occupied by the accused who was working in a dhaba at Dharampur and his wife was employed in a School at Sanawar. On 24.7.2011, prosecutrix and her brother went to the room of the accused for watching television, where accused subjected her to rape. At about 3.00 p.m. when mother of the prosecutrix noticed her taking off her underwear having some dark spots, which smelled of urine, prosecutrix disclosed that by taking off her underwear, accused inserted his finger and after rubbing his penis against her private parts urinated. Sonu Devi narrated the incident to her husband Rinku and police was informed. SI Kshama Dutt (PW-15) went to the spot and recorded statement of Sonu Devi (Ext. PW-2/A) under the provisions of Section 154 Cr.P.C., which led to registration of F.I.R. No. 117 of 2011, dated 25.7.2011 (Ext. PW-12/A) against the accused at Police Station Dharampur, Distt. Solan, H.P., under the provisions of Section 376(2)/511 of the Indian Penal Code. Prosecutrix was got medically examined from Dr. Simmi Sharma (PW-13) who issued MLC (Ext. PW-13/A). The vaginal smear slide, vaginal swab and underwear of the prosecutrix were sealed and sent for chemical analysis. The blood samples for DNA profiling of the prosecutrix as well as the accused were taken by the police. Police also took into possession bed sheet, underwear of the accused and his semen sample. MHC Praveen Kumar (PW-12) kept the samples in safe custody. The samples were sent to the Forensic Science Laboratory, Junga and as per

report (Ext. PW-14/A) human semen was found on the bed sheet, underwear of the prosecutrix, underwear of the accused as also vaginal swab and vaginal smear slide. Record pertaining to the age of the prosecutrix was taken by the police. The radiological age of the prosecutrix was found to be below 12 years. Opinion (Ext. PW-1/A) of the Radiologist Dr. J. P. Kaushik (PW-1) was taken on record. 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 (2)(f) of the Indian Penal Code to which he did not plead guilty and claimed trial.

4. In order to prove its case, in all, prosecution examined as many as sixteen witnesses and statement of the accused under Section 313 Cr. P.C. recorded, in which he took plea of innocence and false implication. Accused also examined one witness in his defence.

5. Appreciating the material on record, including the testimonies of the witnesses, trial Court convicted the accused of the charged offences and sentenced as aforesaid. Hence, the present appeal.

6. We have heard Mr. Lovneesh Kanwar, learned Legal Aid Counsel, on behalf of the appellant as also Mr. Ashok Chaudhary learned Addl. A.G. and Mr. J. S. Guleria, learned Asstt. A.G., on behalf of the State. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find the findings returned by the trial Court to be based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice. Prosecution has been able to prove its case, beyond reasonable doubt.

7. Through the testimony of Ram Lal (DW-1), accused wants the Court to believe that on 24.7.2011, at the time of the incident he was not home and the prosecutrix and her brother were playing out in the open. Hence no incident in question took place. Having perused the same, we are of the considered view that no such fact can even be remotely inferred. Ram Lal is running a grocery shop in the very same building in which he had let out rooms to the accused and father of the prosecutrix. As per this witness, accused works at a Dhaba in Dharampur and his wife is working in the Pinegrove School at Sanawar. He admits that the tenanted premises are below his shop. His version that prosecutrix was playing with her brother cannot be said to be inspiring in confidence for he admits to be a busy shop keeper and he is not sure as to whether at the relevant time, children were playing in front of his shop which incidentally happens to be a National Highway. Also he admits that from his shop, rooms occupied by the tenants are not visible. From his shop he is not in a position to ascertain what would transpire in the tenanted premises. He is not able to disclose the place of work of the accused. Presence of the accused at Dharampur throughout the day, could have been proved by the employer. Incidentally none came forward to depose such fact. Also even from the suggestion put by the accused such defence cannot be said to have been probablized.

