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

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

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Title: Denzong Nang-Ten Sung –Kyob Tsogpa Vs. State of H.P. & Ors. Page-314

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Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 353, 332 read with Section 34 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- applicant had joined investigation- police had not claimed that custodial interrogation of the applicant is required in the present case- therefore, releasing the applicant on bail will not adversely affect the interests of the general public and state- bail granted.
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Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 354 and 506 of IPC - held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- the allegations against the petitioner are grievous and heinous and amount to Sexual harassment - a married woman has a right to live with dignity and honour and none can be allowed to attack the dignity or honour of married woman - the Courts are under legal allegations to protect the right and dignity of married woman-considering the allegations made against the petitioner, it would not be expedient to grant the anticipatory bail and the investigation will be seriously hampered-the petition is dismissed.
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Code of Criminal Procedure, 1973- Section 438- Applicant apprehends his arrest for the commission of offences punishable under Sections 363, 366, 376 (2) (g) and 120-B of IPC, Section 4 and 16 of P.O.S.C.O. Act- The prosecutrix had attributed inculpatory role to one V and had omitted to attribute any inculpatory role to the bail applicant in her statement – subsequently she implicated the bail applicant, which shows that her statement is afterthought as well as improvement and the same cannot be relied upon - bail granted.

Title: Rajeshwar Singh Negi Vs. State of H.P. Page-6

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offences punishable under Sections 341, 323, 395, 367, 147, 148, 149, 120-B 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-investigation had been completed and challan had been filed in the Court- releasing the applicant on bail will not affect the interests of the state and general public- therefore, applicant ordered to be released on bail of Rs.1 lac with two sureties.

Title: Sushil Kumar @ Sunil Kumar son of Sh.Ramesh Chand Vs. State of H.P.

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Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offences punishable under Sections 341, 323, 395, 367, 147, 148, 149, 120-B 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-investigation had been completed and challan had been filed in the Court- releasing the applicant on bail will not affect the interests of the state and general public- therefore, applicant ordered to be released on bail of Rs.1 lac with two sureties.

Title: Sachin Kumar son of Shri Ram Dass Vs. State of H.P. Page-226

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 15 and 27-A of N.D.P.S. Act- it was reported by FSL, Junga that exhibits stated to be poppy husk are not samples of poppy straw- this report casts doubt regarding the prosecution version- merely because 14 cases were registered against the petition since 1990, it cannot be said that he is not entitled to bail- bail granted.

Title: Amrik Singh Vs. State of Himachal Pradesh Page-424

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Section 376 and 342 of IPC- the prosecutrix is major – she had alleged that accused had committed sexual intercourse with her for three years on the pretext of the marriage- she could have known about the fact that accused was married during the course of three years, hence prima facie the prosexutrix had made false allegations against the bail-applicant-bail granted.

Title: Ashok Kumar Vs. State of H.P. Page-539

Code of Criminal Procedure, 1973- Section 439- Non-applicant was granted bail- applicant filed an application for cancellation of the bail granted to the non-applicant- the police reported that non-applicant had not violated any condition, therefore, the bail granted to the non-applicant cannot be cancelled- petition dismissed.

Title: Lalit Kumar Vaidya Vs. State of H.P. Page-199

Code of Criminal Procedure, 1973- Section 482- A complaint was filed against the petitioner before Learned Special Judge who sent the same for investigation to DSP State Vigilance and Anti Corruption Bureau- it was contended that no sanction was obtained prior to filing of the complaint and, therefore, order passed by Learned Special Judge be quashed- held, that sanction is required at the time of taking cognizance - no cognizance is taken, when the complaint is sent to the police for investigation -therefore, there was no requirement of taking sanction- petition dismissed.

Title: Ganesh Dutt Thakur son of Ghurko Ram Vs. Gita Singh wife of Rattan Singh and another Page-892

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 368, 384, 342, 506 read with Section 34 of IPC- it was pleaded that an affidavit was given by the complainant and the matter has been compromised between the complainant and the accused-held that once charge sheet has been filed in a Court of law, FIR cannot be quashed by the High Court in exercise of the inherent powers- High court cannot prejudge the issue and cannot conduct a trial -mere settlement between the parties is no ground to quash the proceedings under Section 482 of Cr.P.C.- the petitioner can approach the Magistrate for the discharge - Petition dismissed.

Title: Subhash Singla son of Shri Jagannath & others Vs. State of H.P. Page-742

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420, 468, 471 and 120-B of Indian Penal Code read with Section 13(2) of Prevention of Corruption Act 1988- it was pleaded that petitioner was born and brought up in India- he was issued a passport by Government of India from Srinagar- an FIR was registered against the petitioner alleging that he is a Tibetan refugee who had got false certificate of Indian citizenship in connivance with the Tehsildar District Leh- this certificate was presented before Tehsildar Sadar for seeking permission under Section 118 of H.P. Tenancy and Land Reforms Act- permission was granted by the State- challan has not been filed before the Court- hence, it was prayed that FIR be quashed- held, that disputed questions of facts are raised by the parties which cannot be decided at this stage- documents cannot be released to the petitioner as they are stated to be forged- however, prosecution directed to complete investigation expeditiously.

Title: Mingchong Dorje alias Yab son of late Tashi Vs. State of H.P. and another Page-620

Code of Criminal Procedure, 1973- Section 482- JMIC Kandaghat declined the opportunity of the cross-examination of 'R'- 'R' had not appeared before the Court as he was suffering from cancer- he was ordered to be summoned on commission- statement of 'R' was not recorded by the commissioner on the ground that his statement had already been recorded when accused was declared proclaimed offender - when case was listed before the Court, Court held that 'R' had not appeared before the commissioner on several dates and the right of cross-examination of 'R' was closed by the order of the Court- held, that trial Court had

not executed the direction of the Court but had given his findings that examination of 'R' was not necessary which was contrary to the order of the Court- once 'R' had appeared before the Commissioner, Commissioner was duty bound to record his statement- Court could not have reviewed its earlier order giving the opportunity to the petitioner- petition allowed.
Title: Vijay Kumar son of Roop Lal Vs. State of H.P. Page-622

Code of Criminal Procedure, 1973- Section 482- Petitioner No. 1 is major, aged 26 years and petitioner No. 2 is aged 20 years- they had married and had executed affidavits before Executive Magistrate- parents of the petitioner No. 2 started harassing petitioner No. 1 in order to compel him to produce petitioner No. 1 before the police- petitioner filed a petition for seeking a direction to the respondents No. 2 and 3 not to harass them and to protect them from respondents No. 4 and 5- held, that the major girl is free to marry or live with anyone she likes and no offence is committed by her by residing with petitioner No. 1/her husband- no person has any right to interfere with their lives- direction issued to the respondents No. 2 and 3 to ensure that petitioners are not harassed by anyone, not subjected to threats or act of violence.
Title: Prabhat Sharma and another Vs. State of Himachal Pradesh and others
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Code of Criminal Procedure, 1973- Section 482- Petitioner pleaded that he was undergoing sentence at Central Jail, Nahan under Section 302 of IPC- he applied for parole of 42 days to look after his aged father, which was not granted-the respondent pleaded that the petitioner was released on parole for 42 days and had not surrendered on the expiry of period of parole-he applied for extension of parole, which was rejected- held that the fundamental rights of convicted persons are suspended after conviction - the petitioner had availed the parole of 42 days- it is not expedient in the interest of justice to release the petitioner on parole-the petition dismissed.
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Code of Criminal Procedure, 1973- Section 482- Petitioner sought quashing of the petition filed under Section 12 of Protection of Women from Domestic Violence Act or for transferring the same to another District- record showed that material preposition of facts were alleged by one party and denied by another party- merits of the case would be seen by the Court after leading the evidence- merely because father of the wife was in the police is not sufficient to infer that justice would not be done –petition dismissed.
Title: Siddharth Thakur son of Shri Pradeep Singh Vs. Deva wife of Sh. Siddharth Thakur and another Page-417

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Title: Brig. J.K. Narang & anr. Vs. Central Bureau of Investigation Page-656

Code of Criminal procedure, 1973- Sections 451 and 457- Complainant claimed exclusive possession of the premises on the ground that his father had delivered the possession to him- as per application filed under Sections 451 and 457 of Cr.P.C. room are in possession of 'J', brother of the complainant- one room is in possession of the complainant- complainant stated that she proceeded to open the shutter of his shop, his brother, his wife, his sons and his daughter attacked him with lathis and threatened to do away with his life- FIR was registered and premises were sealed by the police on which application was filed and learned CJM handed over the possession to the complainant subject to the furnishing on supardari bond- a revision was preferred before learned Sessions Judge which was dismissed- held, that Court can deal with the immovable property under Sections 451 and 457 of Cr.P.C- Court can deal with the immovable property under Section 456 of Cr.P.C- therefore, order passed by courts below set aside and police directed to re-seal the premises.

Title: Joginder Singh Vs. State of H.P. & another Page-151

Constitution of India, 1950- Article 12- Co-operative societies do not fall within the definition of State- Writ Petition is not maintainable against them.

Title: Sushil Kumar Dogra Vs. State of H.P. and others (D.B.) Page-535

Constitution of India, 1950- Article 226- A show cause notice was issued to the petitioners, which was challenged by them-held that the petitioners had not approached the authority and had not put up their case before the Authority – a show cause notice cannot be questioned by filing a writ petition- petition dismissed with a liberty to the petitioner to show cause before authority.

Title: Sunil Kumar Garg & another Vs. State of Himachal Pradesh & others Page-759

Constitution of India, 1950- Article 226- AICTE had approved the institute of the petitioner for running two years pharmacy course- affiliation was granted to the petitioner with Himachal Pradesh Takniki Shiksha Board-extension was granted to run the course- a fact finding report was prepared by Director Technical Education on which the approval was withdrawn- an expert visit committee (E.V.C) was constituted, which conducted the inspection – a show cause notice was issued to the petitioner- the petitioner pleaded that it came to know about the withdrawal of the approval after the receipt of show cause notice- held that the college was running pharmacy course since, 2005- the extension was granted on the basis of infrastructure available with the college- the show cause notice was issued on the basis of deficiencies pointed out in E.V.C. report- a reply pointing out the compliance was not taken into consideration- the deficiencies pointed out are not such in whose absence the institution cannot be run – petition allowed and six months time granted to the petitioner to remove the deficiencies.

Title: Shanti Niketan College of Pharmacy Vs. State of H.P. and others Page-735

Constitution of India, 1950- Article 226- Appellant was appointed as Clerk-cum-Cashier- he remained absent from duty and was treated to have voluntary retired from the service - reference was made to the Industrial Tribunal which upheld the action of the management of voluntary retirement- clause XVI of the Memorandum of Settlement provided that the management has to record satisfaction that the employee had no intention to join duties and if the employee fails to report for duty within 30 days of the receipt of the notice or fails to tender explanation for his absence satisfying the management that he had not taken any

other employment, employee was deemed to have voluntary retired from the service- Tribunal and the Single Judge had not noticed this clause- management had also not conducted any inquiry- award quashed and the matter remanded to the Tribunal to decide the same afresh.

Title: Sanjeev Aggarwal Vs. The Regional Manager, State Bank of India and others (D.B.) Page-907

Constitution of India, 1950- Article 226- Central Government framed a scheme called General Insurance (Rationalization of Pay Scales and Other Conditions of Service of Development Staff) Amendment Scheme- Development Officers were required to opt for Special Voluntary Retirement Package within a period of sixty days or to render their services as Development Officers (Administration) - petitioners had not exercised the option- held, that scheme had become functional after its publication in the official gazette- therefore, the persons who had not exercised the option are not entitled for the benefit under the scheme.

Title: Rajinder Singh Shandil & ors. Vs. Union of India & ors. Page-888

Constitution of India, 1950- Article 226- Court had taken cognizance of non- completion of the road and had issued various directions- the directions were not complied with – initially the contractor stated that he would complete work by end of June, 2016 and thereafter stated that he would complete the work by the end of June, 2017- the contractor directed to complete the work in terms of the contract- a two member committee directed to ensure that money released by the State Government is used only for the purpose for which it is released and not for any other purpose.

Title: Court on its motion Vs. State of H.P. (D.B.) (CWPIL No.8480) Page-476

Constitution of India, 1950- Article 226- Court had taken suo motu notice of erratic and inadequate water supply in and around Shimla- status report was ordered to be filed- Court directed the respondent No. 2 to ensure regular water supply- Municipal Corporation stated that water storage tank had been constructed at two places, which could not be made functional for want of funds- direction issued to the respondent to file affidavit giving the detail of the water supply to the hoteliers, to place on record Mechanism for regularization of water supply, to point out the steps taken where the hoteliers failed to submit detailed information, to outline the steps taken for tapping of natural water resources, to place on record mechanism for blocking the leakages, to make the water storage tanks operational, steps taken to install AMRs - a committee constituted to ensure that regular and adequate water supply be provided to all the residents – another committee constituted to suggest the ways and means to ensure the supply of water, to make an exercise whether any proposal is required to be made to effect changes in the rules in place, suggest plans so that adequate water supply can be made in future also and to take all the steps for doing the needful and to file status report within two weeks.

Title: Court on its own motion Vs. State of H.P. and others (D.B.) (CWPIL No.10 of 2015) Page-541

Constitution of India, 1950- Article 226- Earlier a scheme was framed by the government of India providing pension on retirement – this scheme was modified- the petitioner contended that the amendment in the scheme was not duly notified and the petitioners were not aware of the same - the petitioner got no opportunity to switch over to the amended scheme due to lack of wide publicity- Writ court held that the petitioner had contributed the

full share of the salary - employees provident fund organization had not invited the revised option after the amendment and directed it to recalculate and redeposit the already deposited amount- held that the scheme was published in the Official Gazette- individual service of notification was not required – the publication in the official gazette is a publication to the public and the writ petition based on the fact that petitioners were not aware of the amendment in the scheme had no basis- the court cannot make out a new case which was not pleaded by the parties- the writ court had fallen into error while allowing the writ appeal - Writ petition dismissed.

Title: Regional Provident Fund Commissioner Vs. R.C. Gupta and others (D.B.) Page-721

Constitution of India, 1950- Article 226- Father of the respondent died in harness- respondent moved an application seeking compassionate appointment which was rejected initially- respondent filed an application before the Tribunal pleading that his case was required to be considered for two more occasions- held, that as per instruction of the Government of India, the case of the respondent was required to be reviewed for two years subject to the availability of regular vacancy- Tribunal had only directed the petitioner to consider the case of the respondent for two more years by taking into account number of vacancies- there was no illegality in the order passed by Tribunal- Writ petition dismissed.

Title: Union of India and another Vs. Bhuvneshwar Sen (D.B.) Page-234

Constitution of India, 1950- Article 226- Petitioner appeared in the examination and made a representation regarding the correctness of answer key to some questions - respondent had constituted an Expert Body to look into the representation- held, that opinion of the Expert is entitled to a great weight especially when the petitioner had not filed the affidavit of any Expert to corroborate their opinion- petition dismissed.

Title: Suresh Kumar vs. Himachal Pradesh Board of School Education (D.B.) Page-78

Constitution of India, 1950- Article 226- Petitioner applied for the trade/vacancy of Trainer Electronic Mechanic- respondent No. 4 was selected for the said post- petitioner contended that the parameter/ methodology adopted by the Selection Committee was unfair/arbitrary- held, that Selection Committee is entitled for formulating methodology/ parameter for adjudging the comparative merits of aspirants for assessing their suitability- respondent No. 4 possessed higher experience than the petitioner and the Selection Committee cannot be faulted for awarded higher marks to the respondent No. 4- petition dismissed.

Title: Kapil Vs. State of H.P & others (D.B.) Page-64

Constitution of India, 1950- Article 226- Petitioner claimed that bull fightings were being held in different parts of the State contrary to the provision of Prevention of Cruelty to Animals Act- respondent pleaded that animal fighting has been completely banned – held, that bulls cannot be used for entertainment and sports purpose- Supreme Court has already issued a direction to prevent the use of animal for entertainment purpose- further, direction issued to ensure the implementation of the judgment of the Supreme Court as well as the provision of Prevention of Cruelty to Animals Act.

Title: Sonali Purewal Vs. State of H.P and others (D.B.) Page-697

Constitution of India, 1950- Article 226– Petitioner contended that the investigation was not conducted properly by the police and police be directed to register the FIR- it was reported that no offence was found to have been committed after investigation and a Calandra under Section 107 and 151 of Cr.P.C. was filed- held that the remedy of the petitioner is before Competent Court- petition disposed off with the direction to invoke the jurisdiction of the Competent Court.

Title: Yashu Versus State of Himachal Pradesh and others Page-844

Constitution of India, 1950- Article 226- Petitioner entered into an agreement to sell the land to install an Atta-Chakki (Flour Mill)- he applied to Senior Executive Engineer for electricity connection- he deposited the amount but the connection was not released due to the resistance offered by the private respondent- private respondent refused to execute the sale deed and the petitioner had to file a civil suit for specific performance in which status quo order was passed- respondent sold the part of the suit land despite the status quo order- seller was impleaded as party and another order of status quo was passed- held, that petitioner was put into possession on the basis of agreement to sell- installation of transformer will not confer the ownership upon the petitioner – transferee pendente lite is not a necessary party- petition allowed- the respondents No. 6 to 9 directed to install the transformer and respondents No. 2 to 5 directed to render all necessary assistance and respondent No. 10 directed not to create any hindrance.

Title: Kishori Lal Vs. State of H.P. & ors. Page-856

Constitution of India, 1950- Article 226- Petitioner filed a Writ petition which was allowed and revised pay scale were directed to be released w.e.f. 1.1.1986- pay scale was granted to the petitioner- however, notice was issued informing him that the officials in the cadre of Diary Helper had gained monetary benefits and the recoveries were to be made- petitioner was directed to deposit the amount of Rs. 41,297/- petitioner filed a Writ Petition which was ordered to be treated as an appeal- Managing Director ordered the recovery on monthly installments of Rs. 2,000/- per month from the salary of the petitioner- held, that petitioner was drawing salary since 1989 – his annual increments could not have been ordered to be withdrawn arbitrarily after more than two decades when the petitioner had not misled authorities in any manner- Writ petition allowed and order passed by the respondent directing the recovery from the salary of the petitioner quashed and set aside.

Title: Jia Lal Vs. The Himachal Pradesh State Co-operative Milk Producers' Federation Ltd. & anr. Page-482

Constitution of India, 1950- Article 226- Petitioner filed a writ petition which was objected by the respondent on the ground that in view of the arbitration clause the writ petition is not maintainable- held that constitutional remedy is always available to an aggrieved person and Arbitration clause in an agreement cannot render the writ petition not available ipso facto- although the court may refuse to exercise the jurisdiction in exercise of its discretion.

Title: M/s Lomash Pharmaceuticals through its sole Prop. Smt. Vandana Sharma Vs. State of H.P. & ors Page-860

Constitution of India, 1950- Article 226- Petitioner filed nomination paper for the election to the office of Board of Directors which was rejected on the ground that he had not maintained a credit balance of not less than Rs. 5000/- for a continuous period of two years-it was contended that this bye-law is in derogation and in conflict with clause 2 of appendix "A" of HP Cooperative Societies Rules- held that it was permissible for the bank to

lay down the qualification to contest election to the office of Board of Directors-petition dismissed.

Title: Vinod Thakur Vs. State of H.P. & others. Page-702

Constitution of India, 1950- Article 226- Petitioner had applied for the post of Aganwari worker- Selection Committee had not awarded any marks to the petitioner despite the fact that petitioner had possessed an experience certificate as a Nursery Teacher for 2 years in a private crèche- held, that it was necessary for the petitioner to hold a diploma in nursery teaching- she had failed to produce any material to show that she possessed a diploma in nursery teaching- petition dismissed.

Title: Roshni Devi Vs. State of H.P & others Page-58

Constitution of India, 1950- Article 226- Petitioner had qualified the technical bid- respondents issued a letter seeking clarification regarding the detail of the work executed by the petitioner showing the awarded amount, completion cost and the copy of the final bill- respondents contended that petitioner had not qualified mandatory condition of completing three similar works costing not less than 40% of the estimated cost- held, that petitioner had not carried out a single work but had carried out different types of work - cost of the each of the separate item was to be taken into consideration for determining whether the petitioner had carried out the work equivalent to 40% of the estimated cost or not- petition dismissed.

Title: Sudarshan Kumar Vs. State of H.P. and Ors. (D.B.) Page-50

Constitution of India, 1950- Article 226- Petitioner had sought quashing of policy decision made by respondent prescribing five years qualifying service- petitioner also sought mandamus commanding the respondents to take all necessary steps to grant benefit of Special JBT Certificate after completion of five years' service – respondents pleaded that as per scheme framed by it voluntary teachers who had completed 10 years of continuous services in Government Primary School be given JBT Certificate and the voluntary teachers who had worked in the Literacy campaign be given one year's relaxation- Government thereafter took a policy decision prescribing that voluntary teachers who had completed five years of continuous services are to be regularized – Writ Court had quashed the Annexure filed along with the reply- petitioner had not sought the quashing of that annexure- held, that Court cannot travel beyond the pleading and cannot make out a case not pleaded by the party - writ petitioner had prayed for rewriting of the policy- government decision and policy cannot be the subject matter of writ petition unless arbitrariness is shown in the decision making process – policy decision cannot be quashed on the ground that wiser decision could have been taken- affected persons were not arrayed as party and the Court cannot quash the order after inordinate delay- appeal allowed, writ petition dismissed.

Title: Sukh Dev Kumar & others Vs. State of Himachal Pradesh & others (D.B.)
Page-557

Constitution of India, 1950- Article 226- Petitioner made a request to proceed on long leave on which leave of 16 months was granted to her–subsequently she applied for extension which was declined–the college was taken over and the petitioner was directed to join the duties immediately otherwise her services would be terminated- she failed to join duties and her services were terminated- the record showed that the petitioner had joined duties with D.A.V. college Kotkhai prior to termination of her services - therefore,

respondent no. 4 was under no obligation to conduct the inquiry before dispensing with her services- petition dismissed.

Title: Sneh Lata Pathak Vs. State of H.P. & others. Page-528

Constitution Of India, 1950- Article 226- Petitioner pleaded that his land measuring 42 kanals 3 marlas was allotted to other right holders and in lieu thereof he was allotted land measuring 23.17 standard kanals during consolidation- he further alleged that presently he is not in possession of either parcel of the two - S.D.M Hamirpur was appointed as Local Commissioner to ascertain the actual position of the spot- Petitioner was found in possession of the minor portion of both the parcels - consolidation proceedings proceeded further in the meantime and consolidation Director filed affidavit showing the land and area being allotted to the petitioner - petitioner agreed to the proposal and was later on put in possession of the land proposed in affidavit- writ petition disposed off accordingly.

Title: Subhash Chand Vs. State of Himachal Pradesh and others Page-173

Constitution of India, 1950- Article 226- Petitioner prayed for quashing the notification issued by respondent creating sub Tehsil, Jole and for shifting it to Chowki Minar- petitioner had not pleaded that decision to set up of a new sub-Tehsil suffers from any arbitrariness or malafides - creation of sub-Tehsil is in the domain of the Executive- Court cannot interfere with the same unless it is prima facie, illegal or suffers from arbitrariness- policy decision cannot be questioned on the ground that another decision would have been more fair or wise, scientific or logical or in interest of the society- Court should not substitute its wisdom in place of the wisdom of executive- petition dismissed.

Title: Surinder Kumar Vs. State of H.P. and others (D.B.) Page-600

Constitution of India, 1950- Article 226- Petitioner was appointed as a conductor with the respondent- the respondent adopted Voluntary Retirement Scheme subject to receipt of funds from the State Government for ex-gratia payment– the petitioner filed an application seeking voluntary retirement and prayed that his five years service be counted for the purpose of pensioner/retiral benefits- however, respondent did not count the service and contended that the five years service benefit is not available at the time of voluntary retirement- held that the purpose of the voluntary retirement is to infuse new blood in the organization by permitting the incumbents to seek voluntary retirement-these provisions have to construed fairly–a person getting voluntary retirement cannot be discriminated from other person- the petition allowed.

Title: Shri Brij Lal Thakur Vs. Himachal Road Transport Corporation and another Page-241

Constitution of India, 1950- Article 226- Petitioner was appointed as Steno-typist in the Industries Department and was promoted as Senior Scale Stenographer- he opted for the post of Junior Scale Stenographer in the H.P. Secretariat- his pay was reduced in the Secretariat – he was permitted to retain his pay scale at the time of absorption- held, that pay of the clerks was protected but the petitioner was discriminated- further, his pay was reduced without issuing any show cause notice- petition allowed.

Title: Budhi Ram Justa Vs. State of H.P. and others (D.B.) Page-448

Constitution of India, 1950- Article 226- Petitioner was elected as Pradhan – a show cause notice was issued to him–the petitioner filed a reply - however, the petitioner was ordered to be placed under suspension- the petitioner contended that the reply filed by him was not taken into consideration-held that the order of suspension should disclose the application of mind on the part of the authority to the facts of the case- authority is required to give the reasons leading to suspension– the allegations and the reply should be mentioned in the order asking to show cause or the notice- in the present case, the reply submitted by the petitioner was not mentioned in the order–the order does not deal with the contentions raised by the petitioner-the provisions of natural justice although shown to have been complied with were not complied with in reality–the petition allowed and show cause notice set aside with liberty to pass a detailed order after dealing with the reply of the petitioner

Title: Jagat Singh Vs. State of H.P. & ors. Page-690

Constitution of India, 1950- Article 226- Petitioner was engaged as a driver on a contract basis for a period of one year- the bus being driven by the petitioner met with a fatal accident- criminal proceedings were initiated against the petitioner- a show cause notice was issued to the petitioner but was withdrawn –the proceedings terminated in favour of the petitioner and he was acquitted of the charges framed against him- he made a representation for regularization of his service- the representation was rejected – respondent stated that the contract of the petitioner came to an end, when the services of the petitioner were automatically terminated – mere acquittal in a criminal case will not result in automatic renewal of the contract- the petitioner contended that 12 other persons were similarly situated and their services were continued- a finding was recorded by the Court that accident had taken place due to sinking of the road and not due to negligence of the driver - held that concept of equality can be applied amongst the equal- nothing was brought on record to show that the cases of other persons were similar to the case of the petitioner - the decision making authority was entitled to take the factum of accident into consideration - the show cause notice was withdrawn as there was no relationship of master and servant- the petitioner had failed to show that his services were dependent upon the outcome of the criminal case - hence, mere acquittal will not help the petitioner - Petition dismissed.

Title: Hari Singh Vs. Himachal Road Transport Corporation and others.

Page-663

Constitution of India, 1950- Article 226- Petitioner was selected as an O.T. teacher by duly constituted DPC on 30.7.1987 – she was adjusted in Govt. Primary School, Cheling and was shown to be working as C & V Teacher on tenure basis- she claimed regularization – petitioner was regularized during the pendency of the petition before Writ Court- held, that her entire length of service is to be counted at the time of regularization- petitioner was qualified O.T. who was appointed as JBT on tenure basis – respondents cannot be permitted to take advantage of their own wrong by posting the writ petitioner as JBT when she was admittedly an O.T. – therefore, Writ Court had rightly ordered her regularization with the benefit of past service.

Title: State of H.P. and others Vs. Dechan Palmo (D.B.) Page-348

Constitution of India, 1950- Article 226- Petitioner was selected as PTA- she joined as such on 12.10.2007- her services were terminated on 29.2.2008- she filed a written statement in which direction was passed that she be allowed to rejoin her duty- it was contended that petitioner was not allowed to work because of model code of conduct – held,

that petitioner was not allowed to work for no fault of her- a direction issued to treat the services of the petitioner notionally.

Title: Poonam Kumari Vs. State of Himachal Pradesh & another (D.B.) Page-827

Constitution of India, 1950- Article 226- Petitioners filed a Writ Petition claiming themselves to be holding the district cadre posts of Indian National Congress in District Kangra- they also stated that they are public spirited persons- the person against whom allegations were made were not arrayed before the Court as parties- petition appears to be politically motivated, which could not be called to be public interest litigation- hence the same is dismissed.

Title: Anurag Sharma and another Vs. State of H.P. and others(D.B.) Page-351

Constitution of India, 1950- Article 226- Petitioners were transferred- they filed an application before the Administrative Tribunal which was dismissed- a fresh order of transfer was passed during the pendency of the petition- held that it was not averred in the writ petition that transfer orders were outcome of Malice or malafides- petition dismissed.

Title: Rajender Kumar Arora Vs. State of H.P. & others. Page-904

Constitution of India, 1950- Article 226- Respondent had constructed a Sub Marketing Yard - booths and shops were allotted to the various categories as per prescribed quota- petitioner being co-operative society was entitled to 10% of the quota- petitioner challenged the quota of 50% for the local dealers- held, that no material was brought on record to show that 50% quota prescribed for the local dealers was discriminatory or it was not based upon any intelligible differentia having any nexus with the object sought to be achieved- rather, experience of local dealers was recognized by the respondent by prescribing the quota of 50%- petition dismissed.

Title: Progressive Farmer Society Kharapather Vs. H.P. APM Board, Khalini and others Page-366

Constitution of India, 1950- Article 226- Respondent No. 2 advertised 18 vacancies of peon- petitioners appeared for interview- Interview Committee selected respondents No. 3 and 4- petitioner contended that name of respondent No. 3 was not registered with the Employment Exchanges of Mandi and Kullu which was necessary in view of advertisement notice- there was bias in as much as respondent No. 4 was a driver of Circle Head of Punjab National Bank, Mandi – held, that restriction imposed in the advertisement notice regarding registration of Mandi and Kullu District is violative of Articles 14 and 16 of the Constitution of India- the Court cannot question the marks awarded by Selection Committee- petition dismissed. Title: Dan Singh & another Vs. PNB Bank & others (D.B.) Page-133

Constitution of India, 1950- Article 226- Respondent No. 3 invited bids for construction work by e-tendering- petitioner submitted his bid along with work certificate but bid was declined on the ground that necessary condition of previous work was not fulfilled - it was found that although petitioner had carried out work but it was not similar in nature as the work for which bids were invited- it was contended that during the pendency of the proceedings, similar work was allotted to the petitioner – held that, the court cannot interfere unless it is proved on record that technical committee had over looked relevant consideration or had taken some extraneous matter into consideration – the opinion of

technical committee which consists of the experts cannot be reappraised by the Court-petition dismissed.

Title: M/s Hill Construction and Engineering Company Vs. State of H.P. & others (D.B.) Page-249

Constitution of India, 1950- Article 226- Respondent No. 6 was selected as a Part Time Water Carrier – wide publicity was not given prior to the selection of the respondent No. 6-petitioner could not apply to the said post in absence of the publicity- Writ Petition allowed and the appointment of respondent No. 6 quashed and set aside.

Title: Mangla Devi Vs. State of H.P. and Ors. (D.B.) Page-86

Constitution of India, 1950- Article 226- Respondent was engaged as Beldar – he worked in different capacities of Beldar, fitter and mate - he was engaged as fitter and was offered appointment as work charged Beldar- however, he declined such offer and stated that since he had been working as a fitter, therefore, he be appointed as Work Charged Fitter Grade-I he was given the appointment on work charge basis as Fitter Grade-II on the completion of 10 years - when the record regarding the employment of the petitioner was not produced before the Tribunal, the Tribunal held that the plea of the petitioner that he be appointed as fitter Grade-I was acceptable - it was contended in the writ petition filed before the Court that there are no posts of fitter Grade I and 2 but the posts are categorized as junior technician-the tribunal had drawn an adverse inference on failure to produce the record-held that the petitioner was entitled to be regularized on completion of 10 years as per the directions of the tribunal - Petition dismissed

Title: State of Himachal Pradesh and others Vs. Hari Dutt (D.B.) Page-531

Constitution of India, 1950- Article 226- Respondents appointed the writ petitioners as Veterinary Officers on contract @ Rs. 8,000/- p.m.– the petitioners claimed N.P.A. on the ground that they were deprived of their right to practice and similar benefit is being granted to the Medical Officers and the Veterinary Officers appointed on regular basis – held that the responsibilities of the Veterinary Officers appointed on contract and regular basis are same-similar benefit was being granted to Medical Officers- it was not permissible to deny the benefits to the Veterinary Officers- Petition allowed.

Title: State of Himachal Pradesh and others Versus Abhinav Soni and others Page-829

Constitution of India, 1950- Article 226- Respondents directed to file fresh status report indicating the facilities, infrastructure provided in health centres, right from the level of a Primary Health Centre to Medical Colleges- respondent union of India directed to outline the steps taken by it to provide assistance to the State Government.

Title: Komal Chaudhary Vs. State of H.P. and others (D.B.) Page-544

Constitution of India, 1950- Article 226- State Government took a decision to open eight colleges - however, the government changed and a decision was taken not to open these colleges- writ petitions were filed which were dismissed after making certain observations - new guide lines were framed by the government and decision to open 14 new colleges was taken- a college was proposed to be opened at Kotla Behar - however, this was not included in the new notification while seven out of eight colleges which were denotified earlier were included - the report submitted by the principal showed that sufficient land was available

for construction of the college- adjacent area was thickly populated and a private college was running with 300 students – the college would cater to the needs of five constituencies- the nearest college is located at a distance of more than 40 k.ms. - the colleges de-notified earlier were again proposed to be opened except the college at Kotla Behar- held that a policy decision has to be applied uniformly and rationally – earlier decision was reversed in an arbitrary manner- mere change of government does not mean review of all the decisions taken by the previous government- the government has to continue and carry on the unfinished job of the previous government-writ petition allowed and the respondent directed to open government college at Kotla Behar.

Title: Asha Ram and another Vs. State of H.P. and others. Page-635

Constitution of India, 1950- Article 226- State sought the modification of the order passed by the Court by seeking a direction that the encroached land and the orchard be taken over by the Forest Department-the income generated by the Department will be utilized for afforestation -the State permitted to pluck the apple, conduct their sale, utilize the grant for planting forest trees and to fence the area with the barbed wire-State further directed to furnish particulars of encroachers and the action taken against them.

Title: Court on its own motion Ref:- Krishan Chand Vs. The State of H.P. & others Page-818

Constitution of India, 1950- Article 226- Two contracts for supply of medicines were awarded to the petitioner which were extended from time to time- letters were issued to the petitioner stating that there were certain short comings and supplied medicines did not conform to the standard specifications - the petitioner filed a reply along with the report of the laboratory in which it was stated that there was no short comings in the supply and the drugs were substandard - however, the respondent cancelled the contract, forfeited the money and black listed the petitioner- the respondent pleaded that the reports given by the drug testing laboratory were placed before the Committee which had also considered the explanation given by the petitioner and the order was passed on the basis of the report of the committee- the petitioner had failed to show that the laboratory (report of which was filed by the petitioner) was a recognized laboratory – therefore, no reliance can be placed on the report filed by the petitioner.

Title: M/s Lomash Pharmaceuticals through its sole Prop. Smt. Vandana Sharma Vs. State of H.P. & ors Page-860

Constitution of India, 1950- Article 226- University advertised a post of Assistant Professor in the Department of Education, which was reserved for Other Backward Classes- candidature of the petitioner was rejected on the ground that he had failed to get any marks under the head publication - respondent No. 3 was selected by the University – record showed that Interview Committee had awarded five marks under the head publication in the year 2010 but the marks were not awarded to the petitioner in the impugned interview- this shows that subsequent Interview Committee had not applied its mind and had deliberately omitted to award marks under the head publication- petition allowed and respondents No. 1 and 2 directed to award five marks under the head publication and thereafter to proceed in accordance with law.

Title: Namesh Kumar Vs. State of H.P & others (D.B.) Page-180

Constitution of India, 1950- Article 226- Writ petitioners claimed that the department had not granted them the revised pay scale as per the fitment table – Writ court quashed the

service benefits granted to the family after the death of the employee contrary to the judgment of the High Court - it was not open to the respondent to violate the order passed by the Court- this is a contumacious conduct on the part of the respondent, hence the notices ordered to be issued to the respondent as to why they be not punished for the contempt of the Court.

Title : Avinash Chauhan Vs. P.C. Dhiman and others Page-236

'F'

Factories Act 1948- Section 8- Deputy Director (factories) has been mandated to exercise the powers of Inspector- held that complaint by him is maintainable under the law.

Title: Rajesh Pandya and another Vs. State of H.P. Page-47

Factories Act, 1948- Sections 92 and 106- Complaint filed after 90 days of the acquisition of the knowledge by the inspector-Magistrate took cognizance of the offence-cognizance is bad-even the time to seek prosecution sanction by the inspector cannot be excluded from 90 days- prosecution sanction not a condition precedent for filing a complaint- complaint quashed being time barred.

Title: Rajesh Pandya and another Vs. State of H.P. Page-47

'H'

H.P. Tenancy and Land Reforms Act, 1972 and Punjab Redemption of Mortgage Act, 1913– Plaintiff filed a Civil Suit seeking redemption of the suit land pleading that the suit land was mortgaged by the defendant with the plaintiff for a consideration of Rs. 1900/-the names of the defendants were recorded as non occupancy tenants – the proprietary rights were conferred upon the defendants on the basis of the revenue records- defendants admitted the mortgage but asserted that the mortgage was redeemed and the defendants were put in possession as tenants- the proprietary rights were rightly conferred- according to the Punjab Redemption Act, the property can be redeemed only by filing an application for redemption before the Collector- no record of the application having been filed before the collector was produced- no rapat Rojnamcha showing the redemption was proved- the defendants had failed to lead evidence to show that they were inducted as tenants- the mutation was passed without summoning and hearing the parties- the column of rent also recorded Bilah Lagan Kabja Rajabandi (without rent, the possession is with the consent)- Mere entry of Mal (land revenue) and Swai (local rate surcharge) is not sufficient to prove the payment of rent- there is no period of limitation for redemption- suit decreed.

Title: Prem Dutt son of Basti Ram & others Versus Smt.Mangla wife of Shri Ram Rattan & others Page-879

H.P. Urban Rent Control Act, 1987- Section 14- Landlord filed a petition for eviction of the tenant on the ground that the premises are required bonafide for the purpose of re-construction/rebuilding which cannot be carried out without the premises being vacated by the tenant - the landlord pleaded that the building was aged more than 100 years and had outlived its utility – the landlord wanted to repair the building by pulling down the existing old structure- the tenant on the other hand denied that the condition of the building was not proper-the landlord had rented out part of the premises for running a Restaurant during the pendency of the proceedings- landlord contended that the disposal of the petition would have taken a long time and it was not possible for him to keep the building vacant till the disposal of the petition - held that the land lord is only required to show that he requires the building in a bonafide manner for demolition and re-construction - age and condition of

building are required to be taken into consideration to determine the bonafide need of the landlord- merely because another co-owner has not been arrayed is not sufficient to doubt the bonafide of the landlord- a sanctioned map is not a condition precedent for establishing the bonafide – the fact that a portion of the building is rented out temporarily by the landlord is not sufficient to doubt his bona fides.

Title: Sh. Lin Kuei Tsan Vs. Sh. Ashok Kumar Goel Page-504

H.P. Urban Rent Control Act, 1987– Section 14- Rent Controller found that tenant had fallen into arrears of rent and allowed a period of 30 days to deposit the amount–the amount was not deposited by the defendant-it was contended that Rent Controller had determined the arrears of rent w.e.f. August, 2007 till 2012 where as the tenant was in arrears of rent w.e.f. August, 2008 - this amount was rectified in appeal- held that the tenant was required to file an application for rectification of arrears - instead of filing such application, he filed an appeal- the period of 30 days of deposit of the amount cannot be counted from the date of the order passed by the Appellate Authority but has to be counted from the date of the order passed by the Rent Controller.

Title: Bharat Sanchar Nigam Ltd. & Ors. Vs. Vinod Lakhanpal Page-652

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 118(3)- When special statute provides for penal consequences in itself -prosecution under other laws is uncalled for-in case the interest is transferred to a non-agriculturist-appropriate government may initiate the proceedings and cancel the transfer-acquittal of the accused persons proper-appeal dismissed.

Title: State of H.P. Vs. Sher Singh and others (D.B.) Page-52

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- Landlord filed a Rent petition against the tenant on the ground that premises are required bona fide for carrying out reconstruction, which cannot be carried out without the premises being vacated-the tenant failed to plead the right of re-entry in the reply-during the trial an amendment was sought to incorporate this plea in the reply- held, that right of re-entry is a statutory plea, which can be taken at any stage of the proceedings- mere delay in taking the plea is not sufficient to dismiss the application.

Title: EIH Associated Hotels Ltd. Vs. Mrs. Preet Joshi Page-80

Hindu Marriage Act, 1955-Section 13- Husband filed a petition for Restitution of Conjugal Rights- wife pleaded that husband was having illicit relations with his sister-in-law, these allegations were also repeated in a petition filed by the wife for claiming maintenance under Section 125 of Cr.P.C.- the husband filed a petition for divorce claiming that these allegations were false and had caused cruelty to him- no finding was recorded by the Court regarding the correctness or otherwise of the allegations leveled by the wife in the petitions for seeking restitution and maintenance – it was established in those proceedings that husband was subjecting his wife to mental harassment and physical cruelty- he was physically assaulting her- he had disconnected the electricity and telephone connection from the premises where the parties were residing jointly- he shifted and started residing with his parents and brother at his native place-wife had not left matrimonial home without any reasonable excuse or justifiable cause – the allegation of illicit relations leveled by the wife were vague, unspecific regarding time, place and manner - name of sister-in-law- with whom the husband had illicit relations was also not mentioned- the allegations of unchastity against the husband or the wife amount to cruelty and they will cause mental agony to the

person against whom they were directed- the husband cannot be expected to live with a wife, who had leveled such allegations.

Title: Monika Sharma Vs. Kuldeep Kumar Dogra Page-942

'I'

Indian Evidence Act, 1872- Section 3- Allegations that the accused gave beatings to deceased on the night previous to the fateful occurrence - During postmortem no ante mortem injuries found-statement of the complainant qua the alleged beatings liable to be disbelieved-dowry demands and alleged torture of the deceased for not bearing child not specified in evidence by reference to specific time-close proximity between the alleged harassment and cruelty and death not established - Guilt not established.

Title: State of H.P. Vs. Subhash Chand and another Page-127

Indian Evidence Act, 1872- Section 3- Circumstantial evidence- circumstances from which the conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature to connect the accused with the crime- all the links in the chain of circumstances must be established beyond reasonable doubt and proved circumstances should be consistent, only with the hypothesis of guilt of the accused and totally inconsistent with his innocence - great caution must be taken to evaluate the circumstantial evidence.

Title: Amit Kumar Vs. State of H.P. (D.B.) Page-426

Indian Evidence Act, 1872- Section 3- Prosecution witnesses making improvements in their statements in the court- their testimonies cannot be believed.

Title: State of H.P. Vs. Jagat Pal & others (D.B.) Page-36

Indian Evidence Act, 1872- Section 45- Suicide note of the deceased-duly proved by the handwriting expert after comparison with the handwriting in the note with the admitted handwriting of the deceased-Note carrying the allegations of continuous harassment of the deceased by the accused persons-mental condition of the deceased is fully portrayed by the note- deceased subjected to mental cruelty till the date of her suicide established- proximity between the cruelty and death established-guilt of accused persons established on both counts.

Title: Rupi Devi and another Vs. State of H.P. (D.B.) Page-71

Indian Evidence Act, 1872- Section 65- A Will was executed in favour of the defendants which was handed over to Patwari for recording the mutation – the Patwari lost the will - an application was filed for allowing the defendant to lead secondary evidence - held that the secondary evidence can be led only by the proof of the loss of the original will by examining the Patwari - mere statement of the petitioner regarding the loss is not sufficient to prove the loss- application dismissed

Title: Jagpal Singh & others Vs Veena Devi & another Page-22

Indian Evidence Act, 1872- Section 65- Mutilated will subject matter of the lis - applicant seeking permission to lead secondary evidence of the will-held that the statute does not provide for leading secondary evidence of mutilated documents -prayer rejected.

Title: Shanti Devi Vs. Man Singh and another Page-61

Indian Evidence Act, 1872- Section 65- Secondary evidence of a settlement deed through its photo copy sought to be adduced by the defendant-application rejected by the trial court-original deed is claimed to be in possession of the plaintiff—however, no averment regarding the same was made in the written statement-It was also not asserted in the application that the person in whose possession the document was had omitted to produce it or had delayed its production-the original plaintiff has died and could not reply to the averments made in the application that original document was handed over to him -no adequate material on the record to show that the document was in possession of the deceased plaintiff—held, that application for leading secondary evidence was rightly dismissed by the trial court.

Title: Ved Parkash Vs. Hari Parkash & others Page-195

Indian Evidence Act, 1872- Sections 43 and 45- Non-applicant had filed an application under Order 39 Rules 1 and 2 in the second appeal - application was taken for consideration and the order of status quo was passed- an application was filed again leveling serious allegations against the Advocate- it was prayed that signatures of the applicants on the caveat petition and Power of Attorney given to the Advocate be got examined- the purpose of the application is to establish that the applicants had never engaged A as their counsel and were not aware of the order passed by the Court- applicants were present in the Court but had not levelled any allegation against the counsel- they only sought time to engage counsel as original counsel had expressed his inability to continue with the case-record showed that A had in fact been engaged by the applicants- practice of frequently changing the Advocates and filing applications casting aspersion and assassinating the person and character of the earlier counsel have to be deprecated - a litigant cannot be permitted to drag the court and force it to decide the case in a particular manner- therefore, there is no necessity of examining the signatures – application dismissed with cost of Rs.10,000/-.

Title: Kaushalya Devi Vs. Kaushalya Devi and others Page-382

Indian Penal code, 1860- Sections 147, 148, 149, 302 and 307 and Arms Act- Section 29-The accused had gone to Shoolini fair at Thodo ground Solan-the accused hit the complainant party who was also present in the fair-accused person picked up quarrels with the complainant party- accused H gave a knife blow to complainant on the left side of his abdomen and two knife blows to deceased S - he also gave knife blows to V and P - other accused gave beatings to the complainant party with fist and kick blows- the testimonies of the prosecution witnesses were consistent and corroborated each other-PW 1, 2 and 4 had suffered injuries and had identified the accused in the Court-they knew the accused previously-their testimonies were corroborated by the medical evidence-the knife was got recovered by the accused pursuant to disclosure statement-held, that in these circumstances, the accused were rightly convicted.

Title: Harinder Vs. State of H.P. Page-707

Indian Penal Code, 1860- Section 302- Accused murdered B by attacking him with a scythe - skull was separated from the neck- the dead body was put in a jute bag and was thrown in the jungle – they also gave beatings to PW-13- dead body was found in a putrefied condition and was eaten by maggots - the incident was witnessed by PW-13 who had also suffered injuries - her testimony was corroborated by PW-2 before whom accused “S” made an extra judicial confession qua her guilt- held that in these circumstances the accused was rightly convicted.

Title: Santosh Kumari @ Toshi & others Vs. State of H.P. Page-24

Indian Penal Code, 1860- Section 302- Accused used to beat his wife and threaten to kill her- sister of the deceased/wife heard the cries of son of the accused- she went to the house of the accused and found the deceased lying under the cot and her tongue was clinched between her teeth- bluish bruises were present on both sides of the neck- post mortem report revealed that deceased had died due to the asphyxia caused by ante-mortem injuries and breaking of hyoid bone of the neck- accused was alone with the deceased- he had not explained the circumstances leading to the death of his wife- it was duly proved that accused used to beat his wife and the matter was also compromised- minor contradictions in the testimony of the mother of the deceased is not sufficient to discard her testimony- held, that in these circumstances, prosecution was proved and the accused was rightly convicted.

Title: Nasir Vs. State of H.P. (D.B.) Page-8

Indian Penal Code, 1860- Sections 302 and 120-B- A dead body was found which was identified on the basis of documents as belonging to 'D'- complainant made a statement that 'D' had taken his Innova Car from Rahimpur- deceased 'D' had received 4-5 calls from a mobile number which was sold by 'N' to some unknown person- complainant suspected that calling person might have committed the murder of 'D'- investigation was conducted and it was found that accused 'R' accompanied the person who had talked to the deceased- accused were arrested- accused 'R' made a disclosure statement on which clothes of the deceased were recovered- accused 'B' made a disclosure statement on which T.V. screen and stereo were recovered- accused also showed the place where deceased was murdered and his dead body was thrown- prosecution claimed that deceased was strangulated- Medical Officer stated that cause of death could not be ascertained because of advanced stage of decomposition of the dead body- therefore, cause of death was not established by the post mortem examination- post mortem was again conducted by PW-21 who also stated that no definite opinion could be given regarding the cause of death- therefore, prosecution version that deceased was strangulated by the accused cannot be accepted- articles could not be proved to be belonging to the deceased especially when they could be purchased from the market- in view of these circumstances, accused acquitted.

Title: Ravi Kumar and others Vs. State of Himachal Pradesh (D.B.) Page-408

Indian Penal Code, 1860- Section 302 and 120-B- Accused 'V' asked the deceased 'S' to mop up the floor- accused 'V' was not satisfied with the work of 'S'- he slapped her, picked up a stick and gave beatings to 'S' - she became unconscious and died subsequently- accused in connivance with other accused buried her dead body - accused did not inform her brother about her death and made him to understand that deceased was missing and she would be recovered- stick and mattresses were recovered- the place from where dead body was recovered was also identified- statements of witnesses are trustworthy- deceased was with accused 'V' prior to her death and no explanation was given as to what had happened to her- held, that in these circumstances, guilt of the accused was proved and accused were rightly convicted.

Title: Neelam Kumari Vs. State of Himachal Pradesh (D.B.) Page-666

Indian Penal Code, 1860- Sections 302 and 201 – Accused and deceased were servants of the complainant- they used to sleep in the outhouse- accused was found alone in the morning and when the complainant made an inquiry from him, he replied that deceased had left his room prior to his waking - subsequently, accused confessed that he had an altercation with the deceased over the mobile phone on which he gave a blow on the head of the deceased with the stick and threw his dead body in the bushes- complainant and the

witnesses went to the house of the accused where blood was found on the walls and the clothes- subsequently, dead body of the deceased was found down the hill- complainant had not given the genesis of the occurrence to the police- extra judicial confession also becomes doubtful in view of this fact - recovery was also suspect as the existence of the stick was known to the prosecution witnesses prior to its recovery- stick was also not recovered immediately after the incident- accused remained in the custody of the police and the police had an opportunity to put the blood on the jacket of the accused to falsely implicate him- held, that in these circumstances, prosecution version is not proved- accused acquitted.

Title: Kamlesh Kumar Vs. State of H.P. (D.B.) Page-118

Indian Penal Code, 1860- Sections 302 and 201 read with Section 120-B- Deceased was residing with his children in a rented accommodation- accused lodged a complaint regarding the fact that her husband was missing- subsequently, a complaint was lodged that accused in connivance with B and S had committed the murder of her husband- it was found during the investigation that deceased had quarreled with the accused- accused called B and S- they took the deceased and strangulated him by pressing his neck with her dupatta- dead body was buried in the forest- accused made a disclosure statement and got the dead body recovered- S also made a disclosure statement and got a spade recovered- PW-4 deposed that accused made a confession before him that she had killed the deceased with dupatta- extra judicial confession was made in the presence of PW-4, PW-8 and PW-13 and FIR was lodged by PW-8 but there was no reference to the extra judicial confession in the same- Medical Officer did not establish that death was caused due to strangulation leading to asphyxia, hypoxia or there was any venous congestion- held, that in these circumstances, guilt of the accused was not established.

Title: Luxmi Devi Vs. State of Himachal Pradesh (D.B.) Page-271

Indian Penal Code, 1860- Section 302- Complainant was residing with his wife N (deceased)- the accused had an evil eye on her- he followed her to the jungle and murdered her- when the wife did not return search parties were constituted, on which the dead body was recovered- the prosecution had not explained the circumstances in which the accused was arrested- the complainant himself had stated that his wife was murdered by some unknown person- a blood stained sickle was recovered by the police but no effort was made to get the finger prints on the same analyzed- the complainant had not raised any suspicion against the accused- the circumstance that accused had followed the deceased on the day of incident was not established- simply because the dead body was recovered by the search party of which the accused was a member is not sufficient to infer the guilt of the accused – Medical Officer stated the injury could have been caused by means of darat but darat was not shown to her- the finger prints of the accused were not found on the weapon of the offence – the disclosure statement was also not proved- held that in these circumstances the accused was wrongly convicted by the Trial Court.

Title: Ravi Kumar Vs. State of H.P. Page-968

Indian Penal Code, 1860- Section 302- Dead body of a lady who was subsequently identified as Ashi, wife of accused, was recovered by the police - investigation revealed that the accused suspected the deceased of having illicit relationship and murdered her out of humiliation- no direct evidence of the commission of offence was brought on record by the prosecution – held that in case of circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should be fully proved – the circumstances must be conclusive in nature to fully connect the accused with the commission of crime and they should be consistent only with the hypothesis of the guilt of the accused-the court must

take cautious approach and should adopt great caution while evaluating the circumstantial evidence- dead body was found from the house of the accused-medical evidence established that the deceased died as a result of asphyxia due to strangulation-the deceased and the accused were together in their matrimonial home prior to the incident- accused had told PW-1 that he had strangulated his wife with a dupatta after a quarrel- material contradiction in the testimony of witness is not sufficient to discard it - the accused had the knowledge as to what transpired within the room-he had not given any explanation of the circumstances leading to the inference of the guilt of the accused – held that the accused was rightly convicted by the trial Court.

Title: Sukhdev Singh Vs. State of Himachal Pradesh (D.B.) Page-580

Indian Penal Code, 1860- Section 302- Deceased was residing with his wife 'V' as a tenant- accused 'N' and 'A' frequently visited the deceased- accused 'V' and 'A' developed intimacy and they conspired to kill the deceased- accused came to the house of the deceased- they consumed alcohol and went on a drive in the vehicle- accused murdered the deceased and threw his dead body with knife and stick- it was proved on record that 'A' was already in police custody- hence, subsequent version that he was arrested on 11.8.2010 is false- disclosure statement leading to the recovery of incriminating articles was not reduced into writing- witnesses had not deposed about the intimacy between accused 'A' and 'V'- witness to recovery of the press card had turned hostile- witness to the delivery of blood stained clothes had also not supported the prosecution version- prosecution had failed to prove the links in the circumstances establishing the guilt and chain of the events did not lead only to one conclusion namely the guilt of the accused- accused acquitted.

Title: Amit Kumar Vs. State of H.P. (D.B.) Page-426

Indian Penal Code, 1860- Section 302- Deceased, a Baba, was found dead in his Kutiya- deceased had told that he was under the debt of 8-10 lacs- accused was arrested for the murder of the deceased- there were contradictions in the testimonies of prosecution witnesses- as per medical evidence deceased had died on or around 19.10.2006- prosecution version that accused was in the vicinity of Kutiya at that time was not established- Diary stated to have been maintained by Baba was not proved in his handwriting –weapon of offence i.e. axe was not connected with the accused as no finger prints existed on the handle of the axe - held, that in these circumstances, acquittal of the accused was justified.

Title: State of H.P. Vs. Om Bhadur (D.B.) Page-135

Indian Penal Code, 1860- Section 302- Prosecution witnesses heard a noise and smoke coming out from the upper storey of the house of accused- they ran towards house and found that the accused was walking on the lintel of his house while his mother was taking bath in the bathroom- deceased was taken out of the room who had sustained burn injury- she was taken to Hospital- she was declared unfit to make statement- she died on the way to IGMC, Shimla- prosecution witnesses deposed that accused used to maltreat the deceased after consuming alcohol- daughter of the accused deposed that accused used to keep the can of petrol in the room in which her mother was burnt- prosecution witnesses had seen the accused bolting the door from outside- held, that in these circumstances, prosecution case was proved beyond reasonable doubt.

Title: Surender Singh Vs. State of Himachal Pradesh (D.B.) Page-257

Indian Penal Code, 1860- Section 302- PW-1 had gone to Chandigarh in connection with a Court case-accused and the deceased were present in the residential shed - when the

complainant returned, he found that his wife was murdered with a hammer- it was found on investigation the accused had stolen money and other article and had murdered the deceased – it was duly proved that accused was employed as a servant by the complainant- postmortem report showed that head, face, skull bones, Nasal bones, brain tissues and eyes of the deceased were crushed and fractured- accused and the deceased were present in the room- the accused had absconded soon after the incident- accused had not given any explanation for the same – held that in these circumstances the accused was rightly convicted.

Title: Hiraban Sahani son of Sh.Bangali Shani Vs. State of H.P. Page-926

Indian Penal Code, 1860- Sections 302, 307, 120-B, 148 and 149- Complainant party was returning to their house- 'K' had parked his bike at Maszid Gali- 'C', 'K' and 'S' were about to leave to their home when the accused armed with the knives appeared at the spot- accused Sumit attacked Shelly with the knife when 'C' and 'K' tried to rescue Shelly- accused 'N' stabbed 'C' on his abdomen and accused Sumit hit Sanju on his body who collapsed on the spot- accused Sumit and others intercepted Sunil and Anil and stabbed them with knives- post mortem report showed that deceased had suffered injuries by means of knife, danda, base ball and stick- it was duly proved that items were recovered from the possession of the accused- the incident was deposed by the prosecution witnesses consistently- accused had also sustained injuries in the incident- complainants and accused had indulged in a free fight- therefore, accused cannot be held liable for the commission of offence punishable under Section 302 of IPC but for the commission of offence punishable under Section 304(I) of IPC – conviction and sentence modified accordingly.