8. The incident took place in the afternoon/evening on 24.7.2011. At midnight (00:50 hours), matter was brought to the notice of the police and F.I.R. (Ext. PW-12/A) registered. There is no delay. During the night intervening 24th and 25th July, 2011, prosecutrix was got medically examined from Dr. Simmi Sharma (PW-13) who, on physical

examination observed tenderness in the vaginal parts. Seminal fluid was also present on labia minora. She issued MLC (Ext. PW-13/A). Initially prosecutrix disclosed to the Doctor that accused had inserted his finger inside her vagina. However, such version stands clarified by the Doctor that the child was subjected to sexual assault. Human semen was detected on the underwear of the prosecutrix. Also blood detected on the vulval swab and vaginal smear was due to insertion of penis in the private parts of the prosecutrix, resulting into trauma in the vaginal part. In her uncontroverted testimony she has clarified that efforts of inserting penis in the private part was made. She has explained sexual assault to be a wider term, inclusive of sexual intercourse.

9. Independent of medical evidence, the question which needs to be considered is as to whether the ocular version, through the testimonies of the prosecutrix and her mother, inspires confidence or not.

10. At this juncture we deem it appropriate to deal with the statement of law on the point.

11. In *Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 23.10.2014, In Re,* (2014) 4 SCC 786, the Apex Court has highlighted the need for having an effective State police machinery for curbing the menace of rape, for such crime is not only in contravention of the domestic laws, but is also in direct breach of obligations under International Law, treaties whereof stand ratified by the State, which is under an obligation to protect its women from any kind of discrimination.

12. The Apex Court has highlighted the need for prompt disposal of cases of crime against women and children. (*Rajkumar v. State of Madhya Pradesh,* (2014) 5 SCC 353).

13. In *Shyam Narain v. State (NCT of Delhi)*, (2013) 7 SCC 77, the Apex Court held as under:

> "27. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilized norm, i.e., "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands

just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court."

14. In *Narender Kumar v. State (NCT of Delhi)*, (2012) 7 SCC 171, the apex Court has cautioned the Court to adopt the following approach:

> "The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of the witnesses which are not of a substantial character."

15. The Apex Court in *Munna v. State of Madhya Pradesh,* (2014) 10 SCC 254, has reiterated the principle that testimony of prosecutrix is almost at par with an immediate witness and can be acted upon without corroboration.

16. The Apex Court in *Madan Gopal Makkad v. Naval Dubey and another,* (1992) 3 SCC 204, has held as under:

> "34. A medical witness called in as an expert to assist the court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by explaining the terms of science so that the court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the court.
>
> 35. Nariman, J. in *Queen v. Ahmed Ally,* (1989) 11 Sutherland WR Cr 25, while expressing his view a on medical evidence has observed as follows:
>
> > "THE evidence of a medical man or other skilled witnesses, however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion."
>
> 36. Fazal Ali, J. in *Pratap Misra v. State of Orissa*, (1977 3 SCC 41, has stated thus:
>
> > "... [l]t is well settled that the medical jurisprudence is not an exact science and it is indeed difficult for any Doctor to say with precision and exactitude as to when a particular injury was caused ... as to the exact time when the appellants may have had sexual intercourse with the prosecutrix."
>
> 37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty-first Edition) at page 369 which reads thus:
>
> > "THUS to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or

> even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one. "

38. In Parikh 's Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

> "SEXUAL intercourse. In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

39. In Encyclopedia of Crime and Justice (Vol. 4 at page 1356, it is stated:

> "... [E]ven slight penetration is sufficient and emission is unnecessary."

40. In Halsbury's Statutes of England and Wales, (Fourth Edition), Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse within the meaning of S. 44 of the Sexual Offences Act, 1956. Vide (1) *R. v. Hughes*, (1841) 9 C&P 752, (2) *R. v. Lines and R. v. Nicholls*, (1844) 1 Car & Kir 393.

41. See also Harris's Criminal Law, (Twenty-second Edition) at page 465.

42. In American Jurisprudence, it is stated that slight penetration is sufficient to complete the crime of rape. Code 263 of Penal Code of Califomia reads thus:

> "RAPE; essentials Penetration sufficient. The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime."

43. The First Explanation to S. 375 of Indian Penal Code which defines 'Rape' reads thus:

> "EXPLANATION.PENETRATION is sufficient to constitute the sexual intercourse necessary to the offence of rape."