Title: Nitish Vs. State of H.P (D.B.) Page-141

Indian Penal Code, 1860- Section 302, 392, 201 read with Section 34 and 411- Dead bodies of the deceased husband and wife were noticed by the domestic servant- the gold ornaments which the deceased was wearing and two mobile phones were missing- one mobile was traced to the prosecution witness who had purchased it from the accused- it was found in investigation that accused had killed the deceased due to the dispute over the money for the work of carpenter done by the accused- statement of the accused showed that an amount of Rs. 36,109/- was paid to the accused- PW-2 stated that deceased 'U' had sold the planer of the accused 'S' which shows that there was no discord between the accused and the deceased- medical board concluded that there were signs of asphyxia and poisoning – injuries were not found on the person of the accused - thus, prosecution version that death of the deceased was homicidal is not acceptable- PW-2 who identified the ornaments of the deceased stated that articles are commonly available in the market- PW-6 only deposed that he had dropped the accused at a short distance from the site of the occurrence, however, there is no proof that accused had visited the site of the occurrence- held, that in these circumstances, prosecution version was not proved - accused acquitted.

Title: Som Dutt Vs. State of H.P. (D.B.) Page-96

Indian Penal Code, 1860- Section 304 (Part II) - Accused residing in an orchard with his wife and children - he gave beatings to his wife under the influence of liquor- situation was diffused by his landlord and others - complainant visited the house of the accused and noticed that the door was locked from outside and deceased wife of the accused was lying on the floor-a woman present in the house disclosed that the accused had given beatings to the deceased - natural eye witness (PW6) who was in the house not speaking about the situation in which the deceased was thrown on the floor in injured condition- the accused heavily drunk was made to sleep in another room- PW-6, the witness residing in the same house,

had not seen him coming out of the room or beating the deceased- possibility that the accused taken to deep slumber in the room not ruled out -allegation against accused not established - order set aside and appeal allowed.

Title: Parimal Bhurathoki Vs. State of H.P (D.B.) Page-89

Indian Penal Code, 1860- Sections 341 and 302- Accused had restrained the deceased when he was proceedings on his tractor- accused asked the deceased to get down and gave 2-3 blows of stick on the head due to which deceased died- Medical Officer found that death was caused due to head injury- eye witnesses had seen the accused inflicting the injury on the person of the deceased- accused had made a disclosure statement on which stick was recovered- stick was found stained with the blood- held, that prosecution case was proved beyond reasonable doubt and the accused was rightly convicted.

Title: Dharam Singh Vs. State of Himachal Pradesh (D.B.) Page-768

Indian Penal Code, 1860- Sections 341, 323, 506, 427, 147, 148, 149, 364, 302 and 201 of IPC and **Indian Arms Act, 1959**- Section 25- Complainant along with 'P' and 'K' was travelling in the vehicle - when they reached near Jhiri Rafting point- they stopped their vehicle - some boys came in front of their vehicle and started dancing- they wrongfully restrained the complainant and another person and gave them beatings- 'H' took the vehicle towards Kullu but his vehicle was chased by accused- 'H' was brought to the rafting point where one boy attacked 'H' with sword- 'H' ran towards river and hid himself in the bushes- 'H' succumbed to his injuries subsequently- Medical Officer had noticed the injuries which were grievous and dangerous to life, these could have been caused by piercing sword in thigh and other injuries could have been noticed by kick and fist blows- accused had made a disclosure statement on which a sword was recovered- it had human blood as per report of FSL - the eye-witnesses had deposed about the quarrel- accused had formed an unlawful assembly with common object and had committed murder of 'H'- presence of accused as part of unlawful assembly is sufficient to convict him- accused had given sword blow on the thighs which shows that accused had no intention to kill the deceased- otherwise he would chosen a vital part, hence, the case of the accused would fall under Section 304-II of IPC.

Title: Hem Raj Vs. State of H.P & ors. (D.B.) Page-914

Indian Penal Code, 1860- Sections 364, 302 and 201 read with Section 34- 'R' had gone towards Garshanker along with passengers in his taxi- he did not return- the matter was reported to the police- taxi was found lying unattended and dead body of 'R' was found- witnesses identified the accused- record showed that accused were already shown to PW-3 and PW-5- held, that purpose of identification of the accused is to test the memory of the witnesses - if accused are shown to the witnesses prior to the identification, the purpose of identification is defeated and such evidence cannot be relied upon- further, FIR was lodged on 15.6.2010, whereas, dead body was recovered on 10.6.2010- according to witnesses, dead body was decomposed and was not identifiable- police had taken the blood sample from the rear seat of the car but the scientific officer could not tell the period for which the blood stain had been dried- ligature mark could not be present due to the decomposed and putrified body and summer season- vehicle was hired on 5.6.2010 while dead body was recovered on 10.6.2010- the accused could not have been convicted on the basis of last seen theory- held, that in these circumstances, prosecution version not proved and accused acquitted.

Title: Surinder Singh alias Chhinda & anr. Vs. State of Himachal Pradesh (D.B.) Page-794

Indian Penal Code, 1860- Section 376- Accused raped the prosecutrix thrice and threatened to eliminate her in case incident was narrated to any person- prosecutrix suffered from stomach pain and when she was taken to Medical Officer pregnancy of six months was detected- prosecutrix narrated the incident to her mother on which FIR was registered- prosecutrix delivered a female child and as per DNA report, accused is a biological father of the child- prosecutrix subsequently deposed that she was raped and threatened by the accused- her testimony is trustworthy- she was born on 12.5.1997 as per birth certificate- incident had taken place in the month of January and February, 2011- prosecutrix was minor on the date of incident – prosecution version cannot be doubted merely because of the fact that prosecutrix had not narrated the incident to any person- testimony of the prosecutrix was corroborated by DNA report- held, that in these circumstances, accused was rightly convicted by the trial Court.

Title: Sunil Kumar @ Sonu Vs. State of H.P. Page-586

Indian Penal Code, 1860- Section 376- Accused raped the prosecutrix- prosecutrix disclosed this fact to PW-3 and his wife- accused was confronted with this fact but he denied having committed any such act- the date of birth of the prosecutrix was recorded to be 28.9.1993- incident had taken place on 2nd and 3rd March, 2010- dental age of the prosecutrix was found to be 12 to 16 years and her radiological age was found to be 13 to 15 years- thus it was duly proved that the prosecutrix was minor on the date of incident - medical officer had found injuries on the person of the prosecutrix - mere fact that prosecutrix had turned hostile is not sufficient to doubt the prosecution case when she admitted that she had narrated the incident to PW-3, that she had visited the police Station, that her statement was recorded by the police and had signed the same and that her statement was recorded by SDM- she got identical version recorded with three authorities at different places and time- she had not denied those statements- held, that in these circumstances, accused was rightly convicted.

Title: Chain Ram Vs. State of Himachal Pradesh (D.B.) Page-845

Indian Penal Code, 1860- Section 376- Accused stayed in the house of PW-2 after attending the marriage- PW-1 heard the cries in the night and switched on the light – she noticed that accused was standing in the room and zip of his pant was open – PW-1 also noticed the blood on the legs of the prosecutrix- accused ran away from the spot after the incident – prosecutrix supported the prosecution version- Medical Officer had also noticed the injuries on her person and stated that possibility of sexual assault could not be ruled out- prosecutrix was minor on the date of incident- testimony of prosecutrix was corroborated by independent witnesses and Medical Officer- held, that in these circumstances, accused was rightly convicted.

Title: Jangli Ram Vs. State of H.P. (D.B.) Page-245

Indian Penal Code, 1860- Sections 376 and 506- Prosecutrix was raped by the accused one by one- they threatened to kill her if she narrated the incident to anyone- subsequently, she narrated the incident to her mother – Medical Officer found no injury on any part of her body- her hymen was found intact- FIR was lodged belatedly- the manner in which prosecutrix had narrated the incident to 'T' and 'T' had narrated the incident to the mother of the prosecutrix did not inspire confidence- held, that in these circumstances, the judgment of the trial Court acquitting the accused was justified.

Title: State of H.P. Vs. Nain Singh (D.B.) Page-420

Indian Penal Code, 1860- Section 376- Prosecutrix was returning to her home - she was intercepted by the accused- prosecutrix changed the path sensing bad intention of the accused- accused followed and raped her- she narrated the incident to her mother who informed her husband- matter was reported to the police- Medical Officer had found injuries on the person of the accused and also found injuries on the person of the prosecutrix- held that prosecutrix had taken an untrodden path to save herself from the accused- this fact cannot be used to discard her testimony- presence of injuries on the person of the accused corroborates the version of the prosecutrix- held, that in these circumstances, accused was rightly convicted.

Title: Gulshan Kumar Rana Vs. State of H.P. (D.B.) Page-491

Indian Penal Code, 1860- Section 376- **Protection of Children from Sexual Offences Act, 2012-** Section 6- Prosecutrix a mentally retarded person was present in her home all alone - when her parents returned, they found that she was not at home- search was conducted and the accused was found raping the prosecutrix in the cow shed- matter was reported to the police- there was no delay in registration of the FIR- statement of the mother of the prosecutrix was corroborated by PW-2- Medical Officer had found injuries on the person of the prosecutrix- prosecutrix was minor at the time of incident- held, that the prosecution had succeeded in establishing guilt of the accused and he was rightly convicted.

Title: Hoshiar Singh Vs. State of H.P. (D.B.) Page-897

Indian Penal Code, 1860- Sections 376(D), 392 read with Section 34 of IPC- Prosecutrix had visited Vashisth to see her friend - when she was returning from Vashishth to old Manali, the accused offered her a lift in their truck – the prosecutrix accepted their offer- the truck was taken towards mountain side for about 20 minutes- the accused attacked the prosecutrix, took her belonging, raped her and thereafter dropped her at Manali- the Medical Officer had noticed the injuries which could have been caused within 6 to 10 hours- DNA profile of accused matched with DNA profile from the vaginal swabs of the victim and her clothes- held that mere failure to hold identification parade when the prosecution had an opportunity to see the accused is not fatal to the prosecution- the belongings of the prosecutrix were recovered from the accused and were duly identified by the prosecutrix- the statement of the prosecutrix has been duly supported by medical evidence- the prosecution has no reason to falsely implicate the accused- held that the accused were rightly convicted in these circumstances by the Court.

Title: Arjun alias Joun & ors. Vs State of H.P. Page-626

Indian Penal Code, 1860- Sections 376, 302 and 34- the prosecutrix was found missing- subsequently her dead body was found in half naked condition-the accused were also found missing- accused “C” was arrested and he made a disclosure statement that he could show the place where the dead body was thrown-the cause of death was found to be asphyxia due to hanging-it was also found in postmortem examination that the deceased had suffered multiple injuries - her hymen was found ruptured and vaginal tear was present at the external orifice- it was specifically found by the report of the F.S.L. that blood stains on the clothes of the deceased belonged to the accused-PW-18 also deposed that she had seen the accused in the company of the deceased- disclosure statement made by the accused completes the chain of the circumstances- held that accused was rightly convicted by the trial Court.

Title: Chetan Kumar Vs. State of H.P. Page-745

Indian Penal Code, 1860- Sections 420, 467, 468, 471 and 120-B, IPC & Section 13(2) of the Prevention of Corruption Act- Lease deed in favour of a non-agriculturist registered by Naib-Tehsildar without asking the leasee to furnish agriculturist certificate-other co-accused also entering in criminal conspiracy to execute this illegal act-no offence made out as the law prohibits registration of such document.

Title: State of H.P. Vs. Sher Singh and others (D.B.) Page-52

Indian Penal Code, 1860- Section 498-A and 306- Deceased committed suicide by consuming poisonous substance and thereafter by hanging- trial court held the accused guilty of offence punishable u/s 498 A and acquitted them of the commission of offence punishable u/s 306 I.P.C-appeals by State and accused both-strained relations between the accused persons and the deceased since long—demand of Rs. 80000/- by accused N to pay the installments of the truck and meeting with the brother of the deceased established for want of cross-examination on this aspect- evidence qua beatings and harassment pertains to the period much prior to the suicide-No proximity between the death and alleged cruelty established.

Title: Rupi Devi and another Vs. State of H.P. (D.B.) Page-71

Indian Penal Code, 1860- Section 498-A and 306 IPC- Suicide by wife -allegations of harassments against the husband and mother in law-parents and brother of the deceased making lots of embellishments in their statements-held, that when the prosecution witnesses make improvements in their statements in the court, their testimonies cannot be believed, further minor instances of taunting do not constitute offence under aforesaid sections.

Title: State of H.P. Vs. Jagat Pal & others (D.B.) Page-36

Indian Penal Code, 1860- Sections 498-A and 306- Marriage between the deceased and the accused was solemnized two years prior to the incident-the accused gave beatings to the deceased on which she ran away from her matrimonial home-a compromise was arrived between the parties- sister in law of accused telephoned that quarrel was going between accused No. 1 and the deceased- complainant and the other villagers went to the house of the deceased where they were told that deceased was taken for medicines/treatment- she died at District Hospital, Bilaspur -it was told in the postmortem report that deceased had died owing to asphyxia caused by the consumption of poison-no other injury was found during the postmortem- sister-in-law of the accused was not examined- the complainant and other witnesses had not stated before the police that demands for dowry were made by the accused-the deceased was found cooperative at the time of arrival in the Zonal Hospital yet she had not made any complaint regarding the ill treatment by the accused-held that in these circumstances the accused was rightly acquitted.

Title: State Vs. Pratap Singh & another. Page-40

Indian Penal Code, 1860- Sections 498-A and 306- Wife committed suicide by setting herself ablaze-husband alleged to have abetted her suicide by subjecting her to torture on account of dowry demands and for not bearing child- after trial accused acquitted by the trial court for want of evidence -proximity between the alleged torture and the suicide not established.

Title: State of H.P. Vs. Subhash Chand and another Page-127

Industrial Disputes Act, 1947- Section 25- A reference was made to the Industrial Tribunal regarding the retrenchment of the petitioner- Tribunal ordered the re-engagement of the petitioner along with seniority, however, the back wages were not awarded in favour of the petitioner- petitioner had specifically asserted in his statement that he was not gainfully employed since his termination which was not challenged in cross examination- petition allowed and respondent directed to pay 50% of the back wages to the petitioner from the date of the retrenchment till re-engagement.

Title: Udho Ram Vs. Industrial Tribunal –cum-Labour Court Shimla & another Page-232

Industrial Disputes Act, 1947- Section 25- Petitioner had not led the evidence to show that he was not gainfully employed during the period of his retrenchment therefore, the respondent had no opportunity to contest this fact or to lead evidence that he was gainfully employed- the petitioner was rightly denied the relief of back wages in these circumstances.

Title: Chain Singh Vs. State of H.P. & others. Page-687

Industrial Disputes Act, 1947- Section 25- Workman/respondent No. 2 pleaded that he was working as Generator Operator and was entitled to Rs. 84,797/- he made various requests for the payment of the amount but the amount was not paid- a reference was sought on behalf of the workman by the trade union - respondents contended that the reference was not properly made and Union had no authority to espouse the claim of the workman- held, that there is no proper format to espouse the case of single workman - where the proof of support by workman was available, the reference is maintainable.

Title: M/s Winsome Textile Industries Limited Vs. State of H.P. and another Page-520

Interest Act, 1978- Section 3(3)(c)- Plaintiffs claimed the interest to the extent of Rs. 76 lacs from the defendant- plaintiffs thereafter sold the SLR to CKP Cooperative Bank Limited Mumbai- held, that plaintiffs are not entitled to interest upon interest- therefore, plaintiffs are only entitled for amount of Rs.76 lacs from the defendant.

Title: H.P. State Cooperative Bank Ltd. and another Vs. Uttar Pradesh State Financial Corporation and another Page-374

'L'

Land Acquisition Act, 1894- Section 18- Land of the petitioners was acquired for the construction of Koldam-the petitioners filed a reference petition before the court– the record shows that notices were not issued to the petitioners and were only issued to the respondent no. 1 – Petitioners had never instructed any advocate to appear on their behalf – held that the award was announced by the Court behind the back of the petitioners – the matter remanded to the Court with the direction to decide the same afresh after affording an opportunity to the petitioners.

Title: Kundan Lal Vs. Land Acquisition Collectors and another Page-268

Limitation Act, 1963- Section 5- An application for condonation of delay in filing an appeal was filed pleading that earlier applicant had filed a CMPMO before the High Court-the High Court held that no order was required to be passed on the same– the matter was again listed before the Court and the court passed an order that the petition was wrongly listed as it had already been disposed by the High Court- an appeal was filed immediately thereafter – it was pleaded that the delay had occurred due to filing of the application earlier and the

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that driver did not possess a valid driving licence- driver produced a driving licence- Insurance Company did not get the authenticity of driving licence verified- a witness was produced who proved that another licence produced by the driver was fake – held that Tribunal had wrongly absolved liability of insurance company in these circumstances.

Title: Harnek Singh (Dead), through LRs. Vs. Varinder Singh and others

Page-617

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that driver did not have a valid driving license - it was proved that owner – insured had engaged the driver after going through the driving license- the owner is not supposed to go to the Registration and Licensing Authority to check the validity of the DL- the petitioner-H.R.T.C. was unable to ply the vehicle for 12 days and the Tribunal had rightly granted compensation for the loss of income.

Title: United India Insurance Company Ltd. Vs. Himachal Pradesh Road Transport Corporation and another Page-986

Motor Vehicles Act, 1988- Section 149- It was contended that vehicle was not insured- particulars of the vehicle given in the FIR, insurance policy and cover note are different- Tribunal had found that esteem car was not insured with the insurer- there was no infirmity with the findings of the Tribunal- held, that Insurer was rightly exonerated from liability.

Title: Anil Kumar vs. Nitin Kumar and others Page-445

Motor Vehicles Act, 1988- Section 149- It was held by M.A.C.T. that the accident was outcome of contributory negligence- the insurer had not led any evidence to disprove this fact- appeal dismissed.

Title: Oriental Insurance Company Ltd. Vs. Tapas Madhok and others

Page-965

Motor Vehicles Act, 1988- Section 149- It was pleaded that a tractor being driven in a rash and negligent manner hit the pedestrian due to which 'N' and 'K' died - 'S' had sustained injuries and he died subsequently - Insurance Company pleaded that the deceased and injured were travelling in the vehicle - however, no satisfactory evidence was led to prove this fact- held that the plea of the Insurance Company that the deceased and injured were travelling in the vehicle cannot be accepted and the Insurance Company is liable to pay the compensation.

Title: National Insurance Company Ltd. Vs. Smt. Meena Kumari and others

Page-1

Motor Vehicles Act, 1988- Section 149 read with Section 173- Insurer contended that the insured had committed breach of the terms and conditions of the Insurance policy as the vehicle was being plied without route permit at the time of the accident-an application for additional evidence was filed before the High court to establish this fact- held that insurer having not led any additional evidence before the M.A.C.T. cannot be allowed to defeat the purpose of granting compensation at a belated stage by moving an application for leading evidence-further the certificate issued by R.T.O. Srinagar disclosed that the route permit was valid up to 17-06-2008- the accident had taken place on 30-09-2014 and therefore, the

certificate will not help in determining whether the vehicle had valid route permit on the day of accident or not.

Title: United India Insurance Company Ltd. Versus. Satya Nand and others

Page-999

Motor Vehicles Act, 1988- Section 149- Temporary certificate of registration shows that it was valid till 18.8.2005- accident had taken place on 24.10.2005- no temporary permit was taken, therefore, it was proved that owner of the vehicle had driven it without registration certificate and other relevant documents which is breach of Sections 157 and 149 of the Act- hence, insurer was wrongly held liable to pay the compensation- however, insurer directed to pay compensation with the right of recovery.

Title: National Insurance Company Ltd. Vs. Bhag Chand & others Page-459

Motor Vehicles Act, 1988- Section 149- The driving license was renewed by Licensing Authority – the owner has to satisfy himself about the competence of the driver- he cannot be expected to go to the licensing authority to verify the validity of the license- the insurer had not pleaded and proved that owner had committed willful breach of the terms and conditions of the policy- held that the Insurance company is liable to pay the compensation.

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

Page-989

Motor Vehicles Act, 1988- Section 149- Tribunal had awarded compensation of Rs. 50,000/- along with interest for the injuries sustained by the claimant– insurer pleaded the driver did not have a valid and effective driving license on the day of the accident- the record showed driver had a valid and effective driving license to drive the vehicle at the time of the accident- petition dismissed.

Title: National Insurance Company Ltd. Vs. Nibha Sharma and others Page-952

Motor Vehicles Act, 1988- Section 149- Unloaded weight of the vehicle was 8,000 k.g. and it did not fall within the definition of light motor vehicle-the driver possessed the driving license to drive a light motor vehicle- thus the driver did not have a valid driving license and the owner was rightly held liable to pay compensation.

Title: Yogesh Kumar Sood Vs. Mela Ram and others Page-1006

Motor Vehicles Act, 1988- Section 157- It was contended that offending vehicle was transferred and the insurer was not liable- held, that mere transfer of the vehicle is not sufficient to absolve the insurer of his liability and the insurer has to satisfy the award.

Title: Oriental Insurance Company Vs. Nitu Sharma & others Page-960

Motor Vehicles Act, 1988- Section 157- Vehicle was sold by owner- it was contended by the insurer that he was not liable to satisfy the award- held, that transfer of a vehicle cannot absolve insurer from its liability to satisfy the award.

Title: United India Insurance Company Ltd. Vs. Manu Sharma & others

Page-471

Motor Vehicles Act, 1988- Section 166- Age of the deceased was 30 years- Tribunal had wrongly taken the age as 35 years- 1/3rd of the income was to be deducted towards personal

expenses, whereas, 1/5th was to be deducted keeping in view the number of dependency- claimants had lost the dependency to the extent of Rs. 2,300/- per month, applying multiplier of 16' claimants are entitled to the compensation of Rs. 2,300x 12= Rs. 27,600 x 16= Rs. 4,41,600/-. Title: Chanda Devi & others Vs. Surender Singh & another Page- 450

Motor Vehicles Act, 1988- Section 166- Age of the deceased was 37 years- multiplier of '14' was to be applied- Tribunal had wrongly applied multiplier of '16'.
Title: Naresh Kumar vs. Hari Ram and others Page-456

Motor Vehicles Act, 1988- Section 166- Claim petition was filed by six claimants- the Tribunal had deducted 1/3rd towards personal expenses-held that the Tribunal had erred in deducting 1/3rd towards personal expenses and should have deducted 1/5th towards the same. Title: National Insurance Company Ltd. Vs Smt. Shayda and others
Page-775

Motor Vehicles Act, 1988- Section 166- Claimant had sustained injuries in a motor vehicle accident- he had placed on record the documents showing that an amount of Rs. 82,660/- was spent by him- the Tribunal had awarded this amount-held that the award passed by the Tribunal cannot be said to be excessive.
Title: Oriental Insurance Company Vs. Vikrant Kumar & others Page-780

Motor Vehicles Act, 1988- Section 166- Claimants had pleaded that driver had driven the goods carrying commercial vehicle rashly and negligently, hit the scooter due to which the rider of the scooter died- it was claimed that accident was the result of contributory negligence- however, contents of the FIR and the statements of the witnesses disclosed that driver of goods vehicle was driving the vehicle in a rash and negligent manner- provisions applicable before Civil Court are not applicable before Claim Tribunal- Tribunal should not succumb to technicalities and should not defeat the claim petition on technical ground.
Title: Oriental Insurance Company Vs. Bimla Devi and others Page-295

Motor Vehicles Act, 1988- Section 166- Claimants specifically pleaded that accident had taken place due to negligence of the driver- FIR also established that the vehicle was being driven in a rash and negligent manner- driver did not appear before the Tribunal and had not filed any reply to the claim petition- therefore, rashness and negligence was duly proved.
Title: National Insurance Company Ltd. Vs. Ram Kali and others Page-286

Motor Vehicles Act, 1988- Section 166- Deceased was a Head Constable and his salary was Rs. 14,746- the tribunal had deducted 1/3rd amount towards his personal expenses and had held that claimants had lost source of dependency to the extent of 9,831 per month – Tribunal applied the multiplier to 12- held that the tribunal had rightly awarded the compensation.
Title: Secretary Home, Government of Himachal Pradesh and others Vs. Chanchlo Devi and others Page-984

Motor Vehicles Act, 1988- Section 166- Deceased was aged 37 years at the time of the accident and multiplier of '14' is applicable- taking income of the deceased as Rs. 6,000/- p.m. and deducting 1/3rd towards personal expenses, the claimants had lost source of dependency to the extent of Rs. 4,000/-p.m. or Rs. 48,000/- per annum–they are entitled to a compensation of Rs. 48,000/- x 14 = 6,72,000.
Title: Oriental Insurance Company Vs. Smt. Manju Devi and others Page-777

Motor Vehicles Act, 1988- Section 166- Deceased was drawing salary of Rs.4,829/-- Tribunal had deducted 1/4th towards the personal income- held, that 1/4th of the amount was to be deducted towards personal income and the loss of the dependency is to be taken as Rs.3,600/- per month- age of the deceased was 39 years - applying multiplier of '14' claimants are entitled to Rs. 6,04,800/- (Rs. 3600x12=Rs. 43200/-x14=Rs. 6,04,800/-).
Title: Pushpa Devi and others Vs. National Insurance Co. and another
Page-302

Motor Vehicles Act, 1988- Section 166- Income of the deceased was Rs. 3,500/- per month-50% was to be deducted towards personal expenses of the deceased, being bachelor-claimants have lost the dependency to the extent of Rs. 1750/- the deceased was aged 30 years and multiplier of '14' is applicable- the claimants are entitled to the compensation of Rs. 1750x12x14=2,94,000/- for the loss of dependency.
Title: United India Insurance Company Ltd. Versus Rama Nand and others
Page-993

Motor Vehicles Act, 1988- Section 166- MACT had applied multiplier of '14' and had taken loss of dependency as Rs. 27,000/- per annum, which was correct- the impugned award upheld and the appeal dismissed.
Title: Kanta Devi and others Vs. Nilima Devi and others Page-267

Motor Vehicles Act, 1988- Section 166- Owner pleaded that vehicle was unauthorizedely taken by the driver – however, he had not lodged any FIR- he had also not explained as to how vehicle went in possession of driver and from where the keys were obtained- hence, the plea of the owner that driver had taken the vehicle without authorization cannot be accepted.
Title: Naresh Kumar Vs. Hari Ram and others Page-456

Motor Vehicles Act, 1988- Section 166- Tribunal had awarded a lump sum compensation of Rs. 12,40,000/- with interest @ 7.5 % from the date of filing the claim petition till realization – held that the Tribunal had fallen in error in awarding lump sum compensation without giving detail – the deceased was pursuing Engineering in N.I.T. Hamirpur- he had a bright carrier- he would have become a Gazetted Officer and his income would not be less than Rs. 35,000/- per month - by excising guess work, the monthly income of the deceased can be taken as Rs. 10,000/- per month- the deceased was a bachelor and 50 % of the amount is to be deducted towards the personal expenses – the claimants had lost the dependency of Rs. 5,000/- per month- he was aged 20 years and multiplier of 15 would be applicable- thus the claimants are entitled to Rs. 9,00,000/-(5,000/- x 12x15) towards the loss of dependency.
Titled: National Insurance Company Limited Vs. Shashiwala and others
Page-956

Motor Vehicles Act, 1988- Section 166- Tribunal had awarded compensation of Rs. 20,000/- with interest @ 7.5%-held that the Insurance Company should not have questioned the amount of Rs. 20,000/- awarded to the claimant.
Title: Naresh Kumar Goel Vs. Mam Raj and others Page-774

Motor Vehicles Act, 1988- Section 166- Tribunal had awarded compensation of Rs. 2,15,500/- along with interest- medical officer had determined the disability of the claimant

as 45%- claimant was unmarried and had lost the chance to get married- he was unable to help his parents in their old age- amount of Rs. 1 lakh awarded under the head "pain and suffering, Rs. 1 lacs for the "loss of amenities of life", Rs. 2 lacs under the head "loss of income", Rs. 20,000/- regarding Expenditure on medicines, Rs. 20,000/ as Transport charges, Rs. 10,000/- as Special diet and Rs.18,000/- as attendant charges.

Title: Anil Kumar Vs. Nitim Kumar and others Page-445

Motor Vehicles Act, 1988- Section 166- Tribunal had deducted 2/3rd of the income towards personal expenses- held, that 50% of the amount was to be deducted in case of an unmarried person - taking income of the deceased as Rs. 3,000/- and deducting 50% of the amount loss of dependency would be Rs. 1,500/- per month- age of the deceased was 18 years- multiplier of 14 will be applicable- hence, compensation of Rs. 1,500 x 12 x 14 = Rs. 2,52,000/- awarded towards loss of income.

Title: Salochana Devi and another Vs. Shyam Lal and another Page-468

Motor Vehicles Act, 1988- Section 166- Tribunal held that the accident was outcome of contributory negligence of the offending vehicles–insurer of both the vehicles were saddled with liability to pay the compensation in equal shares- it was duly proved by the statement of Investigating Officer that the accident was the outcome of contributory negligence – the insurer of the car had not led any evidence to prove that there was no negligence on the part of the driver of the car or the car was not involved in the accident- the driver had not questioned the award and it was not permissible for the Insurance Company to say that accident was not outcome of the contributory negligence.

Title: Royal Sundram Alliance Insurance Co. Ltd. Vs. Holi Ram & others Page-982

Motor Vehicles Act, 1988- Section 169- Claimants pleaded that the deceased was travelling in a vehicle but had not pleaded that he was travelling in the vehicle with goods or had hired the vehicle for carrying goods- the owner asserted the deceased was travelling in the vehicle as owner of the goods- held that the tribunal has to give findings keeping in view the pleadings of the party - Tribunal had rightly held that the deceased was travelling in the vehicle as a gratuitous passenger- the owner had committed willful breach of the terms and conditions of the policy and was rightly held liable to pay compensation.

Title: Sh. Jai Singh Vs. Smt. Reena Devi & others Page-772

Motor Vehicles Act, 1988- Section 169- Compensation was awarded in favour of the petitioner- petitioner filed an application for releasing of the awarded amount before MACT-III Shimla who directed that 25% of the awarded amount be released- held, that petitioner is in urgent need of money and, therefore, entire amount was ordered to be released along with interest in favour of the petitioner.

Title: Saroj Chauhan Vs. The Bajaj Allianze Insurance Co. Ltd. Page-229

Motor Vehicles Act, 1988- Section 169- Strict pleadings and proof are not required to determine the rash and negligent driving in a claim petition.

Title: Oriental Insurance Company Ltd. Vs. Vinod Kumar & others Page-300

Motor Vehicles Act, 1988- Section 173- The insured was held to have committed breach of the terms and conditions of the Insurance Policy – insurer was held liable to pay

compensation with a right of recovery– the insured contended that sufficient opportunities were not given to him to prove that the driver of the vehicle had a valid and effective driving license and the owner had not committed any willful breach- held that the insured had ample opportunity to lead evidence during three years – he did not do so- he filed an appeal and the claimant was deprived of his right to get the compensation – the appeal dismissed with cost of Rs. 25,000/-.

Title: Rajinder Kumar Versus Sh. Watan Singh and others Page-966

'N'

N.D.P.S. Act, 1985- Section 15- A car was signaled to stop by the police party and when it was checked, three sacks of poppy husk were found in dickey, four sacks were found in the middle of the rear seat and fifth sack was found in the front seat- testimonies of police officials after careful scrutiny, inspire confidence and are found to be trustworthy and reliable, which can form basis of conviction – mere absence of some independent witness does not affect the creditworthiness of the prosecution case- merely because the number of FIR was not mentioned in NCB Forms or it was not mentioned in the challan that seal impression was put in triplicate will not make the prosecution version false- testimony of police official was corroborated by other police official- independent witness had turned hostile but had named the accused who had signed/put their thumb impression on the recovery memo and identification- he admitted the previous statement wherein the search and the presence of the accused were recorded- other witness also admitted that accused had disclosed their names and police had taken into possession gunny sack- hence, they had corroborated the testimonies of the police official- link evidence was proved – non-production of the seal will not make the prosecution case doubtful – held that accused were rightly convicted by the trial Court- appeal dismissed.

Title: Jagir Singh Vs. State of Himachal Pradesh (D.B.) Page-216

N.D.P.S. Act, 1985- Section 15- Police received an information regarding sale of poppy straw on which police went to the spot- two persons were found sitting on white coloured sack- accused 'A' was apprehended while the other person ran away–25 kg. of poppy straw was recovered from the sacks- testimonies of the police officials are consistent- there are no major contradictions in their testimonies- however, the police officials had not associated any independent witness, although the market was located at a distance of 100-200 mts. from the place of incident- the police had also not made any effort to associate independent witness, although police had prior information– in these circumstances the fairness of investigation is doubtful - accused acquitted.

Title: Ashwani Kumar Vs. State of H.P. Page-183

N.D.P.S. Act, 1985- Section 20- A car was intercepted by the police officials and officials of NCB- one packet containing 9 kg, second packet containing 15 kg, third packet containing 19 kg. and fourth packet containing 19 kg. of charas were recovered from the car- the secret information was duly reduced into writing and was conveyed to Dy. SP/SHO Police Station Banjar, Addl. S.P. and Superior officer of NCB- held, that Trial Court had erred in concluding that prosecution had not complied with the requirement of Section 42(2) of N.D.P.S. Act.

Title: State of Himachal Pradesh Vs. Khub Ram & another (D.B.) Page-782

N.D.P.S. Act, 1985- Section 20- A car was stopped by the police-two persons N and S were sitting on the rear seat while one person named "J" was sitting on the front seat-search of

the car was conducted during which 3.5 kg. of charas was recovered from the dicky and 2.7 kg. charas was found concealed underneath mat of the front seat-accused N and S revealed on inquiry that accused K had sold charas to them- they had also shown the place from where the charas was purchased by them from the accused K - it was stated by PW-1 in cross-examination that there were 3-4 khokas and 2-3 factories in the vicinity of the site of occurrence- the possibility of Chowkidar/ security guard being present in the factories cannot be over ruled - however, Investigating Officer had not made any efforts to associate any independent person which casts a doubt on the prosecution version- PW-1 had not deposed that case property was handed over to him by in charge Malkhana for producing the same in the Court- no entry in the Daily diary was produced which shows that the case property shown in the Court cannot be connected to the contraband recovered at the spot – accused acquitted.
Title: Naresh Kumar Vs. State of H.P. (D.B.) Page-107

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1kg 150 gms of charas- independent witnesses had not supported the prosecution version- it was not proved on record as to when the case property was withdrawn from the malkhana – it is essential to make an entry in the malkhana register at the time of deposit or withdrawl of the case property- however, no DDR was prepared- it casts doubt that the case property produced in the Court is the same which was recovered at the spot- accused acquitted.
Title: Laiq Ram Vs. State of H.P. (D.B.) Page-452

N.D.P.S. Act, 1985- Section 20- Accused was found sitting on seat No. 19 holding a bag on his leg- the bag was checked and it was found to be containing 1.1 kg of charas- independent witnesses had turned hostile and had stated that no recovery was effected in their presence- testimony of police official cannot be ignored on the ground that he is interested in the success of the case – however, testimonies of police officials were contradictory- police officials were standing near front door, therefore, it can not be said that recovery was effected in their presence- it was admitted by prosecution witnesses that proceedings were videographed or photographed - however, video or photographs were not be produced before the Court- held, that in these circumstances, prosecution version could not be relied upon- accused acquitted.
Title: Kewal Ram Vs. State of Himachal Pradesh (D.B.) Page-821

N.D.P.S. Act, 1985- Section 20(b)(ii)(c)- Accused was found in possession of 4.88 kg of charas- independent witness had not supported the prosecution version and the testimonies of the police officials will become doubtful due to this- no entry was made in the Malkhana register regarding the taking out of the case property for production before the Court or re-depositing the same which makes it difficult to connect the case property produced in the Court with the contraband recovered at the spot- held, that in these circumstances, prosecution case was not proved- accused acquitted.
Title: Jagdish Kumar Vs. State of Himachal Pradesh (D.B.) Page-114

N.D.P.S. Act, 1985- Section 21- Accused was intercepted with 1509 strips of spasmo proxyvon capsules and 138 strips of parvon capsules without permit- evidence to link the case property not cogent-Malkhana registers not carrying the entries about retrieval of the case property to the court and redeposit thereof during trial-possibility that the case property is not of the present case not ruled out- conviction and sentence improper—appeal allowed and accused acquitted.
Title: Jitender Kumar Vs. State of H.P. (D.B.) Page-188

N.D.P.S. Act, 1985- Section 21(C)- Accused was found riding a motorcycle having bags on both handles, which were found to be containing medicines/injections- inquiry was made from the Drug Inspector who revealed that except for one or two medicines, the others were psychotropic substances– the accused made a disclosure statement on which huge quantity of N.D.P.S. Drugs was recovered- it was not stated by P.P. while seeking permission from the Court to open the parcels that they were received from an official who had brought them from Malkhana- no entry was recorded regarding the taking out of the case property from the Malkhana, therefore, the case property produced in the Court cannot not be linked to the substance recovered at the spot- accused acquitted.

Title: Manmohan Sharma Vs. State of H.P. Page-404

N.D.P.S. Act, 1985- Section 50- Two accused travelling in a three-wheeler intercepted on a secret information-joint search option given to them vide Ext. PW1/A-16.00gm charas was found in the Pithu bag of one accused and 17.80 gm charas was found tied around the waist of the other accused during search- held, that joint option could not have been given and the conviction could not have been recorded on the basis of recovery effected during such search- further one independent witness associated during the search and sampling had not supported the prosecution case-rapat and Malkhana registers not proved to show as to how the case property was retrieved from the Malkhana during trial and re-deposited in the same- the case property not proved to be the same-entire prosecution case becomes doubtful-conviction and sentence improper-accused acquitted.

Title: Dhyan Singh Vs. State of H.P. (D.B.) Page-499

N.D.P.S. Act, 1985- Sections 18 and 29- Accused was found in possession of bag containing 1.4 k.g of opium- the case property was produced by APP in the Court-prosecution had not proved as to when the case property was withdrawn from the Malkhana- it is mandatory to make corresponding entry at the time of deposit or taking out of the case property in the Malkhana register- DDR is required to be prepared when the case property was taken out from the Malkhana and was re-deposited – it is necessary to ensure the safe custody of the case property from the time of seizure till production- Dy. SP accompanying the police party was not examined- held, that in these circumstances, prosecution version was not proved.

Title: Naseeb Vs. State of H.P. (D.B.) Page-441

N.D.P.S. Act, 1985- Sections 20 (ii) (c) and 18(c) - Accused 'M' was found in possession of 4 kg. of charas and accused 'N' was found in possession of 1 kg. of opium- independent witnesses had not supported the prosecution version, however, they had admitted their signatures on the seizure memos- held, that the prosecution witnesses would be estopped by Sections 91 and 92 of the Indian Evidence Act from deposing in variance to the contents of the document- however, there was no proof that the case property produced in the Court is the same which was recovered from the accused at the spot, as no entry was made in the Malkhana register regarding taking out of the case property for production in the Court-accused acquitted.

Title: Narender Singh Vs. State of H.P. (D.B) Page-31

N.D.P.S. Act, 1985- Sections 20 and 21- Accused was found in possession of 20 small paper packets containing dark brown substance along with polythene pouch containing dark brown powdered substance- substance was tested with NDPS Testing Kit and was found to be Heroin- substance was sealed in a packet- the search of the house of the

accused was conducted during which two polythene bags containing powdered substance confirmed to be Heroin and black coloured substance found to be charas were recovered- accused was found to be in possession of 28.000 grams + 222.0 grams Heroin and 03.397 grams of charas- prosecution witnesses had deposed consistently and there were no contradictions in their testimonies- it was contended that room from where the contraband was recovered was not in possession of the accused - however, it was admitted that brother of the accused had shifted his residence, thus, room remained in possession of the accused- however, keeping in view the quantity of the charas, sentence modified.
Title: Kishori Lal Vs. State of H.P. Page-66

'O'

Official Secrets Act, 1923- Sections 5(1)(c) and 6(a)(c)(e)- **Indian Penal Code, 1860-** Section 468 and 471- Accused were visiting ARTRAC a prohibited place of army in Shimla and collecting information which might tend directly or indirectly to help enemy country in respect of defence matters- search of the house of the accused was conducted during which 19 files were recovered from drawing room containing description of banned organization- some other articles and army uniforms were also recovered from the house of the accused- it was duly proved on record that ARTRAC is a prohibited place which houses the head quarters of the Army Training Command- however, it was not proved that accused had gained access in the prohibited area with a purpose prejudicial to the safety or interest of the State or that such entry was gained under impersonation- files stated to have been recovered from the accused were loose folder and were not in sealed condition- documents could have been easily introduced into them- however, it was duly proved that accused had introduced himself as Army Officer- he was found in possession of forged passports and 17 live cartridges of different arms were recovered without licence- appeal partly allowed- accused acquitted of the commission of offences punishable under Sections 3 (1) (a), 3(1)(c) and Section 5(1)(c) of the Official Secrets Act and convicted of the commission of offences punishable under Sections 6(a)(c) (e) and 6(d) of the Official Secrets Act, Section 25 of the Arms Act and Sections 468 and 471 of the Indian Penal Code.
Title: Senjam Nongdren Khomba Singh @ Senjam Ching Thang Vs. State of H.P. (D.B.) Page-14

'P'

Public Premises Act, 1971- Section 5- The petitioners were in possession of the land recorded in the ownership of central government - proceedings of their eviction were initiated- petitioners pleaded that they had filed the suit which was decreed- they had constructed their house by investing huge amount - the Estate Officer found the possession of the petitioners to be unauthorized and ordered their eviction- petitioners had acknowledged the title of the respondents – respondents were restrained from forcibly evicting the petitioners – long possession is not equivalent to adverse possession- the findings recorded by the authorities are pure findings of fact which are not open in the judicial review- petition dismissed.
Title: Kavita Pant and others Vs. Union of India and another (D.B.) Page-334

'R'

Recovery of Debt due to Banks and Financial Institutions Act, 1993- Section 18- Plaintiffs' bank was constituted under the provision of H.P. Co-operative Societies Act- held, that provision of recovery of debt due to Bank and Financial Institutions Act is not applicable to the Co-operative Bank.
Title: H.P. State Cooperative Bank Ltd. and another Vs. Utter Pradesh State Financial Corporation and another Page-374

'S'

Specific Relief Act, 1963- Section 6- Plaintiff instituted a suit for possession of suit land pleading that suit land was earlier in possession of 'K' (predecessor-in-interest of the plaintiffs and defendant No. 4) as tenant under the previous owners- he was tenant at will for the last more than 50 years- he became owner after the commencement of H.P. Tenancy and Land Reforms Act- defendants claimed to be the purchasers of the shares in the suit land from some of the landlords- they threatened to disturb the peaceful possession of 'K' in the year 1966- K filed a suit for injunction on which defendants stopped interference- the suit was dismissed as cause of action had not survived- defendants claimed that they were in possession of suit land since the date of purchase and name of 'K' was wrongly recorded in the jamabandi - it was specifically held in the civil suit filed by 'K' that he had become owner after the commencement of H.P. Tenancy and Land Reforms Act automatically- defendants had not produced the sale deed and the fact that 'K' had become owner was duly reflected in the revenue record- defendants had also failed to file any affidavit executed by 'K' before Tehsildar- appeal dismissed.

Title: Hoshiar Singh & ors. Vs. Rakesh Singh Sandhu & ors. Page-192

Specific Relief Act, 1963- Section 20- Plaintiff filed a suit asserting that predecessor-in-interest of the defendant had entered into an agreement regarding the sale of the suit land - he was put in possession- the defendants started interfering with the possession of plaintiff on which a suit for injunction was filed –plaintiff came to know during the pendency of the suit that the loan on the land was repaid by the defendant, hence suit for injunction was withdrawn – a fresh suit was filed for seeking specific performance of the agreement- the trial Court found that the agreement was executed but instead of granting specific performance, the relief of refund of earnest money was granted- relief of specific performance was granted in appeal - the agreement provided that on refusal to execute the sale deed, the plaintiff will be entitled to recover the amount mentioned in the agreement - the plaintiff had not filed the suit during the life time of the executants- suit land was never mortgaged as pleaded by the plaintiffs - held that the decree of specific performance granted by the Appellate Court is not justified.

Title: Pushpa Devi & Others Vs. Girdhari Lal Sharma Page-161

Specific Relief Act, 1963- Section 20- Plaintiff had placed an order with the defendant for supply of machinery for Rs. 57 lacs- defendant delayed the supply of machinery and instead of supplying the new machinery, supplied the old and rusted machinery- plaintiff could not start the project due to the old machine- defendant did not file any written statement nor appeared in the witness box- the version of the plaintiff was proved by PW-3- held, that plaintiff is entitled for the recovery of the amount paid by him along with compensation and the interest paid by the plaintiff to the bank for purchasing machinery.

Title: M/s Priyanka Enterprises through its proprietor Shri Ranbir Chaudhary Vs. M/s Tirupati Food Processing through its proprietor Shri Manoj Aggarwal Page-398

Specific Relief Act, 1963- Section 34- Plaintiffs filed a suit for declaration that they were partners of the firm since 1971- public notices were issued which were published in the newspapers- intimation was given to the bank and other commercial establishment- notices were received from tehsildar regarding the payment of sale tax- the record showed that assessing authority was not satisfied about the correctness and had asked for the books of accounts-the proceedings could have been taken within 5 years but were taken beyond the

period of five years – held that the orders were without jurisdiction and the Civil Courts have the jurisdiction to adjudicate upon the matter.

Title: State of H.P. & ors. Vs. Vidya Vati (dead through Lrs.) & ors. Page-549

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that defendant was interfering with the suit land without any right, title or interest- defendant filed a counter claim pleading that he was owner in possession of the suit land and plaintiff was wrongly interfering with the same- a Local Commissioner was appointed to visit the spot and to verify whether construction was being raised or not – he visited the spot and found that construction was being raised – subsequently, another Local Commissioner was appointed to demarcate the suit land- he demarcated the suit land- parties admitted the same to be correct- he found encroachment on the suit land- held, that suit was rightly decreed by the trial Court.

Title: Ram Saran (Dead through LRs Savitri Devi & ors) Vs. Gorakh Ram (Dead through LRs Shrawan Ram & ors) & another Page-310

Specific Relief Act, 1963- Section 38- Plaintiffs pleaded that they had Bartandari rights - defendant No.1 had sold his ownership rights- suit land was Banjar Kadim in the shape of 'Charand' in which plaintiffs and other Tikadarans have Bartandari rights- defendants were interfering with those rights- hence, injunction was sought -Wajib-ul-arz and the order of the Financial Commissioner also recognised the rights of Bartandari- land was Shamlat – entry of the Banjar Kadim had been made and defendants could not have acquired proprietary rights over Banjar Kadim land- land vested in the Punjab Govt. and the defendants could not have purchased the same in the year 1968 nor any rights could have been granted to him in respect of shamlat land.

Title: Jagdish Chand and others Vs. Amar Singh and others Page-201

'T'

Transfer of Property Act, 1882- Section 122- Plaintiff claimed that gift deed executed by 'M', father of the plaintiff in favour of defendant was wrong and applicant had no right in the property and property was ancestral in nature- record showed that 'S' was owner in possession of the suit land – he had gifted the suit land to his son 'C' who had executed the will of the property in favour of his sons 'M' and 'O' in equal share- plaintiff had failed to prove any custom amongst the Rajput of Hamirpur- plaintiff had also failed to prove the ancestral nature of the suit land- property acquired by way of gift does not fall within the definition of ancestral property- therefore, suit was rightly dismissed by the trial Court.

Title: Raman Thakur Vs. Raksha Kumari Page-370

TABLE OF CASES CITED

'A'

'B'

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'W'

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'Y'

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'Z'

Zahira Habibullah Sheikh (5) and another vs. State of Gujarat and others (2006) 3 SCC 374

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

FAOs (MVA) No. 183, 184 of 2007 and
FAO (MVA) No. 546 of 2008.
Judgment reserved on 14.03.2014.
Date of decision: 21 .03.2014

FAO (MVA) No.183 of 2007	
National Insurance Company Ltd.	.....Appellant
Versus	
Smt.Meena Kumari and others	...Respondents
FAO (MVA) No.184 of 2007	
National Insurance Company Ltd.	.....Appellant
Versus	
Smt.Meena Kumari and others	...Respondents
FAO (MVA) No.546 of 2008	
Raksha Devi	.....Appellant
Versus	
National Insurance Company ltd. and others	...Respondents

Motor Vehicles Act, 1988- Section 149- It was pleaded that a tractor being driven in a rash and negligent manner hit the pedestrian due to which 'N' and 'K' died - 'S' had sustained injuries and he died subsequently - Insurance Company pleaded that the deceased and injured were travelling in the vehicle - however, no satisfactory evidence was led to prove this fact- held that the plea of the Insurance Company that the deceased and injured were travelling in the vehicle cannot be accepted and the Insurance Company is liable to pay the compensation. (Para 9-16)

Cases referred:
National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant(s):	Mr.Ashwani K. Sharma, Advocate, for the appellant in FAO Nos. 183 & 184 of 2007 and Mr. V.S. Rathore, Advocate, for appellant in FAO No. 546 of 2008.
For the respondent(s):	Mr. Atul Jhingan, Advocate, with Ms. Shilpa Sood, Mr. Ajay Dhiman and Mr. Rohit Chauhan, Advocates, for the respective respondents in respective appeals. Mr. Suneet Goel, Advocate, for claimant Raksha Devi in respective appeals. Respondent No. 3 ex parte.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, A.C.J.

FAO No. 183 of 2006 is directed against the judgment and award dated 3.3.2007, made by the Motor Accidents Claims Tribunal (I) Kangra at Dharamshala in Claim

Petition No.2-P/II/2004, titled *Meena Kumari versus Raksha Devi and others*, whereby a sum of Rs.1,50,000/- came to be awarded as compensation in favour of the claimant, for short the "impugned award".

2. In **FAO No. 184 of 2006**, the appeal is directed against the same award dated 3.7.2007, made by the same Tribunal in Claim Petition No. 1-P/II/2004, titled *Meena Kumari and others versus Raksha Devi* and others, whereby a sum of Rs.13,27,255/- came to be awarded as compensation in favour of the claimants and insurer came to be saddled with the liability, for short the "impugned award".

3. In **FAO No. 546 of 2008**, appellant/owner/insured has questioned the award dated 1st August, 2008, made by the Motor Accidents Claims Tribunal (I), Kangra at Dharamshala in Claim Petition No. 86-P/II-2004 titled *Sonu Kumar versus Raksha Kumari and others* whereby a sum of Rs.7, 75,000/- with interest @ 8% from the date of institution till its realization, with costs of Rs.2000/-, came to be awarded in favour of the claimant and against the respondents, for short the "impugned award".

4. All the three appeals are outcome of a vehicular accident, allegedly caused by Sunil Kumar driver of the offending tractor bearing registration No. HP37A-0248, rashly and negligently on 2.8.2003 at about 11.15 a.m. at "Bon" and hit pedestrians, namely Neha @ Raksha, Kuldip Chand and Sonu Kumar, who died (Sonu Kumar) during the pendency of the appeal and his legal representatives have been brought on record vide order dated 10.10.2012 and are respondents No. 2(a) to 2 (d) in FAO No. 546 of 2008. The other injured, namely, Nehar @ Raksha and Kuldip Chand succumbed to the injuries on the spot and their representatives and dependants, filed claim petitions for grant of compensation, as per break-ups given in the claim petitions.

5. The Tribunal in both the awards, which is subject matter of FAOs No. 183 and 184 of 2007, held that the insurer is liable and saddled the insurance with the liability. The insurer has questioned the same by the medium of these two appeals. The driver of the offending vehicle and owner/insured have not questioned the awards, thus the awards attained finality qua them. The only question to be determined in these two appeals is whether the appellant/insurer has been rightly saddled with the liability?

6. In FAO No. 546 of 2008, the claimant, driver and insurer have not questioned the findings recorded by the tribunal below. Only the owner-insured has questioned the findings, so far as it relate to saddling the owner-insured with the liability and discharging the insurer-insurance company from its liability.

7. I deem it proper to dispose of these three appeals by this common judgment.

8. In Claim Petition titled *Meena Kumari and others versus Smt. Raksha Devi and others*, the claimants have specifically averred that deceased was along with her father Kuldip Chand standing at a place known as "Bon" on the road side. The offending tractor, which was attached with a trailer, came from Garh side towards Bon, being driven by Sunil Kumar @ Sammi in a high speed, rashly and negligently. The driver lost his control over the vehicle, as a result of which, said tractor turned turtle and hit Neha and Kuldip Chand, who were crushed under the tractor and died on the spot.

9. Claimants have led evidence, oral as well as documentary, and proved the factum of accident which is not questioned by the driver or the owner. Thus, evidence led by the claimants has remained un-rebutted.

10. Insurer examined two witnesses, namely, Sudarshan Kumar, Senior Assistant, Legal Department and Ajay Awasthi, Advocate. Both of them have proved the factum of insurance policy and have not stated anything about the defence taken by the insurer that the injured and deceased were travelling in the offending tractor.

11. It is apt to mention here that driver and owner have led evidence and admitted that both Neha and Kuldip Chand died on the spot, and Sonu Kumar sustained injuries, but has taken a defence that driver has not driven the offending vehicle rashly and negligently.

12. The learned counsel for the insurer while cross-examining the witnesses, led by the claimants, owner and driver, has asked straight questions to the effect that all said three persons, i.e., Neha, Kuldip Chand and Sonu Kumar were not on road side but were travelling in the tractor, which were specifically denied by the witnesses.

13. Having said so, the insurer has failed to prove that injured and deceased were traveling in the offending vehicle, i.e., tractor. Thus, there is ample evidence on the record that the driver has driven the offending vehicle rashly and negligently and they were not traveling in the said tractor but were on the road side when they became the victims of the said vehicular accident.

14. The factum of insurance policy is not in dispute. Even otherwise, it is proved and also admitted by the witnesses, examined by the insurer/appellant, that vehicle was insured, thus, insurer came to be rightly saddled with the liability.

15. Adverting now to FAO No. 546 of 2008, which is also outcome of the same accident, by the same offending tractor, it is astonishing to note that same Tribunal in two other cases, arising out of the same accident, saddled the insurer/insurance company with the liability and in this case, in terms of the impugned award, subject matter of this appeal, discharged the insurance with the liability. It is how the tribunal has discharged its duty, that too, against the concept of grant of compensation and has virtually thrown the claimants on the road side. It is very difficult to recover the money from the insured. However, finding recorded to that effect is perverse and runs contrary to the findings recorded by the same tribunal in other two claim petitions which are subject matter of FAOs 183 and 184 of 2007, referred to supra.

16. In appeal, being FAO No. 546 of 2008, facts are similar and permit brevity. The claimant Sonu Kumar was one of the victims of the accident which was caused by the driver, namely, Sunil Kumar @ Sammi while driving the offending tractor. He became permanent disabled and filed claim petition for the grant of compensation and the Tribunal after examining the case, granted Rs.7,75,000/- with 8% interest, exonerated the insurer, as referred to supra. It was specifically pleaded by the petitioner Sonu Kumar that he was walking on a highway in the area of Garh and at the relevant point of time tractor bearing No.HP37A-0248 came from Garh side, which was being driven by the driver rashly and negligently, who lost control over it, as a consequence, tractor turned turtle due to which lower portion of the body of the petitioner, who was on the road side, was crushed.

17. The owner in this appeal has only questioned whether the insurer has rightly been exonerated?

18. Claimant has examined as many as seven witnesses, including himself. All the witnesses have deposed that he was on road side along with other two persons. He was

hit by the tractor and his lower portion of the body was crushed, sustained injuries and rendered him permanently disabled. He is not in a position to sit and stand. Prem Chand HHC stated that the accident was outcome of the rash and negligent driving of the driver and FIR No. 263/2003 Ext. PW1/A under Sections 279, 337 and 304-A IPC was registered in police station Palampur, and challan stands presented against the accused in the Court.

19. Respondent-driver and owner has examined Janaka Raj, who has stated that tractor met with an accident and ran-over four pedestrians, out of whom two died on the spot and two suffered injuries. Thus, the evidence led by the claimants is supported by the Investigating Officer who has investigated the case and also by the witnesses of owner and driver.

20. In the given circumstances, how can it lie in the mouth of the insurer that injured claimant was traveling in the tractor. The defence which he has taken in other two claim petitions was not proved and believed. Even insurer has not proved the said fact in this case also. I wonder how the Tribunal has believed the said version in this case while passing this award, is an eye opener for the said Tribunal.

21. Insurer has nowhere proved that the claimant was travelling in the tractor. Even otherwise, it was for the insurer to plead and prove that the insured owner has committed willful breach in terms of the policy which would have been the ground for discharging the insurer from the liability which is not the case here. My this view is fortified by the Apex Court judgment in the case of **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid*

licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section149 (2) of the Act."

22. On this point, I am also supported by the latest judgment of the apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** that the insurer has to prove that the insured has committed willful breach of the insurance policy and it is not for the insured to move here and there. It is apt to reproduce Para 10 of the judgment.

"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."

23. Having said so, insurer has also failed to prove that owner, present appellant has committed any breach. Thus, the tribunal below has fallen in an error by granting right of recovery to the insurer. The insurer was to saddle with the liability.

24. Keeping in view the aforesaid discussion coupled with the law on the point, the appeal filed by the owner/insured deserves to be granted and insurer/insurance company is liable to be saddled with the liability. Ordered accordingly.

25. The insurer is directed to deposit the award amount within two months from today in the Registry of this Court, if not already satisfied. Accordingly the impugned award is modified and appeal (FAO No. 546/2008) is allowed.

26. As a corollary to aforesaid discussion and observations, FAOs No. 183 and 184 of 2007 are dismissed and FAO No. 546 of 2008 is allowed, as indicated above.

27. All the appeals stand disposed of accordingly.

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

Rajeshwar Singh Negi ....Petitioner.
Versus
State of H.P. ....Respondent.

Cr.MP(M) No. 149 of 2015.
Date of Decision : 25th February, 2015.

Code of Criminal Procedure, 1973- Section 438- Applicant apprehends his arrest for the commission of offences punishable under Sections 363, 366, 376 (2) (g) and 120-B of IPC, Section 4 and 16 of P.O.S.C.O. Act- The prosecutrix had attributed inculpatory role to one V and had omitted to attribute any inculpatory role to the bail applicant in her statement – subsequently she implicated the bail applicant, which shows that her statement is afterthought as well as improvement and the same cannot be relied upon - bail granted. (Para 2)

For the Petitioner: Mr. Arvind Sharma, Advocate.
For the Respondent: Mr. Vivek Singh Attri and Mr. Tarun Pathak, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The present application has been filed by the bail applicant under Section 438 of the Code of Criminal Procedure as he apprehends his arrest for his allegedly having committed offences punishable under Sections 363, 366, 376, 376(2) (G) and 120-B of the IPC and Sections 4 and 16 of the POCSO Act in FIR No. 53/14 of 18.09.2014 registered at Police Station, Bhawa Nagar, District Kannaur, H.P.

2. Status Report filed and perused. Its perusal divulges the fact that qua the purported occurrences, the prosecutrix recorded her statement before the learned Additional Chief Judicial Magistrate, Rampur on 21.01.2015 wherein she attributed an inculpatory role only to one Vijay Kumar. Therein she has omitted to attribute any inculpatory role to the bail applicant. However, subsequently in her further statement recorded by her before the learned Chief Judicial Magistrate, Reckongpeo on 9.2.2015 she attributed an inculpatory

role to the bail applicant. The factum of her omission to initially on 21.01.2015 attribute any inculpatory role to the bail applicant and in her supplementary statement recorded on 9.2.2015 hers taking to do so, does per se influence an inference that the attribution of an inculpatory role to the bail applicant subsequently by her in her supplementary statement recorded before the learned Chief Judicial Magistrate, Reckongpeo on 9.2.2015 is obviously ingrained with the vice of afterthought as well as an improvement, consequently, it is bereft of any truth or veracity. The learned Deputy Advocate General contended that there is a sound explanation afforded by the prosecutrix to not name the bail applicant initially to be the person who perpetrated the alleged forcible sexual intercourse on her person and the same is grooved upon the factum of the initial statement having been made/recorded by her under compulsion and duress exercised upon her by the bail applicant. However, the said argument cannot be carried forward at this stage obviously given the fact that during the course of recording of her initial statement by the learned Additional Chief Judicial Magistrate, Rampur and during the course of whose recording when he is mandatorily obliged to while recording her statement ensure that it is shred of or bereft of any element of exercise of any duress or compulsion upon her, which duty as cast upon him cannot at this stage be construed to have not being diligently performed by him, besides the presumptive fact of a certificate, as is ordained to be recorded by the Magistrate evidencing the fact of the statement of the complainant/prosecutrix having been elicited by him while its being free from exercise of any duress or compulsion upon her qua the occurrence existing thereon, renders rudderless the contention addressed before this Court by the learned Deputy Advocate General. In face there of, prima facie at this stage, it is apparent that no offence is constituted against the bail applicant. Accordingly, the bail application is allowed and order of 11th February, 2015 is made absolute subject to the compliance of further conditions:

(i) that he shall not leave India without the previous permission of the Court ;

(ii) that he shall deposit his pass port, if any, with police station concerned;

(iii) that he shall apply for bail afresh when the challan is filed before the trial Court and

(iv) that in case of violation of any of these conditions, the bail granted to the petitioner shall be forfeited and he shall be liable to be taken into custody;

However, it is made clear that the findings rendered by this Court hereinabove shall have no bearing on the merits of the case. Before departing, it is imperative, given the fact that this Court has been regularly noticing an abuse of process of law at the instances of complainants, who having arrived at the age of consent and being allegedly aggrieved by the perpetration of forcible sexual intercourse upon them, taking to belatedly ventilate their grievances, to direct all the Station House Officers in all the police stations concerned in the State of Himachal Pradesh to before proceeding to record an FIR against any person alleged to have allegedly committed forcible sexual intercourse to embark upon a pre registration inquiry for ascertaining the truthfulness of the belated allegations. Only on such satisfaction being drawn an FIR would be lodged. More so, satisfaction ought to be drawn qua the tenability, truthfulness and soundness of the explanation qua the belated lodging of the FIR. Copy of this order be sent to the Director General of Police, Himachal Pradesh for circulation to all the quarters concerned for its strict and immediate compliance. Dasti copy.

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

Nasir ...Appellant.
Vs.
State of H.P. ...Respondent.

Cr. Appeal No. 278 of 2010
Reserved on: 20th March, 2015.
Decided on:_25th March, 2015.

Indian Penal Code, 1860- Section 302- Accused used to beat his wife and threaten to kill her- sister of the deceased/wife heard the cries of son of the accused- she went to the house of the accused and found the deceased lying under the cot and her tongue was clinched between her teeth- bluish bruises were present on both sides of the neck- post mortem report revealed that deceased had died due to the asphyxia caused by ante-mortem injuries and breaking of hyoid bone of the neck- accused was alone with the deceased- he had not explained the circumstances leading to the death of his wife- it was duly proved that accused used to beat his wife and the matter was also compromised- minor contradictions in the testimony of the mother of the deceased is not sufficient to discard her testimony- held, that in these circumstances, prosecution was proved and the accused was rightly convicted. (Para-9 to 16)

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

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

This appeal is directed against the judgment, rendered on 25th June, 2010 by the learned Additional Sessions Judge, Sirmaur District at Nahan, H.P., in Sessions Trial No.6-N/7 of 2009, whereby the appellant has been convicted and sentenced to suffer rigorous imprisonment for life and to a pay fine of Rs.20,000/- and in default of payment of fine, to further undergo imprisonment for a period of one year for the commission of offence under Section 302 of the Indian Penal Code (hereinafter referred to as 'IPC').

2. The brief facts of the case are that deceased Mehrooba, the elder daughter of complainant Farmula, aged 22 years was married to accused Nasir about four years prior to her death on the intervening night of 11/12/11/2008. After marriage for about a year, the marital relations between the accused and the deceased were cordial but later, parents of accused Nasir turned both of them out of the house. Complainant Farmula gave Rs.30,000/- to Nasir and her daughter Mehrooba for the construction of new house, which after construction was inhabited by both of them, where they lived for about six months. Thereafter, Nasir, under the influence of his parents, started giving beatings to his wife Mehrooba and because of beatings, few months earlier, Mehrooba had sustained injuries on her arm. Nasir used to threat that he would cut off legs and arms of Mehrooba and would go to serve the Jail. Nasir had relations with another girl because of which he used to give beating to Mehrooba and threatened to kill her. On 11.11.2008, in the evening accused

Nasir had come to the house of his mother-in-law Farmula where his wife was present and there in presence of Farmula, he slapped Mehrooba and asked why she was sitting there. Farmula told Nasir that since his wife was pregnant he should not beat her. On 12.11.2008 at about 7.00 a.m, PW-11 Khushnsiba, sister of deceased Mehrooba, on hearing the cries of Salman, son of accused Nasir, went to the house of Nasir and found Mehrooba lying under the cot. PW-1 Farmula also went to the house of Nasir and found Mehrooba lying on the cot and her bangles were found broken. She tried to wake up Mehrooba, but of no use. Mehrooba's tounge was clinched between her teeth. On both sides of the neck and on left eye bluish bruises were present and Mehrooba, was found dead. PW-1 Farmula reported the matter to the police and police came to the spot where her statement under Section 154, Cr.P.C. containing the aforesaid facts was recorded, wherein she also stated to the police that accused Nasir often used to beat Mehrooba and threatened to kill her due to his quarrels, Nasir had throttled theneck of Mehrooba and thereby killed her. Sub Inspector Shayam Chand, Incharge, Police Post, Majra investigated the case, got spot of occurrence photographed, took into possession pieces of bangles and sent the body for post mortem examination. In investigation, it was found that accused Nasir often used to quarrel with his wife and whenever the matter was reported to the police, both husband and wife were made to understand and at the intervention of villagers their quarrels/disputes were patched up. Statements of the witnesses were recorded by the Investigating Officer.

3. 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.

4. The accused was charged for his having committed an offence punishable under Sections 302 and 316 of the IPC 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 sixteen 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.

5. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant.

6. 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 the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

7. 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.

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. Mehrooba, the deceased wife of the accused was married to the accused about four years prior to the occurrence. For a year marital relations inter-se the accused and the deceased remained cordial, thereafter, marital relations inter-se them developed

estrangement. A 2 ½ years male child has been begotten out of said wedlock. The accused is alleged to have committed the offences for which he came to be charged, convicted and sentenced by the learned trial Court. There is no direct evidence comprised in the depositions of the eye witnesses to the occurrence for sustaining the charge against the accused. However, there is indirect and circumstantial evidence on record which as surging forth from the evidence on record has constrained the learned trial Court to return findings of conviction against the accused. Obviously, when the prosecution case is in its entirety harbored upon circumstantial evidence, then each of the links in the chain of circumstances were enjoined to be unflinchingly proved beyond reasonable doubt.

10. The prosecution had strived and concerted to attribute motive, which link of motive in the chain of circumstances acquires enormous and grave significance, in a case as is the one anchored upon circumstantial evidence. The motive attributed to the accused is of his having ill-treated and maltreated his deceased wife comprised in the acts of physical cruelty meted by him to his deceased wife Mehrooba. The depositions of PW-1, PW-2 and PW-11 when read incisively and in unison with each other manifestly, loudly, consistently and palpably convey the factum of the accused having perpetrated physical cruelty upon his deceased wife, one of which incident has come to be reported to Police Post Majra. The testimonies of PW-1, PW-2 and PW-11 besides being consistent with and in harmony with their respective testimonies on oath, they also do not suffer from any intra-se contradiction so as to render their testimonies to be acquiring the vice of incredibility. Rather the factum as deposed by them, of the accused having meted physical cruelty upon the deceased receives corroboration from documentary evidence existing in Ex. PW-6/A which records the factum of a compromise struck inter-se the accused and the deceased in quick succession to the factum of physical cruelty perpetrated by the accused upon the deceased having come to be reported to Police Post Majra. With the accused not denying the factum of recording of compromise Ex. PW-6/A sequels an invincible and apt conclusion that there were wrangles and bickerings inter-se the deceased and the accused which snowballed into the accused taking to perpetrate physical cruelty upon the deceased. With the noticeable fact pronounced by the depositions of PW-1, PW-2 and PW-11 construed in entwinement with the factum of recoding of Ex. PW-6/A prods this Court to conclude that the accused nursed ill will or hatred towards the deceased, as such, he was fostered to perpetrate physical cruelty upon the deceased. Such acts of physical cruelty perpetrated upon the deceased by the accused communicates the existence of bickerings as well as estrangement in the marital relation inter-se the accused and deceased concomitantly its generating a motive in the mind of the accused to commit the offence for which he came to be charged and convicted by the court below.

11. Now, the propellant cause for the accused to nurse ill will towards his wife emerged from or was germinated by the factum of the accused having illicit relations with another girl. PW-1 Farmula has unequivocally deposed that the accused perpetrated beatings on her deceased daughter as he lived with another girl. She has also proceeded to in her deposition state that her daughter had noticed the accused to be in the company of his girlfriend one month prior to the occurrence. The said fact has been deposed to have been reported by the deceased to the police Station, Paonta Sahib. The defence has not concerted to belie the testimony of this witness qua the factum of her deceased daughter having noticed the accused in the company of his girlfriend which factum was reported to the police Station, Poanta Sahib by eliciting the germane and relevant record qua the said fact from the Police Station concerned. Consequently, for lack of concert and inability on the part of defence to, by adducing the germane record from the police station Paonta Sahib,

belie the fact of the deceased daughter of PW-1 having noticed the accused to be in the company of his girlfriend one month prior to the occurrence, constrains an apt conclusion that it was omitted to be concerted to by the defence as on its adduction the deposition of PW-1 qua the fact aforesaid would have remained un-belittled. Consequently, the overwhelming conclusion which ensues is that the deposition of PW-1 of the accused having been noticed by her deceased daughter to be in the company of his girlfriend and the said factum having come to be reported to the Police Station, acquires veracity. In face thereof it has to be firmly and formidably concluded that the prosecution has been able to unveil by adduction of cogent evidence the factum of the accused having illicit relation with a woman of which the deceased wife of the accused acquired knowledge which ultimately led and sequelled the accused to perpetrate one month prior to the occurrence physical trauma/cruelty upon the deceased. Moreover it appears that the said entanglement of the accused with a woman engendered ill will of the accused towards the deceased as also it constituted a driving motive for the accused to commit the murder of his deceased wife. The prosecution by adducing potent evidence has firmly established the existence of a motive in the mind of the accused, hence has been able to firmly prove a very vital and potent link in the chain of circumstances.

12. Even the factum of the accused having been last seen in the company of the deceased has come to be proved by the deposition of PW 1 and PW 11, both of them have in tandem deposed that the deceased had come to the house of PW-1 on a day prior to the occurrence and asked for her husband Nasir, in the same evening the accused, too arrived at her house at about 8.00 p.m. from the house of his parents. PW-1 deposed that even when the deceased was pregnant the accused took to deliver a blow on the knee of her deceased daughter Mehrooba. However, she, in her previous statement, recorded in writing Ex. PW-1/A has deposed that on the accused arriving at her house had slapped Mahrooba, hence when she in Court in contradiction thereto has deposed that the accused delivered a blow on the knee of his deceased daughter, as such, the learned counsel for the appellant has proceeded to argue that the said contradiction taints and embellishes the prosecution version of physical cruelty prior to the incident having been meted by the accused to the deceased. Nonetheless when the said discrepancy and contradiction is minor as also given the fact that mother of deceased, PW-1 is an illiterate person, as such, given her rusticity and illiteracy she may have with triviality deviated from her previous statement recorded in writing. Consequently, given the aforesaid fact of triviality of contradiction arising from her rusticity as also the factum of the defence having not, when she proceeded to depose in Court qua the factum of the accused on his arriving at the house of PW-1 having delivered a blow on the knee of her deceased daughter Mehrooba whereby she has contradicted from her previous statement recorded in writing, confront this witness with the apposite previous statement, constrains a conclusion that even the defence has acquiesced to the fact that this witness had indulged in a trifling and trivial contradiction. The factum of such acquiescence also conveys the fact that hence the defence concedes to the factum of the accused on a day prior to the occurrence when he arrived at the house of PW-1 where the deceased daughter of PW-1 along with her son had too come, his having perpetrated physical cruelty upon his deceased wife Mehrooba. Even otherwise, when the said act stands corroborated by PW-11, it can be aptly concluded that the accused one day prior to the occurrence meted physical cruelty to the deceased. Besides, when PW-11 also corroborates the testimony of PW-1 qua the factum of both having seen together the deceased and the accused a day prior to the occurrence actuates a tenable inference that even a day prior to the occurrence the accused nursing an ill will as well as motive to commit the offence as alleged.

13. Moreover, the deposition of PW-1 and PW-11 also connotes the evident fact of the accused being last seen in the company of the deceased. The death of Mehrooba was not natural but it was homicidal. PW-3 has proved the post mortem report Ex.PW3/B, which records the demise of the deceased having occurred owing to asphyxia (throttling). Dr. K.L. Bhagat, PW-3 has observed the following injuries on the person of the deceased:-

> "**External appearance**
>
> Body lying supine well preserved, rigour mortis appeared.; Wearing green shirt, white Baniyan, orange coloured salwar with open syes. Tounge was protruding out, froth was coming right side of the mouth, also from the nostril. Face and eyes had petechial hemorrhages
>
> **Wounds bruises position**:-
>
> (1) There were contusions with abrasions on the left side of the neck 5x2 CM in dimensions, brownish black in colour.
>
> (2) Small contusions on the right side of the neck 1x1 cm in dimensions. Brownish black in colour, just below the angle of the mandible.
>
> On disecesion of the neck extra bastion of blood in the sub cutanous tissue. The horn of the hyoid bone on the right side was broken.
>
> **Larynx and trachea**
>
> Filled with forth and clotted blood.
>
> **Mouth Harynx and Oesophagus**
>
> This was filled with forth and oesophagus was empty. There was partially digested food present in the stomach.
>
> **Organs of generation external and internal**.
>
> The utrus was opened and a dead baby (female child) age 32-34 week, wt. 2.1 Kg., no maceration, liqure clear, no visible anomaly, fresh intra utrine death occurred.
>
> **Muscles Bones Joints.**
>
> Fracture of the right horn of hyoid bone occurred."

The opinion reported by PW-3 in Ex.PW3/B was a tentative opinion awaiting the receipt of opinion rendered by the FSL. On receipt of the report of FSL, which portrayed the factum of no traces of poison in the viscera, led PW-3 to finally opine that the cause of the demise of the deceased was asphyxia. Asphyxia was begotten by ante-mortem injuries conveyed by the existence of bluish marks on both sides of her neck. The hyoid bone of the neck of the deceased was broken which was sequelled by throttling and use of force as referred to hereinabove. The factum of throttling of the deceased at the instance of the accused is apparent from the evident fact of bluish marks having been communicated in Ex.PW3/B to be existing on both sides of the neck of the deceased. The opinion, referred to hereinabove, given by PW-3 does plain speakingly convey the factum of the cause of the demise of the deceased being asphyxia begotten by throttling of the neck of the deceased at the instance of the accused, he being the person last seen by PW-1 and PW-11 in the company of the deceased, who for the reasons adverted to hereinabove while engendering a motive towards the deceased, took to, hence, consummate it by resorting to the inculpatory act. PW-3 in his cross-examination concedes to the factum that when a person takes to throttle, his victim shrieks, cries and eliminates. However, he proceeded to depose that when force is used by the person while throttling his victim, the abortive act of the victim is baulked owing to blockage of air bases. Consequently, given the force used by the accused or applied by

the accused on the neck of the deceased connoted by the factum of existence of ante mortem injuries conveyed by the existence of bluish marks on both sides of the neck, the quantum of force being immense, obviously constrain the victim to take to scream or shriek so as to invite the attention of the neighbours living in the neighbourhood of the accused. Consequently, even if, the abortive act of the deceased was benumbed so as to preclude her from screaming or shrieking for inviting the attention of the neighbourhood, as such, the lack of omission of screaming or shrieking by the deceased cannot invite an inference that the accused did not throttle the deceased or that it did not beget asphyxia. More so, the above conclusion also does get mobilization in the face of the death of the deceased being portrayed by PW-3 to be not suicidal rather homicidal. Consequently, the latter attribution by PW-3 of the deceased having not raised cries or screams though arouseable by the accused concerting to throttle her, stands in the realm of a valid explanation.

14. Moreover, PW-1 has deposed that the bangles of the deceased were found in a broken state as also her silver clip was found behind her back on the ground, besides her hair were also found broken and lying at a small distance from the place of occurrence. PW-11 has corroborated the deposition of PW-1. Even IO PW-16 has corroborated the deposition of PW-1 qua the factum of the aforesaid items having been found at the site of occurrence. The said items have been deposed by PW-2 to have been taken into possession vide memo Ex.PW2/A. The recovery of the aforesaid items conveys that there was scuffle preceding the throttling of the deceased by the accused. However, even if, there was a scuffle inter se the accused and the deceased prior to the occurrence, does not constrain this Court to accept the contention of the learned counsel appearing for the appellant that, hence, omission on the part of the deceased to raise hues and cries for inviting the presence of the neighbours living in the immediate vicinity of the site of occurrence, as a natural corollary leads to a concomitant inference that, hence, the entire incident is a concoction or an invention, especially when PW-3 in his deposition has deposed that throttling was by severe pressure as is evident from the presence of bluish marks on either side of the neck, which marks are also visible in photographs of the dead body of the deceased, Ex.PW5/A-2, Ex.PW5/A-7, Ex.PW5/A-9, Ex.PW5/A-12 and Ex.PW5/A-13,, hence, when such immensity of pressure applied by the accused on the neck of the victim/deceased to beget throttling and consequent asphyxia precluded the deceased to scream or shriek. Naturally then, the omission on the part of the victim to raise shrieks or screams at the culminating stage of the scuffle and even at the stage of the accused taking to throttle her does not at all fillip or boost any inference that the incident was concocted or manipulated or that the death of the deceased was suicidal and not homicidal.

15. The defence as comprised in the testimonies of DW-1, DW-2 and DW-3 conveying the factum of inimicality borne by Iqbal, Dilbag and Nasim with the family of the accused owing to which they killed the wife of the accused in the night accompanied by the fact that the site of occurrence has no doors or windows, hence, facilitated their entry therein, eliminates the effect of the inculpatory role as attributed by the aforesaid discussion to the accused. Nonetheless, the testimonies of the defence witnesses to prove the inimicality of the aforesaid towards the family of the accused, hence, theirs being driven to eliminate the deceased wanes and looses its vibrancy in the face of the defence counsel having omitted to during the course of cross-examination of the prosecution witnesses put apposite suggestion to them of the murder of the deceased having not been committed by the accused rather by the aforesaid. Omission on the part of the learned defence counsel to during the cross-examination of the prosecution witnesses portray an inculpatory role to the aforesaid especially when it preceded the recording of the statement of the accused under Section 313,

Cr.P.C., leads to the sequeling conclusion that it does not obviously forbid an inference that the said defence is in its entirety a concoction and an invention. In aftermath, it does not garner or mobilize any tenacity or strength in eroding the prosecution version which for the reasons hereinabove has been concluded to be credible as well as truthful. Moreover, when the motive has come to be proved, by the prosecution by adducing invincible evidence, the effect, if any, of the defence version is emasculated.

16. On appreciation of the evidence, it is imminent and reinforcingly clear that the accused, is, guilty of the offence and that the learned trial Court in coming to appreciate the evidence on record had neither mis-appreciated the prosecution evidence nor had omitted to appreciate the relevant and apposite material on record. Obviously, the impugned judgment of conviction and sentence does not warrant interference. As a result, the appeal is dismissed and the judgment of the learned trial Court is affirmed and maintained. Records be sent back forthwith.

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

Senjam Nongdren Khomba Singh @ Senjam Ching Thang
Khomba Singh @ Senjam Basil Singh ...Appellant.
VERSUS
State of H.P. ...Respondent.

Cr. Appeal No. 148 of 2010
Reserved on: 19th March, 2015.
Decided on:_2nd April, 2015.

Official Secrets Act, 1923- Sections 5(1)(c) and 6(a)(c)(e)- **Indian Penal Code, 1860-** Section 468 and 471- Accused were visiting ARTRAC a prohibited place of army in Shimla and collecting information which might tend directly or indirectly to help enemy country in respect of defence matters- search of the house of the accused was conducted during which 19 files were recovered from drawing room containing description of banned organization- some other articles and army uniforms were also recovered from the house of the accused- it was duly proved on record that ARTRAC is a prohibited place which houses the head quarters of the Army Training Command- however, it was not proved that accused had gained access in the prohibited area with a purpose prejudicial to the safety or interest of the State or that such entry was gained under impersonation- files stated to have been recovered from the accused were loose folder and were not in sealed condition- documents could have been easily introduced into them- however, it was duly proved that accused had introduced himself as Army Officer- he was found in possession of forged passports and 17 live cartridges of different arms were recovered without licence- appeal partly allowed- accused acquitted of the commission of offences punishable under Sections 3 (1) (a), 3(1)(c) and Section 5(1)(c) of the Official Secrets Act and convicted of the commission of offences punishable under Sections 6(a)(c) (e) and 6(d) of the Official Secrets Act, Section 25 of the Arms Act and Sections 468 and 471 of the Indian Penal Code. (Para-11 to 18)

For the Appellant: Mr. N.S. Chandel, Advocate.

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

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

This appeal is directed against the judgment, rendered on 10th June, 2005 by the learned Sessions Judge, Shimla, H.P. in complaint No.2-S/2 of 2004, whereby the appellant has been convicted and sentenced to undergo rigorous imprisonment under Section 3(1) of the Official Secrets Act for 14 years and for offence under Section 5(1)(c) of the Official Secrets Act, 1923, he was convicted to rigorous imprisonment for three years with fine of Rs.1000/-. For offence under Section 6(a)(c)(e) of the Official Secrets Act he has been sentenced to rigorous imprisonment for three years with fine of Rs.1000. For offence under Section 25 of the Arms Act he has been sentenced to rigorous imprisonment for two years and to pay a fine of Rs.1000/-. For offence under Section 468 of the Indian Penal Code, he has been sentenced to rigorous imprisonment for five years and to pay a fine of Rs.2000/-. For offence under Section 471 of the Indian Penal Code, he has been sentenced to rigorous imprisonment for one year and fine of Rs.1000/-. All the sentences have been ordered to be run concurrently. In default of payment of fine, as aforesaid, the appellant has been ordered to be sentenced to undergo further imprisonment for one year.

2. The brief facts of the case are that accused named Senjam Nongdrem Khomba Singh, alias Senjam Ching Thang Khomba Singh and Senjam Basil Singh, resident of Village, Taothong Lamkhai, District Imphal West (Manipur), with a purpose prejudicial to the safety and interest of the State was un-authorizedly visiting ARTRAC a prohibited place of army in Shimla and collecting information which might tend directly or indirectly to help enemy country, in respect of defence matters. Such activity on part of the accused was likely to affect the sovereignty and integrity of India and the security of State, as well as friendly relations of the country with foreign State. Consequent to such desire, the accused had been visiting ARTRAC area in Shimla, to collect information. Accused was residing in Flat No.3, Set No.8, near St. Marry School, Goyal Apartments, Sandal Estate, Chakkar and posing himself as Army Captain and some times as a Major. On receipt of such information, Station House Officer/Inspector Ashok Kumar, Police Station (West), Shimla (PW-29), entered rapat, dated 21st October, 2003 in Daily Diary (Ex.PAA) and visited Goyal Apartments, Chakkar, after associating Municipal Counsellor Harish Kumar (PW-1), Sanjeev Sharma, Sub Inspector Hem Raj (PW-28), Dy. S.P. Digvijay Negi and knocked door of the flat of the accused. Accused on opening the door came out and introduced himself as a Major Senjam Chingthang Khomba Singh of Rashtriya Rifles. On demand showed identity card No. HB-101414, in which his name was recorded as Senjam Basil Singh, service INT CD rank Major Duty Officer and signed by S.B. Singh, Directing Officer HUM Int. Bureau. Accused on being asked disclosed to be an Intelligence Officer and produced identity card No.8104014-HB showing his name Senjam Niggamba Singh, service sepoy, CD rank. Ashok Kumar, Inspector doubting credentials of the accused, called military Intelligence Officer, to the spot, to verify the identity of the accused, as an Army officer. The Intelligence Officer informed that the accused was not an Army officer.

3. Further the case of the prosecution is that consequently search of the residential premises of the accused was carried out in presence of the witnesses and led to recovery of 19 files from his drawing room containing description of Al-Auaida, LTTE etc., a banned organization. The files under memo, (Ex.PA) were seized. Two identity cards of the

accused were found and taken into possession under memo, Ex.PB. One brief case (Ex.P-20), was found in the house of the accused, having certain identity cards and some engineering instruments like compass, Geometry Box, alive cartridges of different arms, fake pass ports in the names of different persons, one digital diary, two cassettes, gun and pistol. Cartridges were sealed in a cloth parcel and kept in a sealed tin box and taken into possession under memo Ex. PC. From almirah of the house of the accused, two army uniforms were recovered. One shirt was half sleeve and another shirt of uniform was of full sleeve having separate trousers. One army jacket bearing Ashoka mark with one badge having recommendation of Chief of Army Staff were recovered. Shirts (Exts. P-33 and P-34) of the uniform were having three stars on the shoulder, one cap (Ex. P-35) and some badges were in the almirah and all these articles were seized under memo, Ex.PD. Further search of the house led to recovery of 9 stamps (Exts. P-37 to P-45), stamp pads (Ext.P46 to P-48) were taken into possession under Memo Ex.PD. Some blank identity cards were also found and taken into possession under memo Ex.PE. Accused produced identity cards Exhibits P-49 and Ex.P-50 to the police.

4. It was thus alleged that accused came to Shimla in January, 2003, bought a flat in Chakkar for Rs.3.5 lakhs and since then started frequently visiting ARTRAC area which is prohibited area and developed intimate relations with L/N Lokindro posted in ARTRAC Shimla. He had kept Army dresses, badges and other security related documents and prohibited ammunition and impersonated Major or Captain of the Indian Army. He was possessing D.O., letter of Cap. Yogender Singh of 20 R.R. and was an active member of the outlawed underground organization United National Liberation Front and had undergone two months training in Burma for that organization. Earlier, was arrested twice by Manipur Police. Ashok Kumar Inspector after search and recovery sent rukka, Ex.PEE to Police Station (West), Shimla, where on its basis, FIR, Ex.PFF, was entered by Inspector B.D. Bhatia (PW-25). During Investigation, specimen writings and signatures of accused were obtained in presence of Shri Gian Chand Negi, Tehsildar (PW-9) and sent for comparison alongwith documents, identity cards recovered from the accused, to the State Forensic Science Laboratory, Junga, were examined by Visheshwar Sharma(PW-18) and opined vide report, Ex.PY, disputed writings and specimen writings of the accused to be of one and the same person. District Magistrate, Shimla, accorded sanction, Ex.PX to prosecute the accused for offences under Section 3/25 of Arms Act and the Central Government had accorded sanction (Ext. PT) to prosecute the accused for offence under the Official Secrets Act and authorized Shri J.P. Thakur, Superintendent of Police, Shimla to lodge a complaint against the accused.

5. 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.

6. The accused was charged for his having committed offences punishable under Sections 3(1)(a), 3(1)(c), 5(1)(c), 6(a)(c) (e), 6(d) of the Official Secrets Act, Section 25 (sic.15) of the Arms Act and Sections 468 and 471 of the Indian Penal Code 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 29 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.

7. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant.

8. 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 the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

9. 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.

10. 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.

11. For gauging the tenability of findings of conviction recorded qua the accused having committed offences under Section 3(1) (a) (c) and Section 5(1) (c) and also for his standing conviction for his having committed offences constituted under Section 6(a)(c) and (e) of the Official Secrets Act, 1923, it is necessary to bear in mind the provisions engrafted in the aforesaid Sections of the Officials Secrets Act, 1923. Section 3(1)(a)(c) of the Official Secrets Act reads as under:-

> "**3. Penalties for Spying**.- (1) If any person for any purpose prejudicial to the safety or interest of the State-
>
> (a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or
>
> (b) make any sketch, plan, model, or note with is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy, or
>
> (c) obtains, collects, records or publishes or communicates to any other person any secret official code or password, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or its intended to be, directly or indirectly, useful to an enemy [or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States]"

Section 5 of the Official Secrets Act, 19213 reads as under:-

> **"5. Wrongful communication. etc., of information.** (1) If any person having in his possession or control any secret official code or pass word or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or relates to anything in such a place, 2*[or which is likely to assist, directly or indirectly, an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States or which has been made or obtained in contravention of this Act,] or which has been entrusted in confidence to him by any person holding office under Government, or which he has obtained or to which he has had access owing to his position as a person who holds or has held office

under Government, or as a person who holds or has held a contract made on behalf of Government, or as a person who is or has been employed under a person who holds or has held such an office or contract-

(a) willfully communicates the code or pass word, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorised to communicate it, or a Court of Justice or a person to whom it is, in the interests of the State, his duty to communicate it; or

(b) uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety of the State ; or

(c) retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or willfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof;"

Section 6 of the Official Secret Acts reads as under:-

"6. Unauthorised use of uniforms; falsification of reports, forgery, personation, and false documents. (1) If any person for the purpose of gaining admission or of assisting any other person to gain admission to a prohibited place or for any other purpose prejudicial to the safety to the State-

(a) uses or wears, without lawful authority, any naval, military, air force, police or other official uniform, or any uniform so nearly resembling the same as to be calculated to deceive, or falsely represents himself to be a person who is or has been entitled to use or wear any such uniform; or

(b) orally, or in writing in any declaration or application, or in any document signed by him or on his behalf, knowingly makes or connives at the making of any false statement or any omission; or

(c) forges, alters, or tampers with any passport or any naval, military, air force, police, or official pass, permit, certificate, licence, or other document of a similar character (hereinafter in this section referred to as an official document) or knowingly uses or has in his possession any such forged, altered or irregular official document; or

(d) personates, or falsely represents himself to be, a person holding, or in the employment of a person holding, office under Government, or to be or not to be a person to whom an official document or secret official code or pass word has been duly issued or communicated, or with intent to obtain an official document, secret official code or pass word, whether for himself or any other person, knowingly makes any false statement; or

(e) uses, or has in has possession or under his control, without the authority of the department of the Government or the authority concerned, any die, seal or stamp of or belonging to, or used, made or provided by, any department of the Government, or by any diplomatic, naval, military, or air force authority appointed by or acting under the

> authority of Government, or any die, seal or stamp so nearly resembling any such die, seal or stamp as to be calculated to deceive, or counterfeits any die, seal or stamp, or knowingly uses, or has in his possession or under his control, any such counterfeited die, seal or stamp ; he shall be guilty of an offence under this section."

12. The accused came to be charged for the offence under Section 3(1)(a) of the Officials Secrets Act, 1923. An offence under Section 3(1)(a) of the Official Secrets Act, 1923 is constituted in case the evidence on record portrays that the appellant had approached, inspected, accessed over or was in the vicinity or entered any prohibited place for a purpose prejudicial to the safety or interest of the State and proceeds to also infringe the prohibition engrafted in sub clause (b) and (c) in case emanating from the circumstances of the case or his conduct or his known character as proved, that his purpose thereof was for a purpose prejudicial to the safety or interest of the State. It stands un-controvertedly proved that ARTRAC located at Shimla is a prohibited place. It houses the head quarters of the Army Training Command. There has to be on record cogent, adequate and satisfactory evidence to prove the factum of the accused having infringed the mandate of the afore extracted provisions, inasmuch as his having visited, gained access in the prohibited area, as the Army Training Command is, with a purpose prejudicial to the safety or interest of the State and such entry was gained under impersonation comprised in a misrepresentation to the officers manning the prohibited area, of his being Major in the Army which he was not. However, no such evidence exists on record that his by visiting the prohibited place as deposed by PW-6 (Khub Chand), PW-7 (Rajesh Kumar), PW-24 (Vijay Kumar Bali) and PW-26 (Hauldar Vinod Pathania), he also infringed the mandate of clauses (b) and (c) of Section 3(1) of the Official Secrets Act, 1923, as such, his prohibitive act necessitated entailment of conviction upon him. Consequently, the findings of conviction recorded by the learned trial Court against the appellant/accused for his having committed an offence punishable under Section 3(1)(a) of the Official Secrets Act, 1923 necessitate interference by this Court and are set aside.

13. The learned trial Court while recording findings of conviction against the accused for his having committed offences punishable under Section 3(1) (c) and Section 5(1) (c) of the Official Secrets Act had remained oblivious to the factum of it being enjoined upon the prosecution to prove that the offence constituted by the accused having approached, inspected, passed over or being in the vicinity of or entered into any prohibited place, was with the purpose prejudicial to the safety or interest of the State besides, it had to be proved that the conditions mandated in Clauses (b) and (c) of Section 3(1) of the Official Secrets Act, 1923 enjoining that the accused had made any sketch, plan, model or note which was calculated to be or might be or is intended to be directly or indirectly, useful to any enemy or had obtained, collected, recorded or published or communicated to any other person any secret official code or password or any sketch, plan, model, article or note or other document or information which was calculated to be directly or indirectly useful to any enemy, hence, had come to be proved by adduction of cogent evidence on record, as such satisfactorily proved. Proof of the aforesaid conditions mandated in the provisions afore referred were enjoined to be combinedly and conjointly proved for securing conviction under the afore referred provisions of the Official Secrets Act. However, the prosecution to prove the factum of the accused having infracted the mandate of clauses (b) & (c) of Section 3(1) of the Official Secrets Act, 1923, has relied upon the documents existing in an open folder which purportedly communicated the factum of the accused/appellant having, hence, infracted the provisions of clause (b) and (c) of Section 3(1) of the Officials Secrets Act,

rendering him as such amenable to conviction. The prosecution though, has relied upon the documents as exist in files (Exts.P-1 to P-19), rather the aforesaid files are loose folders and obviously, theirs hence being not in a sealed condition, rendered an easy introduction of the documents found therein, at the instance of the Investigating Officer. In other words, the documents recited in loose folders cannot, hence, constrain a conclusion of theirs being recovered from the possession of the accused nor also it can be held that the accused had made any sketch, plan, model or note which was directly or indirectly useful to any enemy of the State, especially then none of the aforesaid documents also do not invite attraction of the prohibition mandated in clauses (b) and (c) of Section 3(1) of the Official Secrets Act. Consequently, the recitals of the documents existing or occurring in loose folders, though hence may portray to be connoting the accused having carried out unlawful activities as also his having infringed the provisions of clauses (b) and (c) of Section 3(1) of the Official Secrets Act, as such, his having invited the in-culpability of the accused under Section 3(1)(a) of the Official Secrets Act, nonetheless, they loose their probative force in the face of their existence in loose folders, whereto they have been inferred hereinabove to have been easily introduced by the Investigating Officer. In aftermath, it has to be invincibly concluded that the aforesaid documents purportedly significatory of the accused having infracted the provisions of clauses (b) and (c) of Section 3(1) of the Official Secrets Act as also his having infracted the provisions of sub Section 2 of Section 3 of the Official Secrets Act, when rather demonstrated by the aforesaid reasoning afforded by this Court to be neither infracted nor also the documents aforesaid having been, hence, recovered from the possession of the accused, the recording of findings of conviction against the accused by the learned trial Court for his having committed offences punishable under Section 3(1) (c) of the Official Secrets Act necessitates interference and its being set aside.

14. The accused was also convicted for his having committed offences punishable under Section 5(1)(c) of the Official Secrets Act. However, the essence of infraction of the provisions as envisaged under Section 5(1)(c) of the Official Secrets Act which invite the penalty as contemplated therein is of the accused having retained the sketch, plan, model article, note or document in his possession or control which he has no right to retain it, or when it is contrary to his duty to retain it. However, there is no potent nor satisfactory evidence on record except the documents existing in a loose folder which for the reasons aforesaid cannot be attributed to be recovered from the possession of accused in a lawful manner so as to fasten liability for his having carried them, as such, besides when the documents exist in a loose folders, which hence do not upsurge any inference of theirs having been recovered in a lawful manner from the possession of the accused, the further factum of no documents existing therein comprising any sketch, plan, model, article, note which the accused had no right to retain or when it was contrary to his duty to retain it or willfully fails to comply with the directions issued by the lawful authority with regard to the return or disposal thereof, renders open an apt conclusion that the prosecution has failed to prove by adduction of cogent and adequate evidence, the infraction of the provisions of Section 5(1)(c) of the Official Secrets Act at the instance of the accused, as such, the findings of conviction recorded under the aforesaid provisions of Section 5(1)(c) of the Official Secrets Act, 1923 against the accused are set aside.

15. The accused was also charged, convicted and sentenced by the learned trial Court for his having committed offences punishable under Section 6(a) (c) and (e) and Section 6(d) of the Official Secrets Act. Further fortification to the aforesaid prohibitive act having been committed by the accused is lent by the evidence existing on record portraying the factum of the accused wearing without authority official uniform of Army as also his

having falsely represented himself to be a Major. The evidence qua the factum of the accused having personated, or falsely represented himself to be a Major in the army is comprised in the testimonies of the prosecution witnesses, whose depositions are discussed hereinafter. PW-6, Khub Ram and PW-7, Rajesh Kumar in tandem and unison have deposed that the accused had introduced himself to them as a Major. Moreover, he had applied to Punita Bhardwaj (PW-8), Additional Superintendent of Police, Shimla, for armed licence by moving an application (Ex.PJ), claiming himself to be an army officer of Intelligence Core. He had also affixed his photographs on the application. PW-8 Punita Bhardwaj also deposes that accused introduced himself as a Major posted in Intelligence Corps of ARTRAC, Shimla. PW-10 Sardar Manvir Singh, Arms Dealer also deposes that the accused had visited his shop in the year 2003 at different occasions. He has further deposed that the accused had introduced himself as a Major employed in the army and he had disclosed to him that he wanted to purchase a fire arm. PW-11, Surinder Malik, a hotel owner, deposed in his deposition qua the factum of the accused having stayed in his hotel and his having claimed himself to be an army Captain and making an apposite entry in the visitor book. PW-12, Vikash Kumar deposes that he visited the house of the accused at Chakkar and noticed his photograph in army uniform and also saw the accused loitering in ARTRAC area as well as its library. PW-13 Vikas Goyal of LIC Housing Finance Limited deposes that accused introduced himself as a Major in Army posted in ARTRAC for obtaining house loan. For obtaining loan, application (Ex.PM), was filled in by the accused and he also pasted his photographs (Ext.PM/1). On the form, accused mentioned his address as Additional DTG Officer and filed therewith salary certificate (Ext.PN), purported to be issued by Adjutant Communication and Broadcasting Bureau (HSI).

16. PW-23, Khom Dram Samarjit Singh deposed that his brother, Khom Dram Satish Kumar Singh was posted as Captain in the Indian Army in Unit -20, Rashtriya Rifles, who died on 27th November, 2001. On 12th December, 2001, accused visited his house and introduced himself as Capt. Basil Singh Senjam and that his late brother was his good friend. He had been visiting the house frequently and after familiarizing, accused took away the cap, belt, photo copy of the identity card of his deceased brother and had promised to get benefits released from Army qua the death of his brother. A letter written by Col. Yogender Singh to his brother was also taken by the accused. Accused subsequently intimated him that he had become a Major in the Army. PW-26, Hauldar Vinod Pathania deposes that the accused introduced himself as Major S.B. Singh and he also found the accused sitting in library of the ARTRAC. From the deposition of the aforesaid witnesses, it is proved that the accused was wearing without any lawful authority Army uniform and in pursuance thereto he was falsely representing himself to be a Major and Captain. Moreover, he was also found in possession forged passports (Exts. P-22 to P-25), hence, it stands proved by adduction of cogent and abundant evidence on record by the prosecution that the accused had forged the passports (Exts.P-22 to P-25) for the purpose of cheating, as such, he has committed an offence punishable under Section 468 of the IPC and which passports had been used fraudulently and dishonestly by the accused as genuine, as such, he is guilty of his having committed offence punishable under Section 471 of the IPC.

17. The accused was also convicted by the learned trial Court for an offence punishable 25 of the Arms Act for his having found in exclusive and conscious possession 17 live cartridges of different arms without any valid licence. The evidence existing on record satisfactorily proved the factum of the cartridges being recovered from the house of the accused as also of the accused having failed to produce a valid licence for having them in

his possession. As per the report of Forensic Science Laboratory, one cartridge was of 7.62 mm, two were of 9 mm, four were 7.65 mm and ten were .22 mm.

18. For the foregoing reasons, the appeal is partly allowed and the impugned judgment of the learned trial Court is modified and the accused/appellant is convicted for the offences punishable under Sections 6(a)(c) (e) and 6(d) of the Official Secrets Act, 1923. He is further convicted for the offences punishable under Section 25 of the Arms Act and Sections 468 and 471 of the Indian Penal Code. However, the accused is acquitted of the offences punishable under Sections 3 (1) (a), 3(1)(c) and Section 5(1)(c) of the Official Secrets Act, 1923. Consequently, the accused is sentenced to undergo imprisonment for the term which he has already undergone for the aforesaid offences for which he stands convicted by this Court. He be set at liberty, if not required in any other offence.

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

Jagpal Singh & others .....Petitioners/defendants.

Versus

Veena Devi & another .....Respondents/plaintiffs

CMPMO No.346 of 2014
Date of decision: 06.04.2015

Indian Evidence Act, 1872- Section 65- A Will was executed in favour of the defendants which was handed over to Patwari for recording the mutation – the Patwari lost the will - an application was filed for allowing the defendant to lead secondary evidence - held that the secondary evidence can be led only by the proof of the loss of the original will by examining the Patwari - mere statement of the petitioner regarding the loss is not sufficient to prove the loss- application dismissed (Para 3)

For the petitioners: Ms. Jyotsna Rewal Dua, Advocate.
For the respondents: Mr. Karan Singh Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

Deceased Baldev executed a testamentary disposition qua the suit property in favour of the defendants (petitioners herein). Mutation of inheritance on strength thereof was attested in favour of the defendants (petitioners herein). However, the Patwari, who was handed over the original copy of the testamentary disposition executed qua the suit property by the deceased testator Baldev Singh in favour of the propounder petitioners herein, by the latter, purportedly lost it. Hence, its loss at the instance of the Patwari deterred, disabled and precluded the defendants (petitioners herein) to adduce and prove it in accordance with law. In face thereof the defendants (petitioners herein) instituted an application under Section 65(c) of the Indian Evidence Act for permission/leave to adduce into evidence by way of secondary mode, a photo copy thereof. On the said application, reply was furnished by the plaintiffs (respondents herein).

2. On the contentious pleadings of the parties, the learned trial Court on being seized of the application framed the issues extracted hereinafter:-

> "1. Whether there existed Will dated 27-12.1996 being executed by late Sh. Baldev Singh in favour of defendant No.1. OPD.
>
> 2. If issue No.1 above is proved in affirmative, whether defendants are entitled for leave to adduce secondary evidence of aforesaid Will? OPD?
>
> 3. Relief."

3. On appraisal of the material, as existed/adduced before the learned trial Court, the learned trial Court dismissed the application preferred before it by the defendants (petitioners herein). The learned counsel appearing for the defendants (petitioners herein) has vigorously strived to sway this Court to conclude that the enshrined parameters engrafted in sub section (3) of Section 63 of the Indian Evidence Act which stand extracted hereinafter:

> "63 Secondary evidence.- Secondary evidence means and includes—
>
> (1) xxx xxx
>
> (2) xxx xxx
>
> (3) copies made from or compared with the original;

stand satiated especially from a reading of the testimony of AW-1 Jagpal Singh, who therein has admitted the factum of the original Will having been handed over by him to the Patwari for attesting mutation of inheritance qua the suit property in favour of the beneficiaries as also has divulged therein that preceding its handing over by him to the Patwari a photo copy thereof was retained by him and the same was compared by him with the original. On strength thereof, an argument is raised that the photo copy of the original proposed to be adduced into evidence by way of secondary mode is the one compared with the original, hence its adduction into evidence is necessitated in the face of the original having been lost. In other words the photo copy of the original proposed to be adduced into evidence by secondary mode while hence coming to satisfy the parameters enshrined in the aforesaid sub section (3) of Section 63 of the Indian Evidence Act ought to have been permitted to be taken into evidence. Its refusal to be adduced into evidence has been contended to be vitiated. However, the above submissions addressed by the learned counsel for the defendants (petitioners herein) are rendered rudderless in the face of the fact that she has read the apt provisions of Section 63 of the Indian Evidence Act on which she relies, in isolation or apart from the provisions of Section 65 of the Indian Evidence Act, whereas both are ordained to be read in conjunction or combinedly. Furthermore, the provisions on which the learned counsel for the defendants (petitioners herein) relies upon as exist in sub section (3) of Section 63 of the Indian Evidence Act are subject to and are to be read in conjunction with the provisions of Section 65 sub clause (c) of the Indian Evidence Act, provisions whereof are extracted hereinafter:

> "65. Cases in which secondary evidence relating to documents may be given.- Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:-
>
> (a) xxx xxx
>
> (b) xxx xxx
>
> (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason

not arising from his own default or neglect, produce it in reasonable time;

Only on satisfaction having come to be drawn qua the factum of the original testamentary disposition qua the suit property by the deceased testator, in favour of the petitioners herein having been cogently proved to have been destroyed or lost, would the provisions of sub section (3) of Section 63 of the Indian Evidence Act, come into play. However, even though the learned counsel for the petitioners herein with great vigour contended before this Court that the loss of the original Will stands proved, by the deposition of AW-1 Jagpal Singh nonetheless the self carrying or self serving testimony of the plaintiffs cannot lend succor to the factum of hence its loss having come to be proved by cogent evidence. The best and cogent evidence to prove the loss of the original comprised in the testimony of the Patwari. However, the Patwari has remained unexamined. The lack of effort or concert on the part of the petitioners herein to lead the Partwari into the witness box, especially when his evidence comprised the best evidence to prove the factum of loss of the original, as such, for omission of adduction of best evidence no conclusion can be formed that the original as produced before the Patwari by the petitioners herein, for on its strength enabling the former to attest or record mutation of inheritance in favour of the defendants, was lost by him. Besides, the other best evidence which may have been or could have been adduced by the petitioners herein to prove the factum of its loss was comprised in the factum of the petitioners having applied for a copy of the original Will produced by them before the Patwari and the Patwari on such application having endorsed therein the factum that during the course of his retaining it, his having lost it. In view of the aforesaid, no conclusion other than the one of the petitioners herein having abysmally failed to prove the factum of loss of the original Will, can be formed. In aftermath, reliance upon the provisions of sub section (3) of Section 63 of the Indian Evidence Act by the learned counsel for the petitioners anvilled upon the testimony of the petitioners is both misplaced and mis-maneuvered, hence is discountenanced. Consequently, there is no merit in the petition hence is dismissed. However, it is open to the petitioners to move an appropriate application before the learned trial Court, seeking leave of the learned trial Court to lead the Patwari into the witness box. Any such application shall be decided by the learned trial Court in accordance with law. No costs.

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

Santosh Kumari @ Toshi & others .....Appellants

Versus

State of H.P. .....Respondent.

Cr. Appeal No. 370 of 2011 a/w
Cr. Appeal No. 36 of 2012
Reserved on: 02.04.2015
Decided on : 9th April,2015

Indian Penal Code, 1860- Section 302- Accused murdered B by attacking him with a scythe - skull was separated from the neck- the dead body was put in a jute bag and was thrown in the jungle – they also gave beatings to PW-13- dead body was found in a putrefied

condition and was eaten by maggots - the incident was witnessed by PW-13 who had also suffered injuries - her testimony was corroborated by PW-2 before whom accused "S" made an extra judicial confession qua her guilt- held that in these circumstances the accused was rightly convicted. (Para 10-12)

For the Appellants: Mr. Amit Singh Chandel, Advocate. (in both appeals).
For the Respondent: Mr. P.M Negi, Deputy Advocate General with Mr. Ramesh Thakur, Assistant Advocate General for respondent-State.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Both these appeals are arising out of a common FIR and disposed of by a common judgment.

2. The instant appeals are directed against the judgment, rendered on 28.9.2010, by the learned Sessions Judge, Una, H.P., in Sessions case No.1 of 2010, whereby, the learned trial Court convicted and sentenced the accused No.1 to 3/appellants to undergo rigorous imprisonment for life and to pay a fine in a sum of Rs.5,000/-each and in default of payment of fine to further undergo simple imprisonment for a period of two years for the commission of offences punishable under Section 302/34 IPC.

3. The facts, in brief, are that Ms. Jahida Begum(PW-13), had left her house for the house of sister of her father situated in village Dalgon, (Assam) on 12.4.2008, at the age of 16 years. When PW-13 had been on the way to her house situated in village Nagganjai, One Ainul Haq had proposed PW-13 for marriage and had taken her to Kharupetia. Shahjahan Ali and Ainul Haq had lateron taken her to village Damdama of District Nalbari and had detained her at the house of appellants No.2 & 3, where Ainul Haq had committed sexual intercourse with her without her consent on the intervening night of 12.4.2008 & 13.4.2008. On the following day, appellants No. 2,3 and Shahjahan Ali had taken her to Railway station Rangia, where they boarded train for Delhi. Thereafter PW-13 had been taken to village Baliwal in District Una, H.P. to the house of appellant No.1, where she had been informed by Appellants No. 2, 3 and Shahjahan Ali that she stood sold to them by Ainul Haq for a sum of Rs. 10,000/-. Lateron appellant No.1 had paid a sum of Rs. 20,000/- to appellants No. 2, 3 and Shahjahan Ali. Appellant No.1 was stated to be engaged in the sale of girls of Assam, Eastern States in Una and nearby area of Himachal Pradesh. Appellant No.1 had sold PW-13 for a sum of Rs. 23000/- to PW-6. PW-13 had refused to accompany PW-6 and had started crying for life. Accused No.1 Santosh Kumari had migrated to Himachal Pradesh from Assam and had settled as wife of Shri Bhajan Singh son of Shri Hamam Singh. Shri Bhajan Singh had found PW13 minor and had opposed her sale to PW-6. Santosh Kumari with the help of appellants No. 2, 3 and Shahjahan Ali had wrongfully confined PW-13 in a room of her house for about a week. Shri Bhajan Singh had offered help to PW-13 and at night he had opened the lock of her room and had taken her to Railway station, Una. When appellant No.1 had noticed her husband and PW-13 missing she along with appellants No. 2,3 and Shahjahan Ali left for Railway Station, Una and boarded the train and had reached Delhi. After reaching Delhi shri Bhajan Sing had asked PW-13 to wait for him at the platform. Shri Bhajan Singh had gone to the ticket window to buy a ticket from Delhi to Gauhati for PW-13. In the meantime, appellant No.1,2,3 and Shahjahan Ali had traced PW-13 at the Railway Station and appellant No.1 had started

beating PW-13. When Shri Bhajan Singh had returned after buying ticket, appellant No.1 had slapped him. Santosh Kumari had administered multiple blows with her footwear on the person of Shri Bhajan Singh. PW-13 had cried for attracting the attention of Railway Police. On this, Santosh Kumari told the police that PW-13 is suffering from mental disorder and was required to be controlled. PW-13 was under shock, therefore she could not represent to Railway police. Appellant No.1,2,3 and Shahjahan Ali had taken PW-13 from Delhi to Una in a train. Shri Bhajan Singh had also accompanied the accused persons to his house. Shri Bhajan Singh and his elder brother Shri Baldev Singh (PW-2) had been putting up in their house comprising two rooms with common kitchen. Shri. Baldev Singh was a rustic illiterate villager. He had not been married. Shri Baldev Singh had left his house on 26.4.2008 in the morning for cutting wheat crop of Smt. Taro Devi in village Badhera. When PW-2 had left, the accused persons, Shri Bhajan Singh and PW-13 had been present in the house. PW-2 had returned to his house on 30.4.2008 and had found the room of his younger brother locked and appellant No.1 was not visible. PW-2 had started residing in the open outside the house since it had been summer. It had been alleged that appellants No.1,2,3 and Shahjahan Ali had compelled shri Bhajan Singh to lie down in the room of his house and had thereafter tied him. PW-13 had been separately tied in the room. The accused persons had started causing hurt to PW-13. Shri Bhajan Singh had asked the accused to spare the girl as she had not been at fault. The accused persons were stated to have taken liquor. Thereafter accused persons were stated to have picked up scythe Ex. P-5 and had administered multiple blows thereof on the neck of shri Bhajan Singh. Skull had been separated from the rest of the body. The appellants and Shahjahan Ali had also caused injuries to PW-13. PW-13 had turned unconscious.The accused persons had stacked the dead body of Shri Bhajan Singh in a jute bag and had dumped the same in one corner of the room. PW-13 had been picked up and had been dumped in the nearby forest. A village woman had noticed PW-13 on the next morning and had taken her to her house. PW-13 was got medically treated. She had complained against the murder of Shri Bhajan Singh to the local police. It appeared that the local police due to ignorance of PW-13 had not been able to locate the house of appellant No.1 and her husband. Lateron the custody of PW-13 had been handed over to PW-6. PW-6 had wrongfully confined PW-13 in his house for about a month or so. One day PW-13 was sought to be taken on a scooter to the market at una by PW-6. When PW-13 had noticed some policemen, she had jumped from the scooter and had complained against her wrongful confinement. Appellant No.1 had returned to her house on 10.5.2008. She had asked PW-2 to break open the lock of her room as she had lost key thereof. PW-2 had cut the lock Ex. P-2, with blade. Foul smell had been emanating from the room. PW2 noticed the dead body of his brother packed in gunny bag in the corner of the room. PW-2 had treated appellant No.1, responsible for the murder of his brother and had complained against her to PW-1 Tarsem Singh, Pradhan. PW-1 had then informed to the police Station Haroli. PW12 shri Kapoor Chand SI alongwith his men had rushed to the house of deceased. He had recorded statement Ex. PW-1/B under Section 154 Cr.P.C of PW-1. Crime under section 302 IPC stood registered vide FIR Ex. PW-10/B. Appellant No.1 had been arrested by the police. On interrogation by the police, she had made a disclosure statement comprised in Ex. PW-1/D. PW-12 in the presence of PW-1 and Updesh Kumar had recovered scythe Ex. P-5 vide recovery memo Ex. PW-1/F on the disclosure statement of appellant No.1. Shri Jalalu din father of PW-13 had recorded a missing report to the police Station Dalgaon. Shri Jalalu Din alongwith Assam police had reached Una and had taken away PW-13. Crime under Sections 120-B, 365, 376, 372/34 IPC stood registered against appellants and Shahjahan Ali (accused No.4) and Ainul Haq at police Station Dalgaon vide FIR No. 249/2008. It had been alleged that appellant No.1,2,3 and Shahjahan Ali in

furtherance of their common intention had committed murder of shri Bhajan Singh during the period from 26.4.2008 to 1.5.2008. After completion of investigation, SHO police Station Haroli had prepared final report under Section 173 Cr.P.C against the accused persons and on 8.8.2009 had instituted in the court of Chief Judicial Magistrate, Una. The learned JMIC(II) vide order dated 22.12.2009 had committed the accused person to the court of sessions.