44. In interpreting the above explanation whether complete penetration is necessary to constitute an offence of rape, various High courts have taken a consistent view that even the slightest penetration is sufficient to make out an offence of rape and the depth of penetration is immaterial. Reference may be made to (1) *Natha v. Emperor,* (1925) 26 CrLJ 1185, *(2) Abdul Majid v. Emperor*, AIR 1927 Lah 735(2), *(3) Mst. Jantan v. Emperor,* (1934) 36 Punj LR 35, *(4) Ghanashyam Misra v. State,* 1957 CriLJ 469*, (5) Das Bernard v. State*, 1974 CriLJ 1098. In *re Anthony,* AIR 1960 Mad 308 it has been held that while there must be penetration in the technical sense, the slightest

penetration would be sufficient and a complete act of sexual intercourse is not at all necessary. In Gour's The Penal Law of India, 6th Edn. 1955 (Vol. II), page 1678, it is observed, "Even vulval penetration has been held to be sufficient for a conviction of rape." ”

17. Also, it is a settled principle of law that absence of injuries on the external or internal parts of the victim by itself cannot be a reason to disbelieve the testimony of the prosecutrix. (See: *Mukesh v. State of Chhattisgarh,* (2014) 10 SC 327); *State of Haryana v. Basti Ram,* (2013) 4 SCC 200; *O.M. Baby (Dead) by Legal Representative v. State of Keral,* (2012) 11 SCC 362; and *State of U.P. v. Chhotey Lal,* (2011) 2 SCC 550).

18. The Apex Court in *Puran Chand v. State of Himachal Pradesh,* (2014) 5 SCC 689, observed that even non-rupture of hymen itself would be of no consequence and rape could be held to be proved even if there is slight penetration.

19. Mere fact that hymen is intact or that there is no actual wound on the private part of the prosecutrix is not conclusive of the fact that prosecutrix was not subjected to rape. (*Radhakrishna Nagesh v. State of Andhra Pradesh,* (2013) 11 SCC 688).

20. Reiterating its earlier view in *Mohd. Iqbal v. State of Jharkhand,* (2013) 14 SCC 481; *Narender Kumar v. State (NCT of Delh),* (2012) 7 SCC 171, the Apex Court in *Mukesh v. State of Chhattisgarh,* (2014) 10 SC 327, has held that sole testimony of prosecutrix is sufficient to establish commission of rape, even in the absence of any corroborative evidence.

21. In *Radhakrishna Nagesh v. State of Andhra Pradesh,* (2013) 11 SCC 688, the apex Court held as under:

> “33. It will be useful to refer to the judgment of this Court in the case of O.M. Baby v. State of Kerala, (2012) 11 SCC 362, where the Court held as follows:-
>
> > "17. ..... ‘16. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her

> evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.'
>
> 18. We would further like to observe that while appreciating the evidence of the prosecutrix, the court must keep in mind that in the context of the values prevailing in the country, particularly in rural India, it would be unusual for a woman to come up with a false story of being a victim of sexual assault so as to implicate an innocent person. Such a view has been expressed by the judgment of this Court in the case *of State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 and has found reiteration in a recent judgment in *Rajinder @ Raju v. State of H.P.*, (2009) 16 SCC 69, para 19 whereof may be usefully extracted:
>
> > '19. In the context of Indian culture, a woman - victim of sexual aggression - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent.' ""

22. In *Rameshwar v. The State of Rajasthan,* AIR 1952 SC 54, the Supreme Court has held that previous statement of the raped girl to her mother, immediately after the occurrence, is not only admissible and relevant as to her conduct, but also constitutes corroboration of her statement under the provisions of section 157 of the Evidence Act. In order to come to the aforesaid conclusions, illustration (j) to section 8 of the Evidence Act was relied upon. In that case, the victim, named Purni, was 7/8 years old. She was not administered oath, but was held to be competent witness and, therefore, duly examined and believed.