4. The accused persons were charged, for, theirs having committed offence punishable under Section 302/34 IPC, by the learned trial Court, to, which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 13 witnesses. On closure of prosecution evidence, the statements of accused, under Section 313 of the Code of Criminal Procedure, were recorded, in, which they pleaded innocence and claimed false implication. They chose not to lead evidence in defence.

6. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against accused No.1 to 3/appellants herein and accused No.4 stood acquitted.

7. The accused/appellants, are, aggrieved by the judgment of conviction, recorded by the learned trial Court. The learned counsel appearing for the appellants has concertedly, and, vigorously contended, that, the findings of conviction, 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 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.

8. On the other hand, the learned Deputy Advocate General, has, with considerable force and vigour, contended that the findings of conviction, recorded by the Court below, are, based on a mature and balanced appreciation of evidence on record, and, do not necessitate interference, rather merit vindication.

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

10. Deceased Bhajan Singh was allegedly done to death by the accused. Darat Ex. P-5 was used by accused Majibur Ali and Habibur Rehman to inflict multiple blows on the person of deceased Bhajan Singh. PW-9 Dr. Daljit Singh, who conducted the post mortem examination on the body of deceased Bhajan Singh and proved Post Mortem Report comprised in Ex. PW-9/B, has, in his deposition deposed the factum of his having recorded in Ex. PW-9/B, the hereinafter extracted observations:-

> "***External Appearance:***
>
> *Dead body of an old man 5'-5" wrapped in a plastic gunny bag. Pealed of hairs on scalp, skull was separated from the neck. Brain matter liquefied and eaten by maggots. Ribs were separated from the chest cage and muscles were liquefied. Heart eaten by maggots. Liquiefied and blackish shunker lungs on left side seen. Abdomen is liquefied by putrfication and pale colour intestine seen. Both upper limbs separated from shoulder joints and muscles are liquified. Bones are seen. Lower limbs shows advance stage of putrification. Skin of foot was peeled off and the underlined muscles were*

absent. Maggots seen over the whole body. Neck muscles are liquefied and putrification seen with vertebra are exposed.

Cranium and Spinal Cord:

Peeled out hairs seen. Scalp muscles were putrified skull and vertebra of the cervical region are seen with putrification of muscles. The skull was separated from the body, eye eaten by maggots, mouth, pharynx eaten by maggots. The meaninges are absent. The brain matter is liquefied and eaten by maggots due to advance stage of decomposition.

Thorax:

Walls eaten by maggots. The ribs and cartilages were apart as the muscles were liquefied pleura liquefied and absent.

Larynx and trachea liquefied due to putrification.

Right lung putrefied blackish in colour.

Left lung putrified blackish in colour.

Pericardium, heart, large vessels etc. absent due to eaten by maggots.

Abdomen:

Walls: Putrefied and muscles eaten by maggots.

Peritoneum and Liver: Putrefied

Mouth pharynx and esophagus and Bladder eaten by maggots.

Stomach and its contents were liquefied, due to advance putrification.

Small intestines liquefied due to advance putrification

Large intestine and their contents: pale and liquefied due to advance putrification

Spleen: absent and eaten by maggots.

Kidney: Absent and eaten by maggots.

Organs of Generation External and Internal: Liquified right testicles seen and left side along with penis eaten by maggots.

Muscles, Bones and Joints:

Muscles of upper and lower limbs were reddish brown putrified. The underline bone were seen. Both hip joint and knee joint are in flexion and underline muscles were in advance stage of putrification. No fracture or dislocation seen."

11. However, during the course of his examination-in-chief, he has been unable to depose with firmness, qua the factor which caused the demise of the deceased. The deterrent in his unfolding a firm opinion qua the cause of demise of the deceased is comprised in the fact of the body of deceased Bhajan Singh being putrefied and eaten by maggots. Also the weapon of offence Ex. P-5 with which accused Majibur Ali and Habibur Rehman inflicted injuries on the body of the deceased was not put to this witness for eliciting an unequivocal opinion from him qua the fact of it having caused the purported injuries occurring on the body of the deceased. The star witness of the prosecution, who also happens to be an eye witness qua the occurrence, besides an injured witness, is PW-13. Consequently, hers having rendered an ocular version qua the occurrence renders unnecessary and redundant any advertence to the deposition of the prosecution witnesses, other than the witnesses to recovery of Ex. P-5 and to the deposition of PW-2 before whom accused Santosh Kumari made an extra judicial confession qua her guilt. An incisive

reading of the testimony of PW-13, especially of the apt and relevant portion, underscores the factum of hers having communicated therein the factum of the husband of accused Santosh Kumar having been delivered blows on his neck with darat Ex. P-5 by accused Habibur Rehman. She has also proceeded to depose that on the instigation of accused Santosh Kumari, wife of deceased Bhajan Singh, both accused Majibur Ali and Habibur Rehman had also proceeded to inflict multiple blows on the body of deceased Bhajan Singh. She has been firm in her deposition comprised in her examination-in-chief that blows with Darat Ex. P-5 were delivered on the neck of deceased Bhajan Singh by accused Habibur Rehman as also multiple blows were inflicted upon him by both accused Majibur Ali and Habibur Rehman and which blows sequelled his demise. She has been unequivocal in her deposition that the accused had caused injuries with a sharp edged weapon on the left side of her head and on her left leg. The said injuries were observed by the Court while recording her deposition on oath. She has deposed that after having witnessed the occurrence, wherein accused Majibur Ali and Habibur Rehman by their respective acts had done to death Bhajan Singh, the husband of accused Santosh Kumari, she fell unconscious. She was picked up by the accused and dumped in the nearby forest at night. One woman had been grazing her buffalo in the forest, had taken her to her house and had treated her. She deposed that she narrated the occurrence to the Medical Officer. Subsequently, she made a disclosure qua the occurrence before the police. Ultimately her custody was handed over by the police to a Punjabi boy, to whom she had been sold by accused Santosh Kumari. The relevant, apt and significant portion of the statement of PW-13, the eye witness to the occurrence, who was also injured by the acts attributed by her to the accused, unequivocally voices the factum of participation of the accused in the respective manners as denoted by her in the murder of deceased Bhajan Singh, husband of accused Santosh Kumari. However, the previous statement attributed to her, as, having been made by her before the Investigating Officer under Section 161 Cr.P.C, omits to record the factum of hers having witnessed the occurrence, consequently it is urged before this Court that PW-13 in improvement and in contradiction to her previous statement recorded in writing wherein she had omitted to divulge the factum of hers having witnessed the occurrence, renders her testimony on oath before this Court, whereby she made a disclosure qua the factum of hers having witnessed the occurrence, to be bereft of truth while constituting a contradiction or improvement over and upon her previous statement recorded in writing or its being hence ridden with inveracity. Even though, embellishments and improvements may have imbued her statement on oath with untruth nonetheless the mere fact of hers having improved or embellished upon her previous statement recorded in writing may not give any leverage to the defence, to as such canvas for the acquittal of the accused, especially when during the course of her cross-examination by the learned defence counsel, the latter had omitted to confront this witness with the apt, germane and relevant portions of her previous statement recorded in writing which was purportedly improved and embellished by this witness while deposing in Court qua the occurrence. Absence of concert by the learned defence counsel to confront this witness during her cross-examination with the apt and germane portions of her previous statement recorded in writing fillips and fosters a very natural conclusion that this witness was hence precluded, to, while hers being subjected to cross-examination by the learned defence counsel qua those portions of her deposition on oath which had purportedly been improved or embellished upon by this witness, clarify whether she had, as a matter of fact, made such a statement before the Investigating Officer or its occurrence was a mere contrivance of the Investigating Officer. The omission on the part of the defence counsel to afford hence an opportunity to PW-13 to offer an explanation for sprouting of a purported improvement and embellishment in her deposition on oath, generates an

inference that the statement of PW-13 purportedly made by her to the Investigating Officer was not recorded by the Investigating Officer in the manner as disclosed/stated by her to him. In aftermath, the ensuing and concomitant deduction which sprouts is that the purported improvement and embellishment hence as attributed to PW-13 cannot lend any strength to the contention of the learned counsel for the appellants that her deposition being hence ridden with improvement and embellishment over and upon her previous statement recorded in writing, renders it bereft of veracity. Rather omission on the part of defence counsel portrays acquiescence to the defence counsel to the version qua the occurrence propounded by her in her examination-in-chief. Moreso the above argument also falters in the face of previous statement attributed to PW-13 being an unsigned statement. For reiteration, the relevant improved or embellished portion having not been put to PW-13 by the learned defence counsel while cross-examining her renders the purported previous statement attributed to PW-13 to be hence a mere machination on the part of the Investigating Officer to, may be hence, give leverage to the accused. It is also connotative of a faulty investigation having been carried out by the investigating Officer. Obviously it in no way foists any strength to the arguments as advanced by the learned counsel for the appellants. Moreover, further corroboration to the deposition of PW-13 is lent by the deposition of PW-2 before whom one of the accused namely Santosh Kumari made an extra judicial confession qua the factum of her husband having been put to death and his body having been packed inside a jute bag. The extra judicial confession made by accused Santosh Kumari to PW-2 who is her brother-in-law acquires a hue of veracity especially given the fact that she is related to PW-2, hence, with the latter standing in the capacity of a confidante of accused Santosh Kumari to whom hence a credible and worthwhile extra judicial confession could have been made by accused Santosh Kumari, resultantly when PW-2 has with firmness deposed qua the factum of accused No.1 having made an extra judicial confession qua her guilt and which portion of his deposition in his examination in chief has remained un-shattered during the course of his having been subjected to the ordeal of an inexorable cross-examination by learned defence counsel. Consequently, the extra judicial confession made by accused Santosh Kumari before PW-2, her close relative, hence her confidante in whom she could have deposed faith for disclosing the truth, renders, as such, the extra judicial confession made by accused Sanotsh Kumari to be acquiring an indomitable fervor and strength. The recovery of weapon of the offence further connects the accused in the commission of the offences alleged especially in the face of the fact that the deposition of the eye witness to the occurrence PW-13, who has with vividity rendered an ocular account qua the occurrence has received corroboration from the testimony of PW-2 comprised in his deposition of accused Santosh Kumari having confessed her guilt before him. In aftermath, cumulatively when the aforesaid facets are construed in mutual entwinement and in conjunction with each other, the mere fact that Doctor PW-9 has been unable to depose qua the cause of demise of deceased Bhajan Singh or the weapon of offence Ex. P-5 having not been put to him, for eliciting from him the factum of its user at the instance of the accused, is rendered insignificant. The preponderant and eminent reason, also for the testimony of PW-9 while omitting to bespeak the factum of the injuries being noticed by him on the body of deceased to be attributable to the user of darat Ex. P-5, besides his omitting to pronounce upon the cause of injuries, not hence giving leverage to the accused besides the prosecution case being not engulfed with an aura of doubt, benefit whereof ought not to be given to the accused, exists in or is portrayed by the depositions of PW-13 and PW-2.

12. The summum bonum of the above discussion is that the prosecution has been able to adduce cogent and emphatic evidence in proving the guilt of the accused. The

appreciation of the evidence as done by the learned trial Court does not suffer from any infirmity, or, perversity. Consequently reinforcingly, it can be formidably concluded, that, the findings of learned trial Court, are, well merited, and, do not merit interference.

13. In view of above discussion, we find no merit in these appeals, which are accordingly dismissed, and, the judgment of the learned trial Court is affirmed. Record of the learned trial Court be sent back forthwith.

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

Cr.Appeal No.7 of 2012 With
Cr. Appeal No. 65 of 2012.
Reserved on: 09.04.2015.
Decided on: 17th April, 2015.

1. Criminal Appeal No.7 of 2012.

Narender Singh ...Appellant.

Versus

State of H.P. ...Respondent.

2. Criminal Appeal No.65 of 2012:

Murari Lal .....Appellant.

Versus

State of H.P. ...Respondent.

N.D.P.S. Act, 1985- Sections 20 (ii) (c) and 18(c) - Accused 'M' was found in possession of 4 kg. of charas and accused 'N' was found in possession of 1 kg. of opium- independent witnesses had not supported the prosecution version, however, they had admitted their signatures on the seizure memos- held, that the prosecution witnesses would be estopped by Sections 91 and 92 of the Indian Evidence Act from deposing in variance to the contents of the document- however, there was no proof that the case property produced in the Court is the same which was recovered from the accused at the spot, as no entry was made in the Malkhana register regarding taking out of the case property for production in the Court- accused acquitted. (Para-10 to 12)

For the Appellants: Mr. Jagdish Vats, Advocate in both the appeals.
For the Respondent: Mr. Ramesh Thakur, Assistant A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Both these appeals arise from a common judgment hence are being disposed of by a common judgment. The aforesaid appeals have been preferred by the appellants/accused against the judgment, rendered on 15.12.2011 by the learned Special Judge, Mandi, District Mandi, H.P. in Sessions Trial No. 60/2010, whereby

appellant/accused Murari Lal has been convicted and sentenced to undergo 10 years rigorous imprisonment and to pay a fine of Rs.1,00,000/- for his having committed offence punishable under Section 20 (ii) (c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (herein-after referred to as 'NDPS Act'). In default of payment of fine, he has been sentenced to further undergo rigorous imprisonment for one year. Whereas, accused/appellant Narender Singh has been convicted and sentenced to undergo 3 years rigorous imprisonment and to pay a fine of Rs.50,000/- for his having committed offence punishable under Section 18 (c) of the Narcotic Drugs & Psychotropic Substances Act, 1985. In default of payment of fine, he has been sentenced to further undergo rigorous imprisonment for one year.

2. Brief facts of the case are that on 28.5.2010 Sub Inspector Minakshi along with other police officials, in official vehicle bearing registration No.HP-07B-0406 started from Shimla towards Mandi and Kullu etc. At about 6.45 P.M. on the said date, the said police party was present at place Known as Hanogi in District Mandi. At that place, S.I. Minakshi received the secret information regarding the fact that two persons, one of whom had worn a white and orange coloured T-shirt and blue pant aged about 21/22 years having rucksack on his back and second one, who had worn blue coloured check shirt and kargo pant aged about 20/21 years, having white colour envelope in his hand are on their way on foot from Thalout to Hanogi side. Both of them had started from Thalout side in order to sell the opium and charas. The said information was considered to be reliable by the I.O., as such, she sent information under Section 42(2) of the NDPS Act to her superior officials. Thereafter, she along with other police officials started towards Thalout side. At about 7.00 p.m., when the police party reached at a distance of about 500 meters short of Rains Nallah, then they stopped there, in order to wait for the aforesaid persons. Meanwhile a vehicle Bolero Camper jeep bearing No. HP-33-2827 came there from Thalout side, which was signaled to stop. Two persons were found traveling in it. On inquiry, one disclosed his name Deepak and second disclosed his name as Sanjeet Sah. The I.O. apprised said two persons regarding the secret information, which she had received. Thereafter, both of them were associated in the raiding party. The polie party had given their personal search to the said two witnesses. It is further case of the prosecution that at about 7.15 P.M., the Investigating Officer noticed two persons coming from Thalout side and their physical description including the cloth etc., tallied with the description which she received from the informer. Hence, the said persons were nabbed and their names and addresses were ascertained. On inquiry, one disclosed his name as Maurari Lal son of Sh. Atma Ram and second disclosed his name as Narender Kumar son of Sh. Ghanshyam. Thereafter the Investigating Officer apprised them about the information, which she had received and gave the options to them to give their personal search as well as search of the rucksack to some Gazetted officer or Magistrate. These options have been given to them as their legal right. Both of them had given their consent to be searched by the police. The dark green rucksack was found on the right shoulder of the accused Murari Lal having two compartments and when the bigger one was opened, it was found containing a transparent polythene envelope containing tablet shaped and stick shaped black substance, which on smelling and experience was found to be charas. Similarly, the white coloured polythene, which the accused Narender was having in his hand, was searched. On opening, the same was also found containing another transparent envelope containing soft black substance, which on smelling and tasting was found to be opium. On weighment, the charas was found to be 4 kg and the opium was found to be 1 kg. The said recovered contraband was put in the separate parcels and was sealed with seal 'M'. Specimens of seal impression 'M' were

separately obtained. Ruqua was sent to police station C.I.D., Shimla and the accused were arrested. Other codal formalities were completed on the spot.

3. After completion of the necessary investigation, into the offences, allegedly committed by the accused/appellants, challan was filed under Section 173 of the Code of Criminal Procedure.

4. The accused/appellant Murari Lal was charged for his having committed offences punishable under Sections 20 and 29 of the NDPS Act and accused/appellant Narender Singh was charged for his having committed offences punishable under Sections 18 and 29 of the NDPS Act, by the learned trial Court, to which they pleaded not guilty and claimed trial.

5. In proof of the prosecution case, the prosecution examined as many as 11 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 Cr.P.C., were recorded by the learned trial Court, in which they claimed false implication and pleaded innocence. In defence, the appellants/accused have examined one witness.

6. On appraisal of the evidence on record, the learned trial Court convicted the accused for the offences charged.

7. The appellants/accused are aggrieved by the judgment of conviction, recorded by the learned trial Court. The learned counsel for the accused, have 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, they contend that the findings of conviction be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

8. On the other hand, the learned 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.

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

10. The factum of charas, Ex. P-7, weighing 4 Kgs recovered from a rucksack, Ex.P6 under memo Ex.PW1/F while it being consciously held and possessed by accused Murari Lal, inasmuch as his carrying it on his right shoulder besides, the factum of recovery of opium Ex.P-5 from polythene bag, Ex.P-3 under memo Ex.PW1/F which polythene bag was consciously held and possessed by accused Narender Singh, inasmuch as he holding it in his hand, has been proved by the depositions of the police officials, who have deposed in tandem, harmony and unison qua the apposite proceedings relating to search, recovery and seizure having commenced and concluded at the site of occurrence. Even though the prosecution witnesses have deposed in tandem and in harmony qua each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, hence, portraying proof of unbroken and unsevered links, in the entire chain of the circumstances, therefore, it is argued that when the prosecution case stands established, it would be legally unwise for this Court to acquit the

accused. Besides, it is canvassed that when the testimonies of the official witnesses, unravel the fact of theirs being bereft of any inter-se or intra-se contradictions hence, consequently they too enjoy credibility.

11. Even though, the independent witnesses, namely, PW-1 Deepak and PW-2 Sanjeet Sah, to the proceedings relating to search, seizure and recovery of contraband under memos aforesaid have not come to support the prosecution case, nonetheless, the factum of theirs turning hostile and theirs having not supported the genesis of the prosecution version does not assume any significance nor throws overboard the consistent and harmonious testimonies of the official witnesses, especially in the face of both having admitted their signatures on memos Ex.PW1/A to Ex.PW1/F as well as on Ex.PW1/G. The factum aforesaid of theirs having admitted their signatures on the memos aforesaid, renders them estopped by the rule engrafted under Sections 91 and 92 of the Indian Evidence Act which while interdicting and prohibiting them from deposing orally in variance to their recorded contents to also hence resile or renege from their recorded contents. Consequently, then with a legal bar envisaged under Sections 91 and 92 of the Indian Evidence Act against their deposing orally in digression from or at variance from the recorded recitals of the memos on which they admit their signatures, obviously renders unworthwhile the effect, if any, of theirs having reneged or resiled from the factum of their having not witnessed the proceedings at the site of occurrence, especially when the fact thereof stands recorded in the recitals of the memos on which they admit their signatures.

12. Even though, this Court would be preempted from rendering unworthwhile the testimonies of the official witnesses, who have deposed bereft of intra se or inter se contradictions qua the factum of the recovery of opium and charas from the exclusive and conscious possession of each of the accused respectively. Nonetheless, the prosecution also was enjoined to bring forth evidence that the seizure of opium Ex.P-5 recovered from the exclusive and conscious possession of accused Narender Singh under memo Ex.PW1/F and seizure of charas, Ex.P-7 recovered from the exclusive and conscious possession of accused Murari Lal under memo Ex.PW1/F, was the one as had come to be produced in Court. If there occurs or exists on record discrepant evidence projecting the fact that the case property as attributed to each of the accused or to have been recovered from them at the site of occurrence, is not linkable or connected with the case property as produced in Court obviously then the sequelling inference would be of the case property attributed to have been recovered at the site of occurrence from the purported exclusive and conscious possession of the accused, being not hence the one recovered from them at the site of occurrence. The evidentiary fact which underscores the fact that the case property as produced in Court is unlinkable or not connected with the case property as purportedly recovered from the exclusive and conscious possession of each of the accused at the site of occurrence is comprised in the fact of (a) on 21.06.2011 the case property having been produced before the Court during the course of recording of depositions of independent witnesses, namely, PW-1 Deepak and PW-2 Sanjeet Sah. However, it on 21.06.2011 being produced in Court remained un-opened. (b) On 22.6.2011, the case property kept in parcels Ex.P-1 and Ex.P-2 was produced in Court during the course of the recording of deposition of PW-3 SI Balbir Singh. However, during the course of the recording of deposition of PW-3, the learned trial Court on the request of the learned Public Prosecutor ordered the contents of parcels Ex.P-1 and Ex.P-2 being retrieved there from. On the opening of parcel Ex.P-1, opium (Ex.P-5) was found in the transparent envelope (Ex.P-4) kept inside the polythene bag in parcel Ex.P-1. Moreover, also on the request of the learned Public Prosecutor for the opening of parcel Ex.P-2 having come to be acceded to by the learned trial Court, parcel, Ex.P-2 on its opening

was found containing rucksack, Ex.P-6 wherein charas Ex.P-7 was found. Even when both parcels Ex.P-1 and Ex.P-2 were ordered to be opened wherefrom their contents were respectively retrieved therefrom, nonetheless there is no order rendered by the learned trial Court for the parcels being resealed with the seal of the Court nor any order of theirs having been returned to the appropriate custody of the malkhana In-charge. The fact of non rendition of orders by the learned trial Court qua resealing of both parcels Ex.P-1 and P-2 after theirs having come to be opened and contents thereof having come to be produced before the Court for theirs being shown to the witness aforesaid has its repercussions upon the efficacy of the testimony of PW-6 Inspector Minakshi, who was subsequently examined on oath on 16.07.2011, especially qua the pre-eminent fact of whether the case property as put to PW-3 and PW-6 being the very same case property. With fortifying vigour, it can be aptly concluded that the parcels Ex.P-1 and P-2, containing the respective items of contraband recovered from the exclusive and conscious possession of each of the accused are vulnerable to skepticism or being construable to be not recovered at the site of occurrence from the exclusive and conscious possession of the accused, rather what sprouts an inference of contradistinct items of contraband having been retrieved therefrom during the course of opening of parcels Ex.P-1 and P-2 and theirs being put to PW-3 and PW-6 during the course of theirs being examined on oath on different dates, is the fact that there is no apposite corresponding entry portrayed in the malkhana register, for succoring an inference that the case property after its being produced in Court on 22.06.2011 at the time of the recording of deposition of PW-3 was kept in the Malkhana nor also there is an apposite entry in the Malkhana Register depicting the fact that after its having come to be detained in the police Malkhana, it was retrieved there from at the time of the recording of the deposition of PW-6 subsequently on 16.07.2011. The lack of or omission of portrayal in the apposite columns of the Malkhana Register apposite to the case property recovered respectively from the exclusive and conscious possession of the accused is enunciative of and loudly bespeaks the fact that since the date of the recording of the deposition of PW-3 on 22.6.2011 till the date of the recording of deposition of PW-6 on 16.07.2011, both the parcels remained opened and unsealed, hence, both parcels had come to be tampered with or opened. Consequently, a scope was left for introduction of contraband items therein though respectively attributed to each of the accused. Accentuated fervour is lent to the inference aforesaid from the fact as apparent on a reading of the testimony of PW-3, during the course of the recording of whose deposition the parcels aforesaid were opened, inasmuch as a reading of his testimony in its entirety omits to portray that even when parcels Ex.P-1 and Ex.P-2 were opened and items of contraband were retrieved therefrom for being shown to this witness, the Court had merely ordered that the contents thereof be put inside Ex.P-1 and P-2. However, it had not ordered theirs being resealed with the seal of the Court and thereafter theirs being handed over to the appropriate custody of the Malkhana In-charge. Obviously, then it has to be concomitantly concluded that the parcels remained not sealed with seal of the Court rather came to be sealed in the police malkhana, the sequeling inference is that at the time of their resealing it appears that the items of contraband purportedly attributed to each of the accused respectively may have found their place inside both the parcels Ex.P-1 and Ex.P-2. Consequently, when subsequently PW-6 came to be examined on oath to whom the contents of Ex.P-1 and Ex.P-2 attributed to each of the accused of theirs purportedly having been recovered from their exclusive and conscious possession at the site of occurrence respectively, were shown or put to this witness in Court they may have been planted inside Ex.P-1 and Ex.P-2. In aftermath, the contents of parcels, Ex.P-1 and P-2 attributed to each of the accused, cannot hence be concluded to be ones recovered from the site of occurrence from the exclusive and conscious possession of each of

the accused. As a sequitur, then the invincible conclusion is that the case property as proven by PW-6 on it being shown to her in Court remains not connected with each of the accused, especially when an aura of doubt for the reasons aforesaid arising from lack of Court orders for theirs being resealed with the seal of Court and thereupon being handed over to the appropriate custody of the Malkhana Incharge, even who has not proven by production of the Malkhana Register of his having received them in his custody since the examination of PW-3 and contemporaneous to the examination of PW-6.

13. The aforesaid discrepancies marks the factum that the case property attributed to each of the accused is not linkable to the accused, inasmuch as it having not been proved by the prosecution that the case property as proven by PW-6 was the case property as recovered from the site of occurrence from the exclusive and conscious possession of the accused. The aforesaid discrepancies having escaped from the notice of the learned trial Court has resulted in erroneous findings of conviction against the accused. As such, conviction necessitates interference.

14. On a formation of the aforesaid conclusion, the concomitant deduction is that the prosecution has been unable to prove the guilt of both the accused.

15. In view of above, we find that the findings of conviction, recorded by the learned trial Court below, are not based on a mature and balanced appreciation of evidence on record. Hence, the findings necessitate irreverence. Accordingly, both the appeals are allowed and the judgment rendered by the learned trial Court is set aside. Both the accused are acquitted of the offences charged. Fine amount, if any, deposited by the accused/appellants be refunded to them. Since accused/appellant Murari Lal is in jail, he be set at liberty forthwith, if not required in any other offence. Records of the learned trial Court be sent down forthwith.

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

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

Versus

Jagat Pal & others. ...Respondents.

Cr.Appeal No.407 of 2008.
Reserved on: 09.04.2015.
Decided on: 17th April, 2015.

Indian Penal Code, 1860- Section 498-A and 306 IPC- Suicide by wife -allegations of harassments against the husband and mother in law-parents and brother of the deceased making lots of embellishments in their statements-held, that when the prosecution witnesses make improvements in their statements in the court, their testimonies cannot be believed, further minor instances of taunting do not constitute offence under aforesaid sections.

Indian Evidence Act, 1872- Section 3- Prosecution witnesses making improvements in their statements in the court- their testimonies cannot be believed. (Para 13 & 14)

For the Appellant: Mr. M.A. Khan, Additional Advocate General.

For the Respondents: Mr. V.B. Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

This appeal is directed by the appellant against the judgment, rendered on 27.12.2007 by the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P. in Sessions Trial No. 49/7 of 2004, whereby the accused/respondents have been acquitted of the offences punishable under Section 498-A and 306 of the IPC.

2. Brief facts of the case are that the complainant PW-3 Barfi Ram recorded statement Ex.PW3/A with PW-10 Bachiter Singh under Section 154 of the Cr.P.C., on 4.2.2004 alleging that he is a resident of village Damehda, Police Station Talai and is a teacher. His younger brother Gian Chand died in 1995, whose eldest daughter Sumna Devi was married by him in April, 2003 with accused Jagat Pal. After 2-3 months of marriage, her mother-in-law accused Byasan Devi and her husband Jagat Pal started harassing her on the pretext of her being involved in witchcraft. The deceased Sumna had come to pass "Kala" month in August, 2003 at her parents house but was taken back after eight days. Accused Jagat Pal and Byasan Devi also alleged that Sumna's mother Leela Devi was indulging in witchcraft and started torturing her on this count. He, his wife, Sumna's uncle and aunt had visited her in-laws house in October, 2003 where she told about the harassment being given to her by accused Jagat Pal and Bayasan Devi. Their efforts to make the accused appreciate the things were of no consequence and the alleged maltreatment continued. On the day of lodging of the report, he received a telephonic message from accused Swaru to reach at Badsar Hospital immediately whereafter he went there and found accused Jagat Pal, Swaru Ram and Byasan Devi there and Sumna Devi was admitted in the Hospital and was in unconscious state. He was told that Sumna Devi had consumed some poisonous substance at which she has been brought to Hospital and has been declared dead. The complaint thus alleged about Sumna having consumed some poison having been forced to die by accused Jagat Pal and Bayasan Devi on the count of small matters. The aforesaid statement was sent to Police Station after making an endorsement on it by PW-10 ASI Bachiter Singh, on the basis of which FIR was recorded in the Police Station. The investigation was carried out by the police. During the course of investigation, inquest report was prepared, post mortem of the dead body of the deceased was got conducted from the Medical Officer and post mortem report was obtained by the police, statements of the witnesses were recorded. The viscera of the deceased as well as the vomit material of the deceased were sent for examination to FSL, Junga and report in this regard was obtained.

3. After completion of the necessary investigation, into the offences, allegedly committed by the accused/appellants, challan was filed under Section 173 of the Code of Criminal Procedure.

4. The accused/respondents were charged for theirs having committed offences punishable under Sections 498-A and 306, IPC by the learned trial Court, to which they pleaded not guilty and claimed trial.

5. In proof of the prosecution case, the prosecution examined as many as 14 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 Cr.P.C., were recorded by the learned trial Court, in which they claimed false

implication and pleaded innocence. In defence, the respondents/accused have examined four witnesses.

6. On appraisal of the evidence on record, the learned trial Court acquitted the accused of the offences punishable under Sections 498-A and 306, IPC.

7. The appellant 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, they contend that the findings of acquittal be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of conviction.

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

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

10. Accused Jagat Pal was married to deceased Sumna on 16.04.2003. The alleged occurrence took place on 4.2.2004. PW-3 Barfi Ram lodged complaint Ex.PW3/A. The deceased, as unraveled by postmortem report Ex.PX, died on account of consumption of poison. Though, her death is not homicidal rather is suicidal, however, in the face of the alleged inculpatory acts of maltreatment and ill-treatment meted out by the accused to the deceased, the latter is hence canvassed by the prosecution to have been actuated to commit suicide.

11. For proving the contents of Ex.PW3/A lodged at the instance of PW-3 Barfi Ram, the latter stepped into the witness box. However, during the course of the recording of his testimony, he has deposed the factum of deceased Sumna having remained in connubial bliss at her matrimonial home for a brief period after her marriage. However, he proceeds to depose that thereafter accused Jagat Pal was put to frail health besides, he deposes that in the 'Kala Mahina', she left for her mother's house for only eight days and was called back, even when tradition enjoins that she throughout the 'Kala Mahina' remain at her parents' house. The ill-treatment and harassment meted out by the accused to the deceased is comprised in the fact of the accused alleging that on account of her mother having practiced witchcraft accused Jagat Pal was put to ill health, as also in the fact of the accused asking the deceased to bring money for his treatment. He has deposed that on 28.10.2003, he along with his wife Leela, Soma Devi, Bhago Devi and Jagan Nath went to the house of the accused to prevail upon them to desist from harassing the deceased. Ultimately the occurrence took place on 4.2.2004. However, the facts aforesaid as deposed by this witness in his examination-in-chief do not find occurrence in his previous statement recorded in writing. Consequently, the version as spelt out by this witness in Court during the course of the recording of his examination-in-chief acquires the taint of embellishment or improvement, as such, does not inspire the confidence of this Court.

12. The deposition of PW-4 Leela Devi, the mother of the deceased as comprised in her examination-in-chief is in corroboration to the testimony of PW-3 therein she attributes acts of harassment, ill-treatment and maltreatment constituting actuatory or

instigatory acts for the deceased to commit suicide. The narration as existing in her examination-in-chief while also constituting embellishments and improvements arising from the facts deposed therein not occurring in her previous statement recorded in writing, renders her deposition too un-inspiring and legally un-worthwhile. Moreover, the deposition of PW-5, Soma Devi comprised in her examination-in-chief while disclosing therein that she had been apprised by deceased Sumna Devi qua the fact of hers being taunted by her in-laws and theirs conspiring to kill her, appears to be ingenuously invented besides an improvement especially when the said fact has remained un-deposed by both PW-3 and PW-4. Consequently, when her deposition on oath is in contradiction to the depositions of PW-3 and PW-4, it is rendered legally inefficacious. Moreover, the deposition of PW-5 of her having been telephonically revealed by the deceased about the ill-treatment and maltreatment having been meted out to the latter by the accused is also not credible in the face of the fact aforesaid deposed by her in her examination-in-chief having remained un-divulged by her to the police during the course of the recording of her previous statement by the former, as such, constitutes the version deposed in Court to be an improvement and embellishment and in aftermath it being un-inspiring.

13. PW-6 Rinku Ram is the brother of the deceased, he in his examination-in-chief deposes that when accused Jagat Ram, his brother-in-law, returned home after receiving treatment at Chandigarh, he had visited him to inquire about his health yet the accused extended threats to kill him. However, the said fact not occurring in his previous statement recorded in writing renders his deposition comprised in his examination-in-chief unfolding the fact aforesaid to be bereft of veracity arising from its constituting an improvement and an embellishment. PW-7 Jagar Nath, too deposed that when on 28.10.2003 he in the company of Soma Devi went to the house of the accused, they on arriving near their house noticed the accused quarreling with deceased Sumana and at that time Barfi Ram, Bhago and Leela also arrived, though conveying the factum of the accused while taking to use filthy language against the deceased, as such, harassed the deceased, besides, having meted out ill-treatment and maltreatment to her which constituted a potent instigatory factor for the deceased to commit suicide, yet the above deposition of PW-7 on oath is wholly incredible, in the face of PW-5 having omitted to depose the facts aforesaid during the course of the recording of her examination-in-chief in Court. Consequently, PW-7 deposes an invented fact or deposes in contradiction to the deposition of PW-5, as such, for existence of intra se contradictions in their respective testimonies especially qua the version as spelt out by PW-7, wherein he has attributed the meeting of ill-treatment and maltreatment to the deceased by the accused renders it to be imbued with inveracity. Even though, PW-8, Rajindera Kumari has deposed that the mother of the deceased complained to her twice-thrice of the maltreatment or ill-treatment meted out by the accused to her daughter. Nonetheless, her deposition too is per se invented and hence unreliable while contradicting both PW-4 Leela Devi and PW-3 Barfi Ram, who both have omitted to, in their depositions unfold the factum of theirs having qua the purported incriminatory acts of the accused comprised in their meeting out maltreatment and ill-treatment to the deceased, lodged a complaint with the police or the Panchayat concerned.

14. The evidence on record as comprised in the depositions of the prosecution witnesses is hazy and nebulous, besides discrepant constituted by improvements, embellishments over their previous statements recorded in writing and intra se contradictions in their respective testimonies. Moreover, assuming even if, some trifling and trivialing incidents of tauntings were meted out by the accused to the deceased yet evidence of potency thereof or the magnitude of tauntings and theirs hence constituting a

potent instigatory and actuatory factor for the deceased to commit suicide does not surge forth. For lack of evidence of potency of tauntings meted out by the accused to the deceased and theirs having fomented the deceased to commit suicide, no conclusion can be formed that the purported trifling and trivial incidents had goaded the deceased to commit suicide, more especially when the purported incident of maltreatment or ill-treatment enunciated by the prosecution witnesses to have occurred in the month of October, 2010, is improximate to the fateful incident which stood consummated on 4.2.2004. In aftermath given the improximity of the purported incident of maltreatment and ill-treatment, with the fateful occurrence, the conclusion is that the effect thereof cannot be concluded to have been carried till the fateful occurrence which took place on 4.2.2014 hence at a time remotely distanced from it. In sequel, even if any trifling and trivial incident of maltreatment or ill-treatment attributed to the accused took place with the deceased at her matrimonial home, the fact that the fateful occurrence was not consummated within a short proximity thereof renders, the improximate fateful occurrence to be not, hence, facilitating the marshalling and mobilizing of an inference that it was the actuatory and fomentary cause for the deceased to commit suicide.

15. On a formation of the aforesaid conclusion, the concomitant deduction is that the prosecution has been unable to prove the guilt of the accused.

16. In view of above, we find that the findings of acquittal, recorded by the learned trial Court below, are based on a mature and balanced appreciation of evidence on record. Hence, the findings do not necessitate irreverence. Accordingly, the appeal is dismissed being devoid of any merit and the judgment rendered by the learned trial Court is affirmed and maintained. Records of the learned trial Court be sent down forthwith.

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

State of H.P .....Appellant.
Versus
Pratap Singh & another .....Respondents.

Cr. Appeal No. 387 of 2008
Reserved on: 10.4.2015
Decided on : 18th April,2015

Indian Penal Code, 1860- Sections 498-A and 306- Marriage between the deceased and the accused was solemnized two years prior to the incident-the accused gave beatings to the deceased on which she ran away from her matrimonial home-a compromise was arrived between the parties- sister in law of accused telephoned that quarrel was going between accused No. 1 and the deceased- complainant and the other villagers went to the house of the deceased where they were told that deceased was taken for medicines/treatment- she died at District Hospital, Bilaspur -it was told in the postmortem report that deceased had died owing to asphyxia caused by the consumption of poison-no other injury was found during the postmortem- sister-in-law of the accused was not examined- the complainant and other witnesses had not stated before the police that demands for dowry were made by the accused-the deceased was found cooperative at the time of arrival in the Zonal Hospital

yet she had not made any complaint regarding the ill treatment by the accused-held that in these circumstances the accused was rightly acquitted. (Para-9 to13)

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

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgment, rendered on 29.2.2008, by the learned Sessions Judge, Bilaspur, H.P., in Sessions trial No. 15 of 2005**,** whereby, the learned trial Court acquitted the accused/respondents for theirs having committed offences punishable under Sections 498-A and 306 readwith Section 34 of Indian Penal Code.

2. The facts, in brief, are that the marriage inter-se the deceased Meena Devi and accused Prapat Singh was solemnized two years prior to the occurrence as per Hindu rites and rituals**.** It is further alleged that the deceased was belabored by accused No.1 which led her to flee from her matrimonial home to her parental house. The said occurrence took place six months prior to the registration of FIR. The acrimony arising from the said occurrence had come to be amicably resolved through a compromise having been arrived at inter-se the squabbling parties. It is further alleged that on 18.2.2004 at about 6.00 p.m. Smt. Sapna, Bhabi of accused No. 1, telephonically conveyed that there was an ongoing quarrel between accused No.1 and the deceased. Upon this, the complainant alongwith Smt. Champa, Dharamp Pal and other villagers namely Madan, Geeta Ram, Ram Pal etc went to village Kallar, where they have been informed that deceased was taken to Chharol for medication/treatment. After sometime, it was known to them that she had been referred to Bilaspur as a suspect case of poisoning. The deceased died in District Hospital, Bilaspur. Inquest papers were prepared and her dead body was subjected to postmortem examination. During the Course of investigation, site plan of the occurrence was prepared and statements of the witnesses were recorded. On conclusion of the investigation, into the offences, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and presented in the Court.

3. The accused persons were charged, for, theirs having committed offence punishable under Section 498-A, 306 readwith Section 34 IPC, by the learned trial Court, to, which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 17 witnesses. On closure of prosecution evidence, the statements of accused, under Section 313 of the Code of Criminal Procedure, were recorded, in, which they pleaded innocence and claimed false implication. They chose not to lead evidence in defence.

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

6. The State of H.P is aggrieved by the judgment of acquittal, recorded by the learned trial Court. The learned Assistant Advocate General appearing for the 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 the material on record. Hence, he, contends

that the findings of acquittal, be, reversed by this Court, in, exercise of its appellate jurisdiction, and, be replaced by findings of conviction.

7. On the other hand, the learned counsel appearing for the appellants, 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, hence, do not necessitate interference, rather merit vindication.

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

9. The deceased was married to accused Pratap Singh. Their marriage was solemnized about two years prior to the occurrence. A son was born out of the wedlock inter-se the accused No.1 and the deceased. The deceased as proven by the Post Mortem Report Ex.PE died owing to Asphyxia caused by consumption of poison. However no antemortem injuries have been divulged in the Post Mortem Report to be occurring on the body of the deceased.

10. FIR Ex. PF-1 has been registered on the basis of statement Ex.PA recorded by the complainant. The allegations in the FIR against accused No.1 is of his having belabored the deceased whereas the allegations against accused No.2, is of hers harassing the deceased on trivial matters. Besides there is a narration in the FIR of one Sapna, Bhabhi of accused No.1 having telephonically apprised the complainant of an ongoing quarrel inter-se the accused No.1 and the deceased at about 6 p.m on 18.2.2004 which led the complainant and other persons to proceed to the matrimonial home of the deceased. In proof of the allegations against the accused, the star prosecution witness PW-1 has in his deposition comprised in his examination-in-chief deposed that the accused subjected the deceased to mental as well as physical cruelty and had meted harassment to her by making demands of dowry. He further continues to depose that the deceased was belabored by accused No.1 which led her to flee from her matrimonial home to her parental house. On her arrival at her parental house injury marks were noticed on her person. The said occurrence took place six months prior to the registration of FIR. The acrimony arising from the said occurrence had come to be amicably resolved through a compromise having been arrived at inter-se the squabbling parties. The anvil of the prosecution case, as propounded by PW-1 in his deposition on oath, is, the receipt of a telephonic massage by him from Smt. Sapna Devi, Bhabhi of accused No.1, qua the latter belaboring the deceased. The said belaboring actuated or fomented besides instigated the deceased to commit suicide. However in the face of the non-examination of Sapna Devi, who telephonically intimated the complainant about the belaborings being meted on the fateful day upon the deceased by accused No.1 which led her to commit suicide, as such, for lack of examination of Sapna, Bhabhi of accused No.1 qua the factum as deposed by the complainant of hers having telephonically intimated him about the belabouring having been delivered upon the deceased by accused No.1 which actuated her to commit suicide, renders the deposition on oath of PW-1 qua the aforesaid fact to be suffering for lack of corroboration with an infirmity, besides its hence being constituted to be a hearsay piece of evidence which evidence, as such, is legally un-worthwhile. Moreover, the mental trauma to which the deceased was subjected to by the accused constituted by the accused making demands for dowry upon the deceased, is a fact which has occurred only in the examination in chief of PW-1, its occurrence only in the recorded deposition of PW-1, whereas it remains un-narrated in the previous statement recorded in writing of this witness by the police, renders it to be constituting an embellishment or improvement, as such unreliable.

11. The deposition, too of PW-2 (Smt. Champa Devi) qua the fact of the deceased having been subjected, by the accused, to, mental trauma constituted by theirs making demands of dowry from her is also an improvement or an embellishment constituted by the fact of its occurring only in her examination-in-chief and not in her previous statement recorded in writing. Consequently, the deposition on oath of PW-2 inasmuch as hers attributing an incriminatory role to the accused constituted by theirs demanding dowry from the deceased when occurring only in her examination-in-chief, is an embellishment and is rendered legally un-wrothwhile and incredible. The depositions also of PW-3 (Babu Ram) and PW-4 (Kamla Devi) qua the fact of the accused having subjected the deceased to mental trauma comprised in their act of demanding dowry from her, stands to face incredibility constituted by the fact aforesaid occurring only in their respective examinations-in-chief and not in their previous statements recorded in writing. Consequently, for their statements being imbued with an embellishment and an improvement, the said fact as deposed by them for the first time in the Court during the course of the recording of their depositions on oath, cannot be imputed any credibility.

12. The belaborings or physical cruelty meted by the accused No.1 to the deceased occurred six months prior to the occurrence. The acrimony between the accused and deceased arising out of the said belaborings was amicably resolved whereafter the deceased rejoined her matrimonial home. Given the improximity inter-se the occurrence of physical belaboring meted out by the accused to the deceased inasmuch as it having occurred six months prior to the fateful event cannot render it to be constituting a potent instigatory or fomenting cause for the deceased to commit suicide. The immediate proximate purported incident of physical cruelty is the one attributed to the accused by Sapna, Bhabi of accused No.1, who telephonically conveyed the fact of the accused No.1 delivering merciless beatings upon the deceased. The said fact would have constituted an instigatory or potent cause for the deceased to commit suicide if Sapna had been led into the witness box. However she has not been led into the witness box, whereas she was the best witness to prove the factum of merciless beatings having been delivered by the accused No.1 to the deceased. Apart from the fact that the non-examination of Sapna to prove the factum of merciless beatings having been delivered upon the deceased by accused No.1 which instigated her to commit suicide has hence not lent any succor to the prosecution case comprised in the testimony of PW-1, the complainant, the further vigorous fact of non-display, in the Post Mortem Report of Antemortem injuries existing on the body of the deceased throws overboard as well as dispels the efficacy of the prosecution version anvilled upon the deposition of PW-1, of the accused No.1 immediately proximate to the occurrence, inasmuch, as on the fateful day having delivered merciless beatings to the deceased which constituted the fomenting cause for her to commit suicide. Moreover the version of PW-10 (Dr. G.D Jassal) which belies the version of PW-15 and which also underscores the factum of the deceased being cooperative at the time of hers having reached at Zonal Hospital Bilaspur for treatment cannot be undermined inasmuch as bespeaks the fact of the deceased being capable to narrate a version qua the occurrence. However she omitted to disclose to PW-10 a version qua the incident with a communication therein of an incriminatory role to the accused. As such, the non-disclosure by the deceased to PW-10 even when she was in a conscious state of mind, a version qua the occurrence brings to the fore the factum that she committed suicide for reasons other than the one as attributed to the accused in the complaint.

13. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court does not suffer from any

perversity and absurdity nor it can be said that the learned trial Court in recording findings of acquittal has committed any legal misdemeanor, in as much, as, it having mis-appreciated the evidence on record or omitted to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned trial Court merit interference.

14. In view of the above discussion, we find no merit in this appeal, which is accordingly dismissed, and, the judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

Naag Devta Sewa Samiti, Dobri Salwala .....Petitioners
Versus
Sant Ram & others. ....Respondents.

CMPMO No. 259 of 2014
Date of Decision: 28.4.2015

Code of Civil Procedure, 1908- Order 41 Rule 27- An application was filed for adducing the evidence in appeal which could not be adduced before the trial Court- a permission was sought to lead secondary evidence as the true copy had been stolen- held, that document sought to be produced is material and mere delay in filing the application before the trial Court is not sufficient to dismiss the application- application allowed. (Para-3 to 6)

For the petitioner: Mr. Arvind Sharma, Advocate.
For the Respondents: Mr. K.S. Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The plaintiff had instituted a suit against the defendants claiming therein the relief of permanent injunction for restraining the defendants/respondents from interfering in the management of Naag Devta Mandir, situated in Dobri Salwala, Tehsil Paonta Sahib, District Sirmaur (H.P.). The suit was contested by the defendants. On the contentious pleadings of parties learned trial Court had framed the issues for rendition of findings thereon:-

1. ***Whether the plaintiff is a registered body and registered under Societies registration Act No. 21 of 1860 vide certificate No. 668-SDM/P-2001 dated 5.10.2001, as alleged? ....OPP***
2. ***Whether the management of Nag Devta Temple Dobri Salwala is being looked after by the plaintiff through its president Sh. Devinder Singh Bhandari and other members of its managing committee, as alleged? .....OPP***

3. ***Whether Sh. Varinder Singh Choudhary General Secretary has been authorized to file the present suit vide Resolution No. 18 dated 15.11.2002 by the Governing/General body of the plaintiff, as alleged? ….OPP***

4. ***Whether the defendants are interfering in the management of the Nag Devta Temple without any right title and interest, as alleged in the plaintiff para No. 5 to 8? If so its effect? …..OPP***

5. ***Whether the defendants are trying to take the possession of the movable and immovable property of the Nag Devta Temple illegally and forcibly, as alleged? ….OPP***

6. ***Whether the plaintiff is entitled to the grant of decree of permanent prohibitory injunction against the defendants, as prayed for? ….OPP***

7. ***Whether the defendant Nos. 1 to 3, 5 and other twelve families are the priests/pujaries of the Nag Devta Temple from generation to generation, as alleged? ..OPD 1 to 3 & 5***

8. ***Whether the defendants No.s 1 to 3 and 5 are entitled to manage the temple with a right over the offerings of the temple made by the devotees, from time to time and right to perform prayer as priests, as alleged? …..OPD***

9. ***Whether the ancestors of the defendants came from Ajmer, State of Rajasthan as priests with the Maharani of Sirmaur, as alleged, if so its effect? ….OPD***

10. ***Whether the plaintiff has got no cause of action to file the present suit, as alleged? ….OPD***

11. ***Relief.***

2. On appreciation of the evidence, adduced by the parties at contest before the learned trial Court, the learned trial Court dismissed the suit of plaintiff/applicant/appellant.

3. The plaintiff/appellant/applicant standing aggrieved by the decree of the learned trial Court whereby its suit was dismissed preferred an appeal before learned District Judge, District Sirmaur at Nahan. The appeal was instituted on the ground that the findings recorded by the learned trial Court on all issues are misconceived and required to be interfered with. During the pendency of the appeal, the plaintiff/applicant/ appellant had instituted an application, under Order 41 Rule 27 read with Section 151 CPC and Section 65 of the Indian Evidence Act, for permission to adduce before the learned first Appellate Court certain pieces of evidence, which had remained un-adduced before the learned trial Court, besides permission therein was also sought to lead evidence by way of secondary mode qua documents, recited in application, as true copies thereof stood stolen. The learned first Appellate Court, on considering the submissions addressed before it by the learned counsel on either side, was constrained to dismiss the application. The grounds, which prevailed upon the learned first Appellate Court to dismiss the application, instituted by the applicant/plaintiff/ appellant, were of there being gross indiligence on the part of appellant/plaintiff/applicant constituted by its act of its belatedly instituting the aforesaid application for the reliefs claimed therein, before it. Now the applicant/plaintiff/appellant is

aggrieved by the order rendered by the first Appellate Court, whereby its application aforesaid, for the reasons comprised in the orders rendered by learned District Judge Sirmaur, stood dismissed.

4. Heard the counsel of either side. The documents, which are proposed to be adduced by way of additional evidence before the learned first Appellate Court and that too by way of secondary mode, are contended by the learned counsel for the applicant to be just and essential for enabling the learned first Appellate Court to render findings on the apposite issues occurring at Sr. No. 1 to 3 of the hereinabove extracted issues. The extracted issues stood struck by the learned first Appellate Court on the contentious pleadings of parties. The issues aforesaid devolve upon the factum of maintainability of suit as instituted by the plaintiff as also devolve upon the factum whether the management of Nag Devta Temple Dobri Salwala is being looked after by the plaintiff through its president Sh. Devinder Singh Bhandari and other members of its managing committee. Even if the prayer of the learned counsel for the applicant for adducing additional evidence by way of secondary mode, accompanied by relevant documents, before the learned first Appellate Court for constraining apposite findings on the aforesaid issues stands allowed, yet it would not cause any harm to the opposite party/defendants, especially when the issues aforesaid hence are not core issues rather are merely issues impinging upon the maintainability of the suit.

5. The reasoning adopted by the learned First Appellate Court for rejecting the application preferred by the applicant/plaintiff/appellant is constituted in the fact of it despite having knowledge and possession of documents proposed to be adduced by way of additional evidence and that too by secondary mode it indiligently having taken to belatedly institute it before it. The said reason as propounded by the learned First Appellate Court stands whittled down by the fact that when adjudication on the apposite issues No. 1 to 3 in proof whereof the aforesaid items of additional evidence by secondary mode are proposed to be adduced would be facilitated by their adduction by secondary mode. Consequently, when their adduction is just and essential for rendering a firm and conclusive findings on issues No. 1 to 3, as such, even if there is purported gross indiligence or a procrastinated delay on the part of the applicant/plaintiff to institute an application earlier before the learned trial Court for theirs being adduced by secondary mode, the factum of theirs being just and essential for deciding or rendering findings on issues No. 1 to 3 benumbs and overwhelms the effect, if any, of the reasoning afforded by the learned First Appellate Court for not permitting theirs being adduced into evidence by secondary mode. In sequel, given the essentiality of their adduction for rendition of a decision by the First Appellate Court on issues No. 1 to 3 permission for their adduction as additional evidence by way of secondary mode is accorded. The findings of the learned First Appellate Court in rejecting the application preferred by the applicant/plaintiff before it on the ground of gross indiligence constituted by its procrastinated delay in instituting it earlier are legally infirm. Consequently, the impugned order is quashed and set-aside.

6. To curtail the length of litigation, it is ordered that on adduction before it by the plaintiff/applicant of the items of additional evidence, the learned First Appellate Court hence on their adduction before it shall appreciate/evaluate them and record findings on apposite issues No. 1 to 3 alongwith other issues, on which the parties at lis are at contest.

7. With the aforesaid observations, the petition stands allowed. The impugned order rendered on 8.8.2014 is set aside. The learned first Appellate Court is directed to

complete the entire exercise relating to adduction of evidence and rendition of findings on issues No.1 to 3 and other issues within a period of six months.

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

Rajesh Pandya and another .....Petitioners.
Vs.
State of H.P. .....Respondent.

Cr.MMO No. 26 of 2014
Date of Decision: 28.04.2015.

Factories Act, 1948- Sections 92 and 106- Complaint filed after 90 days of the acquisition of the knowledge by the inspector-Magistrate took cognizance of the offence-cognizance is bad-even the time to seek prosecution sanction by the inspector cannot be excluded from 90 days- prosecution sanction not a condition precedent for filing a complaint- complaint quashed being time barred. (Para- 2 & 3)

Factories Act 1948- Section 8- Deputy Director (factories) has been mandated to exercise the powers of Inspector- held that complaint by him is maintainable under the law. (Para-3)

For the petitioner: Mr. J.S. Bhogal, Senior Advocate with Mr. Rajesh Batra and Mr. Janesh Gupta, Advocates.
For the respondents: Mr. Vivek Singh Attri, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.*(Oral):*

The Deputy Director (Factories), Una, District Una, H.P. instituted a complaint, Annexure P-2, against the petitioners herein/accused in the complaint, for contravention of the provisions of Section 92 of the Factories Act, 1948. The complaint at the instance of the Deputy Director (Factories), Una was instituted before the criminal Court of competent jurisdiction beyond the period mandated and prescribed in Section 106 of The Factories Act, 1948, whose provisions are extracted hereinafter, inasmuch as in transgression of the mandate enshrined in Section 106 of The Factories Act, 1948 it came to be instituted beyond the period of three months prescribed therein. The provisions of Section 106 of the Factories Act, 1948 read as under:-

> "106. Limitation of prosecutions.—No Court shall take cognizance of any offence punishable under this Act unless complaint thereof is made within three months of the date on which the alleged commission of the offence came to the knowledge of an Inspector:
>
> Provided that where the offence consists of disobeying a written order made by an Inspector, complaint thereof may be made within six months of the date on which the offence is alleged to have been committed.
>
> 1[Explanation.—For the purposes of this section,—

(a) in the case of a continuing offence, the period of limitation shall be computed with reference to every point of time during which the offence continues;

(b) where for the performance of any act time is granted or extended on an application made by the occupier or manager of a factory, the period of limitation shall be computed from the date on which the time so granted or extended expired.]"

2. The complaint lodged beyond a period of three months by the complainant comprised in Annexure P-2 would render the learned Court before it had come to be instituted incapacitated to take cognizance thereon only in event of it having come to be substantiated at this stage by the petitioners herein that it had come to be lodged at the instance of a functionary/official who was empowered as an Inspector. Only in the event of substantiating material qua the factum of Deputy Director (Factories), Una being empowered as an Inspector would, the provisions of Section 106 of the Factories Act barring the criminal Court of competent jurisdiction to take cognizance thereon unless it is instituted within three months from the date of acquisition of knowledge by the Inspector qua the commission of the offence at the instance of the petitioners herein come to the aid of the petitioners herein to anvil a submission that hence, the criminal Court of competent jurisdiction is barred to take cognizance thereon. For determining whether the Deputy Director (Factories), Una, who instituted complaint comprised in Annexure P-2, was empowered as an Inspector, an advertence is required to be made to Annexure-I (annexed to the complaint), which is a notification issued by the Government of Himachal Pradesh enunciating therein that the Deputy Director (Factories) stands appointed as Deputy Chief Inspector. Now for determining whether the enunciation in Annexure P-2, of the complainant while being portrayed therein to be a Deputy Director (Factories), Una having come to be appointed under Annexure-I as Deputy Chief Inspector also stood hence appointed as Inspector for empowering him to institute a complaint under the provisions of the Factories Act, 1948 to enable the criminal Court of competent jurisdiction to take cognizance thereon, a further advertence is required to be made to Section 8 of the Factories Act, 1948 whose provisions are extracted hereinbelow:-

> "8. Inspectors.-.(1).....
>
> (2) The State Government May, by notification in the Official Gazette, appoint any person to be a Chief Inspector who shall in, addition to the power conferred on a Chief Inspector under this Act, exercise the power of an Inspector throughout the State.
>
> (2A) The State Government may, by notification in the Official Gazette, appoint as many Additional Chief Inspectors, Joint Chief Inspectors and Deputy Chief Inspectors and as may other officers as it thinks fit to assist the Chief Inspector and to exercise such of the powers of the Chief Inspector as may be specified in such notification.
>
> (2B) Every Additional Chief Inspector, Joint Chief Inspector, Deputy Chief Inspector and every other officer appointed under sub-section 2(A) shall, in addition to the powers of a Chief Inspector specified in the notification by which he is appointed, exercise the power of an Inspector throughout the State.
>
> 3. ....."

3. An incisive reading of Section 8(2B), whose provisions are extracted hereinabove display that the Deputy Chief Inspector has been mandated therein to be competent to exercise the powers of an Inspector through out the State. Obviously, then the complaint having been instituted and investigated by the Deputy Director (Factories), who stood under Annexure A-1 appointed as Deputy Chief Inspector, which designation empowers him to exercise the powers of an Inspector, besides empowers him or renders him legally capacitated to institute a complaint only within the prescribed period enshrined in Section 106 of the Factories Act, inasmuch as within 90 days from the date of his acquiring knowledge of commission of an offence at the instance of the petitioners herein was both maintainable as well as cognizable by the competent criminal Court of jurisdiction if it come to be instituted within 90 days since the acquisition of knowledge of commission of offence by the petitioners herein. Nonetheless, uncontrovertedly his having instituted the complaint beyond a period of 90 days since the acquisition of knowledge by him qua the commission of offence at the instance of the petitioners herein renders the criminal Court of competent jurisdiction incapacitated to take cognizance thereon. However, the learned Deputy Advocate General contends that the time spent for obtaining sanction to launch prosecution against the petitioners is excludable from the period of three months. Nonetheless, the said submission has no force and stands subdued by the prescription in Section 106 of the Factories Act, 1948 of the complaint being institutable within three months from the date of acquisition of knowledge of commission of offence by an Inspector. Now with the complainant being an Inspector within the ambit of provisions of Section 8(2B) of the Factories Act, 1948 and when the mandate of Section 106 of the Factories Act which is a special legislation omits to exclude the time spent, if any, in obtaining sanction for prosecution rather it makes mandatorily obligatory upon an inspector to not beyond a period of three months from the date of acquisition of knowledge qua the commission of offence at the instance of the petitioners herein lodge a complaint against the petitioners qua the purported contravention of the provision of Section 92 of the Factories Act, 1948. Consequently, when it is uncontrovertedly established that the complaint at the instance of the respondent stood instituted beyond a period of three months/90 days, in contravention of the statutory mandate of Section 106 of the Factories Act, it hence barred the Judicial Magistrate 1st Class, Nalagarh to hence take cognizance thereon. In aftermath, the time spent by the respondent in obtaining the approval/sanction for prosecution of the petitioners herein is neither condonable nor excludable from the period of 90 days, besides it was not necessary at all to obtain sanction for prosecuting the accused/petitioners in the face of the specific mandate of Section 106 of the Factories Act enjoining an Inspector to as a complainant to within a period of 90 days from the date of acquisition of knowledge of commission of an offence at the instance the petitioners herein institute a complaint, even without any approval/sanction for prosecution of the petitioners by the appropriate government. More so, when the necessity for obtaining approval/sanction for prosecution of the petitioners herein/accused is neither an indispensable requirement nor a sine qua non for an Inspector as a complainant, to institute a complaint within the statutorily ordained period of 90 days since the acquisition of knowledge by him qua the commission of offence at the instance of the petitioners herein, as such its being awaited and the time spent in obtaining it was not excludable. Accordingly, the present petition is allowed and the complaint Annexure P-2 instituted before the learned Judicial Magistrate 1st Class, Nalagarh is quashed and set aside. All the pending applications also stand disposed of.

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

Sudarshan Kumar .....Petitioner
Versus
State of H.P. and Ors. ....Respondents

CWP No.709 of 2015.
Reserved on: 17/04/2015.
Decided on: May 01, 2015.

Constitution of India, 1950- Article 226- Petitioner had qualified the technical bid- respondents issued a letter seeking clarification regarding the detail of the work executed by the petitioner showing the awarded amount, completion cost and the copy of the final bill- respondents contended that petitioner had not qualified mandatory condition of completing three similar works costing not less than 40% of the estimated cost- held, that petitioner had not carried out a single work but had carried out different types of work - cost of the each of the separate item was to be taken into consideration for determining whether the petitioner had carried out the work equivalent to 40% of the estimated cost or not- petition dismissed. (Para-2 to 6)

For the petitioner: Mr.Bimal Gupta, Advocate.
For the respondents: Mr.Anup Rattan, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The respondents had floated tenders for execution of work nomenclatured as "Channelization of Chhounchh Khad in Tehsil Indora District Kangra, H.P. (SH;-C/o EARTHEN Embankment including crated apron, stone pitching etc. from RD 1000 to 5000 i.e. increased slopping width of pitching NSL to LWL." The estimated cost of work aforesaid to be executed through a Contractor was a sum of Rs.11,62,75,450/-. The petitioner herein avers that he fulfilled all the requisite enjoined conditions to compete with other Contractors for allocation of the work aforesaid to him, qua which through tenders floated by the respondents, quotations from him as well as from other competing bidders were invited. The petitioner was declared qualified for the technical bid by the respondents. The declaration of the petitioner herein by the respondents to be qualified for the technical bid rendered him fit and eligible for the financial bid. The imperative enjoined conditions for constituting the petitioner herein to be eligible to participate and be declared eligible for allocation of work was vis-à-vis the petitioner his having during the last seven years previous to the floating of tenders by the respondents for execution of work aforesaid, completed three similar works costing not less than an amount equal to 40% of the estimated cost.

2. The respondents herein, while considering the apposite material placed before them, for construing whether the material hence portrayed the factum of the petitioner herein having complied with the conditions aforesaid and its being inabundant or not, issued a communication, comprised in Annexure P-5, to the petitioner eliciting therein

from the petitioner the details of works certified by the authorities concerned showing/demonstrating the awarded amounts, completion cost as well as the copy of the final bill. The petitioner proceeded to make a representation to the respondents comprised in Annexure P-6 in which he appended material in purported satisfaction of the enunciation in Annexure P-5. Moreover, the petitioner after forwarding his representation comprised in Ext.P-6 also furnished to the respondents Annexure P-7. Nonetheless, the respondents vide Annexure P-10 rejected the representation of the petitioner herein.

3. The petitioner is aggrieved by the orders rendered by the respondents comprised in Annexure P-10 and seeks its being quashed and set aside besides the petitioner ventilates a grievance that Annexures P-6 and P-7 while constituting compliance with the mandated condition of his having completed during the seven years previous to the floating of tenders by the respondents three completed works costing not less than the amount equal to 40% of the estimated cost of the work proposed to be executed by the respondents, he be declared eligible for participation in the financial bid.

4. The respondents in the reply to the writ petition contend that the prayer made by the petitioner in the writ petition is untenable and Annexure P-11 is discardable, besides it is contended that the works in purported compliance by the petitioner within the enjoined mandate of the apposite rules entailing upon him to furnish proof qua his having completed three works during the 7 years previous to floating of tenders by the respondents for execution of the contemplated work, cost whereof is equivalent to 40% of the estimated cost of the work proposed to be awarded to the successful bidder, is not a single consolidated work rather is a plurality of jobs/works performed by the petitioner herein. In aftermath, it is contended that the petitioner herein has not begotten compliance with the enjoined mandate of the aforesaid rules.

5. The petitioner in his rejoinder has controverted the factum as enunciated in the reply. Tritely, the controversy can be put to rest by dwelling upon the import of Annexure P-11. Even though, Annexure P-11 is a single award. However, for construing whether the works comprised therein are to be reckoned to be consolidated or compact works or not, as such, constituting them to be a single complete work or not, cost/costs whereof are to be concomitantly segregated or not so as to render them falling within the ambit of the mandate, as referred to herein-above inasmuch as they/it bearing a complete cost equivalent to 40% of the estimated cost of the work contemplated to be executed, there ought to have been an element of jointness or un-segregability inter-se each of the works qua which Annexure P-11 was issued by the authority concerned. For fathoming and determining as well as disinterring whether the above element of consolidation of works qua which Annexure P-11 was issued by the authority concerned exists, an advertence is necessarily required to be made even to Annexure P-12 appended with the rejoinder filed by the petitioner herein, in repudiation to the contention of the respondents. Even though, Annexure P-12 does fortify the submission of the learned counsel for the petitioner herein that the items of work qua which approval was rendered by the authority concerned for theirs being awarded in favour of the petitioner was a singular approval, however, the above factum of each of the items of works comprised in Annexure P-12 having been accorded a joint approval or a singular approval would not per se *ipso facto* by the factum of theirs having been allotted under a singular order of the authority concerned render them to constitute a single completed work. Singularity of a complete job or allotted work bearing a cost equivalent to 40% of the amount of the estimated cost of the proposed work is cullable from the factum of each of the works being inter-connected or inter-related or un-segregable

from each other. However, a perusal of Annexure P-12 and theirs displaying the factum of the items of work comprised therein being not consolidated works rather being segragable or distinctive works makes them loose the element of consolidation which is the hallmark of a singularly completed job, whose completed costs is also reckonable for determining the fulfilling or non-fulfilling of the enjoined conditions cast upon the petitioner herein. Consequently, the disclosures in Annexure P-12 of distinct or segragable items of work allotted to the petitioner herein even though under a single order of allotment/allocation would not render the works comprised therein to be a single completed work rather are separately completed disjoined works or each is a distinct work, hence each work loses the character of jointness, besides theirs being plural. Consequently, the cost of each of the separate items of work divulged in Annexure P-12 are to be separately taken into account as tenably done by the respondents while discarding the posture of the petitioner displayed in Annexures P-6 and P-7 as well as Annexure P-11, as such, the rendition of orders by the respondents comprised in Annexure P-10 are, hence, legitimized.

6. In aftermath, there appears to be no force in the contention of the petitioner that the respondents in discarding the details furnished by the petitioner in proof of his having completed three works with each costing not less than the amount equal to 40% of the estimated cost of the works proposed to be executed by the respondents and they having not thoroughly applied their mind to the material as placed before them, have proceeded unlawfully. The decision, as arrived at by the respondents, in concluding that each of the works displayed by the petitioner in Annexures P-12 and P-13 was not a single work rather were segregated plural works is tenable. Cost of each of the works was reckonable as reckoned for determining the eligibility of the petitioner. As a natural concomitant when none of the individual items of work displayed in Annexure P-12 and P-13 bore a completed cost equivalent to 40% of the estimated cost of the proposed work, the petitioner was rendered ineligible to participate in the financial bid. The act of the respondents was, hence, tenable and apt.

7. With the aforesaid observations, the petition is dismissed, so also the pending application(s), if any. However, there will be no order as to costs.

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

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

Versus

Sher Singh and others .....Respondents.

Cr. Appeal No. 500 of 2011-C.

Reserved on: 23rd April, 2015.

Decided on : 2nd May, 2015

Indian Penal Code, 1860- Section 420, 467, 468, 471 and 120-B, IPC & Section 13(2) of the Prevention of Corruption Act- Lease deed in favour of a non-agriculturist registered by Naib-Tehsildar without asking the leasee to furnish agriculturist certificate-other co-accused also entering in criminal conspiracy to execute this illegal act-no offence made out as the law prohibits registration of such document.

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 118(3)- When special statute provides for penal consequences in itself -prosecution under other laws is uncalled for-in case the interest is transferred to a non-agriculturist-appropriate government may

initiate the proceedings and cancel the transfer-acquittal of the accused persons proper-appeal dismissed. (Para-13 & 14)

For the Appellant:	Mr. P.M. Negi, Dy. A.G.
For the Respondents:	Ms. Shashi Kiran, Advocate vice Mr. Rupinder Singh, Advocate for respondent No.1. Mr. Ajay Kumar, Senior Advocate with Dheeraj K. Vashishta, Advocate for respondent No.3. Mr. Nitin Khanna, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgment, rendered on 7.7.2011 by the learned Special Judge, Kullu, H.P., in Sessions trial No. 2 of 2003, whereby, the learned trial Court acquitted the accused/respondents of the offences for which they came to be charged and tried by it.

2. Briefly stated the facts of the case are that on 22.11.995 Inspector Lal Singh along with C. Kushal Singh were on patrolling duty at Chhanikhor, District Kullu, H.P. A secret information was received that one Sudhir Malik, President of M/s Palvi Gram Udyog, Chhanikhor obtained ten biswas of land, situated in Village Chhanikhor from one Kehar Singh for a sum of Rs.6000/- at the rate of Rs.10/- per month for a period of fifty years. Inspector Lal Singh also came to know about the fact that Reader Rajinder Kumar also connived with accused Sudhir Malik and they prepared the forged documents and on the basis of those forged documents they were able to obtain loan of Rs.7 lacs from Khadi Gram Udyog, Shimla. Upon this FIR under Sections 420, 467, 468, 471 and 120-B, IPC read with Section 13(2) of the Prevention of Corruption Act was registered at Police Station (Enforcement) North Zone at Dharamshala.

3. During the investigation the relevant record was taken into possession. The signatures were sent for comparison to Govt. Examiner of Questioned Documents. As per the prosecution, from the record it transpired that Sudhir Malik son of Shri Ilam Singh got registered a society under the name and style of M/s Palvi Gram Udyog Santha. The said society was registered with the Registrar of Societies at serial No.3035 in the year 1991-92. It was also transpired during the investigation that two Himachalies were also found to be the members of the said society and their names were ascertained as Ram Lal and Punam but during the investigation their addresses were not ascertained. It is further the case of the prosecution that Sudhir Malik did not get registered the said society with Himachal Pradesh nor he obtained permission of the H.P. Government for obtaining the land on lease. The lease deed of ten biswas of land was registered by Sher Singh accused the then Naib Tehsildar, Kullu, whereas as per the law the said lease deed could not have been registered. The agriculturist certificate was not found attached with the lease deed nor any permission from H.P. Government was attached. The lease deed was registered without any Society Registration Certificate as Palvi Gram Udyog was registered out side Himachal Pradesh.

4. According to the prosecution, the Tehsildar could have registered the document and the same was registered by ignoring the legal provisions. The mutation of the same was entered but was not sanctioned. The then Revenue Officer Shri Chet Ram Kaundal demanded agriculturist certificate and registration certificate including the

permission of the H.P. Government which were not supplied to him despite requests. It is further the case of the prosecution that accused Sudhir Malik moved an application before the Tehsildar, Kullu for making an entry regarding equitable mortgage in favour of the society. At that time Sudhir Malik concealed the fact that the mutation of the same has not been entered in the revenue record. The said letter was dealt with by Reader Rajinder Kumar Sood, who forged dispatch number and sent the same for registration to the Patwari, Patwar Halqua Chong with a permission to make entry regarding equitable mortgage in favour of Khadi Gram Udyog, Shimla. During the investigation said handwriting was found to be of Rajinder Kumar.

5. It is further the case of the prosecution that accused Rajinder Kumar misused his powers and position and he either himself put the signature of Tehsildar or got the letter signed from some one else and directed Halqa Patwari to enter the mutation regarding equitable mortgage ignoring the fact that mutation could not have been sanctioned and no entry regarding equitable mortgage could be made in the revenue record. It is further the case for the prosecution that the Patwari, Patwari Halqa Chong violated the departmental instructions qua the fact that till the mutation is not sanctioned, no entry could have been made in the revenue record. As per the prosecution, the society whose President/Secretary is Sudhir Malik got sanctioned loan of fifteen lacs from Khadi and Gram Udyog Board, Shimla. According to the prosecution, he hatched a criminal conspiracy with the government officials/officer and got sanctioned the loan for a sum of Rs.15 lacs and he received a sum of Rs.6,56,000/- from Khadi Gram Udyog for construction of building and purchasing of machinery etc. On the spot, the police found that Sudhir Malik had spent only Rs.4,38,559/- for building works and no machinery of Rs.1,76,000/- was found on the spot. According to the prosecution, the accused Sudhir Malik thus mis-used amount of Rs.2,17,441/- which was received by him as loan.

6. On conclusion of the investigation, into the offences, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and presented in the Court.

7. Accused Sher Singh and accused Nes Ram were charged for theirs having committed offences under Section 13(1)(d) of the Prevention of Corruption Act read with Section 120-B, IPC, accused Shdhir Malik was charged for his having committed offence punishable under Section 471 read with Section 120-B, IPC and accused Rajinder Kumar was charged for his having committed offences punishable under Section 13(i) of the Prevention of Corruption Act to which they pleaded not guilty and claimed trial.

8. In order to prove its case, the prosecution examined 30 witnesses. On closure of prosecution evidence, the statements of accused, under Section 313 of the Code of Criminal Procedure, were recorded, in, which they pleaded innocence and claimed false implication. In defence, the accused had examined one witness.

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

10. The State of H.P is aggrieved by the judgment of acquittal, recorded by the learned trial Court. The learned Deputy Advocate General appearing for the 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 the material on record. Hence, he, contends that the findings of acquittal, be, reversed by this Court, in, exercise of its appellate jurisdiction, and, be replaced by findings of conviction.

11. On the other hand, the learned counsel appearing for the appellants, have, 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, hence, do not necessitate interference, rather merit vindication.

12. 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.

13. Accused Sudhir Malik is canvassed by the prosecution to be a non agriculturist. He was enjoined by law to possess an agriculturist certificate for empowering him to execute a lease deed with the lessor in his favour. However, even without accused Sudhir Malik possessing an agriculturist certificate and it not having produced before accused Sher Singh, the then Naib Tehsildar, the latter proceeded to hence unlawfully register the lease deed, Ex.PW1/A in favour of M/s Palvi Gram Udyog, Chhanikhor of which accused Sudhir Malik was the President. The society aforesaid was a society registered outside Himachal Pradesh. On the strength of Ex.PW1/A, accused Sudhir Malik, President of M/s Palvi Gram Udyog, Channikhor, in whose favour lease deed, Ex.PW1/A qua 10 biswas of land located in Village Chhanikhor was executed by one Kehar Singh for a sum of Rs.6,000/- at the rate of Rs.10/- per month for a period of 50 years, is alleged to have procured a loan in the sum of Rs.7,00,000/- from Khadi Gram Udyog, Shimla. Consequently, it is alleged by the prosecution that a vitiated and fraudulent registered lease deed Ex.PW1/A was used as a security by accused Sudhir Malik for hence causing wrongful gain to himself and for causing wrongful loss to the Khadi Gram Udyog, Shimla, inasmuch as on its anvil a loan of Rs.7 lacs was obtained by accused Sudhir Malik. However, the factum of Khadi Gram Udyog, Shimla having released or disbursed the loan amount to M/s Palvi Gram Udyog, Chhanikhor of which accused Sudhir Malik was the President, on the strength of Ex.PW1/A is falsified by the fact that the loan amount was sanctioned by it to be disbursed in favour of M/s Palvi Gram Udyog, Chhanikhor in the year 1992 whereas the lease deed was registered subsequently. Consequently, as a natural concomitant an inference which is warranted as tenably drawn by the learned trial Court, is that even if Ex.PW1/A was ingrained with an illegality arising out of the factum of it having come to be registered by accused Sher Singh, the then Naib Tehsildar without insisting upon accused Sudhir Malik to, before causing or effectuating its registration, produce an agriculturist certificate, the pre-eminent fact of its not being the material which was either considered or prevailed upon by M/s Khadi Udyog, Shimla for sanctioning or disbursing the loan amount in favour of M/s Palvi Gram Udyog, Chhanikhor, is concomitantly is of it neither having been used as a collateral security by the accused for seeking sanction of loan in his favour by Khadi Gram Udyog, Shimla nor hence in its purported illegal registration there was any nexus inter se such purported illegal registration of Ex.PW1/A and the sanction or disbursement of loan in favour of M/s Palvi Gram Udyog, Chhanikhor. Naturally, then it has to be held as aptly done by the learned trial Court that the purported unlawful registration of Ex.PW1/A has not caused any wrongful gain to M/s Palvi Gram Udyog, Chhanikhor of which accused Sudhir Malik was the President nor wrongful loss was caused to the financial institution which sanctioned and disbursed loan to M/s Palvi Gram Udyog, Chhanikhor of which accused Sudhir Malik was the President. Even if assuming that Ex.PW1/A was unlawfully registered by accused Sher Singh in favour of M/s Palvi Gram Udyog, Chhanikhor of which accused Sudhir Malik was the President by Kehar Singh, constituted in the face of accused Sher Singh registering it without production of an agriculturist certificate before him by accused Sudhir Malik, whose production in the face of his being an agriculturist, would alone have rendered the registration of Ex.PW1/A by accused Sher

Singh, the then Naib Tehsildar to be legitimized. Nonetheless when there exists an apposite provision in the Himachal Pradesh Tenancy and Land Reforms Act inasmuch as in Section 118, sub section (3), whose provisions are extracted hereainbelow:-

> "118(3). No Registrar or the Sub Registrar appointed under the Indian Registration Act, 1908 shall register any document pertaining to a transfer of land which is in contravention of sub section (1) and such transfer shall be void ab-initio and the land involved in such transfer, if made in contravention of sub section (1) shall together with structures, buildings and other attachments, if any, vest in the State government free from all encumbrances.
>
> Provided that the Registrar or the Sub-Registrar may register any transfer-
>
> (i) where the lease is made in relation to a part or whole of a building, or
>
> (ii) where the mortgage is made for procuring the loans for construction or improvements over the land either from the Government or from any other financial institution constituted or established under any law for the time being in force or recognized by the State Government."

A reading whereof constrains an inference that when therein the Registrar or the Sub Registrar appointed under the Indian Registration Act, 1908 proceeds to in favour of a non agriculturist register a conveyance deed, it then empowers the appropriate government to initiate proceedings for vestment of land comprised in such unlawfully registered deed of conveyance along with structures, buildings and other attachments thereon. Consequently, when the provisions of special statute aforesaid prohibit or interdict the registration of a conveyance deed by a Registrar or a Sub Registrar under the Indian Registration Act, 1908 in favour of a non agriculturist, as also, contemplates therein the ensuing consequences, as a natural corollary then in face thereof when the penal consequences for infraction of the statutory prohibition prescribed therein have remained uncontemplated the apt deduction is obviously that when under the special statute it is open for the appropriate government to initiate the warranted action as prescribed under Section 118(3) of the Himachal Pradesh Tenancy and Land Reforms Act against accused Sudhir Malik. As a corollary then, for lack of contemplation in and with no mandate existing in Section 118(3) of the Himachal Pradesh Tenancy and Land Reforms Act of penal action being warranted against either accused Sudhir Malik who executed PW-1/A qua 10 biswas of land located at Chhanikhor with Kehar Singh or against accused Sher Singh, the then Naib Tehsildar, who purportedly unlawfully registered Ex.PW1/A, as such, the initiation of investigation by the Investigating Officer qua the purported flouting of provisions of Section 118(3) of the Himachal Pradesh Tenancy and Land Reforms Act at the instance of accused Sudhir Malik and accused Sher Singh arising form their respective acts was uncalled for, besides obviously then the charge against the accused for theirs, hence, transgressing the mandate of Section 118(3) of the Act and the offences for which they have come to be charged and tried was unwarranted and necessitated their acquittal as appropriately done by the learned trial Court.

14. Moreover, the factum that Ex.PW5/A-13, Ex.PW5/A-16 and Ex.PW5/A-18, which are the pay orders, are not proved by the prosecution to have been actually released in favour of the accused, consequently, it cannot be concluded that as a matter of fact the

loan amount as sanctioned in favour of M/s Palvi Gram Udyog, Chhanikhor of which accused Sudhir Malik was the President, was actually disbursed or released to accused Sudhir Malik. Even if the said amount had come to be released in favour of M/s Palvi Gram Udyog, Chhanikhor, of which accused Sudhir Malik was the President, the factum that Ex.PW1/A was not used as collateral security for its sanction or approval by M/s Khadi Gram Udyog, Shimla, reiteratedly does not constitute any offence under Sections 420, 467, 468, 471, 120-B of the IPC against accused Sudhir Malik.

15. Moreover, the role attributed to accused Rajinder Sood is, of his while rendering duties as Reader to Tehsildar, his having connived with accused Sudhir Malik and forged endorsement No.628 comprised in Ex.PW1/B. The forgery attributed to accused Rajinder Sood is of his having in Ex.PW1/B forged the signature of Tehsildar. However, the above role attributed to accused Rajinder Sood stands discountenanced by the factum existing in the deposition of PW-29 wherein he deposes that the specimen signatures of accused Rajinder Sood comprised or existing in Q-3, cannot be categorically or with definitiveness be opined to be similar or tallying with the purportedly forged signature of Tehsildar purportedly prepared by accused Rajinder Sood comprised in Ex.PW1/B, the purportedly forged endorsement made by accused Rajinder Sood. Consequently, with no categorical or definite opinion ensuing from the handwriting expert, who deposed as PW-29 qua Q-3, the specimen signatures of accused Rajinder Sood on their tallying or comparison by him with the purportedly forged endorsement comprised in Ex.PW1/B to be belonging to accused Rajinder Sood obviously, then it can be hence concluded that the role attributed to accused Rajinder Sood by the prosecution has not come to be convincingly proved.

16. Furthermore, the role attributed to accused Nes Ram, Patwari by the prosecution is of his having illegally entered rapat qua lease deed in the daily diary register of the Patwar Circle at serial No.394 in favour of M/s Palvi Gram Udyog, Chhanikhor. Consequently, the entry in the daily diary register of Patwar Circle occurring at serial No.394 is alleged to be forged. Assuming that hence accused Nes Ram, Patwari had entered rapat No.394 in the daily diary qua lease deed executed and registered in favour of M/s Palvi Gram Udyog, Chhanikhor of which accused Sudhir Malik was the President, nonetheless in face of the fact that he proceeded to do so only in pursuance to his having received orders comprised in Ex.PW2/A, as such, when he was enjoined to obey the orders comprised in Ex.PW2/A, no criminal liability hence can come to be attributed to accused Nes Ram in his having come to in consonance therewith record a rapat qua the lease deed in the daily diary register in the Patwar Circle concerned. Besides, even if assuming that Ex.PW2/A which stood complied with, by accused Nes Ram constituted by his act of recording in consonance thereto a rapat at serial No.394 of the daily diary register of Patwar Circle concerned was forged inasmuch as it was not signed by PW-2, nonetheless in the face of the prosecution omitting to, beside collecting the specimen writings of PW-2, as also, omitting to get them compared with the admitted signatures of PW-2 by their dispatch to the Handwriting Expert, renders such omission to constrain a conclusion that there has been lack of or want of a sound investigation on the part of the Investigating Officer for enabling this Court to record a finding that the purported forged signatures of PW-2 as existing on Ex.PW2/A and purportedly forged by accused Nes Ram, did not belong to PW-2. In aftermath and for reiteration, it can be convincingly concluded that there is lack of or want of evidence that Ex.PW2/A was forged by accused Nes Ram and hence, it was unlawfully relied upon by him to record rapat No.394 in the daily diary register of the Patwar Circle concerned with a dishonest intention to aid or facilitate accused Sudhir Malik to get an entry in the apposite record.

17. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of acquittal has committed any legal misdemeanor, in as much, as, it having mis-appreciated the evidence on record or omitted to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned trial Court merit interference.

18. In view of the above discussion, we find no merit in this appeal, which is accordingly dismissed, and, the judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

Smt. Roshni Devi .....Petitioner.
Versus
State of H.P & others ....Respondents.

CWP No. 9338 of 2013-D
Decided on : 4.5.2015

Constitution of India, 1950- Article 226- Petitioner had applied for the post of Aganwari worker- Selection Committee had not awarded any marks to the petitioner despite the fact that petitioner had possessed an experience certificate as a Nursery Teacher for 2 years in a private crèche- held, that it was necessary for the petitioner to hold a diploma in nursery teaching- she had failed to produce any material to show that she possessed a diploma in nursery teaching- petition dismissed. (Para-2 and 3)

For the Petitioner: Mr. Neel Kamal Sood, Advocate.
For the Respondents: Mr. Vivek Singh Attri, Deputy Advocate General for respondents-State.
Mr. G.R Palsara, Advoate, for respondent No.6.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The writ petitioner is aggrieved by the impugned order rendered by the learned Divisional Commissioner comprised in Annexure P-10. The learned Divisional Commissioner Mandi, while being faced with a lis *inter-se* the petitioner herein and respondent No. 6 herein, qua the legality of the order rendered by the Additional District Magistrate, Mandi, dismissed the appeal preferred by the petitioner herein and affirmed the orders rendered by the learned Additional District Magistrate, Mandi. The writ petitioner had earlier instituted a Writ Petition No. *4873 of 2013* before this Court and this Court on considering the import of clause 7(1) of the scheme, which stands extracted hereinafter, applicable to the appointments of "Anganwari workers", as the petitioner herein is, in a scenario as in the instant case where the Selection Committee concerned omitted to award marks to the petitioner, who in compliance thereto despite hers possessing experience

certificate as a nursery teacher for three years conveyed in Annexure P-3 from a private crèche nomenclatured as "*Samaj Kalyan Vikas Mandal*" , even when issued by a private organization aforesaid was concluded to be hence not stripping it of force or its being not recognizable or its not holding validity for the purpose of awarding two marks for experience garnered therein by the petitioner as a Nursery Teacher, especially when the scheme omitted to portray that the experience certificate as a Nursery Teacher for two years in a crèche ought to emanate only from a government or semi government institution.

"A) ***Maximum 13 marks for educational qualification*** *will be given in the following manner:-*

i) Percentage of marks in metric divided by 10 subject to the maximum of 10 marks.

(ii) Candidates who possess 10+2 and higher educational qualification will be given 3 additional marks.

B) ***"Maximum 2****marks for experience to be given as under:-*

One mark *for candidates having experience as Anganwadi Helper/ Balsevika/ Balwadi Teacher/ Nursery Teacher for one year or Shishu Palak of ECCE center for 10 months.*

Or

Two marks *for candidates having experience as Anganwadi Helper/ Balsevika/ Balwadi Teacher/Nursery Teacher for two or more years."*

C) ***2 mark*** *for disabled women having 40% and above disability subject to the condition that the type of disability is not such as to hamper the discharge of her job responsibility.*

D) ***2 marks*** *for SC/ST/OBC candidates.*

E) ***2 marks*** *for State Home/Balika Ashram Inmates/Orphans/Widows/ Destitutes and Divorcees.*

F) ***4 marks*** *for personal interview.*

Total 25 marks."

2. However in paragraph 6 of the judgment aforesaid, this Court does impute, besides compliance to the apposite guidelines, credibility and legal vigor to the enjoined necessity of satiation by the candidate/aspirant with the mandate of a communication issued by the Directorate of Social Justice & Empowerment Himachal Pradesh of 1st Dec, 2006, whose contents personify that the possession of a diploma, in Nursery Teaching ought to precede the subsequent experience garnered by the petitioner as a Nursery Teacher for hence constituting or begetting the ordained cumulative and conjoint compliance with the mandate of clause 7(1) of the apposite scheme and of the apposite communication of the Directorate of Social Justice & Empowerment of 1st December, 2006, whose contents are extracted hereinafter, for hence, foisting a tenable right on the aspirant/candidate to claim selection and consequent appointment as an "Anganwari Worker'.

"No.14-29/87-ICDS
Directorate of Social Justice & Empowerment
Himachal Pradesh.

To

1. All the District Programme Officers in Himachal Pradesh.
2. All the Child Development Project Officers in Himachal Pradesh (through DPOs).
Dated Shimla-9 1-Dec-2006.

Subject: Guidelines for the appointment of Anganwari Workers/ Helpers clarification thereof.

Sir,

With regard to marks to be given for Nursery Teachers experience, clarifications are being sought by most of the CDPO through respective DPOs. In this regard it is clarified that candidates having DIPLOMA of Nursery teacher and on the basis of that diploma having experience of teaching in any Government/semi Government School may be given experience marks.

Yours faithfully,
Director
Social Justice & Empowerment,
(Himachal Pradesh)"

3. Now, it is not in dispute inter-se the parties at lis that both the aforesaid clause 7(1) of the scheme as well the communication aforesaid, were in existence or were alive at the time when the selection committee selected/appointed the petitioner herein as "Anganwari worker". Consequently, the conjoint mandate of both the provisions of Clause 7(1) of the scheme as well as of the communication of Directorate of Social Justice & Empowerment Himachal Pradesh of 1st Dec, 2006 necessitated cumulative/conjoint compliance. Besides when both were in existence at the time when the selection committee appointed the petitioner herein, then both held the field. As a corollary then, it was enjoined upon the petitioner to preceding hers obtaining experience of more than 2 years from a private crèche as a Nursery Teacher to also hold or possess a diploma in Nursery Teaching. However the petitioner herein has been unable to place either before the ADM, Mandi or before the appellate authority, such materiel depicting the factum of hers preceding hers obtaining experience as a Nursery Teacher for 2 years in a private crèche, divulged in Annexure P-3 begotten compliance qua the mandate of the instructions afore-referred constituted by hers prior to hers having joined a private crèche as a Nursery Teacher and hers having obtained the apposite experience, hers possessing or holding a Diploma as a nursery teacher. In sequel when hers prior to hers having possessed the germane experience from a private crèche as a Nursery Teacher for the ordained period of more than two years hers also possessing a diploma as a Nursery Teacher was a sine qua non for the petitioner warranting the selection committee concerned to award her two marks, especially when the mandate of the apposite rules as well as of the instructions comprised in the communication aforesaid of the Directorate of Social Justice & Empowerment Himachal Pradesh of 1st Dec, 2006 then held force in as much as they governed the selection/appointment of the petitioner herein, besides when the instructions aforesaid are not in supplantation rather are supplemental to the apposite rules ,as such, enjoyed alongwith the apposite rules omnibus legal vigour. Consequently, when she omitted to portray material pronouncing upon her satiating the aforesaid mandate of both the apposite rules and the instructions aforesaid, obviously cannot sequel a finding that there was any

lapse or misdemeanor committed by the selection committee concerned in not awarding two marks to the petitioner. However the learned counsel for the petitioner contends with force that the effect of both the aforesaid rules as well as of communication of the Directorate of Social Justice & Empowerment Himachal Pradesh of 1st Dec, 2006 gets weakened in the face of the government of Himachal Pradesh having issued Annexure P-4 of 5.10.2009, wherein there exists no postulation as exists in the communication of the Directorate of Social Justice & Empowerment Himachal Pradesh of 1st Dec, 2006 of hers preceding to obtain experience as a Nursery Teacher hers possessing or holding a Diploma as a Nursery teacher, as such, he contends that the effect of the apposite rules or of the communication of Directorate of Social Justice & Empowerment Himachal Pradesh of 1st Dec, 2006, preceding Annexure P-4, wanes. However, the said argument is a faulty submission, inasmsuch, as, the factum of Annexure P-4, coming into existence at a time subsequent to the selection/appointment of the petitioner does not permit it to command or hold sway qua the marks to be awarded to the petitioner herein, on the score aforesaid, rather given the un-controverted fact of the petitioner having come to be selected/appointed in the year 2006, as such, when the rules applicable then are the rules/communication extracted hereinabove, or when they held or commanded the field besides when in consonance thereto the petitioner did not hold or possess a diploma as a nursery teacher as a pre-requisite for foisting a legal sinew to hers only holding the experience certificate comprised in Annexure P-3. Consequently, the omission of the selection committee concerned to not award her two marks cannot be held to be holding no formidability.

4. In view of above, I find no merit in the petition, same is accordingly dismissed, as also, the pending applications, if any.

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

Shanti Devi ...Petitioner.
Versus
Man Singh and another ...Respondents.

Civil Revision No. 179 of 2014.
Decided on: 4th May, 2015.

Indian Evidence Act, 1872- Section 65- Mutilated will subject matter of the lis - applicant seeking permission to lead secondary evidence of the will-held that the statute does not provide for leading secondary evidence of mutilated documents -prayer rejected.

For the petitioners: Mr. Karan Singh Kanwar, Advocate.
For the Respondents: Mr. B.C. Negi, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge. (Oral)

The respondents are the propounders of the Will of deceased Gita Ram. Under his testamentary disposition, Gita Ram conveyed therein his rights and interest in the

suit property in favour of the respondents herein. Since the condition of the testamentary disposition of the deceased Gita Ram, executed by the latter in favour of respondents herein stood mutilated, hence, a certified copy thereof was proposed to be adduced in evidence by the respondents herein by instituting an application under Section 65 of the Indian Evidence Act. Even though, the provisions of Section 63 of the Indian Evidence Act define the phrase "secondary evidence", whose provisions stand extracted hereinafter:-

> "63. Secondary evidence.—Secondary evidence means and includes—
>
> (1) Certified copies given under the provisions hereinafter contained;
>
> (2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
>
> (3) Copies made from or compared with the original;
>
> (4) Counterparts of documents as against the parties who did not execute them;
>
> (5) Oral accounts of the contents of a document given by some person who has himself seen it."

Inasmuch as, sub section 3 of Section 63 of the Indian Evidence Act defines "secondary evidence" to mean and include copies made from or compared with the original. Moreover, the hereinafter extracted provisions of Section 79 of the Indian Evidence Act impute a presumption of genuineness to certified copies, which presumption under Section 4 of the Indian Evidence Act has been ordained therein to be conclusive unless the fact sought to be proved by adduction of a certified copy of the original stand disproved. Section 79 of the Indian Evidence Act reads as under:-

> "79. Presumption as to genuineness of certified copies.—The Court shall presume [to be genuine] every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer 2[of the Central Government or of a State Government, or by any officer 3[in the State of Jammu and Kashmir] who is duly authorized thereto by the Central Government]:
>
> Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.
>
> The Court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such paper."

Primarily, the application at hand came to be instituted under the provisions of Section 65 of the Indian Evidence Act. However, clause (c) of Section 65 enunciates the conditions which have to be necessarily complied with or have to stand satisfaction as a prerequisite for the tendering into evidence, any document by way of secondary mode. Section 65 reads as under:-

> "65. Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—
>
> (a) When the original is shown or appears to be in the possession or power— of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process

> of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;
>
> (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
>
> (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
>
> (d) when the original is of such a nature as not to be easily movable;
>
> (e) when the original is a public document within the meaning of section 74;
>
> (f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 1[India] to be given in evidence2; 1[India] to be given in evidence;"
>
> (g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection."

Its perusal underscores the factum of proof of the preeminent condition of loss or destruction of the original as an indispensable/sine qua non for permission being accorded for adduction of a certified photo copy thereof by secondary mode. The original Will executed in favour of the respondents herein by Gita Ram has not been stated to have been lost or destroyed, however, the original Will is uncontrovertedly mutilated. Section 65(c) of the Indian Evidence Act does not permit its mutilated condition to be a contemplated condition, for permission hence being accorded for adduction into evidence a certified photo copy thereof by way of secondary evidence, in replacement or substitution to the adduction of its original. The solitary ground envisaged under Section 65 of the Indian Evidence Act for permission being accorded for adduction or tendering into evidence a certified copy of the original by way of secondary evidence is when the original is lost or destroyed. Irrefutably, when the original is mutilated, its mutilation per se does not constitute its loss or destruction. Even though the certified copy of the mutilated will acquires a hue of genuineness, however, the said statutory hue of genuineness imputed to it is a rebuttable presumption especially when in the face of the mutilated condition of the original Will, the relevant part or portion thereof cannot be obviously tallied with the compatible part of the certified photo copy proposed to be adduced by secondary mode, rather when it can yet be said that the presumption of those portions/parts existing in the certified photo copy and theirs not existing in the original is drawable. Consequently, for non existence of the apt and relevant portions in the original testamentary disposition which however may/do exist in its certified copy, existence only of such apt and relevant portions in the certified copy and their non existence in the mutilated testamentary disposition of deceased Gita Ram, succors an inference that hence the fact of their mere existence in the certified copy stands disproved, as such, the presumption of truth attached to the certified copy stands rebutted. In face thereof, the present petition is allowed and the impugned order of 31.07.2014, comprised in Annexure P-6 is quashed and set aside. All pending applications also stand disposed of. The parties are directed to appear before the learned trial Court on 16th June, 2015.

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

Kapil .....Petitioner
Versus
State of H.P & others .....Respondents.

CWP No. 9044 of 2014
Decided on : 6th May, 2015.

Constitution of India, 1950- Article 226- Petitioner applied for the trade/vacancy of Trainer Electronic Mechanic- respondent No. 4 was selected for the said post- petitioner contended that the parameter/ methodology adopted by the Selection Committee was unfair/arbitrary- held, that Selection Committee is entitled for formulating methodology/ parameter for adjudging the comparative merits of aspirants for assessing their suitability- respondent No. 4 possessed higher experience than the petitioner and the Selection Committee cannot be faulted for awarded higher marks to the respondent No. 4- petition dismissed. (Para-3)

For the Petitioner: Mr. Subhash Sharma, Advocate.
For the Respondents: Mr. Ramesh Thakur, Assistant Advocate General, for respondents No.1 and 2.
Mr. Ramakant Sharma, Advocate, for respondent No.3.
Mr. Yudhbir Singh Thakur, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The petitioner herein, in pursuance to an advertisement comprised in Annexure P-3 for eliciting applications from the aspirants/probable candidates for filling up the vacancies in various trades/categories as enunciated therein, applied for the trade/vacancy of Trainer Electronic Mechanic. The enjoined essential qualifications for any aspirant who concerted to be considered for selection and appointment to the trade/vacancy of Trainer Electronics Mechanic are expostulated in Annexure P-3/T, whose enunciations are extracted hereinafter:-

" Xx x xx

Essential Qualifications

10th pass or equivalent Technical (Engineering) from the recognized University or three years diploma (Engineering) from the recognized Board/institute or in the concerned Trade, National Trade Certificate/NAC.

One year post in the Training Institute or industry.

CTI Degree Holder experience of one year.

Two years Diploma Holder by the competent Officer-Certification.

NAC NTC- Two years."

2. The petitioner herein as divulged by Annexure P-2 appended to the writ petition possessed Bachelors degree of Technology. Therefore he satiates the eligibility criteria for his being considered for selection and appointment as a Trainer Electronic Mechanic.

3. The petitioner alongwith other aspirants/applicants was interviewed by a Board constituted by the respondent concerned. However the petitioner scored lesser marks than respondent No.4. The petitioner canvasses before this Court that the parameters formulated or the methodology adopted by the selection committee concerned/interviewing Board as depicted in the specimen Performa appended to Annexure R-1 prescribing the awarding of marks on the strength of or on the anvil of the experience possessed by the aspirant, has sequelled his candidature being arbitrarily discarded vis-à-vis respondent No.4, who however has been unfairly, besides untenably awarded marks on the strength of his possessing higher experience than the petitioner. In addition he contends that the factum of his possessing a Bachelors degree in Technology per-se ipso facto empowered him to get selection and appointment to the post against which respondent No. 4 came to be appointed. Tritely put the petitioner herein though satiated or accomplished the eligibility criteria for his being considered for selection and appointment to the trade concerned. However, the mere factum of his fulfilling the eligibility criteria in as much as his possessing a Bachelors degree in Technology would not give succor to the contention of his learned counsel that merely on strength thereof he had a vested or an indefeasible a right to obtain selection and appointment to the trade against which respondent No.4 stood appointed. Even though, no portion of the advertisement apposite to the trade against which the petitioner applied for, prescribes the mechanism or the methodology to be formulated or adopted by the Interviewing Board/Selection committee concerned, yet the reticence in the Advertisement notice, whereby applications were elicited for filling up the vacancies in various trades inclusive of the trade apposite to the petitioner,qua the mechanism to be adopted by the interviewing board/selection committee for awarding marks to the aspirants, cannot be construed to be debarring, estopping or precluding the respondents to formulate a mechanism if otherwise fair and just, as well as non-arbitrary and non-discriminatory for adjudging the comparative merits of the contending aspirants or for evaluating and assessing their suitability for selection and appointment to the post/vacancy concerned. The prescription in the proforma appended to Annexure R-1 of higher marks being awardable for higher experience to any aspirant or probable candidate for the trade concerned, carries with it rather is also imbued with the virtue of it revering the experience garnered by the candidate or an aspirant concerned, dehors the mere possession of a degree in the trade concerned. Besides obviously the experience mobilized by an aspirant is justifiably reckonable for adjudging the suitability for selection and appointment of an aspirant/probable candidate to the trade concerned. Moreover, experience in the trade concerned empowers an aspirant who possesses it to while equipping him with the concomitant skill, efficiency and the experience in the trade concerned hence renders him more empowered to discharge the functions apposite to the trade concerned vis-à-vis a raw or inexperienced hand. The prescription in the proforma appended to Annexure R-1 qua the awarding of higher marks to an aspirant possessing higher experience does hence when facilitates rendition of or performance of duties by an aspirant possessing it, in a more skilled and efficient manner, as such, the prescription aforesaid does not smack of either malafides or arbitrariness or discriminatoriness. Moreover, with respondent No.4 possessing higher experience than the petitioner as divulged in the reply of the respondents, as a corollary then his suitability for selection and appointment to the trade concerned was of an accentuated grade vis-à-vis the petitioner. The petitioner cannot fault respondent No.4

for his possessing higher experience and as a corollary his being awarded higher marks than him qua the facet of his possessing higher experience vis-à-vis him especially when for the reasons aforesaid, the mechanism as adopted in the proforma appended to Annexure R-1 for awarding of higher marks for higher experience, advances and promotes skill and efficiency, in the rendition of or in the performance of duties by the aspirants/candidate who possesses such experience vis-à-vis an aspirant/probable candidate who does not possess it. In view of above, there is no merit in the petition, same is accordingly dismissed as also the pending applications, if any.

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

Kishori Lal .....Appellant.
Versus
State of H.P .....Respondents.

Cr. Appeal No. 41 of 2013
Decided on : 6.5.2015

N.D.P.S. Act, 1985- Sections 20 and 21- Accused was found in possession of 20 small paper packets containing dark brown substance along with polythene pouch containing dark brown powdered substance- substance was tested with NDPS Testing Kit and was found to be Heroin- substance was sealed in a packet- the search of the house of the accused was conducted during which two polythene bags containing powdered substance confirmed to be Heroin and black coloured substance found to be charas were recovered- accused was found to be in possession of 28.000 grams + 222.0 grams Heroin and 03.397 grams of charas- prosecution witnesses had deposed consistently and there were no contradictions in their testimonies- it was contended that room from where the contraband was recovered was not in possession of the accused - however, it was admitted that brother of the accused had shifted his residence, thus, room remained in possession of the accused- however, keeping in view the quantity of the charas, sentence modified. (Para-12 to 16)

For the Appellant: Mr. Lakshay Thakur and Mr. Ajay Thakur, Advocates.
For the Respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal is directed against the findings of conviction recorded by the learned Judge Special Court (Additional Sessions Judge), Fast Track Court, Hamirpur against the accused/appellant for his having been proved to be in conscious and exclusive possession of 222.0 grams of Heroin and 03.397 grams of charas. However, the learned trial Court recorded findings of acquittal in favour of the accused/appellant qua his allegedly, consciously and exclusively possessing 50 grams of Heroin.

2. The appellant/accused is aggrieved by the findings of conviction recorded against him qua his allegedly, consciously and exclusively possessing 222.0 grams of Heroin and 03.397 grams of Charas. Nonetheless, the State of Himachal Pradesh has not preferred

any appeal against the findings of acquittal recorded in favour of the accused/appellant qua his consciously, exclusively possessing 50 grams of Heroin.

3. Brief facts of the case are that on 3.5.2012 at 10.15 a.m. a police party headed by SI Rajinder Kumar alongwith HC Kapil Dev, HHC Kamlesh Kumar, HHC Pawan Kumar, Constable Sumit Kumar and Constable Jagat Ram of State Vigilance & Anti Corruption Bureau (SV&ACB), Police Station, Hamirpur, District Hamirpur, H.P., were on patrol duty and when they reached at Shukkar Khad near Village Beri, Tehsil and District Hamirpur, at about 1.30 p.m. they saw the accused sitting alone at a deserted place in the khad. The accused on seeing the police started running. However, he was chased and apprehended by the police. On ascertaining the identity of the accused, SI Rajinder Kumar sent the police officials to secure the presence of independent witnesses, however, none could be associated as the accused was apprehended at a deserted place. The accused was then given an option either to be searched by the police officer or before a gazetted officer or before a Magistrate, the accused exercised his option to be searched by a police officer. The police officials also gave him their personal search, but during their search, nothing incriminating was recovered. On the personal search of the accused, one transparent polythene bag from the left pocket of his shirt containing 20 small paper packets (Puriyan) containing dark brown substance alongwith polythene pouch containing dark brown powder substance was recovered. On inquiry, the accused disclosed the substance aforesaid to be heroin. Thereafter SI Rajinder Kumar called for NDPS Testing Kit and on receipt thereof, the confirmatory test was conducted and the brown coloured powder substance was found to be Heroin, qua which confirmation test memo was prepared in presence of HC Kapil Dev and Constable Sumit Kumar. The recovered contraband was weighed and same was found to be weighing 50 grams. The polythene bag containing contraband was packed, stitched and sealed in a cloth parcel after affixing five seals bearing impression T and was taken into possession vide seizure memo. The sample seal impression H was taken on separate piece of cloth for the purpose of record and seal H after its use was entrusted to HC Kapil Dev. NCB forms in triplicate were filled in by the Investigating Officer. Facsimile seal impression H was also taken on the aforesaid forms. Ruuka was sent through HHC Pawan Kumar to Police Station State Vigilance & Anti Corruption Bureau, Hamirpur. On the basis of which, case FIR No. 3 of 3.5.2012 came to be registered against the accused for his having committed the offence punishable under Section 21 of the Narcotic Drugs and Psychotropic substances Act, 1985. Thereafter the police officials proceeded towards village Khathwin alongwith the accused for conducting the search of his house. On the way the police party associated Raj Kumar and Braham Dass, as independent witnesses. On 3.5.2012 at about 5.15 p.m., the accused was formally arrested by the police for being in possession of 50 grams of heroin, regarding which arrest memo was prepared. Prior to entering the house, the police officials offered themselves to be searched again by the accused in presence of the independent witnesses but nothing incriminating was recovered from them. The police officials thereafter entered inside the house alongwith independent witnesses and during the course of search of a room, they spotted one grain container (Drum) kept in a corner which was opened and searched leading to recovery of one transparent plastic container of Bournvita containing polythene bags. The plastic container was opened, it contained two polythene bags (Pouches) out of which one contained dark brown colour powder and the other contained small paper packets (Puriyan) which were found to be containing powder substance. The police also recovered one small piece of black colour substance in the form of chapatti. The Brown colour substance contained in the polythene bags and paper packets was tested with the help of NDPS testing kit and was confirmed Heroin. In this context, NDPS confirmation test memo was prepared in the presence of independent witnesses. SI

Rajinder Kumar also tested the black colour substance in the form of chapatti by burning and smelling and it was found charas. Separate confirmation test memo was prepared in this regard. The heroin was weighed and found to be 250 grams. Similarly charas was also weighed and was found to be 4 grams. The police thereafter completed seizure formalities. The polythene bags were put in the Bournvita container which was packed in a cloth parcel and stitched and sealed with 7 seals bearing impression J. Similarly, the charas was put in a polythene pouch and was packed, stitched and sealed in a cloth parcel by affixing 5 seals bearing impression J. The weighing scales alongwith weights were packed in a Boru and sealed with one seal bearing impression J and all the above articles i.e. 2 sealed parcels and one sealed boru were taken into possession vide seizure memo in presence of independent witnesses. Sample of seal impression J was taken on a separate piece of cloth and the seal J after its use was entrusted to independent witnesses. SI Rajinder Kumar also filled in NCB forms in triplicate. Facsimile seal impression J was taken on the NCB forms in triplicate. Spot map was prepared and statement of witnesses were recorded. The investigating Officer presented the parcels to Shri Balbir Singh, Dy.S.P for the purpose of resealing. The parcels were resealed by affixing 3 seals bearing impression T and its facsimile was taken on NCB forms in triplicate and requisite entry regarding reasoning was made. Sample of resealing seal impression T was taken on separate piece of cloth. The sealed parcels thereafter were handed over to HC Umeshwar Singh for its deposit in Malkhana. On 5.5.2012 the sealed parcels were sent for forensic examination to State FSL, Junga . On the same day special report of arrest and seizure of the contraband was also sent to SP SV & ACB, Central Range Mandi . On the basis of report of FSL, the contraband recovered from the possession of the accused was opined to be 28.000 grams+222.0 grams Heroin (Diacetylmorphine) and 03.397 grams of charas indicating the presence of cannabinoids including the presence of tetrhydrocannabinol. On conclusion of the investigation, into the offence, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court.

4. The accused/appellant was charged by the learned trial Court for his having allegedly committed offences punishable under Sections 20 & 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985, to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 13 witnesses. On closure of 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. However, he chose to lead evidence in defence.

6. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the appellant/accused for his having committed offence punishable under Sections 20 & 21 of Narcotic Drugs and Psychotropic Substances Act, 1985, qua his allegedly, consciously and exclusively possessing 222.0 grams of Heroin and 03.397 grams of charas. However, the learned trial Court recorded findings of acquittal in favour of the accused/appellant qua his allegedly, consciously and exclusively possessing 50 grams of Heroin

7. The learned counsel appearing for the appellant have concertedly, and, vigorously contended, that, the findings of conviction, 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 the material on record. Hence, they, contend that the findings of conviction, be, reversed by this Court, in, the exercise of its appellate jurisdiction, and, be replaced by findings of acquittal.

8. The learned Deputy Advocate General has with considerable force and vigour, contended that the findings of conviction, recorded by the Court below are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

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

10. Since the prosecution witnesses have deposed in tandem and in harmony qua each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, portraying proof of unbroken and un-severed links, in the entire chain of circumstances, as such, it is argued that hence when the prosecution case stood established, it would be legally unwise for this court to acquit the accused.

11. Besides when the testimonies of the official witnesses, unravel the fact of theirs being bereft of any inter-se or intra-se contradictions, hence, consequently, they too enjoy credibility.

12. Mr. Lakshay Thakur, learned counsel appearing for the appellant/accused has vigorously canvassed, on the anvil of site plan comprised in Ex. PW-14/H and its displaying the factum of contraband having been recovered from room No.1. He proceeds to canvass that in face of the deposition existing in the cross-examination of PW-11 and its divulging rather the factum of the accused being in possession of a room opposite to the kitchen disclosed in Ex. PW-14/H as room No.2, whereas room No. 1, wherefrom items of contraband were allegedly recovered, being in possession of Kartar Chand, brother of the accused, naturally exculpates the accused from the factum of his being in exclusive possession thereof, especially when the place or the premises wherefrom it was allegedly recovered was not in his possession, , besides as a corollary de-establishing the factum of his exclusively and consciously possessing it. Reiteratedly, he contends with force before this Court that given the bequest qua the premises by the deceased father of both accused Kishori Lal and his brother Kartar Chand, highlighted in Ex. PW-14/H, besides with an admission existing in the cross-examination of PW-11 qua room No.2 being the only premises in exclusive possession of the accused, whereas recovery of contraband was effected from room No.1 not in possession of the accused, as such, the contraband allegedly attributed to have been recovered from the conscious and exclusive possession of the accused, whereas its having been recovered from a room not in possession of the accused, cannot be held to be, as such, recovered from the premises exclusively possessed by the accused. He, as a natural corollary, argues that the offence, for which the accused/appellant was charged and tried, staggers and falls apart.