23. In *State of Punjab versus Jagir Singh* (1974) 3 SCC 277 the apex Court held that:-

> "A criminal trial is not like a fairy tale wherein one is free to give fight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the

evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the Courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures." (Emphasis supplied)

24. The Apex Court in *State of Rajasthan versus N. K.* THE ACCUSED (2000) 5 SCC 30 has held that:-

> "... ...It is true that the golden thread which runs throughout the cobweb of criminal jurisprudence as administered in India is that nine guilty may escape but one innocent should not suffer. But at the same time no guilty should escape unpunished once the guilt has been proved to hilt. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on prowl for easy prey, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal Courts which gives rise to the demand for death sentence to the rapists. The Courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women." (Emphasis supplied)

25. It is also a settled position of law that victim of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. If for some reason Court is hesitant to place implicit reliance on the testimony of the victim it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the victim must necessarily depend on the facts and circumstances of each case. If the totality of the circumstances appearing on the record of the case disclose that victim does not have a strong motive to falsely involve the person charged, Court should ordinarily have no hesitation in accepting her evidence. [*State of Maharashtra versus Chandraprakash Kewalchand Jain,* (1990) 1 SCC 550 and *O. M. Baby (dead) by Legal Representative vs. State of Kerala*, 2012 (11) SCC 362].

26. The Apex Court in *State of Punjab versus Gurmit Singh and others,* (1996) 2 SCC 384 has held that:-

> "... ...The Courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The

testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion ?

---- --- ---

"21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Court, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case." ... ...

(Emphasis supplied)

The Court again reiterated its view in Siriya @ Shri Lal vs. State of Madhya Pradesh, (2008) 8 SCC 72.

27. In *State of M.P. v. Dharkole alias Govind Singh and others,* (2004) 13 SCC 308 the Apex Court has held that:-

"9. ... Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts; the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

"10. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case?

"The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be

> dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A junior may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other."

"11. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and commonsense. It must grow out of the evidence in the case."

[Emphasis supplied]

28. In *Dattu Ramrao Sakhare v. State of Maharashtra* (1997 (5) SCC 341) it held that:

> '5. .....A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored'. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

29. In *Radhu v. State of Madhya Pradesh,* (2007) 12 SCC 57, the Apex Court has held that "... Even if there is consent, the act will still be a 'rape', if the girl is under 16 years of age" and "There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort

money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case".

30. Law with regard to testimony of a child witness is now well established. In *Golla Yelugu Govindu* vs. *State of AndhraPradesh* (2008) 16 SCC 769, while reiterating its earlier view the Apex Court held that:-

> "11. 6.Indian Evidence Act, 1872 (in short the 'Evidence Act') does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer J in Wheeler v. United States (159 U.S. 523). The evidence of a child witness is not required to be rejected per se; but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See Surya Narayana v. State of Karnataka (2001 (1) Supreme 1).

31. In *State of Himachal Pradesh vs. Suresh Kumar* (2009) 16 SCC 697, the Apex Court was dealing with a case where victim was ravished by the accused on 15.3.2000 which incident was narrated by the victim to her sister later during the day. She also narrated the incident to her parents the following day and later on to the Doctors. Court accepted the statement of the sister, parents and the doctors while holding the accused guilty. Importantly, Apex Court reversed the finding recorded by the High Court wherein it was held that statement of the victim being minor was not worthy of credence.

32. The apex Court in *Radhakrishna Nagesh Versus State of Andhra Pradesh,* (2013) 11 SCC 688 had an occasion to deal with a case of a child victim. After considering its earlier decisions, the Court held that Court must examine the evidence of the prosecution in its entirely and then see its cumulative effect to determine whether offence of rape stands committed or not.

33. The apex Court in *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat,* (1983) 3 SCC 217 has held as under:

> "9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered

essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical. It is conceivable in the western society that a female may level false accusation as regards sexual molestation against a male for several reasons such as :-

(1) The female may be a 'gold digger' and may well have an economic motive- to extract money by holding out the gun of prosecution or public exposure.

(2) She may be suffering from psychological neurosis and may see an escape from the neurotic prison by phantasizing or imagining a situation where she is desired, wanted, and chased by males.

(3) She may want to wreak vengeance on the male for real or imaginary wrongs. She may have a grudge against a particular male, or males in general, and may have the design to square the account.

(4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta.

(5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.

(6) She may do so on account of jealousy.