13. The above argument appears to acquire a lot of sheen at its façade. Nonetheless, the deposition alone existing in the cross-examination of PW-11, underscoring the factum of contraband having been recovered from room No.1, displayed by PW-11 to be not in the exclusive possession of the accused, does not per-se constrain an inference of its alone depicting the factum of Kartar Chand, brother of the accused/appellant who as conveyed by PW-11 to be in possession of room No. 1, did not as such continue to retain its possession, rather an advertence ought also to be made to the deposition existing in the cross-examination of DW-1 wherein there exists an admission of Kartar Chand having constructed a separate house under Indira Awas Yojna Scheme at Village Khatwin and his

residing therein with his family members. The said admission existing in the cross-examination of a defence witness, is not discardable, it acquires immense probative tenacity as well as is imbued with veracity, especially when it is articulated by a defence witness. Besides, it overcomes the effect of the deposition existing in the cross-examination of PW-11, displaying therein that in pursuance to a testamentary disposition qua the premises displayed in PW-11/H, by the deceased father of accused and his brother Kartar Chand, the accused had come to occupy and possess only room No.2, whereas the room No.1, wherefrom recovery of contraband was effected, was in possession of Kartar Chand. Moreover it fosters a natural inference of Kartar Chand, brother of the accused/appellant having abandoned it, since his shifting to village Khatwin, sequelling an inference that possession of room No.1 was retained by the accused. Reinforcingly when no apt evidence exists in the deposition of the prosecution witnesses, conveying that at the time when they entered room No.1, they had broken open the locks. Consequently, the absence of the above evidence, with aplomb fillips a deduction that the premises nomenclatured as room No. 1 in the site plan comprised in Ex. PW-11/H, were open as well as accessible to the accused alone, and they as such, facilitated an easy ingress therein of the prosecution witnesses. In aftermath, it has to be, with invincibility, concluded that the recovery of contraband was effected from the premises alone in the conscious and exclusive possession of the accused.

14. The learned counsel for the accused/appellant has further adverted to the fact of road certificate comprised Ex. PW-1/B reciting description of 3 parcels as under:-

> *(1)one parcel marked P-1 sealed with 5 seals of H and re- sealed with 3 seal of T (2)* ***one parcel marked P-2 sealed with 7 seals and re-sealed with 3 seals of T****(3) one parcel sealed with 5 seals of (J) and resealed with seal of T*
>
> *(4) Sample of seal J & T = 2 adad*
>
> *(5) Sample of reseal= 1 adad*
>
> *(6) Photocopy of FIR= 2 pages*
>
> *(7) Seizure memo = 2pages*
>
> *(8) NCB form= 6 pages*

15. Now when the property elucidated therein was submitted by PW-2, for rendition of an opinion, qua its contents, before the State Forensic Science Laboratory, the latter had recorded in Ex. PW-13/C, the factum of parcel No.2 though described in Ex. PW-1/B to be sealed with 7 seals and re-sealed with seal 'T' without enunciation of the English alphabet borne on the 7 seals, to be though also embossed with 7 seals, yet theirs also bearing/carrying the alphabet letter 'H', as such, the non-enunciation of the English alphabet borne on the 7 seals of parcel-2, in the road certificate, though subsequently elucidated qua the 7 seals in the FSL report, comprised in Ex. PW-13/C, is argued to be constituting a discrepancy, as such, rendering Ex. PW-13/C to be not connected to the case property. However, the aforesaid discrepancy would not render the report of FSL comprised in Ex. PW-13/C in-consequential nor would it render to be not relatable to the case property or unreadable, especially when the omission of enunciation of the English alphabet borne on 7 seals qua P-2 in as much as it being not embossed with seal 'H' may be attributable to be arising from some typographical mistake. Moreso, when at the time of receipt of parcel-2 detailed in Ex. PW-1/B in the State FSL, Junga, the parcels were found intact. Moreover, when there is no suggestion put to PW-2 that when he carried the parcels to FSL, they had

come to be tampered with nor also when no apposite suggestion has been put to the mohariar, incharge Malkhana, concerned, that when they were retrieved by him from the malkhana and were handed over to PW-2, P-2 did not bear seal impression 'H'. Accordingly, the argument is rejected and the appeal is dismissed. The appreciation of the evidence as done by the learned trial Court does not suffer from any infirmity, or, perversity. Consequently reinforcingly, it can be formidably concluded, that, the findings of the learned trial Court, are, well merited, and, do not merit interference.

16. In view of the above discussion, the appeal is dismissed, and, the judgment of the learned trial Court is maintained and affirmed. However, keeping in view the facts and circumstances of the case and also bearing in mind that the weight of 'charas' falls within the category of 'small quantity' hence, qua it, the sentence of imprisonment imposed upon the accused by the learned trial Court is maintained and affirmed. Nonetheless, since the weight of 'Heroin' falls within the category of 'lesser than commercial quantity but greater than small quantity', as such, in the interest of justice, the accused is sentenced, qua the offences constituted by his proven to be consciously and exclusively possessing 'Heroin', to imprisonment for the term already undergone by him. He be released from the custody forthwith, if not required in any other case. The sentence of fine imposed upon the accused by the learned trial Court qua his having been found guilty for his consciously and exclusively possessing 'Heroin' as well as 'Charas' is modified and the appellant is directed to, within one week from the date of receipt of copy of this judgment, deposit before the learned trial Court a sum of Rs.5000/- as fine qua each of the items of the contraband and in default of payment of fine to undergo rigorous imprisonment for one month.

17. The registry is directed to prepare the release warrant of the accused and send it to the Superintendent of the jail concerned, in conformity with this judgment forthwith. Records be sent down.

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

Cr. Appeal No. 480 of 2007 along with
Cr. Appeal No.111 of 2008.
Reserved on: 24th April, 2015.
Decided on : 7th May, 2015

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1. Criminal Appeal No. 480 of 2007

Rupi Devi and another .....Appellants.

Versus

State of H.P. .....Respondent.

2. Criminal Appeal No. 111 of 2008.

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

Versus

Rupi Devi and another .....Respondents.

Code of Criminal Procedure, 1973- Section 378- Suicide note lightly thrown overboard by the trial Court, though it attributed a clinching incriminatory role to the accused- note proves that the deceased was instigated and fomented by the accused to commit suicide- trial court fell in error while appreciating the evidence particularly by ignoring the suicide note-appeal by State allowed. (Para-17 & 18)

Indian Evidence Act, 1872- Section 45- Suicide note of the deceased-duly proved by the handwriting expert after comparison with the handwriting in the note with the admitted handwriting of the deceased-Note carrying the allegations of continuous harassment of the deceased by the accused persons-mental condition of the deceased is fully portrayed by the note- deceased subjected to mental cruelty till the date of her suicide established- proximity between the cruelty and death established-guilt of accused persons established on both counts. (Para-17)

Indian Penal Code, 1860- Section 498-A and 306- Deceased committed suicide by consuming poisonous substance and thereafter by hanging- trial court held the accused guilty of offence punishable u/s 498 A and acquitted them of the commission of offence punishable u/s 306 I.P.C-appeals by State and accused both-strained relations between the accused persons and the deceased since long—demand of Rs. 80000/- by accused N to pay the installments of the truck and meeting with the brother of the deceased established for want of cross-examination on this aspect- evidence qua beatings and harassment pertains to the period much prior to the suicide-No proximity between the death and alleged cruelty established. (Para-15)

For the Appellant(s): Mr. Anup Chitkara, Advocate for appellants in Cr. Appeal No.480 of 2007 and Mr. M.A. Khan, Addl. Advocate General for the appellant in Cr. Appeal No. 111 of 2008.

For the Respondent(s): Mr. M.A. Khan, Addl. A.G. for the respondent in Cr. Appeal No. 480 of 2007 and Mr. Anup Chitkara, Advocate, for the respondents in Cr. Appeal No.111 of 2008.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Since, both these appeals arise from a common judgment rendered on 30.11.2007 in Session Trial No. 16-S/7 of 2007 by the learned Additional Sessions Judge, Solan, hence, they are proposed to be decided by a common judgment.

2. Criminal Appeal No. 111 of 2008 has been instituted by the State of H.P. It stands aggrieved by the judgment of the learned trial Court, whereby the learned trial Court recorded findings of acquittal against the accused/respondents qua charge framed against them under Section 306 of the IPC. On the other hand, Criminal appeal No.480 of 2007 has been instituted before this Court at the instance of the accused, who stand aggrieved by the findings of conviction recorded against them for theirs having committed an offence punishable under Section 498-A read with Section 34, IPC.

3. Briefly stated the facts of the case are that the deceased Vidya Devi committed suicide on 29.8.2006 and her body was found hanging in cowshed of her matrimonial home. The deceased is also alleged to have consumed some insecticides, two bottles of which were found lying near the door of the cow shed. As per the prosecution, the

deceased had resorted to the extreme step because of the cruelty meted out to her by her mother-in-law Rupi Devi and her husband, Narbir Singh. She is alleged to have been harassed and maltreated right from the inception of her marriage till the time she finally bid adieu to her worldly journey. She had been married to Narbir Singh in the year 1990.

4. Immediately after the marriage, the accused is alleged to have started harassing the deceased. In 1992 after the deceased gave birth to a daughter things deteriorated further and the deceased is alleged to have returned back to her parental house. In 1993, accused Narbir Singh is stated to have tried reconciliations through a Panchayat, but all in vain. The deceased continued to remain in her parental house and also took up a job in a Anganwari Centre in village Seri. In the year 1994, the accused Narbir Singh had got issued a notice through his lawyer in order to persuade her to join his company. The said efforts of Narbir Singh also did not yield result. Finally in the year 2004, the accused Narbir Singh again made an endeavour to persuade the deceased to join his company by approaching "CASA-VISA" a family conselling Centre, set up under the aegis of Central Social Welfare Board, Government of India, New Delhi to settle the family dispute. Finally a compromise was entered inter se the husband and wife and the deceased joined her husband accused Narbir Singh at her matrimonial home. From 2004 onwards the deceased was living in her matrimonial house.

5. On 29.8.2006 Smt. Rita Thakur, PW-4 the Pradhan of Gram Panchayat Basal received a telephonic information that the deceased Vidya Devi had committed suicide and by the time she reached the spot the police had also reached the spot. The police thereafter had taken the photographs of the spot and taken two bottles lying there into possession in her presence. The copy recovered from the room of the deceased was also taken into possession vide memo Ex.PW4/B, which also bears her signatures. The matter was reported to the police by PW-1 Shri Geeta Ram, the brother of the deceased vide Ex.PW1/A. The grounds of harassment and maltreatment projected by the prosecution are that the deceased used to be given beatings by the deceased in trivial and petty issues and the accused used to coax the deceased to demand her share in the property and demand dowry from her parents. The police investigated the case and collected the evidence.

6. On conclusion of the investigation, into the offences, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and presented in the Court.

7. The accused were charged for theirs having committed offences punishable under Section 306, 498-A read with Section 34, IPC to which they pleaded not guilty and claimed trial.

8. In order to prove its case, the prosecution examined 17 witnesses. On closure of prosecution evidence, the statements of accused, under Section 313 of the Code of Criminal Procedure, were recorded, in, which they pleaded innocence and claimed false implication. In defence, the accused had examined one witness.

9. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused for theirs having committed offence punishable under Section 498-A read with Section 34, IPC. However, it acquitted the accused for the charged framed against them under Section 306 read with Section 34, IPC.

10. The accused are aggrieved by the findings of conviction recorded by the learned trial Court for theirs having allegedly committed offence punishable under Section

498-A read with Section 34, IPC. The learned counsel appearing for the 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 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.

11. On the other hand, the learned Additional Advocate General appearing for the State has with considerable force and vigour, contended that the findings of acquittal, recorded by the learned trial Court below in favour of the accused for theirs having allegedly committed offence punishable under Section 306 read with Section 34, IPC, are not based on a mature and balanced appreciation of evidence on record, hence, necessitate interference by this Court.

12. 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.

13. The accused as disclosed and underlined by postmortem report Ex.PW7/A proved by Dr. Sandeep Jain (PW-7) wherein he has recorded the hereinafter extracted observations, concluded there upon and also on the strength of the report of Chemical Analyst, comprised in Ex.PW17/B, who on receiving the viscera of the deceased had found it to be containing organo phosphorous, a poisonous substance, that cumulatively hence the demise of the deceased occurred on account of asphyxia sequelled by hanging as also by consumption of organo phosphorous poison. The demise of deceased Vidya Devi is per se not homicidal rather is suicidal. Observations recorded by PW-7 in post mortem report, Ex.PW7/A, read as under:-

> "Ligature marks.
>
> Externally there was a ligature of blue dupatta around the neck with knot over the right angle of mandible ligature mark was present below the ligature which was dark brownish in colour starting from right mastoid region and running anteriorly below the chin and towards left side visible up to mid line of neck posteriorly. The width of mark at right mastoid region was 2x5 cm and increasing upto 5 cm anteriorly and left lateral side. Length of mark was 25 cm. There was abrasion over the right mastoid area.
>
> Dissection of ligature mark:- Skin and sub cautaneous tissue from the ligature mark was dissected and showed the dry white sub cautaneous tissue. The mussel and vessels, underline the mark, were congested underlying bones were not fractured."

14. The accused Narbir Singh and the deceased were married in the year 1990. A daughter, Kumari Samriti was born out of the wedlock inter se accused Narbir Singh and deceased Vidya Devi. The demise of the deceased by hers committing suicide occurred in the year 2006. However, relations inter se deceased Vidya Devi and accused Narbir Singh developed estrangement after one year of the marriage. Sh. Rajnish Kumar (PW-10) deposes that immediately a year after the marriage of deceased Vidya Devi with accused Narbir Singh, the former lodged a report with the police station regarding her maltreatment which sequelled a compromise inter se the deceased and her accused husband. However, the compromise did not have the desired effect as deceased Vidya Devi returned to her parental home. In the year 1993 as deposed by PW-6, accused Narbir Singh convened a Panchayat

whereupon deceased Vidya Devi was persuaded to rejoin the company of accused Narbir Singh. Consequently, deceased Vidya Devi rejoined the matrimonial company of accused Narbir Singh. However, her stay at her matrimonial home did not last long, inasmuch as in the very same year i.e. in the year 1993, the deceased on having come to be harassed and humiliated by the accused, was coerced to as deposed by PW-1 and PW-2 join Aganwari Centre at Village Seri. Accused Narvir Singh strived and concerted to, in the year 2004, through the aegis of the Samgra Vikas Samiti, Kandaghat, whose Director deposed as PW-8 (L. Tomar) by instituting an application before him, to solicit his help in retrieving deceased Vidya Devi to her matrimonial home. With the efforts of PW-8, who summoned deceased Vidya Devi to the Centre, a compromise was effectuated inter se deceased Vidya Devi and accused Narbir Singh comprised in Ex.PW8/C, in pursuance whereof, deceased Vidya Devi rejoined her matrimonial home. However, even after hers having rejoined the matrimonial home, the deceased Vidya Devi continued to render duties at Anganwari Centre, Seri.

15. PW-1 Shri Geeta Ram, though has deposed that since the year 1990 the accused started harassing and humiliating the deceased, besides he deposed that in the year 1992 when deceased Vidya Devi gave birth to a female child, the accused unleashed harassment upon her. Moreover, he deposes that accused Narbir Singh financed a truck and when he was unable to defray the loan installments, he perpetrated harassment and physical cruelty upon deceased Vidya Devi which constrained the deceased to ask/request him to give her a sum of Rs.80,000/- which request was acceded to by PW-1 by his handing over an amount of Rs.80,000/- to accused Narbir Singh. The aforesaid statement in his deposition comprised in his examination-in-chief of his having paid to the accused on the request of his deceased sister a sum of Rs.80,000/- to enable accused Narbir Singh to defray the loan installments of his truck has remained un-shattered in his cross-examination. Therefore, the said fact hence with formidability can be concluded to have been established by the prosecution. Moreover, the further harassment meted out by accused Narbir Singh to his deceased sister is comprised in the fact of accused Narbir Singh, insisting upon his deceased sister to demand her share in the parental property. In addition, the deceased has been deposed by PW-1 to have also been harassed for working in the Aganwari Centre, Seri. Besides, the deposition of the mother of the deceased, (PW-6 Smt. Shayama Thakur) discloses the fact that after a month of the marriage of the deceased with accused Narbir Singh, the former started quarreling with the deceased and was taken to belabour the deceased over trifles. Moreover, she deposes that when the pregnancy of the deceased was three months old, the accused took to belabour her. However, the aforesaid deposition of both PW-1 and PW-6 though portray factum of harassment, humiliation as also belabouring constituting maltreatment having been perpetrated upon the deceased by the accused in the year 1992. Nonetheless, obviously given the improximity and remoteness inter se the harassment, maltreatment and physical cruelty arising from the facts as deposed by PW-1 and PW-6, with the fateful incident which occurred in the year 2006, consequently for lack of proximity in time inter se the purported incidents of mental and physical trauma which were heaped upon the deceased, the effect of such harassment, humiliation and belabourings as well as concomitant mental trauma which beset the accused cannot hence be concluded to have continued to have till the fateful occurrence their effect upon the psyche of the deceased so as to, as a natural corollary facilitate a conclusion that the aforesaid incriminatory acts attributed to the accused by PW-1, PW-2 and PW-6 constituted the actuatory and fomentary factors for the deceased to commit suicide, rather, the inference is that given the efflux of time since the perpetration of the purported acts of physical and mental trauma upon the deceased at the instance of the accused and the fateful occurrence, the effect thereof stood abated or waned.

16. Moreover, even the compromise, Ex.PW8/C effectuated inter se accused Narbir Singh and deceased Vidya Devi by PW-8, the Director of Samgra Vikas Samiti, Kandaghat which led to the deceased to rejoin her matrimonial home bespeaks the fact of hence the deceased having forgiven the accused for their previous misdemeanour. Compromise, Ex.PW8/C was recorded in the year 2004, in quick spontaneity thereto the deceased rejoined her matrimonial home. The fateful occurrence took place in the year 2006. Therefore, the apt and germane evidence which has to be disinterred and discerned is whether in the intervening period since the year 2004 when the deceased was constrained by Ex.PW8/C to rejoin her matrimonial home and the fateful occurrence which took place in the year 2006, the accused subjected the deceased to physical as well as mental trauma which hence instigated the deceased to commit suicide so as to then conclude whether the offences for which the accused came to be charged and tried stand substantially and cogently proved. The oral evidence qua the fact of the accused Narbir Singh having perpetrated physical cruelty upon the deceased is comprised in the testimony of PW-5, the daughter born out of the wedlock of accused Narbir Singh with deceased Vidya Devi. However, the factum in the deposition of PW-5 comprised in her examination-in-chief, of the accused having perpetrated physical cruelty upon the deceased cannot invincibly be concluded to have occurred in the period intervening 2004 to 2006, especially when in her examination-in-chief, she is reticent qua the factum of the accused belabouring the deceased within the aforesaid period, besides when she in her cross-examination admits the suggestion that during the year 2006, the deceased was never belaboured by the accused in her presences, upsurges an inference that even the deposition of PW-5 is unable to communicate that in the relevant and germane period, inasmuch as period in the intervening 2004 to 2006, the accused belaboured as well as harassed the deceased and hence perpetrated mental trauma as well as physical cruelty upon her. In sequel, there is abysmal want of oral evidence bespeaking the fact that both the accused in the germane period intervening 2004-2006 subjected the deceased to physical as well mental cruelty which led the deceased to commit suicide.

17. However, the learned trial Court has untenably thrown overboard the import and significance of the suicide note comprised in Ex.PW9/A to Ex.PW9/F proved by PW-9 Sh. Visheshwar Sharma, Scientific Officer, State Forensic Laboratory, Junga to be scribed by the deceased, on his comparing it with her admitted writings A-1 to A-72, comprised in Ex.PW9/G-1 to Ex.PW9/G-72. An incisive and circumspect scanning of the suicide note of the deceased comprised in Ex.PW9/A to Ex.PW9/F loudly bespeaks the factum that the deceased was under immense pain and suffering in her matrimonial home. A reading of the opening of the suicide note wherein she has asked her daughter PW-5 to sell her "Mangal Sutra" and her ring for rearing expenses to complete her matriculation does portray the fact that it was scribed at a time contemporaneous to the fateful occurrence, inasmuch as, in the fateful year, when her daughter PW-5 was prosecuting studies in the 9th class. Therefore, the aforesaid fact narrated in the opening of the suicide note Ex.PW9/A to Ex.PW9/F constrains this Court not to omit to discard it especially when it stands proved to be in the handwriting of the deceased, besides it being for the reasons aforesaid contemporaneous to the fateful occurrence. In sequel, the enunciations therein attributing a incriminatory role to the accused acquire a hue of credibility. The deceased therein having authorized her daughter to consign her to flames rather permitting the accused to do so is a strong pointer to the factum of the intensity of estrangement in her relations with the accused. Besides, she therein having attributed to accused Rupi Devi a role of the latter having used derogatory terms against her cannot also be outweighed, as given the severity of the relentlessly used invectives against her by accused Rupi Devi her psyche was shattered.

Even though, the enunciations attributing an incriminatory role to the accused though do not bespeak physical cruelty having been heaped or perpetrated upon her by the accused, besides there is also no ascription with specificity with contemporanity in timing vis-à-vis the fateful occurrence and the incriminatory roles attributed to both the accused by the deceased, which instigated and fomented her to commit suicide. Nonetheless, the bemoaning element in the suicide note, Ex.PW9/A to Ex.PW9/C is communicative of the relentless and perennial mental trauma having come to be perpetrated by both the accused upon her especially in the fact as occurring therein of hers beseeching her brother PW-1 to not solemnize the marriage of PW-5 (her daughter) in a home where the in-laws carry an avarice in their mind constraining them to demand her share in her parental home. The aforesaid fact is also existing in the testimony of PW-1, obviously then since the time when PW-1 communicates in his testimony of the accused harassing her to demand her share in the parental property till the preparation of suicide note by the deceased, the said harassment at the instance of the accused continued unabatedly. The continuity of harassment on the score aforesaid and it having been kept alive by the accused till the fateful occurrence underscores the factum of the psyche of the deceased having been bruised, besides she being beset with a severe mental trauma. The mental bruises, trauma and wounds seeped into the psyche of the deceased. The immensity of the pain inflicted upon her psyche by the acts of the accused comprised in their relentlessly perpetrated discreet vocal harassment and humiliation did enjoin a mental trauma upon the deceased, as such, even if oral evidence is amiss qua the accused in quick immediacy or proximity to the fateful occurrence perpetrated belabouring upon her so as to constitute such acts falling within the ambit of physical cruelty. Nonetheless, the feelings of anguish arising from the strong under current of her bruised and traumatized psyche by use of derogatory epithets by accused Rupi Devi and the systematic discreet escalating and repeated demands by accused Narbir Singh upon her for hers claiming share in the parental home nourished an animosity in her mind towards both the accused, besides it so deeply seeped and pervaded her mental psyche so as to bring turmoils and turbulences therein. The turnmoils and turbulence which beset her mental psyche constituted mental cruelty, if not, physical cruelty, as such, the mental cruelty with which her mental psyche was traumatized by the acts of the accused, actuated and fomented the deceased to commit suicide.

18. In aftermath, though the learned trial Court aptly concluded that there was evidence of cruelty perpetrated by the accused upon the deceased and the accused were liable to be convicted under Section 498-A read with Section 34, IPC yet it committed a palpable legal misdemeanour while its hence concluding that the accused are not liable to be convicted under Section 306 read with Section 34, IPC. There is close nexus or interconnectivity inter se the perpetration of cruelty upon the deceased by the accused, whether physical or mental, with the commission of suicide at her instance, inasmuch as especially in the face of the suicide note whose import and significance has been discussed herein-above, having been lightly thrown overboard by the learned trial Court, though its attributing a clinching incriminatory role to the accused, rather renders a conclusion that the deceased hence was instigated and fomented by the accused to commit suicide. Consequently, the learned trial Court has committed an error while acquitting both the accused for theirs allegedly having committed offence under Section 306 IPC. However, the learned trial Court has not committed any legal misdemeanour while convicting the accused for theirs having committed offence punishable under Section 498-A read with Section 34, IPC.

19. For the foregoing reasons, Cr. Appeal No.480 of 2007 preferred by the accused is dismissed and Cr. Appeal No.111 of 2008 preferred by the State is allowed and the judgment of the learned trial Court so far as it acquits the accused for theirs having committed the offence punishable under Section 306 read with Section 34 of the IPC is quashed and set aside. Accordingly, the accused are also convicted for theirs having committed offences punishable under Sections 306 read with Section 34 of the IPC besides theirs having committed offences punishable under Section 498-A read with Section 34, IPC.

20. Given the facts and circumstances of the case, both the accused/convicts are sentenced to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs.5000/- each for theirs having committed offences punishable under Section 498-A read with Section 34, IPC. They are further sentenced to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs.5,000/- each for theirs having committed offences punishable under Section 306 read with Section 34, IPC. In default of payment of fine amount, they shall further undergo simple imprisonment for a further period of one month on both counts. All the sentences shall run concurrently. The period of detention, if any, undergone by the accused during the investigation, inquiry or trial of the case, be set off against the term of imprisonment imposed on them.

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

Suresh Kumar .....Petitioner.

VERSUS

Himachal Pradesh Board of School Education .....Respondent.

CWP No.7897 of 2014.
Decided on: 07.05.2015

Constitution of India, 1950- Article 226- Petitioner appeared in the examination and made a representation regarding the correctness of answer key to some questions - respondent had constituted an Expert Body to look into the representation- held, that opinion of the Expert is entitled to a great weight especially when the petitioner had not filed the affidavit of any Expert to corroborate their opinion- petition dismissed. (Para-2 to 4)

For the Petitioner: Ms. Suman Thakur, Advocate.
For the respondent: Mr.Lovneesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The petitioner is B.A., B.Ed. On 29.9.2013, the respondent conducted written examinations of TET (TGT Arts) comprising of 150 marks. The petitioner took the said examination. On 4.10.2013, the respondent board released a press note that the answer key of the TET examination stand down loaded on the website of the board. The respondent elicited objections to the answer key within a fortnight. The petitioner represented qua the correctness of some of the answer keys to some questions. On

23.10.2013, the respondent proceeded to publish another press note qua the declaration of the official result of the TET examination. The petitioner rearing a grievance qua the correctness of some of the key answers to some questions occurring at serial No.13 and 57 of the examination book, proceeded to file a writ petition bearing CWP No.9118 of 2013. On 5.8.2014, this Court permitted the petitioner to withdraw the petition aforesaid with liberty to make a representation to the respondent-board within one week. Within the aforesaid period, the petitioner made a representation to the respondent-board, however, the said representation of the petitioner against the existence of purportedly incorrect answer keys having been displayed in the choices of some questions stood rejected. Consequently, the petitioner nursing a grievance against the rejection of his representation by the respondent-board has filed the instant petition.

2. The contentious questions whereto purportedly inaccurate/incorrect answer keys occur in their respective choices, are comprised in questions No. 13 and 57 of booklet, Series-B. The said questions are extracted hereinafter:-

"13. Vocabulary of an infant at the end of the 2nd year becomes:-

(A) 100 words (b) 60 words

(C) 150 words (d) 10 words.

57. Excretory product of earthworm is

(A) Urea (B) Uric acid

(C) Ammonia (D) Amonio acid"

3. The respondent while rejecting the representation of the petitioner qua the purportedly inaccurate or incorrect keys occurring in their respective multiple choices had depended upon the opinion of the subject matter experts concerned. In so far as the accurate or correct answer to question No.13 in booklet, Series B, the subject matter experts rendered the opinion that the correct option is "B". The standing and repute of the members of the committee set up by the respondent-board, for rendering an expert opinion qua the exactness or accuracy of the keys existing in the multiple choices qua question No.13 stands uncontroverted by adduction of cogent and reliable material on record. In aftermath, the standing and repute of the members, who constituted the committee set up by the respondent board for rendering an opinion qua the correctness or otherwise of the keys to question No.13, hence, being unimpeachable, the opinion as meted by them comprised in Annexure R-1/2, wherein, the experts on a profound and erudite study of the relevant material rendered the opinion that the correct option qua question No.13 is "B", has to be concomitantly, when stands unrebutted by adduction of any material at the instance of the petitioner comprised in the opinion of any expert or experts empowered with higher learning and erudition in the subject concerned, vis-à-vis the members, who constituted the committee, given utmost reverence. More so, when the opinion is founded upon a proficient and in depth analysis of the literature apposite to the subject concerned besides is also accompanied by proficiency in reasons in support thereto. In sequel, the challenge of the writ petitioner to the rejection of his representation by the respondent is without any force and vigour.

4. Even, in so far as, the rendition of an opinion qua question No.57 in book let, Series B corresponding to question No.50 in booklet of series–A, the subject matter experts concerned have opined that the accurate option is "A". The said opinion is comprised in Annexure R-1/3. Alike and akin to the reasoning meted by this Court for imbuing validity and strength to the opinion rendered by the subject matter experts qua question No.13 in booklet, series B, the opinion of the experts qua question No.57 in book let, Series B

corresponding to question No.50 in booklet, series –A, too stands to be afforded legal vigour by this Court.

5. The upshot of the above discussion is that this Court is not constrained to interfere with the opinion rendered by the subject matter experts upon which dependence was made by the respondent board for rejecting the representation of the petitioner. Consequently, there is no merit in this petition and it is dismissed accordingly. All pending applications also stand disposed of. No costs.

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

EIH Associated Hotels Ltd. ...Petitioner.
VERSUS
Mrs. Preet Joshi ...Respondent.

Civil Revision No.31 of 2015.
Decided on: 13th May, 2015.

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- Landlord filed a Rent petition against the tenant on the ground that premises are required bona fide for carrying out reconstruction, which cannot be carried out without the premises being vacated-the tenant failed to plead the right of re-entry in the reply-during the trial an amendment was sought to incorporate this plea in the reply- held, that right of re-entry is a statutory plea, which can be taken at any stage of the proceedings- mere delay in taking the plea is not sufficient to dismiss the application. (Para 4)

For the petitioner: Mr. R.L. Sood, Senior Advocate with Mr. Arjun Lal, Advocate.
For the Respondent: Mr. C.P. Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge. (Oral)

The landlord/petitioner herein has instituted a petition under Section 14 of the Himachal Pradesh Urban Rent Control Act, 1987 before the learned Rent Controller (8), Shimla seeking the eviction of the tenant/respondent herein from the demised premises. The grounds on which eviction of the tenant/respondent herein is sought, are comprised in paragraph No.18(a) of the petition. The said grounds are extracted hereinafter:-

"18(a) Grounds on which the eviction of the tenant is sought:-

(i) that after the commencement of the Act, Tenant/Respondent has constructed a residential building of about eight rooms known as Spar Lodge at Rock House, Chaura Maidan, Shimla-171004, which accommodation has been converted by her into a guest house that too after she has acquired the vacant and peaceful possession of the same, which accommodation is more than sufficient for her residential needs. Moreover, Block No.8 in which

quarter No.8 is situated has been declared unsafe and unfit for human habitation by the Municipal Corporation, Shimla. Notices have been issued to the petitioner as well as to the respondent by the M.C. Shimla, in this regard.

(ii) That the premises in question are bonafide required for carrying out repairs and for purposes of building/rebuilding and or making substantial additions and alternations thereto, since the condition of the building is not good, which cannot be carried out without the premises being vacated.

(iii) That the petitioner is obliged to provide residential accommodation to their employees, who are working in Shimla. The premises in question are bonafide required by the petitioner for use by its employees after affecting the necessary repairs/additions and alternations and or after rebuilding and reconstructing the same."

2. On the contentious pleadings of the parties, the learned Rent Controller struck issues for trial inter se the parties at contest. The issues as framed by the learned Rent Controller, too stand extracted hereinafter:-

"1. Whether the respondent has acquired a reasonably sufficient accommodation for her requirements as alleged? OPP

2. Whether the suit premises has become unsafe and unfit for human habitation as alleged? OPP.

3. Whether the suit premises is bonafide required for purpose of repairs, building/re-building and for making substantial additions and alterations as alleged?OPP

4. Whether the suit premises is bonafide required for providing residential accommodation to the employees of the petitioner, as alleged?OPP

5. Whether the Major Rajesh Chauhan has no locus standi to file the petition, as alleged?OPD

6. Whether the petition is not maintainable as alleged?OPD

7. Whether the petitioner is not the landlord of the suit premises as alleged?OPD

8. Whether the petitioner has no cause of action as alleged?OPD

9. Relief."

3. The apt and germane issues pertinent for putting at rest the controversy qua the permissibility of incorporation of the proposed amendment in the reply of the tenant/respondent herein, are issues No.2 and 3. However, before proceeding to dwell upon the permissibility of incorporation of the proposed amendment in the reply of the tenant/respondent herein, it is deemed apt to extract hereinafter, the amendment proposed to be incorporated in the reply of the tenant/respondent herein:-

"(i) That in para 18(a)(ii) of reply in the last after the words occurring" The premises are in good habitable condition." The following words may be allowed to be added. "without conceding the bonafide of the petitioner for rebuilding and reconstruction of the premises in question it is submitted that if the petitioner/non-applicant rebuilds or reconstructs the premises in question after

getting the possession from the applicant and after obtaining appropriate sanction from the competent authority the respondent/applicant is desirous and has a right of re-entry to the premises in rebuilt/reconstructed building, after reconstruction equivalent in area to the original premises for which the respondent is tenant. It is submitted that the petitioner does bonafide require the building including the premises in question for rebuilding and reconstruction, however, if this Ld. Rent Controller comes to the conclusion that the premises ini question are unsafe and unfit for human habitation and that the same are bonafide required by the petitioner/landlord for rebuilding and reconstruction then in that event the tenant/respondent may be given right of reentry to the premises in the rebuilt building equivalent in the area to the original premises qua which the present applicant is a tenant."

(ii) Similarly since the petition has been filed by the petitioner on the ground of bonafide required for carrying out repairs and for purposes of building/re-building and or making substantial additions and alterations thereto, since the condition of the building is not good which cannot be carried out without the premises being vacated and also that the premises in question are bonafide required by the petitioner for use of the same by its employees after effecting the necessary repairs and alterations and or after rebuilding and reconstruction the same and which ground of eviction is taken in Para 18(a)(iii) of the petition. The petition on the said grounds of eviction is liable to be dismissed since both the grounds of eviction are self destructive in nature and accordingly the respondent be allowed to take this objection by way of adding preliminary objection No.6 to the reply filed by her as under:-

"6. That the petition as filed is not competent on the grounds of evictions as taken in paras 18(a)(ii) and 18(a)(iii) of the petition as both the grounds are self destructive in nature. Apparently, the petition has been filed by the petitioner on the grounds of bonafide requirement for carrying out repairs and for purposes building/rebuilding and or making substantial additions and alterations there to, since the condition of the building is not good and which work cannot be carried out without the premises being vacated. And also that the premises in question are bonafide required by the petitioner for use of the same by its employees after effecting the necessary repairs and alterations and or after rebuilding and reconstruction the same and which ground of eviction is taken in paras 18(a)(ii) & 18(a)(iii) of the petition. The petition on the said grounds of eviction is liable to be dismissed since both the grounds are self destructive in nature."

4. The issues aforesaid have been struck by the learned Rent Controller on the contentious pleadings apposite to them in the petition for eviction of the tenant/respondent herein from the demised premises. The factum whether the tenant/respondent herein is evictable from the demised premises on the scores of the demised premises having become unsafe and unfit for human habitation as also the factum whether the demised premises is

bonafide required for the purpose of repairs, building/rebuilding and for making substantial additions and alterations, all fall within the ambit and contemplation of Clause (c) of Section 14(3) of the H.P. Urban Rent Control Act. However, the proviso to Clause (c) of Section 14(3) of the H.P. Urban Rent Control Act invests or foists in the tenant a right of reentry in the rebuilt building/premises on new terms of tenancy on the basis of a mutual agreement inter se the landlord or tenant. The tenant/respondent herein in the reply had omitted to initially plead the statutory right of reentry in the rebuilt premises as invested in her by the proviso to Clause (c) of Section 14(3). However, when the case had arrived at the stage of adduction of evidence, she moved an application under Order 6, Rule 17 of the CPC before the learned Rent Controller for incorporation in her reply to the eviction petition instituted by the landlord/petitioner herein the amendment as recited therein. Even though, she has hence belatedly taken to claim the right of reentry in the rebuilt premises in terms of the proviso to Clause (c) of Section 14(3) of the H.P. Urban Rent Control Act, nonetheless, the said right as invested by the aforesaid Clause in favour of the tenant is a statutory right and its assertion at any stage at the instance of the tenant/respondent herein cannot be either barred nor interdicted merely on the ground that it was belatedly raised, inasmuch as its then acquiring the tinge of the tenant/respondent herein while being indiligent in asserting it, she stands ousted from asserting the inherent statutory right invested in her. In other words, the statutory right invested in the tenant/respondent herein by the proviso to Clause (c) of Section 14(3) of the H.P. Urban Rent Control Act is neither oustable nor the tenant/respondent herein is either debarred or precluded from raising it at any stage by seeking permission of the learned Rent Controller to incorporate it in her pleadings merely on the ground that it is raised belatedly or that respondent/petitioner herein is either indiligent or indolent in canvassing it. Moreover, even if, the said plea was belatedly raised, yet when it stands anchored upon a statutory right, besides when for facilitating consummation of the said right, the spirit of the mandate enshrined in the proviso to Clause (c) of Section 14(3) of the H.P. Urban Rent Control Act, is required to be complied with, as such, only when the necessary compliance with the mandate of the proviso to Clause (c) of Section 14(3), is the indispensable sine qua non, for fructification of the said right in favour of the tenant/respondent herein, hence, the permission for incorporation of an amendment apposite to it in the reply of the tenant/respondent herein was warranted for creating a pedestal, for enabling the fructification of the said right inherent in the tenant/respondent herein in consonance with the spirit of law mandated in the proviso to Clause (c) of Section 14(3) of the H.P. Urban Rent Control Act. In aftermath, the said right cannot be thrown overboard nor prematurely ousted merely on the score that the proposed incorporation of the said statutory right in the reply of the tenant/respondent herein by way of an amendment to it, hence, having been belatedly raised or it being not raisesable given the indolence or indiligence of the tenant/respondent herein.

5. In view of the aforesaid discussion, the impugned order, comprised in Annexure PH, is affirmed and the petition stands disposed of in the above terms. Even if, in case, findings on issues No.2 and 3 anvilled upon clause (c) of Section 14(3) of the H.P. Urban Rent Control Act are answered in the affirmative or in favour of landlord/petitioner herein, for reiteration, such findings may entitle the tenant/respondent herein to claim a right of reentry in the rebuilt premises only in consonance with the mandate of the proviso to Clause (c) of Section 14(3) of the H.P. Urban Rent Control Act. The parties are directed to appear before the learned Rent Controller on 15th June, 2015. All pending applications also stand disposed of.

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

Kashmiri Lal .....Plaintiff.
Versus
Kishori Lal .....Defendant.

OMP Nos. 137 of 2015 & 310 of 2014,
518 of 2014 & OMP No. 368 of 2014 in
Civil Suit No. 81 of 2011.
Date of decision : 13.05.2015.

Code of Civil Procedure, 1908- Order 21- A decree was passed by the Court on the basis of the compromise under which defendant was to pay sum of Rs. 75 lacs in three installments and in case of failure, suit shall stand decreed and defendant would execute sale deed in favour of the plaintiff- defendant had failed to pay the amount to the plaintiff- defendant pleaded that he had financial difficulties in making payment- held, that defendant cannot be permitted to evade or omit to pay the cash amount or to claim extension of time on the ground of financial difficulties - further, receiver cannot be appointed as the application for the appointment of the receiver was filed only to seek time which is otherwise impermissible.

For the plaintiff: Mr. K.D.Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate.
For the Defendant: Mr. Ashwani Sharma, Advocate.
Mr. Umesh Kanwar, Advocate, in OMP No. 137 of 2015, for applicant.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.*(oral)*

OMP No. 137 of 2015.

Application for modification of consent decree being OMP No. 137 of 2015 is dismissed as withdrawn. However, liberty reserved to the applicant to institute an appropriate suit before the Civil Court for setting aside the decree, if any, obtained by the plaintiff herein on the purported ground of fraud and collusion.

OMP No. 310 of 2014, 518 of 2014 & OMP No. 368 of 2014.

Consent decree comprised in Annexure A-3 is harbored upon a compromise deed comprised in Ext.C-1 thereby both Civil Suit No. 81 of 2011 titled as Kashmiri Lal Vs. Kishori Lal, which is the extant suit, and another Civil Suit No. 2 of 2012 titled as Kashmiri Lal Vs. Kishori Lal, pending in the Court of Learned District Judge, Hamirpur, H.P. besides another Civil Suit No. 100 of 2011 titled Kishori Lal vs. Kashmiri Lal pending in the Court of learned Civil Judge (Sr. Division), Hamirpur, were settled. Insofar as Civil Suit No. 81 of 2011, which is the extant civil suit, qua which the consent decree was rendered by this Court comprised in Annexure A-3, the defendant herein/Judgement debtor was obliged to defray to the plaintiff a sum of Rs.75 lacs in three equal instalments of Rs. 25 lacs each payable on or before 31st July, 2014, 31st July, 2015 and 31st July, 2016. It was also mandated therein that in case the defendant/judgement-debtor commits default in the payment of any instalment, the suit shall stand decreed and the defendant was enjoined to

execute a sale deed qua the suit property with the plaintiff/decree-holder. Uncontrovertedly, the defendant/judgement-debtor has omitted to defray to the plaintiff herein or has committed default in tendering to the plaintiff/decree-holder cash instalments within the time schedule prescribed in Ext.C-1. Consequently, the plaintiff/decree-holder foists a claim upon the judgement-debtor to execute, as ordained in Ext.C-1, a sale deed qua the suit property with him. The defendant/judgement-debtor has, however, contrived a novel legal mechanism to evade the decree, even when he has committed default in tendering to the plaintiff the cash instalments within the schedule prescribed therein. The decree is a consent decree, hence, is conclusive and binding upon both the plaintiff and the judgement debtor. The consequence of the defendant/judgement-debtor omitting to defray to the plaintiff/decree holder cash instalments within the time schedule prescribed therein is of his being obliged to execute a sale deed qua the suit property with plaintiff/decree-holder. However, the judgement debtor has made arduous efforts before this Court portraying financial disempowerment which disables him to defray to the plaintiff decree holder the cash instalments as prescribed in Ext.C-1. The obligation cast upon the judgement debtor necessitated immediate, prompt and strict compliance within the parameters of Ext.C-1. No latitude or leeway is permissible to the judgement-debtor to evade or omit to defray to the plaintiff the cash amount or even claim for extension of time for their defrayment to the plaintiff/decree-holder even when he stands financially disabled to tender them to the plaintiff/decree holder. The applications, which have been instituted, on the part of the defendant-judgement debtor for extension of time for defraying to the plaintiff/decree holder the cash instalments, are hence of no avail and of no aid to the judgement debtor/defendant for facilitating the relief as prayed for in the applications, especially when the recitals/obligations in Annexure A-1 which is a consent decree, are couched in mandatory term, as such, prohibit this Court to enlarge or extend time, as prayed for by the counsel for the judgement debtor, for now tendering within the extended time or enlarged time the cash instalments, peremptorily entailed to be defrayed by the judgement debtor to the decree holder within the time prescribed. Necessarily then the applications now instituted at the instance of judgement debtor defendant for extension of time or enlargement of time for complying with the mandate of consent decree are to be rejected. Beside another application instituted by the defendant under the provisions of Order 40 Rule 1 CPC canvassing therein the plea that this Court appoint a receiver to sell the suit property for marshalling funds to defray to the plaintiff the cash instalments prescribed in the consent decree is too a well devised contrivance to only seek enlargement and extension of time for marshalling and mobilizing funds for defraying to the plaintiff the cash instalments whereas the cash instalments prescribed in the consent decree were to be defrayed to the plaintiff within the time schedule prescribed therein, without any departure therefrom or any non adherence to the time schedule existing therein. Non adherence, if any, by the judgement debtor to the time schedule prescribed therein for defrayment by him to the decree holder the amounts as referred to hereinabove has reared, as enshrined in paragraph 4 of Ext.C-1, the consequence of the defendant/ judgement debtor being obliged to execute qua the suit property a sale deed with the plaintiff/decree holder. Besides, the application is also frivolous and necessitates its rejection as no power vests in this Court to appoint a receiver to sell the property of the judgement debtor, i.e. the suit property which empowerment is the sole repository of the owner of the property. Therefore, the application is rejected. Sale deed qua the suit property with the plaintiff/decree-holder shall be executed by the defendant judgement debtor within one month.

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

Mangla Devi .....Petitioner
Versus
State of H.P. and Ors. ....Respondents

CWP No.7498 of 2014
Reserved on: 02.05.2015.
Decided on: May 15, 2015.

Constitution of India, 1950- Article 226- Respondent No. 6 was selected as a Part Time Water Carrier – wide publicity was not given prior to the selection of the respondent No. 6- petitioner could not apply to the said post in absence of the publicity- Writ Petition allowed and the appointment of respondent No. 6 quashed and set aside. (Para-3 to 6)

For the petitioner: Mr. Ajay Sharma, Advocate.
For the respondents: Mr.Anup Rattan, Additional Advocate General, for respondents No. 1 to 4.
Mr. Surender Saklani, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge:

The writ petitioner has challenged the appointment of respondent No.6 as a Part Time Water Carrier in the Government Primary School, Barota, Tehsil Indora, District Kangra, H.P. The respondents have proceeded to vindicate their act of appointing respondent No.6 to the post of Part Time Water Carrier, in the Government Primary School, Barota, Tehsil Indora, District Kangra, on the anvil of a rule existing in the apposite rules governing the appointment of Part Time Water Carriers in the school concerned nomenclatured as Rule 12, which stands extracted hereinafter:-

> *"Rule 12 Compassionate Grounds Appointment.*
>
> *The Government will have the power to appoint any candidate as part time water carrier on compassionate grounds without following the slection process if the candidates are widow, woman deserted by her husband or otherwise destitute, handicapped persons and if the candidate falls below the poverty line as defined by the Rural Development Department from time to time."*

2. The rule extracted hereinabove empowers the Government to, while departing from the selection process appoint an aspirant/probable candidate as a Water Carrier in the school concerned in case it is found that the aspirant is a widow, woman deserted by her husband or otherwise destitute, handicapped person and if the candidate falls below the poverty line as defined by the Rural Development Department from time to time. The respondent No.6 is satiating the requirement of the apposite category whereunder he came to be selected and appointed. Moreover, the appointment of respondent No. 6 is concerted to be foisted with validity on the score of hence, when the respondent No.6 in consonance thereto having applied for the post concerned earlier than the petitioner herein, besides his having come to be selected, appointed and his having joined earlier, to the

application of the petitioner having come to be subjected to scrutiny, concomitantly an assiduous effort was made on the part of the respondents that the petitioner hence having not contemporaneously alongwith respondent No.6 applied for the post of Part Time Water Carrier in the Government Primary School, Barota, Tehsil Indora, District Kangra, H.P. at which stage the respondent No.6 was found fit and suitable within the parameters of any of the enshrined categories apposite to him, therefore, the challenge, if any, made by the petitioner to the selection and appointment of respondent No.6, is, shaky as well as legally unsound, especially, when hence there was no occasion to assess or consider the interse comparative merits of the petitioner and respondent No.6.

3. The legal sinew and tenability of Rule 12 empowering the State Government to depart from, besides make short shrift of the selection process has to be tested on the touchstone of the constitutional tenets of equality of opportunity in public employment, enshrined in Articles 14 and 16 of the Constitution of India. In case the mandate encapsulated in Rule 12 empowering the Government to benumb, derogate or depart from the selection process is found constitutionally unsound, then the mere factum of the selection committee concerned having been constrained by the petitioner not applying contemporaneously alongwith respondent No. 6 for the post concerned to assess their inter se comparative merits, leaving them with no option than to appoint the petitioner, would also not acquire any strength or vigour. The departure from the selection process enunciated in Rule 12 extracted above is perse, antithetical besides militative of the constitutional tenets of equality of opportunity in public employment. Even when the Government proceeds to appoint any person, aspirant or probable candidate to the post of part time water carrier in the school concerned, no short shrift besides departure from the constitutional tenets equality of opportunity in public employment, is, reverable. Especially when irreverence to the constitutional tenets of equality of opportunity in public employment is not only impermissible, rather is interdicted. The rule obviously with its omitting to mandate therein that when the Government proceeds to marshal the provisions of Rule 12, extracted hereinabove, empowering it to make short shrift of the selection process, while making selection and appointment of any aspirant to the post of part time water carrier in pursuance to an application initiated by him, though suitable, besides fulfilling the enshrined parameters, that no widely circulated advertisement preceding the exercise of the power at the instance of the Government is at all necessary, infringes the constitutional tenets of equality of opportunity in public employment. Only in the event of the widest publicity, emanating from the vacancies having been advertised, preceding the initiation of selection and appointment of any aspirant to the post of water carrier, for eliciting applications from all who satiate and fulfill the enshrined parameters for rendering their candidature to be considered suitable for employment, would the selection and consequent appointment of respondent No.6 stand validated. For reiteration, wide publicity qua the occurrence of vacancy is an indispensable sine qua non for sanctifying the selection and appointment of an aspirant to the post of part time water carrier in the school concerned. However, no material exists on record to portray that preceding the initiation of selection and consequent appointment of respondent No.6 to the post of part time water carrier the appropriate authority had advertised the vacancy. Omission in the above regard has to be deprecated and frowned upon by this Court.

4. With the widest publicity to the occurrence of a vacancy having been initiated by the Government prior, to its initiating the mechanism for selecting and appointing a suitable candidate to the post, would have facilitated the participation of the largest number of candidates, besides would have also facilitated the selection committee

concerned to dispassionately assess the comparative merits and suitability of all the aspirants/probable candidates to the post concerned. However, with a postulation in the aforesaid rule qua wide publicity through advertisement qua the occurrence of a vacancy being dispensable when an appointment under Rule 12 is proposed to be made, has necessarily constrained or precluded the applicant/petitioner to apply for it, alongwith respondent No.6 besides has deterred a dispassionate evaluation of her suitability as well as her fitness for selection and appointment to the post concerned alongwith the respondent No.6. It appears that the power vested in Rule 12 and with the enjoined mandate therein of a constitutionally unsound tenet of departure from selection process which rather has an inbuilt or embodied indispensable precursor of a wide publicity through advertisement qua the occurrence of vacancy, has been resorted to by the Government to arbitrarily and in a partisan manner select and appoint the respondent No.6 to the post of part time water carrier in prejudice and in derogation to the compatible rights of other aspirants. Consequently, the respondents No. 1 to 5 having untenably departed from the selection process by omitting to give wide publicity qua occurrence of vacancy of part time water carrier through advertisement for eliciting the participation of the petitioner alongwith other suitable candidates, rather theirs on receiving only the singular application of respondent No.6 having assessed his candidature unilaterally and declared him fit and suitable within the apposite and enshrined parameters of the apt category germane to him for his selection and appointment, have infringed the mandate of Articles 14 and 16 of the Constitution of India enshrining the solemn tenet of equality of opportunity in public employment.

5. In aftermath, Rule 12 cannot escape the application to it of the constitutional tenets of equality of opportunity to the public employment, rather it while prescribing departure from the selection process embodying the widest publicity being given to the occurrence of vacancies through advertisement for eliciting participation of the optimum number of suitable candidates/aspirants enabling the selection committee to adjudge their comparative merits is to be construed to be antithetical to it, as such necessitates its while it being in infraction thereof, besides being ultra vires, to the aforesaid tenets, its being struck down.

6. As a natural corollary, when Rule 12 is militative of the constitutional tenets of equality of opportunity in public employment, the mere fact of respondent No.6 having applied earlier than the petitioner for the post of part time water carrier and hence the respondent No.6 having also come to be selected/appointed and his having joined earlier than the petitioner's application having come to be evaluated and scrutinized for assessing her suitability for selection/appointment, does not give leverage to the respondent No. 6 to render his selection to be sacrosanct especially when the constitutional mandate enshrined in Articles 14 and 16 of the Constitution of India contemplating equality of opportunity in public employment stood infracted, comprised in the factum of the petitioner not, having been awakened by the issuance of an advertisement qua the occurrence of a vacancy of a part time water carrier when the respondent No.6 applied for it. Consequently, when no wide publicity was given to the occurrence of a vacancy of part time water carrier, hampered her to apply for it, in subterfuge of the constitutional tenets of equality of opportunity in public employment, whose infraction has begotten the striking down of Rule 12 by this Court inasmuch as it makes a departure from the selection process hence gives omnibus latitude to the Government to, besides empowers it to arbitrarily choose a singular aspirant hence renders such a selection and appointment to be liable for interference and its being quashed and set-aside.

7. For reiteration, in the event of an advertisement having been issued by the respondents/State on the occurrence of a vacancy of a part time water carrier, she may have applied alongwith the respondent No.6 for the post aforesaid empowering the department concerned alongwith respondent No.6 to assess hers as well as the comparative merit of the respondent No.6 besides of other applicants whose applications may have been solicited through wide publicity. In sequel, the omissions aforesaid having throttled through a deprecable mechanism besides suffocated inasmuch, as ousted the petitioner from participating alongwith respondent No.6 besides other candidates in a fair, non-arbitrary and non discriminatory process of selection through assessment of their interse comparative merits, hence they cannot come to be countenanced. Consequently, the writ petition is allowed and the selection and appointment of respondent No. 6 is quashed and set-aside. Moreover, Rule 12, as extracted hereinabove, is struck down.

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

Parimal Bhurathoki .....Appellant.
Versus
State of H.P .....Respondent.

Cr. Appeal No. 386 of 2012
Reserved on: 7.5.2015
Decided on : 15.5.2015

Indian Penal Code, 1860- Section 304 (Part II) - Accused residing in an orchard with his wife and children - he gave beatings to his wife under the influence of liquor- situation was diffused by his landlord and others - complainant visited the house of the accused and noticed that the door was locked from outside and deceased wife of the accused was lying on the floor-a woman present in the house disclosed that the accused had given beatings to the deceased - natural eye witness (PW6) who was in the house not speaking about the situation in which the deceased was thrown on the floor in injured condition- the accused heavily drunk was made to sleep in another room-Pw6, the witness residing in the same house, had not seen him coming out of the room or beating the deceased- possibility that the accused taken to deep slumber in the room not ruled out -allegation against accused not established - order set aside and appeal allowed. (Para-11)

For the Appellant: Mr. Nitin Khanna, Advocate.
For the Respondent: Mr.M.A Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the impugned judgment rendered on 21.7.2012, by the learned Additional Sessions Judge, FTC Kullu, in Sessions trial No. 46 of 2011, whereby, the learned trial Court convicted and sentenced the accused/appellant to undergo rigorous imprisonment for a period of ten years and to pay a fine in a sum of Rs.5,000/- (five thousand) and in default to further undergo Rigorous imprisonment for a

period of one year for commission of offence under Section 304 (part II) of Indian Penal Code.

2. On 22.7.2011, a telephonic information was received in the police station, Manali that a lady had been brought to the Mission Hospital Manali in an injured condition, who had succumbed to her injuries. On the basis of above, Rapat No. 10(A) was registered. As per rapat No. 11 (A) ASI Rajeev has recorded the statement of complainant Sarita Thakur under Section 154 Cr.P.C. Complainant Sarita Devi reported in her statement that they had kept accused as servant in their apple orchard and the accused used to reside in the orchard with his wife alongwith his children. On 21.7.2011, at about 8 p.m. another lady came to her and disclosed that accused under the influence of liquor is beating his wife. On this, she went to the room of the accused and saw that he was beating his wife with fist blows. She pacified the accused and rescued deceased Parvati from his clutches. On 22.7.2011 at about 5.30 a.m., she and her sister heard knocking of door from the house of the accused. She left to the room of the accused and found that the room was bolted from outside. On the opening of room, she found that the deceased was lying on the floor and another woman Sita Devi was standing in the room holding a child in her lap and disclosed to her that accused had again beaten the deceased as a result of which she had fallen on floor. Thereafter, the injured was taken to the Mission Hospital Manali, where she was declared brought dead by the Medical Officer. On the basis of statement of complainant, rukka was sent to the police station on the basis of which FIR No. 321 of 2011 was got registered. During the course of investigation, Investigating Officer filled inquest papers. For Post Mortem Examination on the dead body of the deceased an application was moved before the M.O, CHC, Manali. The team of Doctors in their opinion voiced the fact of demise of deceased being attributable to head injury. Photographs of the place of occurrence and dead body were clicked. During the course of investigation, IO has prepared spot map. On conclusion of the investigation, into the offence, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court.

3. The accused/appellant was charged for his having committed offences punishable under Section 302 of Indian Penal Code, by the learned trial Court to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 13 witnesses. On closure of 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. He did not choose to lead evidence in defence.

5. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the appellant/accused for his having committed offence punishable under Section 304 Part II of Indian Penal Code.