(7) She may do so to win sympathy of others.

(8) She may do so upon being repulsed.

10. By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :- (1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred, (2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours, (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely

> embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husbands' family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocent. (12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by counsel for the culprit, and the-risk of being disbelieved, act as a deterrent.
>
> 11. In view of these factors the victims and their relatives are not too keen to bring the culprit to books. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the Court's in the western world (obeisance to which has perhaps become a habit presumably on account of the colonial hangover). We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities- factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification : Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self preservation. Or when the 'probabilities-factor' is found to be out of tune."

[Also: *State of H.P. v. Asha Ram,* (2005) 13 SCC 766]

34. We shall now discuss the evidence in view of the aforesaid settled proposition of law.

35. Prosecutrix (PW-4) who was examined, without oath, has clearly deposed that she alongwith her brother had gone to the house (here she means room) of the accused to watch the television. Accused put his finger in her private part and then urinated in her underwear. She narrated the incident to her mother. Even previously accused had committed such act which she did not disclose on account of fear, so instilled in her mind by the accused of being beaten up by her mother. The witness has fully withstood the test of cross examination and we do not find her version to be shaky, unbelievable or uninspiring

in confidence. Only when she went back to her house and on queries put by her mother did she disclose the incident to her. Her admission that other tenants used to reside in the adjoining quarters would in no manner render her testimony to be false or doubtful for it is not her case that she cried and none came forward to help her or the accused out of fear could not have performed such an act. Also her brother was very young, perhaps unable to understand or notice the events taking place around him.

36. Sonu Devi (PW-2) states that on 24.7.2011 at about 3.00 p.m., when prosecutrix came home, she saw her change her underwear. When queried, she informed of having urinated in her underwear. She found some dark spots. When confronted, prosecutrix became perplexed. Affectionately, after comforting her and assuring her of not being beaten up, she was told that it was the accused and not her who had urinated in her underwear. She further disclosed that by taking off her underwear, accused put his finger and also rubbed his penis against her private part and threw some substance like urine, of which her underwear got wet. She also disclosed that even earlier he had done the same and had asked her not to disclose it to anyone, lest she be beaten up by her mother. Witness noticed private parts of the prosecutrix to be reddish in colour. She informed her husband and after he came home at about 6.00 p.m., the matter was reported to the police. In the meanwhile Neelam wife of accused also arrived and hearing the incident fell unconscious. She further states that police took into possession the bed sheet and wrapped it into a parcel which was sealed.

37. We find that even this witness has withstood the test of cross examination. We find her version to be clear, cogent and consistent with that of the prosecutrix. Witness admits that accused was employed at a Dhaba at Dharampur but however she does not state that all throughout the day he was at his place of work and was not present in his room, more particularly at the time her children had gone to watch the television in his room. Wife of the accused was not home at that time.

38. Version of Sonu Devi stands corroborated by her husband Rinku (PW-3).

39. Thus in our considered view prosecution has been able to establish by leading clear, cogent, convincing and inspiring piece of evidence, establishing the charged offence.

40. We find that oral version stands corroborated by link evidence. Inspector Pritam Singh (PW-14) immediately recorded the incident and police swung into action. SI Kshama Dutt (PW-15) rushed to the spot and recorded statement (Ext. PW-2/A) of the mother of the prosecutrix. The incriminating articles i.e. bed sheet and the clothes of the prosecutrix as also the accused, vaginal swab and smear, were recovered and sealed. The accused was got medically examined and sample of his blood and semen obtained. The sealed articles were kept in safe custody and sent for chemical analysis to the laboratory. Result of DNA profiling (Ext. PW-14/B) revealed the blood and the semen found on the body and the clothes of the prosecutrix as also other clothes/articles to be that of the accused. Doctor has proved that the charge of sexual assault is made out.

41. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused stands proved beyond reasonable doubt to the hilt. It cannot be said that accused is innocent or not guilty or that he has been

falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

42. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that accused raped the prosecutrix.

43. For all the aforesaid reasons, we find no reason to interfere with the well reasoned judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Findings of conviction cannot be said to be erroneous or perverse. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any. Records of the Court below be immediately sent back.

****