6. The learned counsel appearing for the appellant has concertedly, and, vigorously contended, that, the findings of conviction, 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 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.

7. The learned Additional Advocate General 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.

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 Parvati, wife of accused is alleged to have been murdered by the latter. A team of Doctors comprising Dr. Shashi Yapa, Dr. Rakesh Negi and Dr. Dorje Angrup carried out a post mortem examination on the body of the deceased. PW-1 Dr. Shashi Yapa has proved Post Mortem Report Ex. PW-1/D. He in his deposition voiced the fact of the demise of the deceased being attributable to head injury. He has proceeded to depose that the head injury occurring on the body of the deceased is sequelable by fist blows, slaps and in case the victim is banged against the wall or the floor. However, in his cross-examination, he has deposed that the injuries, which sequelled her demise, can also occur in case the victim falls from extreme height. Even, PW-2 Dr. Rakesh Negi, in his deposition has stated that, on his and Dr. Shashi Wapa and Dr. Dorje Angroop having on 17.10.2011 received an application comprised in Ex. PW-2/A from the police, recorded an opinion comprised in Ex. PW-1/D qua the cause of demise of the deceased. They in their opinion comprised in Ex.PW-1/D, have unequivocally voiced therein the factum of the demise of the deceased, being ensuable from the head injury, occurring on the body of the deceased whose occurrence is attributable to the fall of the victim on hard surface from a sufficient height and velocity. A conjoint reading of the depositions of PW-1 and PW-2, who both have proved Ex. PW-2/B, unravels the factum of the head injuries noticed by each of them on the body of the deceased, to be the cause of the demise of the deceased. A further communication exists in their respective depositions, that the head injury which sequelled the demise of the deceased could be engendered by fall on hard surface from a sufficient height and velocity and by perpetration of fist blows and assault on the person of the victim.

10. The accused was an employee of PW-4. He alongwith his deceased wife lived together in the accommodation provided to them by PW-4. The accommodation provided to the accused and the deceased, was adjoining the house of PW-4. Both PW-4 and PW-6 conjointly conveyed in their respective depositions of an occurrence having taken place on 21.7.2011. PW-4 Kumari Sarita Thakur, who had provided accommodation to the accused has conveyed that she received intimation from PW-6 Sita Devi, qua the factum of a squabble/quarrel having erupted inter-se the accused and the deceased at about 6-7 p.m. on 21.7.2011 in the presence of the latter. The time of the occurrence/incident which took place on 21.7.2011 is disclosed by PW-6 to be at about 6-7 p.m. when the accused came home in an intoxicated state and when his deceased wife in her presence questioned his condition, besides protested to the factum of his being in an inebriated state sequelled their inter-se squabbling which culminated in the accused having delivered fist blows on the person of the deceased. However, with the intervention of PW-6 and two other women who had come to the spot, the accused was pacified and was taken to a separate room for sleeping. The deceased was observed by PW-6, in the morning at about 5.30 a.m. of the succeeding day to be lying on the floor with injuries on her eyes. Also PW-4, the employer of the accused, on hearing the sound of knocking of the locked door of the room occupied by the deceased, proceeded to the site of occurrence, where she as previously noticed by PW-6, PW-4 also noticed that the deceased was lying on the floor. However, PW-6 the guest of the accused and the deceased who also occupied the premises alongwith the accused and

deceased, was sitting in the room. The accused is deposed by PW-4 to be occupying another room. What attracts the immediate attention of this Court is that PW-4 has turned hostile qua the fact of PW-6, the guest of the accused occupying the latter's premises alongwith the deceased family, having disclosed to PW-4 the fact of the accused having belabored the head of the deceased which belabouring begot her demise. Consequently with PW-4 who lodged the report qua the occurrence having resiled from her previous statement recorded in writing, throws overboard the genesis of the prosecution case. Also the effect of PW-6, the occupant of the premises alongwith the accused and the deceased having turned hostile and having omitted to in her examination-in-chief depose unequivocally the fact that she ocularily saw the accused belaboring the deceased or his having perpetrated an assault on the head of the deceased resulting in hers gaining injuries thereon and which ultimately sequelled her demise, is that it jettisons the prosecution case.

11. PW-4 and PW-6 both are unanimous in their depositions qua the factum of an occurrence having taken place on the day preceding the fateful occurrence, inasmuch, as, in the evening of 21.7.2011, when the accused came home in an intoxicated state which condition of the accused sequelled a squabbling inter-se him and his wife. However, PW-6, who was an occupant of the premises alongwith the accused and the deceased, and, obviously was a natural witness to the occurrence besides which took place at about 6-7 p.m., on the preceding day to the fateful occurrence when she rather at about 5.30 a.m. found her aunt lying on the floor with injures on her eyes, has omitted to disclose the preeminent fact of any assault having been witnessed to have been perpetrated on the person of deceased by her by the accused and which begot her demise. In sequel, omission of a communication, either in the depositions of PW-4 and PW-6 of the accused having in immediate proximity to the occurrence belaboured the deceased, does not beget the sequel or an inference that, given the improximity of the initial occurrence which occurred in the evening of the preceding day and body of the deceased having been found in a room with injures in the morning of the succeeding day and which injuries sequelled her demise, more especially re-enforcingly when PW-6 occupying the premises alongwith the deceased hence was a natural witness qua perpetration of belabourings by the accused on the body of the deceased, has omitted to depose hers having seen the accused belabour the deceased which begot the condition in which the deceased was found in morning of the succeeding day, that the accused belaboured the head of the deceased hence begot her demise or that any incriminatory act in the death of his wife is attributable to the accused. PW-6 was the best witness to the occurrence, if any, which occurred subsequent to 21.7.2011. In addition, when on culmination of the occurrence which took place on 21.7.2011 at about 6-7 p.m. , both the accused and the deceased with the intervention of PW-6 as well as of two other women, proceeded to sleep in separate rooms. Moreover, when the accused then uncontrovertedly was in an inebriated condition, besides on a peaceful and amicable termination of the squabble which erupted inter-se the accused and the deceased, having been begotten, by the intervention of PW-6 and two other women, they proceeded to sleep in their respective rooms, obviously then, when the accused was in an inebriated condition and when his blood sample was not collected for analyzing the quantum of alcohol consumed by him for fathoming that given the minimal intake of alcohol, he could awaken from his slumber, as such, it has to be concluded that given his inebriated condition in which he was made to sleep in a room other than the one occupied by the deceased, he remained un-awakened from his sleep. Moreover, in case he awoke from his sleep the said fact would have been noticed by PW-6 occupying the premises alongwith the deceased and accused whereas there is omission of communication thereof in the deposition of PW-6**.** Concomitantly it has to be held that the accused was taken to deep slumber in his room

other than the room occupied by the deceased. Consequently, it cannot be held that he proceeded to the room occupied by the deceased to perpetrate an assault upon her or to inflict injuries on her head which ultimately begot her demise. The depositions of PW-1 and PW-2, who both have proved Ex. PW-1/D underscoring the factum of the demise of the deceased sequelable by head injuries emanating from fall on hard surface from a sufficient height and velocity, does hence, when PW-6 the occupant of the premises alongwith the deceased and the accused has omitted to render a vivid ocular version qua the factum of the accused having belaboured the deceased or perpetrated an assault on her head he while being awakened from his slumber his having proceeded to the other room occupied by his deceased wife, that the deceased sustained the injuries by fall on a hard surface. The learned trial Court has imputed unnecessary leverage to and ascribed unwarranted significance to the factum of an occurrence inter-se the accused and the deceased having proved to have occurred at about 6-7 p.m. on the preceding day. However, the occurrence, if any, which took place on the preceding day was not construable to be tantamounting to an inference as un-tenably drawn by the learned trial Court that the accused eliminated the deceased, especially when the body of the deceased was noticed at about 5.30 a.m on the succeeding day by PW-6 in another room than the accused, besides hers being reticent qua any assault having come to be perpetrated by the accused on the person of the deceased or any head injury during the course of assault having come to be delivered on the body of the deceased. In the learned trial Court having remained oblivious to, in the absence of an apt and an apposite communication in the testimony of PW-6, the occupant of the premises alongwith the accused and the deceased, who rather was the best witness to the occurrence, if any, which occurred on the day succeeding to the occurrence of 21.7.2011 at about 6-7 p.m. qua any assault having perpetrated on the head of the deceased by the accused, rather its having imputed significance to the occurrence on the preceding day, whereas it has no nexus or link with the occurrence of the succeeding day, has committed gross mis-appreciation of evidence on record. It has also omitted to appreciate the prosecution evidence in a wholesome manner. Preponderantly, the conduct of the accused, too has been lightly thrown overboard especially when as pronounced by the deposition of PWs aforesaid he remained present in the room alongwith the deceased, besides he carried the body of the deceased for affording treatment to her to the nearest hospital. When the aforesaid conduct of the accused subsequent to the fateful incident is consistent with his innocence and inconsistent with his guilt, it was necessarily ordained to be ascribed leverage by the learned trial Court. It having omitted to ascribe leverage to the aforesaid conduct of the accused which demonstrated his innocence, has committed gross mis-carriage of justice. Consequently reinforcingly, it can be formidably concluded, that, the findings of learned trial Court merit interference.

12. In view of above discussion, the appeal is allowed and the impugned judgment of 21.7.2012, rendered by the learned Additional Sessions Judge, FTC Kullu, is set aside. The appellant/accused is acquitted of the offences charged. The fine amount, if any, 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.

13. The registry is directed to prepare the release warrant of the accused and send it to the Superintendent of the jail concerned, in conformity with this judgment forthwith. Records be sent down forthwith.

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

Jai Ram .....Petitioner.
Versus
State of H.P & others. ....Respondents.

CWP No. 3899 of 2014
Decided on : 27.5.2015

Constitution of India, 1950- Article 227- Petitioner prayed that the writ in the nature of certiorari be issued for quashing the award passed under Section 11 of the Land Acquisition Act and to determine the compensation as per the provision of Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- it was pleaded that the land of the petitioner was acquired in the year 2007- held, that land was acquired in the year 2007- award was announced in the year 2014- section 24(2) of the Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act provides that an award rendered 5 years or more prior to the commencement of the Act will be annulled and the proceedings for compensation be re-initiated- held that in the present case period of five years had not expired and proceedings cannot be initiated under the new Act- petition dismissed. (Para-2 and 3)

For the Petitioner: Mr. J.L Bhardwaj, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Deputy Advocate General for respondents-State.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The petitioner through this writ petition claims the hereinafter extracted relief:-

> *"That a writ in the nature of certiorari may kindly be issued for quashing the award passed under Section 11 of the Land Acquisition Act, 1894 dated 31.3.2014 by the respondent No.3 and further writ in the nature of mandamus may kindly be issued directing the respondents to determine the compensation as per the provisions of the Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 and pay the compensation to the petitioner excluding the amount paid through cheque dated 29.5.2014 amounting to Rs. 2,21,460/- which amount has been received by the petitioner under protest and justice be done."*

2. The facts apposite to determine the controversy besetting the parties at contest are, that the land of the petitioner had been subjected to acquisition in the year 2007 and on consummation of the acquisition proceedings, an award comprised in Annexure P-7 has been rendered by the Land Acquisition Collector. In pursuance to acquisition of land of the petitioner , the respondents between 2007 to 2010 constructed a road named "Dabrot to Mehandi Road". Given the factum of construction of the road aforesaid, at the instance of the respondents over and upon the land of the petitioner, obviously then the necessary and apt sequel is that the petitioner has lost possession

thereof rather the respondents have come to possess the contentious land. The aforesaid fact of the petitioner having lost possession of his land rather the respondents having come to acquire physical possession of the land is of utmost significance as it impinges upon the attraction or upon the applicability of sub section (2) of Section 24 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as the "New Act", whereunder the petitioner has canvassed that compensation qua his land be re-determined. A reading of hereinafter extracted apt sub section (2) of Section 24 of the "New Act" loudly communicates, that the proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), hereinafter referred to as the "Old Act" would come to lapse, and, even the award rendered on consummation of acquisition proceedings initiated under the aforesaid Act would have no significance, rather it would be enjoined upon the authorities concerned to re-initiate proceedings qua acquisition of land under the "New Act", only in the event of an award having been rendered five years or more prior to the commencement of the "New Act". However, in the instant case given the uncontroverted fact of the award qua the land of the petitioner under the "Old Act", having been rendered in the year 2014, hence not 5 years or more prior to the commencement of the "New Act", so as to enjoin or warrant a finding that the award under the "Old Act" necessitates annulment or rescission. In sequel, it has to be concluded that when the prime condition envisaged initially in sub section (2) of Section 24 of the "New Act" for unsettling the award rendered under the "Old Act" has remained un-satiated or unfulfilled, besides it, when entwined with the enjoined necessity of contemporaneous substantiation of the conjoint condition with it in as much as, of possession of the land of the petitioner having not been taken by the respondents, too stands ousted by the uncontroverted fact of the respondents having constructed a road "Dabrot to Mehandi " between 2007 to 2010. In sequel, the argument of the learned counsel for the petitioner qua the purported fulfillment of initial condition spelt out under the New Act stands enfeebled.

> "*(2) Notwithstanding anything contained in sub section (1) in case of land acquisition proceedings initiated under the land Acquisition Act, 1894 (1 of 1894) where an award under the said Section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of the Act."*

3. Moreover, the alternative condition constituted, in sub section (2) of Section 24 of the "New Act" for rendering an award announced under the Land Acquisition Act, 1894, to face rescission or annulment, thereupon facilitating initiation of proceedings under the New Act and re-determination of compensation thereunder, is of substantiation by the petitioner of compensation having been not paid or disbursed to him qua his land having been previously subjected to acquisition. The factum of initiation of proceedings under the "Old Act" stands uncontested. On consummation of the proceedings for acquisition launched under the "Old Act" an award was announced and compensation was determined in favour of the petitioner, The compensation determined in favour of the petitioner qua his land subjected to acquisition under the "Old Act" has been portrayed by paragraph 5 of the reply furnished by the state to have come to be disbursed and received by the petitioner. Consequently, when compensation qua his land has been paid to the petitioner, even the condition in the alternative to the initial condition for construing the proceedings under the "Old Act" to have lapsed, arising from the proven fact of non-payment of compensation to

the petitioner for his land which was subjected to acquisition stands obviously then un-satiated or unaccomplished. Consequently, for reiteration given the acceptance of compensation by the petitioner, he cannot contend before this Court that he has fulfilled or satiated the alternative condition spelt out in sub section (2) of section 24 of the New Act. Consequently, he is interdicted from canvassing before this court that the proceedings for acquisition of his land launched under the "Old Act" stood lapsed and that compensation qua his land be determined afresh under the New Act. Besides, when the alternative condition comprised in sub section (2) of section 24 of the New Act mandates a statutory embargo or estoppel against the petitioner to claim re-determination of compensation under the "New Act" in case he receives compensation determined under the "Old Act". For reiteration, given the admitted fact of his having received compensation, though determined under the "Old Act", the statutory bar aforesaid estops him to espouse before this Court that the acquisition proceedings initiated qua his land under the "Old Act" stand lapsed. In view of above, there is no merit in this petition same is dismissed accordingly.

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

Cr. Appeal No. 437 of 2012 along with
Cr. Appeal No.447 of 2012.
Reserved on: 21.05.2015.
Date of Decision: 28th May, 2015.

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1. <u>Cr. Appeal No. 437 of 2012</u>

Som Dutt .....Appellant.

Versus

State of H.P. .....Respondent.

2. <u>Cr. Appeal No. 447 of 2012</u>.

Rakesh Kumar ...Appellant.

Versus

State of H.P. ...Respondent.

Indian Penal Code, 1860- Section 302, 392, 201 read with Section 34 and 411- Dead bodies of the deceased husband and wife were noticed by the domestic servant- the gold ornaments which the deceased was wearing and two mobile phones were missing- one mobile was traced to the prosecution witness who had purchased it from the accused- it was found in investigation that accused had killed the deceased due to the dispute over the money for the work of carpenter done by the accused- statement of the accused showed that an amount of Rs. 36,109/- was paid to the accused- PW-2 stated that deceased 'U' had sold the planer of the accused 'S' which shows that there was no discord between the accused and the deceased- medical board concluded that there were signs of asphyxia and poisoning – injuries were not found on the person of the accused - thus, prosecution version that death of the deceased was homicidal is not acceptable- PW-2 who identified the ornaments of the deceased stated that articles are commonly available in the market- PW-6 only deposed that he had dropped the accused at a short distance from the site of the occurrence, however, there is no proof that accused had visited the site of the occurrence-

held, that in these circumstances, prosecution version was not proved - accused acquitted. (Para-14 to 20)

For the Appellant(s): Mr. Lakshay Thakur, Advocate in appeal No. 437 of 2012 and Mr. Virender Thakur, Advocate in appeal No.447 of 2012.

For the Respondents: Mr. Ramesh Thakur, Assistant Advocate General

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

Since both the aforesaid appeals arise from a common judgment hence they are being disposed of by a common judgment**.**

2. Both the appeals are directed by the accused/appellants against the impugned judgment rendered on 24.8.2012 by the learned Additional Sessions Judge (Fast Track Court), Solan in Session trial No. 3FTC/7 of 2010, whereby, the learned trial Court convicted and sentenced the accused No.1 and 2 for theirs having allegedly committed the offences punishable under Sections 302, 392, 201 and read with Section 34 of the IPC and accused No.3 Satya Prakash was convicted and sentenced for his having allegedly committed the offence punishable under Section 411 of the IPC.

3. Brief facts of the case are that on 14.6.2009 at Gauri Apartments, Kathog, P.O. Salogra, dead body of Mrs. Uma Sood was found in drawing room of her flat whereas dead body of Dr. Ramesh Sood, her husband was found in the adjoining room of the apartment which was noticed by one Kamlesh, working as domestic servant in the house of deceased who further informed Atulya Sood a close relative of Ramesh Sood and consequently information was also given to son of deceased namely Sanjeev Sood who resided at Delhi and was employed in a company. Said Kamlesh has visited apartment as usual a day before i.e. on 13.6.2009 when she was given quilt covers by deceased for interlocking but on the next day when police visited Gauri Apartments on an information of death of the old couple, Kamlesh noticed that all the golden ornaments which deceased was wearing on 13.06.2009 were missing. The police investigatiion reveals that on 14.06.2009 at about 7.45 a.m., information was given to police by one Mohan Singh resident of Garui Apartment when Inspector Jagdish Chand Kanwar along with S.I. Krishan Kumar and other members of police party came and S.I. Kirhsan Kumar conducted formal investigation who also recorded statement of Sanjeev Kumar son of deceased couple besides prepared site plan. Dead-body of deceased Dr. Ramesh Sood as well as his wife Smt. Uma Sood were sent for autopsy to R.H., Solan and after post mortem dead body of deceased were handed over to Sanjeev Sood, their son. In his statement to the police, Sanjeev Sood did not express his suspicion over anyone in the murder of his parents, who were stated to be of good nature and kind hearted, as such, no one would have killed them but he suspected that two mobile phone Nos. 94181-64099 and 98163-65853 of deceased father were not traceable. Similarly one lock which was being put on the lower gate was not traceable. The police investigation further reveals that both the mobile numbers were kept under observation and monitoring by tele-companies by police and request was made to the Nodal Officer of BSNL, Airtel and Reliance for supplying names and addresses of the subscribers alongwith all incoming and outgoing call details of both the aforesaid mobile numbers of the deceased. It further transpires from the investigation that information was received that one sim card having

IMEI No.355542010579094 and another IMEI No.3556540096044120 were used even after the death of Dr. Ramesh Sood. On these IMEI numbers five sim cards had been used and the number of the sim card were 98175-02005, 98175-79753, 96250-33344, 96250-38844 and 98170-34791. A reference was thereafter, made by police to DGP Vigilance for obtaining call details of above said sims of IMEI numbers referred to above.

4. The detailed information received from tele companies revealed that Bhupinder one of prosecution witnesses was using mobile No.98175-02005 and said mobile was purchased by him from accused Som Dutt and on being enquired from said Bhupinder, he told that accused Som Dutt had given him Nokia 1100 mobile in lieu of an advance of Rs.1,400/- given by this witness to accused Som Dutt for making bed box which could not be given by him and at the same time accused Som Dutt could also not refund Rs.1,400/- as demanded by Bhupinder. He initially offered Nokia 1100 mobile, however, this mobile set had gone out of order and thus, Nokia mobile 1100 could be used from 29.07.2009 to 03.08.2009 but the first set given by accused Som Dutt had gone out of order, he agreed to provide another mobile Noka i.e.6030 mobile having IMEI No.35542010579094 on which said Bhupinder used mobile NO.98175-02005 w.e.f. from 03.08.2009 to 22.08.2009 and this mobile was produced by Bhupinder to police which was seized vide memo in presence of H.C. Devender and one Vinod Kumar and consequently mobile set along with sim was deposited with MHC. It has also come in the evidence that besides removing the mobile phones abovestated, accused Som Dutt and Rakesh Kumar in furtherance of their common intention had removed golden ornaments of deceased Uma Sood weighing about 67.800 grams which were sold by them to accused Satya Parkash for a consideration of Rs.60,000/- in presence of one Neeraj Juneja, an electrician in the Middle Bazar, Shimla, who knew accused as well as the jeweller. During interrogation, accused Som Dutt revealed on 24.8.2009 that he could identify shop at Shimla where he had sold the gold ornaments on 14.06.2009 and his statement under Section 27 of the Indian Evidence Act was recorded which was signed by witness H.C. Prem Dass and Rameshwar as well as accused himself. The shop of accused Satya Prakash at Middle Bazar, Shimla was identified by accused Som Dutt in pursuance to statement but on inquiry accused Satya Prakash disclosed that he had melted four bangles and rings and made new four bangles and two rings but pair of tops of the deceased remained in same condition. The police took into possession the ornaments vide recovery memo. On 23.8.2009, accused Rakesh Kumar and Som Dutt had taken the police at the spot and identified the places separately vide separate identification memos. Sanjeev Sood also produced bill of mobile Nokia 1100 in the name of his father Dr. Ramesh Sood. On 20.08.2009, accused Som Dutt made a disclosure statement and in pursuance to this disclosure statement got recovered the broken pieces of mobile Nokia 1100. On 30.8.2009, accused Rakesh Kumar disclosed that he had broken the sim and thrown on link road near NH, Solan to Shimla and in pursuance to this disclosure statement got recovered the broken pieces of sim in presence of witnesses. The witness, namely, Kamlesh had identified the gold tops of the deceased before the Executive Magistrate i.e. Naib Tehsildar, Sh. Narayan Singh and the police obtained a certificate to this effect. During the course of investigation it was found that the accused had by smothering murdered deceased Uma Sood at the first instance and thereafter Dr. Ramesh Sood in the adjoining room besides they dishonestly removed Rs. 1200/-, two mobiles and golden ornaments belonging to deceased Uma Sood. Accused Som Dutt, who was a mason/carpenter by profession was engaged by Dr. Ramesh Sood in Gauri Apartment at Village Kathog and some amount was outstanding to be paid to accused Som Dutt. It has also come in the investigation that accused Som Dutt was invariably called for wood work by deceased and accused was to take between Rs.30,000/- to Rs.40,000/- from deceased but when he went to take amount

from deceased Uma Sood, she refused to make payment to him and intimidated accused by proclaiming that accused Som Dutt had sold wood and till the accounts qua entire material of wood used and sold by him is not settled by him, he would not be given any payment and while doing so she had retained the planer of accused Som Dutt. On 13.06.2009, accused Som Dutt met one Rakesh Kumar resident of Ashwani Khad and told about his problem and then they made out the entire plan and both the accused entered into the apartment from lower gate when deceased Uma Sood came as prior to that day accused Som Dutt was called by the deceased couple for cutting a tree and after knocking at the door, accused No.1 and 2 entered the drawing room when deceased Uma Sood came and accused demanded balance money and planer which was flatly refused by deceased Uma Sood. As per their plan they caused death of said Uma Sood by smothering and similarly her husband too met identical fate but on realizing at that very moment that someone was approaching in the flat where deceased couple was lying dead both of them ran away and remained underground for few days so that they could not be apprehended.

5. The case was investigated by Inspector Jagdish Chand Kanwar till 28.09.2009 and thereafter on 29.09.2009 Inspector Raj Kumar, the then SHO, Police Station Solan was entrusted with investigation. During the course of investigation, statements of the witnesses were recorded, post mortem of dead bodies of deceased were conducted besides report of FSL were also obtained. It was also revealed from the record that there was divergence of opinion of the medical expert and clarification was sought several times by the Superintendent of Police, Solan in this regard. Vide letter dated 3.9.2009, the medical board clarified to the Superintendent of Police that smothering/gagging could be one of the causes of death and also opined that deceased had died due to poisoning and asphyxia. At the same time, it was also opined that smothering/gagging could also be not ruled out as there were signs of asphyxia. Finally, vide letter dated 15.10.2009 which is the last and final opinion of expert had clarified to the Superintendent of Police, Solan that traces of organ phosphorus insecticide can be present due to consumption of fruits and vagetables and grains and traces of organophosphorous found in the lab report No.FSL9AD/Chem Toxin/-9-3713 is not sufficient to cause immediate death.

6. On conclusion of the investigation, into the offence, allegedly committed by the accused, report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court.

7. Accused Som Dutt and Rakesh Kumar were charged for theirs having committed offences punishable under Sections 302, 392, 201 read with Section 34, IPC and accused Satya Prakash was charged for his having committed an offence punishable under Section 411 of the IPC, by the learned trial Court to which they pleaded not guilty and claimed trial.

8. In order to prove its case, the prosecution examined 36 witnesses. On closure of prosecution evidence, the statements of the accused, under Section 313 of the Code of Criminal Procedure were recorded in which they pleaded innocence and chose to lead no evidence in defence.

9. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/respondents.

10. The accused/appellants are aggrieved by the judgment of conviction recorded by the learned trial Court. The learned counsel appearing for the appellants have

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, they contend that the findings of conviction be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

11. On the other hand, the learned Assistant Advocate General has with considerable force and vigour, contended that the findings of conviction 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.

12. 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.

13. The marital couple named Mrs. Uma Sood and Dr. Ramesh Sood were residents of Gauri Apartments, Kathog, Post Office Salogra. Both are alleged to have been murdered by accused No.1 and 2. The dead bodies of both the deceased in the apartment occupied by them located at Kathog, Post Office Salogra were noticed by PW-2 Smt. Kamlesh on 14.06.2009 when she visited the premises for performing household chores. The prosecution case is harboured upon circumstantial evidence. In a case which in its entirety is anvilled upon circumstantial evidence, a solemn legal obligation casts upon the prosecution to prove each of the links in the chain of circumstances. Even motive which otherwise may be irrelevant in a case anchored upon direct evidence, yet assumes preeminent significance in a case which is harboured upon circumstantial evidence.

14. The motive which is attributed to the principal accused Som Dutt, who is alleged to have allied with him, accused No.2, Rakesh Kumar, to commit the offences for which both of them stood charged and tried by the learned trial court, is alleged to have sprouted from the fact as deposed by PW-1 and PW-2 of his having been engaged by the deceased to carry out carpentry work in their premises, his not having been paid remunerations thereof or his purported valid payments to him for his discharging the works of carpentry in the premises of the deceased having remained unsettled, as such, germinated the motive in his mind to murder both the deceased. However, the fact as evident on a reading of the testimonies of PW-1 Sanjeev Sood and PW-2 Smt. Kamlesh is of the deceased having retained the planer of the principal accused Som Dutt in lieu of her claim against the latter, of reimbursement by him to her of certain amounts advanced or paid to him hence recoverable from him. Nonetheless, a perusal Ex.P-8, which is the statement of account of 9.9.2006 portraying the fact of a total amount of Rs.36,109/- having been paid by the deceased to accused Som Dutt qua which vouchers Ex.P-1 to P-6 portraying his having received payments of the amounts comprised in them, from the deceased belies the factum that accused Som Dutt while his having not come to be paid his dues by the deceased for his having performed carpentry jobs at the premises of the deceased, nursed a motive against the deceased hence proceeded to eliminate them, in alliance with accused No.2, Rakesh Kumar. Moreover, the factum existing in the testimony of PW-2 Smt. Kamlesh of the deceased Uma Sood having sold the planer of accused Som Dutt retained by her in lieu of the Principal accused Som Dutt omitting to reimburse advances or settle his accounts with her renders nugatory the factum of any existing strife inter se or discord inter se the deceased and the accused Som Dutt qua settlement of certain accounts inter se them. Reiteratedly, rather the fact as evident on a reading of the testimony of PW-2 Kamlesh is of the deceased Uma Sood having sold the planer of accused Som Dutt as retained by her, hence, manifesting the factum of no bickerings or discord inter se

accused Som Dutt and deceased Uma Sood remaining alive or in existence qua whose existence accused Som Dutt nursed a motive against the deceased. In sequel, the motive as attributed to the accused staggers and stands capsized. Concomitantly, with the motive attributed to the accused by the prosecution having remained in the realm of mere allegations, besides not proven by cogent evidence, renders a vital and crucial link in the chain of circumstances to be hence severed as well as emasculated. For want of proof of motive, hence, the accused cannot be concluded to, for perpetuating their motive or for accomplishing their motive, proceeded to the premises of the deceased to murder them.

15. Another link in the chain of circumstances which was enjoined to be cogently proved by the prosecution was qua the cause of the demise of the deceased Uma Sood and Dr. Ramesh Sood. For ferreting the truth qua the cause of demise of both the deceased, an advertence to the testimony of PW-35 Dr. Raj Kumar Sharma, who along Dr. A.K. Singh and Dr. Subhash Thakur, carried out the postmortem examination on the bodies of both the deceased is relevant as well as germane. He in his examination-in-chief states that he alongwith Dr. A.K. Singh and Dr. Subhash Thakur, on 14.06.2009 at 3.00 p.m., conducted the post mortem examination on the body of deceased Uma Sood and in course thereof the following observations were recorded:-

> "External Appearance: Well built with Salwar suit red check, white braw, grey hair with bindi on forehead eyes, mouth closed, fist open with post mortem lividity. Rigour mortis was present in the lower limb, pelvic joint and shoulder joint. No ligature marks were observed on neck. Multiple rounded inoculated marks over left arm as shown in diagram. Skull and spinal cord- No abnormality detected. In thorax ribs and cartilage-NAD, Pleura laryanx and trachea-NAD, right and left lungs congested. Pericardium and heard-NAD.
>
> In Abdomen-walls, peritoneum, mouth, pharynx and oesophagus-NAD. Stomach and its contents-Semi digested food with gas. Small intestine-full of gases. Large intetsine-full of gases. Liver, spleen, kidney, bladders and organs of geerations-ND. Stomach with contents-part of intestine, liver, lungs, blood, part of skin, sample of hairs were sent for chemical analysis to FSL Junga."

Besides, he continues to depose that on the same day, he along with Dr. A.K.Singh and Dr. Subhash also carried out the post mortem examination on the body of deceased Dr. Ramesh Sood and in course thereof he observed the following features:-

> "External appearance:- Normal built male body with white baniyan blue underwear and white pyjama. Pyjama was stained with blood opposite to the pelvic region with grey hair. Post mortem lividity positive, fist open, rigours moritus developed in peripheral parts. No external wound, no mark of ligature. Skull and Spinal Cord- No injury. Ribis and Pleura-NAD, Larynx treachea and both lunges congested. Heart and pericardium normal. In abdomen-wall, peritoneum, mouth, pharynx and oesophagus-NAD. Stomach and its contents- Semi digested food with gas. Small intestine-full of gases. Large intestine-full of gases. Stomach small intestine, liver contents from stomach, blood hairs,blood stained patch from pyjama sent for chemical analysis to FSL Junga."

Post mortem reports Ex.PW35/B and Ex.PW35/D have been deposed by PW-35 to have been signed by him along with Dr. A.K. Singh and Dr. Subhash Thakur. He has proved the signatures of Dr. A.K. Singh and Dr. Subhash Thakur as he was conversant with their signatures his having worked with them in the hospital. The final report qua the cause of demise of the deceased is comprised in Ex.PW35/E, which stands extracted hereinafter, has been proved to be bearing his signatures as well as the signatures of Dr. Subhash Thakur and Dr. A.K. Singh. Final report enunciates:-

> "The stomach.....contain traces of organo phosphorous poisoning, so deceased died due to organo phosphorous poisoning with asphyxia."

The final opinion qua the demise of the deceased has been pronounced therein to be arising on account of consumption of organo phosphorus with asphyxia. Hence, given the existence of traces of organo phosphorus substance in the stomachs of both the deceased, the S.P., Solan, on 28.8.2009, addressed a letter comprised in Ex.PW35/F to the Medical Superintendent, Zonal Hospital, Solan, on strength whereof, the Medical Board, which was constituted for furnishing answers to the queries raised therein submitted its opinion comprised in Ex.PW35/G. Relevant portion whereof reads as under:-

> "1. **Whether the deceased died due to smothering/gagging as disclosed and confessed by the accused persons during interrogation?** : Opinion is that smothering/gagging cannot be ruled out as there are signs of asphyxia.
>
> 2. **Whether the contents of organo phosphorus remain present in human body due to consumption of vegetables, fruits and grain or food etc.?**: Opinion can be given by Forensic Experts/person giving Viscera report in FSL Junga i.e. quantitative and qualitative values of the substance.
>
> 3. **Whether both deceased died due to poisoning or by smothering/gagging?** : Cannot be given as single cause but definitely signs of poisoning and asphyxia were present.
>
> 4. **Whether the cause of death of both the deceased could be smothering/gagging or otherwise?**: as per opinion given in point 3.
>
> It is one of the causes."

The opinion comprised in Ex.PW35/G, postulates that smothering/gagging cannot be ruled out as there were signs of asphyxia and the cause of demise cannot be attributable to a single reason as signs of poisoning and asphyxia were present, besides smothering can be one of the causes. Another letter comprised in Ex.PW34/A was transmitted by the Superintendent of Police, Solan to the Medical Officer concerned for eliciting the opinion of the doctors concerned, in sequel whereof an opinion comprised in Ex.PW35/H was rendered. In Ex.PW35/H, it was pronounced that traces of organo phosphorous insecticides can be present owing to consumption of fruits and vegetables as well as grains. Further it was opined that traces of organo phosphorous found in the lab report were not sufficient to cause immediate death.

16. For testing the veracity of the deposition of PW-35 qua the cause of demise of the deceased, as comprised in Ex.PW35/E wherein the cause of demise of the deceased has been initially opined therein to be attributable to poisoning arising from the fact of existence of traces of organo phosphorous substance in the stomach(s) of both the deceased, as also,

the veracity of the opinion rendered in digression thereto comprised in Ex.PW35/G wherein the cause of demise of the deceased has been rather attributed to be arising from smothering or gagging, has to be tested in the light of his deposition exsiting in his cross-examination. The opening part of his cross-examination by the learned defence counsel belies and overcomes the opinion comprised in Ex.PW35/G rendered by the team of doctors which constituted the Medical Board expressing therein the cause of demise of the deceased tobe on account of smothering or gagging, inasmuch as therein he has openly proclaimed and voiced the fact that no external injury was found on the persons of each of the deceased during the course, when the team of doctors, who constituted the Medical Board conducted the post mortem examination on the bodies of the deceased, whereas their existence thereon would rather have alone pronounced the fact of their demise being attributable to smothering or gagging. He in his further part of his cross-examination concedes or acquiesces to the opinion expressed in Parikh's Textbook of Medical Jurisprudence and Forensic Medicine and Toxicology that in the event of the demise of the deceased being attributable to smothering or gagging foreign material has to be found on the person of the deceased. However, when foreign material is uncontrovertedly unavailable or found not existing on the body of each of the deceased nor any external injury or mark was found existing on the person/body of each of the deceased suggestive of smothering or gagging, consequently, the initial opinion rendered in Ex.PW35/E wherein the demise of the deceased has been attributed to poisoning arising from consumption of organo phosphorous is to be concluded to have remained intact or to hold the field. The opinion qua the demise of the deceased expressed in Ex.PW35/E, cannot be benumbed or overcome by a subsequent opinion comprised in Ex.PW35/G. The opinion expressed and comprised in Ex.PW35/G in digression to the initial opinion in Ex.PW35/E, portrays unwarranted and uncalled for vacillations and ditherings on the part of the doctors , who rendered opinion in Ex.PW35/E, even when there was want of or lack of any noticeable external injury on the person of the deceased during course of theirs having carried out post mortem on the respective corpses, for succoring a conclusion that hence the demise of the deceased is attributable to smothering or gagging. Moreover, the answer given to the quarries existing at serial No.2 in Ex.PW35/H, which stand extracted hereinafter:-

> "2. Trace of organophosphorous found in the Lab report No.FSL(AD/Chem Toxin)/09-3713 is not sufficient to cause immediate death."

does surround the initial opinion comprised in Ex.PW35/E wherein the cause of the demise of the deceased has been attributed to consumption of organo phosphorus poison with haziness or nebulousness. However, the aura of haziness or nebulousness which has gathered around the cause of demise initially expressed by the doctors in Ex.PW35/E which stand extracted hereinabove, disappears in the face of an admission in the cross-examination of PW-35, of the FSL Junga having omitted in its reports to give the quantity of organo phosphorous poison noticed to be present in the stomachs of the deceased, besides further admission that with the quantity of the aforesaid poisonous substance having been not divulged in its reports by the FSL, it cannot be firmly said that the poison as detected in the stomachs of both the deceased was not sufficient to cause the death of both the deceased. Consequently, for fortification when this witness expresses his acquiescence to the factum that with the FSL Junga in its reports comprised in Exts. PA and PA-1 having omitted to reflect the quantum of organo phosphorous poison present in the samples sent to it for analysis, as such, the expression comprised in clause (2) of Ex.PW35/H, which stands extracted hereinabove, pronouncing that the traces of organo phosphorous found in the lab

report is not sufficient to cause immediate death, is built upon shaky foundations rather the inference is drawable that the initial opinion of the team of the doctors comprised in Ex.PW35/E wherein the cause of demise of both the deceased have been attributed to the presence of organo phosphorous substance in the stomachs of the deceased holds the fields and that the subsequent opinion comprised in clause 2 of Ex.PW35/H is entirely anvilled upon surmises and conjectures. Therefore, the earlier opinion of the Medical board comprised in Ex.PW35/E holds the field qua the cause of the demise of both the deceased.

17. The further existence of an admission in the cross-examination of PW-35 that in a case of death by poisonous gases there is absence of any injury mark external of internal on the body of the deceased. Consequently, it can be forthrightly concluded that given the absence of injury marks external or internal on the body of the deceased, the demise of the deceased was caused by consumption of organo phosphorous substance, also, when he in his cross-examination discloses the fact that asphyxia is caused for want of oxygen, then the asphyxia attributed in Ex.PW35/E to be the one of the causes of demise of both the deceased can be concluded to have erupted on account of consumption of poisonous substance by both the deceased sequeling emission of poisonous gases therefrom which baulked the inflow of oxygen to the respiratory tracts.

18. The effect of the above discussion is that the opinion of the team of the doctors comprised in Ex.PW35/E is to be held to be the conclusive opinion qua the cause of demise of the deceased as ascribed therein and that the further opinion of team of the doctors comprised in Ex.PW35/G in digression to the earlier opinion is wholly unfounded for want of hard and concrete material rather anvilled upon conjectures and surmises and is in digression to the reports of the FSL comprised in Ex.PA and PA-1 wherein traces of poison have been revealed therein to be existing in the viscera of both the deceased, quantity whereof has been omitted to be mentioned, as such, enfeebling and undermining the factum as disclosed in caluse 2 of Ex.PW35/H that the traces of organo phosphorous is not sufficient to cause death besides, deter the medical board to conjecturally conclude that the quantum of poison present in the stomachs of both the deceased was insufficient to cause their demise. More so, when it was open only for the FSL to record in its report the factum of the quantum of organo phosphorous substance existing in the viscera of both the deceased and whether being sufficient or insufficient to sequel the demise of both the deceased even when the FSL entailed reticence qua the quantum of organo phosphorous existing in the viscera of both the deceased being sufficient or not sufficient to cause death . It was not open for, when the reports of the FSL comprised in Ex.PA and PA-1 omitted to divulge therein the quantum of organo phosphorous substance, the team of the doctors, who rendered opinion No.2 in Ex.PW35/H to espouse therein that the quantum of organo phosphorous substance detected in the lab record concerned was not sufficient to cause immediate death. Consequently, the demise of the deceased is to be concluded to be suicidal not homicidal, as a naturally corollary then the attribution of guilt to accused No.1 and 2 in murdering the deceased by taking to smother or gag them cannot be concluded to be having any foundation upon any probative evidence on record. Moreover, there exists no evidence on record portraying the fact of the accused having forcibly administered poison to the deceased as the post mortem reports of the deceased voices the fact of no ante mortem external or internal injury marks having been noticed on their bodies, though to then necessarily occur, by the team of doctors while conducting the post mortem examination on the dead bodies of the deceased.

19. Accused No.1 and 2 are alleged to have stolen ornaments i.e. Gold tops, Exts.P 13 & P-15, Bangles Exts.P-15 to Ex.P18 and gold rings, Exts. P-19 and P-20, in course whereof they committed murder. The gold ornaments of deceased Uma Sood allegedly stolen by the accused are alleged to have been sold by accused No.1 and 2 to accused No.3. Some of the gold ornaments allegedly sold by accused No.1 and 2 to accused No.3 stood melted at the instance of the latter yet some of the gold ornaments comprised in Ex.P-13 and P-14 remained unmelted or intact. The prosecution strived to connect the accused with the theft of the gold ornaments of the deceased Uma Sood and concomitantly with the murder of both the deceased as carried out by them for accomplishing their motive of committing theft in the house of the deceased, by relying upon the testimony of PW-2 Kamlesh, the maid of the deceased, who in presence of PW-17, Narain Singh Chauhan, Naib Tehsildar has identified tops Exts. P-13 and P-14. However, the existence of an admission in the cross-examination of PW-2 Kamlesh, who identified gold tops, Ex.P-13 and P-14 of theirs being commonly and easily available in the market, renders the factum of both the aforesaid while being not uncommon, as such, easily procurable besides the fact of their easy procurability, the further fact of the son of the deceased having omitted to identity Ex.P-13 and P-14 in his examination-in-chief, though he was the best person being the son of the deceased to portray credible evidence of both being owned and possessed by the deceased entwined with the fact that given the absence of the further preeminent evidence of any insignia existing on them as a mark of their exclusivity of their ownership and possession by the deceased Uma Sood, renders open the conclusion that the mere fact of identification of Ex.P-13 and P-14 at the instance of PW-2 is insufficient to constrain a conclusion that both belonged to the deceased Uma Sood. Even their purported recovery from the shop/premises of accused No.3, to whom they were purportedly sold by accused Nos.1 and 2 cannot connect the accused in the commission of their theft at their instance, besides cannot link them in the murder of both the deceased, especially in the face of existence of a further fact in the deposition of PW-2 of hers omitting to identify the bangles Ex.P-15 to P-18 and rings Ex.P19 and P20 which omission facilitates a deduction from this Court that the aforesaid gold ornaments purportedly stolen by the accused from the premises of the deceased in course whereof they committed the murder of both the deceased and subsequently purportedly sold them to accused No.3 have not been unflinchingly proved to have been owned and possessed by deceased Uma Sood nor belonged to her. For reiteration, in the face of absence of worthy and potent evidence portraying the ownership of Ex.P13 to P-20 by the deceased, as such, no conclusion can be formed that the gold items aforesaid were stolen by the accused from the premises of the deceased in course whereof they murdered both the deceased and thereafter they purportedly sold them to accused No.3. The overwhelming conclusion which is hence warranted is that the accused neither visited the premises of the deceased nor committed any theft, nor to satiate their motive of theft. committed the murder of both the deceased. Even though, the prosecution further concerted while relying upon the testimony of Neeraj Juneja, PW-19 in whose presence the accused purportedly sold gold ornaments Ex.P-13 to Ex.P-20, weighing 68.500 grams to accused No.3 for a sum of Rs.60,000/-, whereas, their value was not less than 1.5 lacs, to clinch the fact of the accused having visited the premises of the deceased to commit theft in course whereof they committed the murder of the deceased, besides reliance is placed upon disclosure statement Ex.PW8/A made by accused Som Dutt qua the name of goldsmith to whom gold ornaments as purportedly stolen by them from the premises of the deceased were sold, in pursuance where of the aforesaid gold ornaments were seized under Memo Ex.PW9/A. However, the factum of efficacy of disclosure statement Ex.PW8/A purportedly made by accused Som Dutt, in pursuance whereof recovery of stolen gold ornaments,

Ex.P13 to P-20 was effected at the instance of Som Dutt from the commercial premises/shop of accused No.3, Satya Prakash stand denuded, in the face of the aforesaid discussion forthrightly pronouncing upon the factum of the demise of the deceased being not attributable to smothering or gagging of each of the deceased at the instance of the accused rather the demise being suicidal. Consequently, in case the accused had intended to commit theft or had allegedly committed the theft of the gold ornaments comprised in Ex.P-13 to Ex.P-20, in course thereof, in case of resistance posed by the deceased they naturally would have taken to inflict injuries on the persons of the respective deceased as a necessary precursor to theirs intending to dispense with or to eliminate both of them yet, there is no evidence portrayed in the post mortem reports comprised in Ex.PW35/B and Ex.PW35/D qua existence of any ante mortem injuries on the persons of each of the deceased, in communication of resistance as purportedly posed by the deceased to the act of the accused to commit theft and the accused having repulsed the resistance of the deceased by compatible show of strength connoted by theirs having inflicted injuries upon the persons of the deceased. More so, in the absence of the aforesaid material on record explicitly pronouncing upon the factum of the opinion comprised in Ex.PW35/E of the demise of the deceased being attributable to consumption of organo phosphorous substance and asphyxia which has been for the reasons afforded hereinabove concluded to be alone holding sway and command qua the cause of demise of the deceased and its dispelling the fact of the demise of the deceased being attributable to smothering or gagging, dispels as well as wholly negates the effect, if any, of recovery of Exts. P13 to P-20 from the commercial premises of accused No.3, as also, the effect of the theft of gold ornaments belonging to the deceased and after their murder, theirs having been sold to the former by the accused. Moreover, even the deposition of PW-19 Neeraj Juneja, in whose presence**,** accused No.3 paid a consideration of Rs.60,000/- to accused Som Dutt for receiving gold ornaments Ex.P-13 to P-20 from the latter, is of no avail on the score of his not knowing accused No.3 especially when no evidence exists portraying the fact of his having previously known accused No.1 and 2 so as to render him empowered to identify them. It appears that the disclosure statement Ex.PW8/A is a wholly invented and a concocted piece of evidence and the recoveries of allegedly stolen gold ornaments Ex.P-13 to P-20 in pursuance to Ex.PW8/A is a wholly well engineered and ingenuous exercise on the part of the Investigating Officer to falsely implicate accused No.1 and 2 as well as accused No.3. Besides, the reasons for rendering legally inefficacious, the recovery of Mobiles and sim card under recovery memos Ex.11/A and Ex.PW5/A are obviously parameteria to the one as assigned and attributed by this Court for overcoming the evidentiary value of recovery of Ex. P-13 to P-20, as such, the recoveries of mobile and sim are also concluded to have ingeniously planted upon the accused by the prosecution in connivance with PW-11 Bhupinder.

20. The deposition of PW-16 Anurag Verma, who dropped both the accused, namely Som Dutt and Rakesh Kumar on his bike at a short distance from the site of occurrence is also pressed into service by the prosecution to clinch the quilt of the accused. Even if assuming that his testimony acquires credibility qua the fact as deposed by him of his having seen the accused at a short distance from the site of occurrence, yet does not, when he does not further depose in his testimony that he had seen the accused entering the site of occurrence, subsequent to his having dropped the accused on his bike at a short distance from the site of occurrence, constitute evidence of his having seen the accused entering the premises. In sequel, his testimony cannot carry any grain of truth in imputing an incriminatory role to the accused. Further more, the recovery of the gold ornaments Ex.P-13 to P-20 from the shop/commercial premises of accused No.3 on his having purchased them from accused Nos.1 and 2, for the aforesaid reasons is also concluded to have been

ingenuously planted upon accused No.3. Consequently, no offence is made out against accused No.3.

21. For the foregoing reasons, both the appeals are allowed and the judgment of the learned trial Court is set aside. Consequently, all the accused, namely Som Dutt, Rakesh Kumar and Satya Prakash are acquitted of the offences for which they stand charged and convicted by the learned trial Court. They be set at liberty forthwith, if not, required in any other offence. Fine amount, if any, deposited by the accused be refunded to them forthwith.

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

Cr. Appeal No. 248 of 2014 a/w connected matters.
Reserved on: 22.5.2015
Decided on : 29th May, 2015

1. Cr. Appeal No. 248 of 2014	
Naresh Kumar	.....Appellant.
Versus	
State of H.P.	.....Respondent.
2. Cr. Appeal No. 249 of 2014	
Sonu	....Appellant.
Versus	
State of H.P.	.....Respondent.
3. Cr. Appeal No. 381 of 2014	
Kewal Ram	.....Appellant.
Versus	
State of H.P.	.....Respondent.
4. Cr. Appeal No. 251 of 2014	
Sunil Kumar & another	.....Appellants.
Versus	
State of H.P.	.....Respondent.

N.D.P.S. Act, 1985- Section 20- A car was stopped by the police-two persons N and S were sitting on the rear seat while one person named "J" was sitting on the front seat-search of the car was conducted during which 3.5 kg. of charas was recovered from the dicky and 2.7 kg. charas was found concealed underneath mat of the front seat-accused N and S revealed on inquiry that accused K had sold charas to them- they had also shown the place from where the charas was purchased by them from the accused K - it was stated by PW-1 in cross-examination that there were 3-4 khokas and 2-3 factories in the vicinity of the site of occurrence- the possibility of Chowkidar/ security guard being present in the factories cannot be over ruled - however, Investigating Officer had not made any efforts to associate any independent person which casts a doubt on the prosecution version- PW-1 had not deposed that case property was handed over to him by in charge Malkhana for producing the same in the Court- no entry in the Daily diary was produced which shows that the case

property shown in the Court cannot be connected to the contraband recovered at the spot – accused acquitted. (Para 9-13)

For the Appellant:	Mr. Amrinder Singh Rana vice Mr. H.S Rana, Legal aid counsel, Mr. Anirudh Sharma for appellant(s) in Cr. Appeal Nos. 248 and 249 of 2014.
	None for appellants in Cr. Appeal Nos. 251 and 381 of 2014.
For the Respondent:	Mr. P.M Negi, Deputy Advocate General, for respondent-State in all appeals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeals are directed against the judgment of 19.5.2014 rendered by the learned Special Judge, Solan, District Solan, H.P., in Sessions trial No. 5-S/7 of 2011**,** whereby, the learned trial Court convicted and sentenced the accused/appellants Naresh Kumar, Sonu, Joginder Singh and Sunil Kumar to undergo rigorous imprisonment for a period of ten years each and to pay a fine in a sum of Rs.1,00,000/- (One Lac) each and in default of payment of fine to further undergo simple imprisonment for a period of two years each for commission of offence under Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as ACT) whereas and accused/appellant Kewal Ram was convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine in a sum of Rs.1,00,000/- (One Lac) and in default of payment of fine to further undergo simple imprisonment for a period of two years for commission of offence under Section 29 of Narcotic Drugs and Psychotropic Substances Act, 1985

2. The facts, in brief are that, on the intervening night of 20/21.1.2011, HC Prem Dass alongwith C Bahadur Singh, HHG Shyam Lal, HHG Manohar Lal and C Raj Pal were present at National Highway-22 at place Sector 3 near Shivalik Agro Company. At about 2.15 a.m. one Maruti car bearing registration No. DL-3CM-7361 came from Shimla side was signaled to stop by them. The driver of the car stopped the car at some distance. At that time, it was noticed that in the car two persons were sitting on the front seat and two others were on the back seat. On inquiry the driver of the vehicle disclosed his name to be Naresh Kumar S/o Dalel Singh and the person sitting on the front seat disclosed his name to be Joginder Singh S/o Gulab Singh and the persons sitting on the back seat disclosed theirs names as Sonu and Sunil Kumar R/o Haryana. The driver of the vehicle was asked to unlock the dickey of the car for checking. On checking the dickey of the car, one black coloured raxin bag was found. On checking the bag aforesaid, there were two cream coloured bags in which charas in the shape of wicks and balls was found and one shirt of cream colour "Checkdar" was also found inside the rexin bag. Thereafter the police officials checked the vehicle bearing No. DL-3CM-7361 and underneath the mat of the front seat one green coloured bag marked 'ARIA' was found. Inside the green coloured bag, there was a red coloured bag in which charas in the form of sticks and balls, was found. Subsequently, with the help of weights and scales, the police officials weighed the contraband kept in two cream coloured bags and on weighment of one bag 2 kg Charas and in the another bag 1Kg. 500 grams charas was found. After weighment, the charas was again put in the rexin bag in the same manner as it was opened and the recovered charas and the shirt was put in a cloth parcel and sealed with the seal impression 'N'. The charas

found underneath the mat of the front seat on weighment was found to be 2 Kg. 700 grams, which was put in the bag as it was opened and was put in the cloth parcel and sealed with the seal impression 'N'. Both the cloth parcels, one containing 3.5 kgs and the other containing 2.7 Kgs charas were sealed with six seals each of seal impression N and separate seal impression N Ex. PW-1/A. NCB-1 forms were also filled in at the spot and the seal after its use was handed over to him. Thus, in all, 6.200 Kgs of charas had been recovered from the conscious and exclusive possession of the accused. The charas weighing 6 Kg 200 grams alongwith vehicle bearing No. DL-3CM-7361 and its documents were taken into possession vide seizure memo comprised in Ex. PW-1/B, which bears the signatures of the witnesses and the accused. NCB form in triplicate had been filled in. The photographs of the proceedings Ex. P-14 to Ex. P-25 have been clicked. Site map comprised in Ex. PW-14/B was also prepared. HC Prem Dass prepared Rukka comprised in Ex. PW-14/A and had sent it to police Station, Parwanoo for registration of the case/FIR through Constable Raj Pal. On receipt of Rukka, FIR Ex. PW-5/E came to be registered. Thereafter, personal search of the accused were conducted. Thereafter, the charas parcels alongwith NCB -1 form, samples of seals N and K were sent to FSL, Junga for analysis. The other case property i.e. car, its documents, keys had also been deposited by HC Prem Dass with MHC, who had entered the entire case property in malkhana register, the abstract of which is comprised in Ex. PW-5/A to PW-5/C. CIPA certificate comprised in Ex. PW-5/L was also prepared. HC Prem Dass prepared special report comprised in Ex. PW-3/A and had sent the same to SDPO Parwanoo for information, who had made endorsement on it and handed over one copy of it to constable Ram Lok, which was further handed over by him to Investigating Officer of the case. On 21.1.2011 the case property was sent by MHC to FSL Junga through C Vijay Kumar. During the course of interrogation of the accused, they had disclosed that the charas recovered from them had been purchased by them from their co-accused Kewal Ram. Accused Sonu had also revealed the phone number of accused Kewal Ram as 98162-23243. ID proof and call details of the this number was collected. On perusal of the call details they were found to have been used on 20.11.2011. The accused Naresh Kumar and Sonu had disclosed the location of accused Kewal Ram and the spot was identified vide maps comprised in Ex. PW-14/G and PW-14/H. The house of accused Kewal Ram was searched, but nothing was recovered from his house, memo comprised in Ex. PW-14/J was prepared to this effect. Then accused Kewal Ram was arrested vide memo Ex. PW-14/L. During the course of his interrogation, he had disclosed that he had supplied the charas to the accused and in lieu of that they had supplied him motorcycle bearing registration No. HR-12-F-3112, the value of which was Rs. 70,000/- . On the disclosure statement of accused Kewal Ram comprised in Ex. PW-7/A, the motor cycle was got recovered and taken into possession vide seizure memo comprised in Ex. PW-7/B. Spot map of said recovery is comprised in Ex. PW-14/M. On the receipt of FSL report and on conclusion of the investigation, into the offences, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and presented in the Court.

3. The accused persons were charged, for, theirs having committed offence punishable under Sections 20 and 29 of NDPS Act, by the learned trial Court, to, which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 15 witnesses. On closure of the prosecution evidence, the statements of the accused, under Section 313 of the Code of Criminal Procedure, were recorded, in, which they pleaded innocence and claimed false implication. They did not choose to lead any evidence in defence.

5. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellants.

6. The accused/appellants are aggrieved by the judgment of conviction, recorded by the learned trial Court. The learned counsel appearing for the appellants/accused have concertedly, and, vigorously contended, that, the findings of conviction 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 the material on record. Hence, they, contend that the findings of conviction, be, reversed by this Court, in, exercise of its appellate jurisdiction, and, be replaced by the findings of acquittal.

7. On the other hand, the learned Deputy Advocate General, 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, hence, do not necessitate interference, and rather merit vindication.

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

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

10. The deposition of PW-1, C Bahadur Singh is of prime importance. He in his deposition, has voiced that on the intervening night of 20/21.1.2011, he alongwith HC Prem Dass, HHG Shyam Lal, HHG Manohar Lal and C Raj Pal were present at National Highway 22 at place Sector 3. He continues to depose that on 21.1.2011 at about 2.15 a.m. one Maruti car bearing registration No. DL-3CM-7361 came from Shimla side which was signaled to stop by him. The driver of the car stopped the car at some distance. It was noticed that in the car, besides its driver, three other persons were occupying it. He deposes that one person was sitting on the front seat and two others were on the back seat. On inquiry by HC Prem Dass , the driver disclosed his name to be Naresh Kumar and the person sitting on the front seat disclosed his name to be Joginder and the persons sitting on the back seat disclosed theirs names as Sonu and Sunil Kumar all R/o Haryana. HC Prem Dass has been deposed by this witness to have asked the driver of the vehicle to unlock the dickey of the car for checking. On checking the dickey of the car, HC Prem Dass found one black coloured raxin bag. On checking the bag aforesaid, there were two cream coloured bags in which charas in the shape of sticks and balls was found and one shirt of cream colour “Checkdar” was also found inside the rexin bag. Thereafter HC Prem Dass checked the vehicle aforesaid and underneath the mat of the front seat one green coloured bag marked ARIA was found. Inside the green coloured bag, there was a red coloured bag in which charas in the form of sticks and balls, was found. Subsequently, HC Prem Dass with the help of weights and scales weighed the two cream coloured bags of charas and on weighment in one bag 2 kg Charas and in the another bag 1Kg. 500 grams charas was found. After weighment, the charas has been deposed by this witness to have been put in

the rexin bag in the same manner as it was opened and the recovered charas and the shirt was put in a cloth parcel and sealed with the seal impression 'N'. The charas found underneath the mat of the front seat on weighment was found to be 2 Kg. 700 grams, which was put in the bag as it was opened and was put in the cloth parcel and sealed with the seal impression 'N'. The impression of seal so used was separately taken on a piece of cloth which has been deposed by this witness to be comprised in Ex. PW-1/A which has been deposed to be bearing his signatures in red circle. NCB forms were also filled in at the spot and the seal after its use was handed over to him. The charas weighing 6 Kg 200 grams alongwith vehicle bearing No. DL-3CM-7361 and its documents were deposed by this witness to have been taken into possession vide seizure memo comprised in Ex. PW-1/B, which bears his signatures in red circle. He further deposes that on recovery memo comprised in Ex. PW-1/B, all the accused and witness Shyam Lal appended their signatures. Thereafter, memo of arrest comprised in Ex. PW-1/C was prepared which has been deposed to be bearing his signatures in red circle and all the accused persons have also been deposed to have appended their signatures thereon.

11. The attribution of an inculpatory role to accused Kewal Ram exists in the testimony of HC Prem Dass PW-14, wherein he has deposed that during the course of interrogation of accused Naresh and Sonu, both disclosed to him the factum of accused Kewal Ram having sold charas to them. Besides it was also disclosed by accused Naresh and Sonu to the Investigating Officer during the course of his interrogating of accused Naresh and Sonu, the place/location from where charas was purchased by them from Kewal Ram. The spot identification map of the place where charas was purchased by Sonu and Naresh is comprised in Ex. PW-14/H. Memo Ex. PW-14/J was prepared displaying the house where the charas was purchased. However, accused Kewal Ram was not present in the House. Subsequently on 18.3.2011 the accused Kewal Ram was arrested from his house. During the course of interrogation of accused Kewal Ram he disclosed that in exchange of charas the accused persons sold to him their motor cycle for a sum of Rs. 70,000/-. The disclosure statement of Kewal Ram qua the aforesaid fact is comprised in Ex. PW-7/A and the recovery of motor cycle at the instance of accused Kewal Ram in pursuance thereof is comprised in Ex. PW-7/B. The aforesaid revelation has been espoused by the prosecution to connote the guilt of the accused Kewal Ram qua his having committed offence punishable under Section 29 of NDPS Act for which he stood charged and tried by the trial Court.

12. The testimony of PW-1 has been corroborated by other prosecution witnesses. Consequently, the genesis of the prosecution case qua the accused being in conscious and exclusive possession of charas while its being carried in the vehicle occupied by them has been contended to have been firmly established. However, though the depositions of the official witnesses in the event of their testimonies being bereft of any inter-se or intra-se contradictions, are both trustworthy and credible, for founding thereupon findings of conviction, even when there is omission on the part of the Investigating Officer to associate independent witnesses in the proceedings relating to search, seizure and recovery of contraband in the manner as alleged by the prosecution. The omission on the part of the Investigating Officer to associate independent witnesses in the apposite proceedings would not stand in the way of returning findings of conviction against the accused on the strength of the consistent testimonies of the official witnesses qua the genesis of the prosecution case, only in case the evidence comprised in the testimonies of the official witnesses discloses that independent witnesses were not available for theirs being joined in the proceedings related to search, seizure and recovery of the contraband. However in the event

of evidence on record fortifyingly disclosing that the independent witnesses were available in close vicinity to the site of occurrence, the inability of the Investigating Officer to solicit their participation in the apposite proceedings would taint the genesis of the prosecution version, especially when theirs being joined in the apposite proceedings, a firm conclusion of the investigation having been carried out in an independent and fair manner would be garnered. This Court to disinter whether independent witnesses were available in the vicinity of the site of occurrence for theirs being joined in the apposite proceedings, yet there being a conscious omission on the part of the Investigating Officer to do so for fostering an apt conclusion that omission on the part of the Investigating Officer to despite their availability solicit their participation in the apposite proceedings, was constrained by a oblique motive on his part to smother the truth qua the genesis of the prosecution case, an advertence is required to be made to the existence of a statement in the cross-examination of PW-1 qua availability of 3-4 Khokhas and 2-3 factories in the vicinity of the site of the occurrence. Moreover even in the cross-examination of PW-14 there occurs an admission of the premises of Shivalik Agro Factory being located at a distance of 30-40 feet from the site of occurrence. Given the proximate location of the aforesaid factories to the site of occurrence necessarily then when the presence of Chowkidars/security guards to maintain vigil of the premises at night cannot be overruled. Consequently, it was only on concerted efforts having been made by the Investigating Officer, by visiting the premises of the factories/buildings located in the vicinity of the site of occurrence, for ascertaining the availability of the security guards/chowkidars expected to maintain vigil at night of the factories/buildings, for hence soliciting their participation in the apposite proceedings. However, there is no evidence on record portraying the fact that any concerted effort was made by the Investigating Officer to ascertain the presence of chowkidars/ security guards expected to maintain vigil at night of the premises of factories/buildings located in the vicinity of the site of occurrence. Consequently, omission of concerted efforts on the part of the Investigating Officer to either ascertain the presence of chowkidars/security guards expected to maintain vigil at night of the premises of factories/buildings in the vicinity of the site of the occurrence or obviously then, solicit their presence in the apposite proceedings relating to search, seizure and recovery, constrains an inference that despite availability of independent witnesses in the vicinity of the site of occurrence, the Investigating Officer consciously omitted to do so. His conscious omission to associate independent witnesses in the apposite proceedings relating to search, seizure and recovery of the contraband naturally foments a conclusion that the said omission was sequelled by an oblique motive on the part of the Investigating officer to smother the truth qua the occurrence. Consequently, this Court would not imbue veracity to a smothered investigation carried out by the Investigating Officer.

13. Moreover, the prosecution was required to prove the fact that the case property, as shown to PW-1 and identified by him on its production by the learned P.P was linkable to the case property as recovered from the site of occurrence in the manner as alleged by the prosecution. The deposition of PW-1 discloses that the case property comprised in parcels P-1 to P-8 though bore the seal impressions of FSL as also the seals were intact, nonetheless PW-1 in his deposition has omitted to depose the pivotal and crucial facts of the case property having been handed over to him by PW-5, Incharge Malkhana of the police Station, concerned at the relevant time for producing the same in the Court at his instance. For omission of or non-existence of a statement to the effect that the case property as shown to him in the Court by the learned P.P on production at his instance in Court, was handed over to him or to some other official by PW-5, after its having been retrieved by the latter from the police Malkhana, concerned, wherein it was kept in safe custody, besides omission of a disclosure in the statement of PW-1 that when he received

the case property from PW-5, after its retrieval by the latter from the police Malkhana, the official concerned recorded an apposite entry in the Malkhana register, renders open a conclusion that the case property as shown in court to PW-1, on its production by the learned P.P, was not handed over by PW-5 to PW-1 rather its entry in Court is to be attributed to a undisclosed source which renders suspect the factum of its constituting the property as was allegedly recovered from the conscious and exclusive possession of the accused. What fortifies the factum of the case property as shown to PW-1 in Court by the learned PP being not the property/contraband allegedly recovered at the site of occurrence from the conscious and exclusive possession of the accused, is the fact that there is no existence or occurrence in the deposition of PW-5 qua the person to whom he handed over the case property for its production in Court at the instance of learned PP for its being shown to PW-1. Besides there being no apposite entry contemporaneous to the date of its production in Court at the instance of the learned PP, in the Malkhana register portraying the fact that it was on the date on which it was shown to PW-1 by learned PP retrieved from the Police Malkhana and thereupon handed over to an unnamed official for its being at the instance of the learned PP shown to PW-1. Consequently, even if the seal impressions on parcels remained intact and the seal impression borne on the parcels tallied with seal impressions, as displayed in the report of the FSL, nonetheless for lack of a contemporaneous entry in the malkhana register depicting its retrieval therefrom on the date on which it was at the instance of learned PP produced in Court besides there being also no enunciation in the deposition of PW-5 qua the person to whom he handed over the parcels, renders its appearance in Court at the instance of learned PP to be suspect. Obviously then it cannot be construed to be the case property as was recovered from the purported, alleged, conscious and exclusive possession of the accused at the site of occurrence. Moreover, the inculpatory role as attributed to accused Kewal Ram of his having sold charas to accused Sonu and Naresh in lieu whereof he received the motor cycle which stood recovered under memo PW-7/B preceded by a disclosure statement comprised in PW-7/A cannot also be concluded to be sustainable especially when the charas as purportedly sold by him to accused Naresh and Sonu has not been proved for the reasons aforesaid to be the one which was produced in Court at the time of recording of deposition of PW-1 at the instance of the learned PP.

14. The summum bonum of the above discussion is that the prosecution has not been able to adduce cogent and emphatic evidence in proving the guilt of the accused. The appreciation of the evidence as done by the learned trial Court suffers from an infirmity as well as perversity. Consequently reinforcingly, it can be formidably concluded, that, the findings of learned trial Court merit interference.

15. In view of above discussion, the appeals are allowed and the impugned judgment of 19.5.2014, rendered by the learned Special Judge, Solan, District Solan, is set aside. The appellants/accused are acquitted of the offences charged. The fine amount, if any, deposited by each of 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.

16. The registry is directed to prepare the release warrants of the accused and send them to the Superintendent of the jail concerned, in conformity with this judgment forthwith. Records be sent down forthwith.

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

Jagdish Kumar .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No.: 223 of 2013
Reserved on: 28.5.2015
Date of Decision : 03.06.2015

N.D.P.S. Act, 1985- Section 20(b)(ii)(c)- Accused was found in possession of 4.88 kg of charas- independent witness had not supported the prosecution version and the testimonies of the police officials will become doubtful due to this- no entry was made in the Malkhana register regarding the taking out of the case property for production before the Court or re-depositing the same which makes it difficult to connect the case property produced in the Court with the contraband recovered at the spot- held, that in these circumstances prosecution case was not proved- accused acquitted. (Para-9 to 13)

For the Appellant: Mr. Vivek Sharma, vice Mr. Satyen Vaidya, Advocate.
For the respondent: Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, *Judge*

This appeal is directed against the judgment rendered on 5.1.2013 by the learned Special Judge (II), Mandi, District Mandi, H.P. in Sessions trial No. 1 of 2012, whereby the appellant has been convicted and sentenced to undergo rigorous imprisonment for a period of twelve years and to pay a fine of Rs. One lac for commission of offence punishable under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'NDPS Act') and in default of payment of fine, he has been sentenced to undergo simple imprisonment for two years.

2. The prosecution story, in brief, is that on 20.10.2011 at about 4.30 p.m. SI Dulo Ram alongwith ASI Pratap Singh, HHC Raj Kumar, LHC Sanjay Kumar, on receipt of prior information, were present near Dhanotu Chowk, in the meantime accused came there having a bag in his right hand. It is alleged that accused was roaming quickly towards Sabzi Mandi and also came back, the police got suspicion and the accused was stopped. Dalip Chand and Kartar Singh were joined as indepdent witnesses in the raiding party. On inquiry, accused had disclosed his name and address. Thereafter the bag, on which "Next Gen" was imprinted was checked and on checking the bag, one polythene bag was found kept inside it on which "Lall and Sons", the Mall Shimla was imprinted and inside the said bag one polythene envelope, which was tied with a piece of cloth was found and on opening the same a black coloured material in the shape of sphere and stick was found in it and on smelling the same was found to be Charas. On weighing the charas, it was found to be 4 Kg. 880 grams. The charas was sealed in a parcel in the same manner by using seal H at 18 places. Sample seal was taken on piece of cloth. NCB form in triplicate were filled in and seal was also affixed on it. Charas was taken into possession vide seprate memo, which was

singed by the accused and the witnesses. Rukka was prepared. Rukka, NCB form, copy of seizure memo, sample seal were then sent to P.S State CID Bharari through HHC Raj Kumar. FIR was registered against the accused. Accused was arrested and the case property for chemical examination was sent to FSL Junga and report was received. Special Report was sent to ASP, CID Bharari.

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

4. In order to prove its case, the prosecution examined as many as 10 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded, in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C. the accused was given an opportunity to adduce evidence in defence and he chose not to adduce any evidence in defence.

5. On appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused.

6. The accused/appellant is aggrieved by the judgement of conviction recorded by the learned trial Court. Shri Vivek Sharma, Advocate, has concertedly and vigorously contended that the findings of conviction, recorded by the learned trial Court, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of conviction be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

7. On the other hand, the learned Assistant Advocate General appearing for the 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.

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 embedded in the deposition of PW-1. He deposes that on 20.10.2011 at about 4.30 p.m, he alongwith HHC Raj Kumar, LHC Sanjay Kumar and ASI Dulo Ram were present near Dhanotu Chowk. The accused has been deposed to have there arrived from Jai Devi. The accused has been deposed to be the carrier of a raxine type black green coloured bag on his right shoulder. He further deposes that the accused was walking briskly towards Sabzi Mandi wherefrom he turned towards Dhanotu Chowk. Thereafter he has been deposed by this witness to have retrieved towards Sabzi Mandi. On suspicion having been aroused he was stopped. Dalip Chaudhary and Kartar Chandel have been deposed to have been associated. On inquiry accused revealed his name to be Jagdish Kumar. The Investigating Officer has been deposed by this witness to have checked the bag carried by the accused in the presence of witnesses Dalip Chaudhary and Kartar Chandel and in the presence of official witnesses. The bag was bearing the words 'Next Gen'. On opening the bag aforesaid, it was found to be containing a white, red and green polythene bag bearing the label of Lal and Sons, The Mall, Shimla. On checking, it was found to be containing a transparent polythene bag which was tied with a piece of cloth from one side. In it a black coloured substance, in the form of spheres and sticks, was recovered. On the

basis of smell and experience it was identified to be the Charas. On weighment, the charas was found to be 4.880 kilograms. Memo of identification has been deposed by this witness to have prepared. The memo aforesaid has been deposed to have signatured by him, Dalip Chaudhary and Kartar Chand. Thereafter, the Charas was inserted in a polythene bag and the polythene bag was put in the same bag, wherefrom it was recovered. The bag was put in the same cloth parcel and the parcel was sealed with 18 impressions of seal H. Seal impression has been deposed by this witness to have taken on separate pieces of cloths, one of such impression is comprised in Ex. PW-1/B, which bears his signatures and signatures of Kartar Chandel, Daleep Chaudhary and Jagdish Kumar. He continuous to depose that NCB Form-1 Mark A was filled in triplicate at the spot and seal impression has been deposed by this witness to have embossed on it. He further deposes that seal after use was handed over to Dalip Chaudhary. Charas was seized vide seizure memo Ext.PW-1/C, which was signed by him, Kartar Chandel, Dalip Chaudhary, LHC Sanjay Kumar and by the accused. Copy of the seizure memo has been deposed to have been supplied to the accused. Ruka mark-B was prepared and handed over to HHC Raj Kumar alongwith the case property, sample seal and NCB 1 form with a direction to carry the aforesaid to the police station Bharari. The investigating officer has been deposed to have prepared the site plan and recorded the statement of witnesses as per their version. Accused has been deposed by this witness to have arrested vide memo Mark-C, which bears the signatures of Kartar Chandel, Dalip Chaudhary and accused. During the course of his examination in chief, one sealed parcel sealed with seven impressions of FSL, 17 impressions of seal H, 10 impressions of seal T were produced in Court. One seal impression was broken and was not legible. On permission having been accorded to the learned Public Prosecutor to open the parcel, this witness identified the parcel Ext.P-1 to be the same which was prepared in his presence. Further he deposes that the bag Ext.P-2 bearing the words “Next Gen”, polythene bag Ext.P-3 bearing the words “Lal and Sons”, transparent polythene Ext.P-4, piece of cloth Ext.P-5 and charas Ext.P-6 have been deposed to be the same as were seized from the alleged conscious and exclusive possession of the accused.

10. Even though the testimonies of the official witnesses do not suffer from any taint of incredulity for existence there if any inter-se and intra-se contradictions nor theirs testimonies are bereft of the consistencies as such obviously rendering them to be construable to be credible as well as inspiring for concluding qua the guilt of the accused. However, when the testimonies of the official witnesses qua the factum of recovery of contraband under memo PW-1/C from the alleged conscious and exclusive possession of the accused at the site of occurrence suffers contradiction from the deposition of an independent witness PW-2, who has openly and loudly communicated therein the fact that the recovery of charas as alleged by the prosecution to be effected from the conscious and exclusive possession of the accused at the site of occurrence, was not so recovered, in his presence, hence seeps into the truthfulness of the genesis of the prosecution version as deposed by the official witnesses. In other words, with the independent witness associated by the Investigating Officer in the apposite proceedings at the site of occurrence omitting to lend support to or his not corroborating the prosecution case, the testimonies of the official witnesses qua the genesis of the prosecution version loose their credibility. As a natural concomitant then an apt inference which ensues is that the recovery of charas from the alleged conscious and exclusive possession of the accused at the site of occurrence, is not attributable to the accused nor also then any incriminatory role to him in the alleged commission of any offence, can be fastened.

11. Dehors the aforesaid discussion, bringing to the fore the fact that the prosecution case is hence engrained with the vice of prevarication as well as falsehood, the further connecting evidence qua the factum of the case property as produced in Court during the recording of the testimony of PW-1 being linkable to the case property as was recovered from the alleged conscious and exclusive possession of the accused at the site of occurrence, was comprised in the factum of theirs, being a display in the Malkhana register of the police station concerned, where it was deposited after its recovery from the alleged conscious and exclusive possession of the accused at the site of occurrence, qua the fact that it at a time contemporaneous to its production in Court, at the instance of learned Public Prosecutor during the Course of recording of testimony of PW-1, retrieved therefrom, for facilitating its production in Court. Besides, there was an enjoined necessity of, an entry being recorded in the apposite register qua the re-deposit of case property in the Malkhana concerned after its production in Court during the course of the recording of the testimony of PW-1. However, Prakash Chand as deposed by PW-3 to be the regular MHC , has been omitted to be examined by the prosecution. Omission on the part of the prosecution to examine the regular MHC Prakash Chand, who during the course of the recording of his deposition, may have displayed evidence connoting the factum of it having been retrieved from the Malkhana, with an apposite contemporaneous entry at the time of its retrieval therefrom in the register concerned, for transmission to an official named therein for producing it in Court. Besides the recording of his deposition would have also underscored the factum whether subsequent, to its production in Court during the course of recording of the deposition of PW-1, it was returned to Prakash Chand through an official named in register, who then on receiving it had recorded an apposite contemporaneous entry of its return, in the apposite register whereafter he deposited the same in the Malkhana concerned. However, omission of examination of the regular MHC, has stifled or smothered the adduction of evidence with respect to the case property as produced in Court during the course of the examination of PW-1 retrieved from the Malkhana with an apposite contemporaneous entry having been recorded in the register concerned, besides has also suffocated evidence qua the name of official to whom the purported case property was handed over for its production in Court at the instance of the learned PP during the course of recording of the testimony of PW-1. Moreover the absence of his examination has too precluded the emanation of evidence that even after his production in Court it was through an official named in the Malkhana register, received by Prakash Chand, the Regular MHC who thereupon after recording an entry of its return to him after its production in the Court, had deposited it in the Police Malkhana. In aftermath, the non-existence of the aforesaid evidence which may have emanated on examination of MHC Prakash Chand had precluded the obvious upsurging of evidence qua hence the fact that the case property as produced in the Court during the course of recording of deposition of PW-1 is both connectable or relatable to the case property as allegedly recovered from the conscious and exclusive possession of the accused at the site of occurrence. The above said infirmity grips the prosecution case with the vice of pervasive infirmity rendering it hence to be unbelievable.

12. The summum bonum of the above discussion is that the prosecution has not been able to adduce cogent and emphatic evidence in proving the guilt of the accused. The appreciation of the evidence as done by the learned trial Court suffers from an infirmity as well as perversity. Consequently, reinforcingly, it can be formidably concluded, that, the findings of the learned trial Court merit interference.

13. In view of above discussion, the appeal is allowed and the impugned judgment of 5.1.2013, rendered by the learned Special Judge (II) Mandi is set aside. The

appellant/accused is acquitted of the offence charged. The fine amount, if any, 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.

14. The Registry is directed to prepare the release warrant of the accused and send it to the Superintendent of the jail concerned, in conformity with the judgment forthwith. Records be sent forthwith.

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

Kamlesh Kumar .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 25 of 2013.
Reserved on: 27.05.2015.
Date of Decision : 3rd June, 2015.

Indian Penal Code, 1860- Sections 302 and 201 – Accused and deceased were servants of the complainant- they used to sleep in the outhouse- accused was found alone in the morning and when the complainant made an inquiry from him, he replied that deceased had left his room prior to his waking - subsequently, accused confessed that he had an altercation with the deceased over the mobile phone on which he gave a blow on the head of the deceased with the stick and threw his dead body in the bushes- complainant and the witnesses went to the house of the accused where blood was found on the walls and the clothes- subsequently, dead body of the deceased was found down the hill- complainant had not given the genesis of the occurrence to the police- extra judicial confession also becomes doubtful in view of this fact - recovery was also suspect as the existence of the stick was known to the prosecution witnesses prior to its recovery- stick was also not recovered immediately after the incident- accused remained in the custody of the police and the police had an opportunity to put the blood on the jacket of the accused to falsely implicate him- held, that in these circumstances, prosecution version is not proved- accused acquitted.

(Para-10 to 20)

For the Appellant: Mr. Satyen Vaidya, Advocate.
For the Respondent: Mr. M.A. Khan, Additional Advocate General

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

The instant appeal is directed by the accused/appellant against the impugned judgment rendered on 19.10.2012 by the learned Additional Sessions Judge (Fast Track Court), Shimla in Session Trial No. 8-S/7 of 2011, whereby, the learned trial Court convicted and sentenced the accused/appellant for his having allegedly committed offences punishable under Sections 302 and 201 of the IPC.

2. Brief facts of the case are that on 6.11.2010 at 4.10 p.m., Narayan Negi, resident of Ganeri informed the police telephonically that two of his servants had altercation with each other. One of them is lying in the bushes and appears to be dead. As per the telephonical information, rapat has been entered in daily diary register. ASI Ram Lal, along with other police officials, went towards Ganeri village in official vehicle No.HP-07-0686. When the police reached at the spot, Narayan Singh Negi got his statement recorded under Section 154, Cr.P.C., whereby he revealed to the police that he is an agriculturist by profession. He has one outhouse at his orchard. He engaged one Kamlesh Kumar about three months back to look after his orchard and also engaged one Vishal Bahadur about a month back. Both of them used to take meal in his house and sleep in the outhouse (dogri). On 5.11.2010, both Kamlesh and Vishal went towards outhouse side at 8.30 P.M. after taking meal in his house. On 6.11.2010, only Kamlesh came to his house at 8 a.m. When he asked Kamlesh about Vishal Bahadur, then Kamlesh disclosed to him that Vishal Bahadur had already left his room when he woke up in the morning. Kamlesh went to the Ghasni to tie the grass bundles and he also went to the house of Jagdish Sharma after taking his meals. After some time, Jagdish Sharma, disclosed him that he received a call last night at about 11 p.m., from Kamlesh on his mobile phone disclosing that Vishal Bahadur fell down, then he enquired about his number and disconnected the phone. After hearing these words from Jagdish he became somewhat suspicious as Kamlesh came to his house alone and did not tell that Vishal Bahadur fell down during the night time. Narayan Singh Negi further told to the police that he, along with Jagdish Sharma and Devinder Chauhan, came to his residential house and called Kamlesh there. He inquired from Kamlesh about the call made by him last night to Jagdish Sharma, then Kamlesh became perplexed. Kamlesh disclosed to him that he had an altercation with Vishal over the mobile phone, so, he gave blow on the head of Vishal Bhadur with a stick (Binda) and threw his dead body in the bushes. Thereafter, he went towards outhouse side along with Jadish Sharma, Devinder Chauhan and Kamlesh and saw blood on the walls and on the clothes. They went to the hill side, saw the body of Vishal Bahadur and immediately informed the police telephonically. The complaint further disclosed to the police that Kamlesh disclosed to him that he washed his clothes, having blood stains, after the incident and also wiped the floor to remove the blood stains. The statement of the complainant was sent to police station through HHC Kulbhushan. The police party present at Ganeri deputed some persons to protect the dead body and some police officials and villagers stayed in the outhouse of Narayan Singh. The police party started investigation during the morning hours i.e. at 6.30 a.m. The room where the alleged incident had taken place, was inspected in the presence of witnesses and Narayan Singh Negi. The investigating officer had prepared the site plan and clicked the photographs of the room. They also took into possession the blood stained clothes of Vishal Bahadur. The police also took into possession, the stick stained with blood, prepared its sketch and wrapped the same in a parcel. The police have also lifted the blood from the walls and floor with the help of cotton swab. They also took into possession the register, diary and attendance note book belonging to the deceased. Recovery and seizure memo to this effect was also prepared in the presence of the witnesses. The police party thereafter, went to that place where the dead body was lying in the bushes. The photographs were clicked, site plan was prepared and the dead body was pulled out from the bushes. During the personal search of the dead body, the police did not recover anything except for the clothes, which he was wearing. The dead body was taken to CH, Chopal where the post mortem of the deceased was conducted. The viscera were also preserved along with the clothes. The dead body of Vishal Bahadur was handed over to Naryan Singh Negi for last rituals. The statements of witnesses were recorded. The accused was formally arrested and

information regarding his arrest was given to Naryan Singh Negi. On 9.11.2010, the accused made disclosure statement in presence of the witnesses to the effect that he can effect the recovery of clothes and mobile along with charger, which he had hidden near the farm house. The accused took the police to village Ganeri and at the instance of the accused, mobile phone, charger, jacket and pants were recovered near the bathroom of outhouse. The photographs of the place of recovery were clicked and the articles, so recovered, were sealed in parcel. On 11.11.2010, request was sent to SP for obtaining call details of mobile phone No.98160-07728. After the information received from the telephone department, one Mast Ram, resident of Village Tiprog was found to be the owner of mobile phone, who disclosed to the police that the mobile phone was given by him to deceased, when he was working with him. The viscera and clothes were sent to FSL Junga on 12.11.2010. The Investigating Officer on 27.11.2010 obtained the jamabandi, tatima and temporary demarcation report from local Patwari and also prepared the site plan of the place of incident with the help of PWD officials. The date of birth certificate of the accused was obtained from Pithoragarh, Uttrakhand. The IO also recorded the statements of the witnesses under Section 161 of Cr.P.C. The report of FSL was also obtained, according to which, the shirt, weapon of offence, the jacket of Kamlesh Kumar and the pants of Kamlesh Kumar were having the traces of blood of Vishal Bahadur. During the investigation, it was revealed that the deceased used to refrain the accused from using the mobile phone, so the accused developed ill-will towards the deceased. On the eve of Diwali festival, the deceased and the accused took liquor in the house of Narayan Singh and at about 8.30 p.m., they went to the outhouse where both of them had altercation with each other. Kamlesh Kumar accused took the advantage of the fact that Vishal Bahadur was intoxicated, so, he gave beatings with stick to Vishal Bahadur on his head and other parts of the body, as a result of which, Vishal Bahadur died on the spot.

3. On conclusion of the investigation, into the offence, allegedly committed by the accused, report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court.

4. Accused was charged for his having committed offences punishable under Sections 302 and 201 of the IPC by the learned trial Court to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 22 witnesses. On closure of prosecution evidence, the statement of the accused, under Section 313 of the Code of Criminal Procedure was recorded in which he pleaded innocence and in defence examined three witnesses.

6. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/respondents.

7. The accused/appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. The learned counsel appearing for the appellant has concertedly and vigorously contended that the findings of conviction 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 conviction be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

8. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended that the findings of conviction 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.

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

10. Both, the accused and the deceased were co-employees of PW-6 Narayan Singh Negi. They resided together in the "Dogari" of PW-6. Both, on the eve of Deepawali which fell on 5.11.2010 have been deposed by PW-6 to have taken their meals as well as consumed liquor in his house, whereafter at about 8.30 p.m., as usual they went to the "Dogari". The incident is alleged to have occurred at the place depicted in the site plan comprised in 22/A. The accused is alleged to have, by user of danda (Ex.P9) at his instance, put to death deceased, Vishal. The recovery of danda, Ex.P-9 was effected at the instance of the accused under memo Ex.PW6/A in pursuance to the disclosure statement made by the accused.

11. The postmortem report, Ex.PW9/B stands proved by the deposition on oath of PW-9, Dr. Vishal Chandel, who carried out the postmortem examination on the dead body of deceased Vishal. The relevant portion of the postmortem report constituting observations recorded in it, is extracted hereinafter:-

> "The deceased was stout and well built, rigorous mortise with fracture left forearm and left leg. While coloured T-shirt, Grey trouser, brown underwear. Clothes covered with sand, mud and dust. Body covered with sand and mud. Face and ears also covered with sand, dust and mud.
>
> Generalized, bruises and contusions on body. Mark of ligature nil.
>
> Scalp; Four lacerations on occipital region of skull which were skull deep/bone deep.
>
> First injury 5cm x 2.5 cm
>
> Second injury 3 cm x 1 cm.
>
> Third injury 3 cm x 1.5 cm
>
> Fourth injury 2 cm x 1.5 cm
>
> Skull deep laceration 3 cm x 1.5 cm on frontal region of scalp.
>
> Skull and Vertebra:
>
> Fracture frontal part of skull. Vertebra normal.
>
> **Membrances and Brain.**
>
> Concussion frontal region of brain meninges swollen injuries to superficial vessels on occipital region and meniges and brain with clotted blood on surface of brain on occipital region. Spinal cord normal.
>
> **Thorax**
>
> Walls, ribs and cartilages: left side for criss cross linear contusions 15 cm x 20 cm in length, 5 cm x 6 cm wide reddish blue in colour with generalized bruises which were black in colour.

Pleurae normal, larynx and trachea normal. Right lung normal. Pericardium normal heart normal large vessels etc., normal.

Abdomen

Multiple bruises blush reddish in colour, generalized linear criss cross contusion 10 cm x 6 cm in size, 5 to 6 in number, blush red in colour. Peritoneum normal. Mouth, pharynx and oesophagus filled with blood. Stomach and its contents:- wall of stomach contusion present, pinkish in colour with raptured blood vessels semi fluid contents in stomach. Small intestines and their contents. Semi solid contents in small intestine. Walls normal. Large intestines and their contents: normal. Semi solid contents. Liver normal. Spleen normal. Kidneys normal. Bladder normal filled with urine. Organs of Generation external and internal normal.

Muscles, Bones and Joints:

Multiple contusions in bruises on face and forehead. Contusions and bruises both elbows and arms. Lacerations and contusions on hips, legs and thighs. Disease of deformity nil. Fractures: Skull frontal region, fracture left forearm. Dislocations nil.

Certificate cause of death:

Deep head injury with injury to brain. Probable time that elapsed that almost instantaneous. Between death and postmortem more than 24 hours."

During the course of his examination-in-chief, PW-9 has communicated the fact that the deep head injury observed on the person of the deceased and which sequeled his demise can be caused by use of danda, Ex.P-9.

12. The principal prosecution witnesses in proof of the guilt of the accused are PW-6, Narayan Singh Negi, the employer of both the accused and the deceased Vishal, PW-7 Jagdish Sharma and PW-8 Mohi Ram. PW-6 Narayan Singh Negi, in his deposition on oath has deposed that accused Kamlesh was engaged by him about three months prior to the occurrence and deceased Vishal was engaged by him about one month prior to the occurrence. Both have been deposed by him to have on the fateful day taken meals with his family. Both have been deposed to be residing in his "Dogari". He further deposes that on the eve of Diwali i.e. on 5.11.2010 both partook meals, as also, consumed liquor in his house. Both have been deposed to have left for his "Dogari" at about 8.30 p.m. He further deposes that at about 9.00 P.M., he called Vishal on his mobile and Vishal apprised him that they have reached the "Dogari". On 6.11.2010, at about 8.00 a.m., accused Kamlesh alone came to his house which led him to inquire from accused Kamlesh about Vishal Bahadur. The accused has been deposed to have told him that he woke up late in the morning and by that time Vishal Bhadur had already left the house. There is a disclosure in his deposition on oath that the accused specifically told him that he did not know about the whereabouts of deceased Vishal. Accused Kamlesh has been stated by him to have taken breakfast and thereafter proceeded to Ghasni to tie bundles of grass. He deposes that at about 11 a.m., he went to the house of Jagdish Sharma and remained with him. After lapse of a considerable time, he disclosed to him that at about 11 p.m., he received calls twice and thrice from accused Kamlesh Kumar over his cell phone. Jagdish Sharma has been deposed by PW-6 to have further apprised him that accused Kamlesh then disclosed to him that Vishal Bahadur had fallen down. After his having been apprised about

the fate of Vishal Bahadur by Jagdish Sharma, he deposes that he suspected some foul play, as Kamlesh came alone for work. Consequently, he along with Jagdish and Devinder Chauhan came to his house and thereupon they called Kamlesh from Ghasni. He deposes that when he inquired from the accused the cause for his calling up Jagdish Sharma over the latter's cell phone and his having apprised him about Vishal Bahadur, his having refused to have made any call to Jagdish Sharma. On re-inquiry by him from the accused about Vishal, accused Kamlesh has been deposed to have become perplexed and then he narrated that he had an altercation with Vishal for a mobile phone succeeded by a scuffle inter se them whereafter Vishal ran away. On repeated queries by PW-6 from the accused, the latter is deposed to have divulged to him that he had given severe beatings to deceased Vishal with a stick and thereafter had thrown his body in the bushes. On hearing the story from the accused, PW-6 rang up Up-Pradhan, Mohi Ram and called him to his house. Thereafter they went to Dogri and Mohi Ram also met them on the way. Blood was noticed to be spilled on floor of the "Dogari", besides blood was splashed on the walls and on the shirt of Vishal. It was also observed by them that the accused had tried to wipe out blood stains from the floor and walls. He also inquired from accused Kamlesh about Vishal, whereafter he disclosed to him that Vishal had run away from the place and on his repeated queries, accused Kamlesh disclosed to him that the body of Vishal is lying in the bushes. The accused has been deposed to have shown to them the stick with which he gave blows to deceased Vishal and which was kept/concealed by him behind the door. The accused has been deposed to have led PW-6, PW-7 and PW-8 to the place where the dead body of deceased Vishal was lying. After seeing the dead body, the aforesaid deposes to have returned to the "Dogari" and thereafter theirs having informed the police of Police Station, Chopal at about 4.00 p.m. In cross-examination he deposes that the relations inter se the deceased and the accused were cordial. Besides, in his cross-examination there occurs a disclosure that on the day when the police visited the site of occurrence, the accused had shown to the police danda, Ex.P-9. However, he concedes to the fact that the police had not taken into possession danda, Ex.P-9, on 6.11.2010. Moreover, his deposition in his cross-examination bespeaks the factum of the accused having been kept in the Dogri on 6.11.2010 and 7.11.2010 till the body of Vishal Bahadur was taken for postmortem. He further deposes in his cross-examination that the police officials also stayed in the "Dogri" on 6.11.2011. Furthermore, he has articulated in his deposition on oath comprised in his cross-examination that the accused never concerted to run away from the house or the "Dogri".

13. PW-7, Jagdish Sharma also corroborates the testimony of PW-6 especially qua the pivotal fact of the accused in his presence and in the presence of of PW-6 and PW-8 Mohi Ram having confessed his guilt. Besides, he therein explicitly pronounces the fact of on 5.11.2010 of accused Kamlesh having communicated to him on his mobile the fact that Vishal had fallen down. In his cross-examination, he deposes that he had apprised PW-6 about the phone call received by him from accused Kamlesh at the very moment he reached his home. He deposes that they did not disclose anything to Mohi Ram but asked him to inquire personally from accused about the incident. He deposes that the police took into possession stick, Ex.P-9 on 7.11.2010.

14. PW-8 Mohi Ram in his deposition deposed a version in corroboration and in tandem with the depositions of PW-6 and PW-7. Besides, he in his examination-in-chief has proven parcel Ex.P-1, containing match boxes, Ex.P-2 and Ex.P-3, having controlled soil and blood sample, Ex.P-4 and Ex.P-5. He has also proven parcel Ex.P-6, containing the check shirt (Ex.P-7) and stick Ex.P-9. He has further proven parcel Ex.P-8, containing register (Ex.P-10), diary (Ex.P-11), attendance note book)ExP-12). All the aforesaid articles

have been deposed by this witness to have been taken into possession by the police under recovery memo Ex.PW6/A. Recovery memo Ex.PW6/A has been deposed by this witness to be bearing his signatures. The dead body has been deposed by this witness to have been identified by PW-6 Naryan Singh Negi qua which memo Ex.PW6/B was prepared by the police. Memo Ex.PW6/B has been deposed by this witness to be bearing his signature along with the signatures of Narayan Singh and Devinder. This witness has deposed his having accompanied Narayan Singh to CH, Chopal where the post mortem of the deceased was conducted. The doctor concerned has been deposed by this witness to have handed over the parcel of cloth, which the deceased was wearing to the police. The parcel, Ex.P19 has been deposed by this witness to be bearing his signatures in red circle. The dead body has been deposed by this witness to have been handed over to Narayan Singh under memo Ex.PW6/D for carrying out his last rituals. In cross-examination he deposed that his statement as well as the statements of PW6 and PW-7 were recorded on 6.11.2010 by the police.

15. The instant case is not anvilled upon eye witness account qua the occurrence. It, in its entirety is harboured upon circumstantial evidence. In a case which is anvilled upon circumstantial evidence, motive which otherwise does not assume significance, assumes significance. The motive as attributed to the accused is constituted in a disclosure made by the accused on inquiry by PW-6 of an altercation having ensued inter se him and deceased Vishal Bhadur for/over a mobile. However, the motive as attributed to the accused by PW-6 arising from a disclosure made to him on inquiry from accused Kamlesh stands denuded of its probative efficacy, in the face of the genesis of the occurrence, as promptly disclosed to the police and recorded in the daily diary report comprised in Ex.PW13/A being not in tandem with or in harmony with the depositions of PW-6, PW-7 and PW-8 vis-à-vis the fact respectively occurring therein of a purported disclosure having been made by the accused to PW-7 in the night of 5.11.2010 over the cell phone of the latter qua the fact of the deceased having fallen down. On the edifice of the disclosure purportedly made by the accused to PW-7 over the latter's cell phone qua the fact of the deceased having fallen down, the prosecution concerts to prove that the accused was in the company of the deceased at the time when he suffered head injury and which ultimately sequeled his demise. On the anvil of the aforesaid hypothesis, the prosecution has endeavoured to connect the accused in the murder of deceased Vishal.

16. Now this Court is beset with the conundrum to gauge the veracity or otherwise of the factum of the disclosure by PW-7 in his deposition on oath of the accused having over his cell phone on the night of 5.11.2011, communicated to him the fact of the deceased Vishal having fallen down. The veracity thereof has to be gauged and comprehended in the light of its having or not found occurrence in the daily diary report qua the incident promptly transmitted or furnished by the informant to the police, comprised in Ex.PW13/A. Even when the preponderant fact of PW-6 on 6.11.2011 having been apprised by PW-7 about a disclosure having been made by accused Kamlesh over the cell phone of the latter qua the fact of the deceased having fallen down, besides PW-8 when also deposes that the statement of the witnesses were recorded on 6.11.2010, obviously, then the said fact ought to have, when conveyed by PW-7 to PW-6 prior to the transmission by the latter to the police station concerned, information qua the incident, found occurrence therein. However, a perusal of the daily diary report comprised in Ex.PW13/A omits to convey the fact of the informant having reported the fact of the accused having disclosed to PW-7 the pivotal fact of deceased Vishal having fallen down. The omission of recital of the pivotal fact, in the daily diary report comprised in Ex.PW13/A of the accused having disclosed and divulged to PW-7 over the mobile/cell phone of the latter, of the deceased having fallen down

though, PW-6 was as emanating on a reading of the testimony of PW-7, informed promptly qua the said disclosure by the accused to him qua the aforesaid fact, leads to the apt sequel, that either the said information purveyed by PW-7 to PW-6, was suppressed or PW-6, PW-7 and PW-8 are concocting the factum of the accused having disclosed to PW-7 over his cell phone in the night of 5.11.2010, the fact of the deceased having fallen down. Hence on account of reticence in Ex.PW13/A of the aforesaid germane fact, as such, not only a shroud of doubt engulfs the factum of the purported disclosure by the accused to PW-7 over the mobile phone of the latter qua the fact of the deceased having fallen down, besides the disclosure aforesaid by the accused to PW-7, obviously suffers immense erosion. Consequently, the purported extra judicial confession made by accused Kamlesh to PW-7 over the mobile phone of the latter also stands in the realm of incredulity. Moreover, the concert on the part of the prosecution to hence prove that the accused was last seen in the company of the deceased at a time, when he suffered head injuries which sequeled his demise, has remained unsubstantitated.

17. The depositions on oath of PW-6, PW-7 and PW-8 divulging therein that the accused extra judicially confessed his guilt before each of them and also led them to the site of occurrence besides, showed them the place of hiding and concealment of the dead body of the deceased and in addition showed them the stick used by him to deliver blows on the head of the deceased, while constituting facts which are in succession to the disclosure made by PW-7 to PW-6 qua the former having received on the night of 5.11.2010 a communication over his mobile phone from the accused, disclosing to him the fact of the deceased having fallen down, the effect of which purported disclosure has been for the reasons spelt out hereinabove construed to be unbelievable as well as incredulous, also then as a concomitant stand imbued with the vice of prevarication or falsehood. In other words, the successively or subsequently made extra judicial confession by the accused qua his guilt before PW-6, PW-7 and PW-8 stands to be discarded. What garners the inference that the efforts on the part of PW-6, PW-7 and PW-8 to elicit from the accused truth qua the occurrence which purportedly yielded from the accused a purported communication by him to them of a confession of his guilt are also a well engineered invention and concoction, is embedded in the fact that the daily diary report comprised in Ex.PW13/A does not enunciate therein the fact of an extra judicial confession having been made by the accused qua his guilt before PW-6, PW-7 and PW-8. Since the information comprised in Ex.PW13/A was in quick succession to the fateful incident and also was preceded by the disclosure made by PW-7 to PW-6 qua the accused having on the night of 5.11.2010 disclosed to him over his mobile the fact of the deceased having fallen down, hence, even if, the information qua the incident was telephonically transmitted by the informant to the police station concerned obviously, then the extra judicial confession attributed by PW-6, PW-7 and PW-8 to the accused qua his guilt ought to have found occurrence therein. Its suppression by the informant at the time of his having transmitted information to the police station concerned which resulted in the recording of the daily diary report comprised in Ex.PW13/A leads to the sequeling inference that the purported extra judicial confession made by the accused to PW-6, PW-7 and PW-8 was not as deposed by them made by the accused before either of them preceding to the reporting of the occurrence rather the said fact of the extra judicial confession having been purportedly made by the accused to PW-6, PW-7 and PW-8 is an ingenuous invention at the instance of the prosecution witnesses or a devised machination to falsely implicate the accused.

18. The effect of the above discussion is that even the motive as purportedly attributed to the accused by PW-6, PW-7 and PW-8 for his having committed the murder of

the deceased whose confession was along with the purported extra judicial confession made by the accused qua his guilt before PW-6, PW-7 and PW-8 was made prior to the transmission of the information qua the fateful occurrence by the informant to the police station concerned sequeling the recording of daily diary report comprised in Ex.PW13/A, yet the aforesaid fact connoting the carrying of motive by the accused in his mind to murder deceased Vishal Bahadur as deposed to be communicated by the accused to PW-6, PW-7 and PW-8 while not finding occurrence in Ex.PW13/A, renders their depositions on oath while being hence an improvement or an embellishment over the daily diary report, to be unworthy of credence.

19. Even though, the prosecution has relied upon the recovery of danda, Ex.P-9 under recovery memo Ex.PW6/A purportedly preceded by a disclosure statement having been made by the accused yet the recovery of danda Ex.P-9 at the instance of the accused, loses its vigour and efficacy given the fact that prior to its recovery at the instance of the accused from the place of its concealment and hiding, it was shown by the accused to PW-6, PW-7 and PW-8. Apart there from, when prior to the occurrence, the factum of its user and its place of concealment was known to PW-6, PW-7 and PW-8 yet with the daily diary report comprised in Ex.PW13/A omitting to covey that the accused belaboured the head of the deceased with a stick, sequels an inference that PW-6, PW-7 and PW-8 even prior to its recovery at the instance of the accused by the police had ingenuously contrived to incriminate the accused with its purported user. Moreover, the factum of non occurrence in the disclosure statement Ex.PW10/A made by the accused to the police qua the place of hiding and concealment of the danda by him lends fillip to an inference that danda, Ex.P-9 was recovered even when its recovery at the instance of the accused by the Investigating Officer under recovery memo Ex.PW6/A was not preceded by a disclosure statement qua its place of hiding and keeping, concomitantly leading to an apt inference that its recovery stands whittled down as well enfeebled. Given the above inference of false incrimination of the accused in the user of danda by him for belabouring the head of the deceased which sequelled injuries and caused his demise, the efficacy of its recovery at the instance of the accused as well as its user at the instance of the accused stand dwindled. Furthermore, the deposition of PW-6 comprised in his cross-examination underscore the factum of the police having arrived at the site of occurrence on 6.11.2010 and having stayed there along with the accused on 6.11.2010 uptill 7.11.2010. However, the police did not concert to recover at the instance of the accused danda Ex.P-9 on 6.11.2010 even when before PW-6, PW-7 and PW-8 the accused had purportedly made an extra judicial confession qua his having used danda to belabour the head of the deceased and his also having divulged to each of them the place of its concealment or hiding. Obviously, then the omission on the part of the police to recover danda Ex.P-9 on 6.11.2010 when construed in conjunction with the fact that they had remained at the site of occurrence on 6.11.2010 to 7.11.2010, whereas the recovery of danda was effected under recovery memo Ex.PW6/A on 7.11.2010, renders it to be a wholly contrived machination to falsely implicate the accused. Even the recovery of the dead body of the accused from the place of its concealment and hiding purportedly at the instance of the accused under recovery memo Ex.PW6/B also become suspect besides, vulnerable to skepticism especially in the face of the accused having purportedly made an extra judicial confession qua his guilt before PW-6, PW-7 and PW-8 and his having prior to its recovery shown to the aforesaid prosecution witnesses, the place of its hiding and concealment. Obviously, when the extra judicial confession of his guilt purportedly made by him before PW-6, PW-7 and PW-8 for the reasons hereinabove is of scant legal worth, besides when the police had remained, at the site of occurrence from 6.11.2010 to 7.11.2010 whereas the recovery of the body of the deceased at the instance of the accused was effected on

7.11.2010 under Memo Ex.PW6/B, renders it to be discovered and recovered after an intensive search made by the police in collaboration with PW-6, PW-7 and PW-8 and not at the instance of the accused.

20. The upshot and summom bonum of the aforesaid discussion, is that even the existence of the blood stains on the jacket of the accused opined by the FSL to be carrying the blood of the deceased cannot connect the accused in the murder of the deceased especially when given the fact that the accused remained in the company of the police right from 6.11.2010 to 7.11.2010, obviously then it facilitated the police to daub the jacket of the accused with the blood oozing from the head injury of the deceased, so as to falsely implicate him. The further upshot of the above discussion is that the accused is not to be concluded to have committed the murder of the accused.

21. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has omitted to appraise the entire evidence on record, in, a wholesome and harmonious manner. On the other hand, it appears that by giving a piece meal reading, to the evidence on record, it has also discarded the probative force and relevance of the facets aforesaid, hence, indulged in gross mis-appreciation of evidence sequeling substantial mis-carriage of justice.

22. In view of the above, the appeal is allowed and the judgment of the learned trial Court is set aside. Consequently, the accused/appellant is acquitted of the offences for which he stood charged and convicted by the learned trial Court. He be set at liberty forthwith, if not, required in any other offence. Fine amount, if any, deposited by the accused be refunded to him forthwith.

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

State of H.P. .....Appellant.
Versus
Subhash Chand and another .....Respondents.

Cr. Appeal No. 262 of 2009.
Reserved on: 29.05.2015
Date of Decision : 3rd June, 2015.

Code of Criminal Procedure, 1973- Section 156- The Investigating officer not associating the immediate neighbours of the accused and deceased to find out the truth-the investigation suffers from the taint of partisanship rendering the prosecution case doubtful particularly when other evidence is doubtful-trial court came to the correct conclusion-appeal devoid of merits-dismissed. (Para-12)

Indian Evidence Act, 1872- Section 3- Allegations that the accused gave beatings to deceased on the night previous to the fateful occurrence - During postmortem no ante mortem injuries found-statement of the complainant qua the alleged beatings liable to be disbelieved-dowry demands and alleged torture of the deceased for not bearing child not specified in evidence by reference to specific time-close proximity between the alleged harassment and cruelty and death not established - Guilt not established. (Para-11)

Indian Penal Code, 1860- Sections 498-A and 306- Wife committed suicide by setting herself ablaze-husband alleged to have abetted her suicide by subjecting her to torture on account of dowry demands and for not bearing child- after trial accused acquitted by the trial court for want of evidence -proximity between the alleged torture and the suicide not established. (Para-10)

For the Appellant: Mr. Ramesh Thakur, Assistant Advocate General.
For the Respondents: Mr. Rajesh Mandhotra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed by the State against the judgment rendered on 3.10.2008 by the learned Sessions Judge, Hamirpur, District Hamirpur, in Sessions trial No. 09 of 2008, whereby, the learned trial Court acquitted the accused for theirs having allegedly committed the offences punishable under Sections 498-A and 306 read with Section 34 of the Indian Penal Code.

2. Brief facts of the case are that on July 25, 2007, Ramesh Chand son of Jai Singh, resident of Village Tikker telephonically informed Police Station, Sadar Hamirpur that Rajni Devi had committed suicide during the previous night by setting herself afire. Such report was entered in the daily diary and the Investigating Officer proceeded to the spot. He recorded the statement of Smt. Champa Devi wife of Sh. Prem Chand under Section 154, Cr.P.C., disclosing therein that she belongs to Village Tikker in Tehsil Hamirpur. Her husband is a labourer. She gave birth to four daughters and two sons. One daughter, namely, Rajni Devi was married about five years back to accused Subhash Chand according to Hindu rites and customs and adequate dowry was given. However, Rajni Devi could not bear a child. It was reported that accused had been physically beating her and maltreating her for not bearing a child. Once she had come to her parental house and she was taken back to the matrimonial house after three months with the intervention of some relatives. On the previous night of July 25, 2007 at about 12 O'clock, Rajni Devi telephoned her mother and disclosed that the accused were altogether present in the house and they were torturing her by saying that she was 'Banjh" and that Subhash would remarry. She was calmed down by the complainant by saying that they would talk in this behalf later on. At about 2.30 a.m., Sulekha, sister of Subhash Chand telephoned the complainant that Rajni Devi had sprinkled kerosene oil on her and she sustained burn injuries. So the informant and her husband went to the house of Rajni Devi, but the house was found locked. They came to know that Rajni Devi had been shifted to Dandru. So they went to Dandru, but Rajni had died by that time. It was reported that Rajni committed suicide due to torture and cruelty meted out to her by the aforesaid accused Subhash Chand and Sumna Devi. On the basis of aforesaid statement FIR was registered in the police station. The case was investigated into by the Investigating Officer and during the course of Investigation, the IO prepared site plan, got the body of the deceased photographed, prepared the inquest report and also obtained the post mortem report. The investigating Officer also took into possession the burnt salwar and half burnt piece of cloth along with match box from the spot. The Investigating Officer also took into possession one canny of kerosene oil from the kitchen of the accused. The viscera etc., were sent to the FSL, Junga and procured the report to this effect. As per the post mortem report, the cause of death of Rajni Devi was extensive burns leading to neurogenic and hypovolunic shock and death.

3. On conclusion of the investigation, into the offence, allegedly committed by the accused, report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court.

4. Accused were charged for theirs having committed the offences punishable under Sections 498-A and 306 read with Section 34 of the IPC, by the learned trial Court to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined twenty 15 witnesses. On closure of prosecution evidence, the statements of the accused, under Section 313 of the Code of Criminal Procedure were recorded in which they pleaded innocence and no evidence was led by them in defence.

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

7. The State is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Assistant Advocate General has concertedly and vigorously contended that the findings of acquittal recorded by the learned trial Court are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal recorded by the learned trial Court be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction.

8. On the other hand, the learned counsel appearing for the 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.

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

10. Deceased Rajni Devi was married to accused Subhash Chand. She committed suicide on 24.07.2007 by setting herself afire. The postmortem report Ex.PW6/B proved by PW-6 Doctor Sunita Galodha emphatically underscores the factum of the demise of the deceased having been sequeled by burn injuries. Besides, there is a communication in the post mortem report of, no ante mortem injury/injuries having been observed by the examining doctor on the body of the deceased when subjected to postmortem. The marriage inter se accused Subhash Chand and deceased Rajni was solemnized five year prior to the occurrence. However, the deceased did not bear any child. The primary allegation, raised by the complainant, PW-1 Smt. Chamapa Devi against the accused in her deposition and its traumatizing the mental psyche of the deceased, as such, constituting perpetration of mental cruelty upon her is comprised in the factum of hers being taunted or tormented by the accused for hers not bearing a child. Even the complainant, PW-1 has in her testimony recorded on oath voiced therein the fact of the accused belabouring the deceased on the score of hers not bearing a child, as such, even an attribution of physical cruelty is made by the complainant against the accused. Cruelty, both physical as well as mental arising from the facts aforesaid voiced by the complainant in her deposition on oath allegedly fomented or instigated the deceased to commit suicide. The purported mental and physical cruelty attributed by the complainant to the accused would have an inculpatory effect only in the event of substantiation by cogent evidence qua the factum of both purported acts of physical or mental cruelty being both grave as well of an accentuated degree so as to foment or goad

the deceased to commit suicide. Besides, the acts attributed to the accused spurring mental as well as physical cruelty were enjoined to be proved to have occurred in immediate proximity to the occurrence. Even though, PW-1 in her deposition on oath records the fact of in immediate proximity to the occurrence, the accused having belaboured the deceased, hence the perpetration of physical cruelty on the deceased in close proximity to the fateful occurrence/incident, may render it to be construable to be an instigatory or fomentary cause for the deceased to commit suicide. However, the factum of the accused having perpetrated physical cruelty upon the deceased in the night previous to the fateful occurrence, hence, in close proximity to the fateful occurrence stands in the realm of a pure invention or concoction at the instance of PW-1 on two counts i.e. :- (a) the post mortem report omitting to divulge therein existence of ante mortem injuries on the body of the deceased and (b) the lack of or omission of a disclosure with specificity in timing of the purported belabourings delivered by the accused upon the deceased by the complainant in he previous statement recorded in writing, renders the deposition on oath of PW-1 qua the factum of belabourings meted by the accused to the deceased to be hence not construable to be in close proximity to the fateful occurrence. Necessarily, then want of potent evidence displaying the fact that the purported belabourings meted by the accused upon the person of the deceased which instigated or goaded her to commit suicide, were in close proximity to the fateful occurrence, as such, the beatings, if any, delivered by the accused upon the person of the deceased purportedly constituting perpetration of physical cruelty by the accused upon her which purportedly drove her to commit suicide cannot obviously to be construed to have instigated or fomented the fateful event/incident. Further more, the gravamen of the allegations of the prosecution against the accused is of theirs having traumatized the psyche of the deceased by subjecting her to maltreatment and ill-treatment for hers not bearing a child, also ought to be discountenanced by this Court on the score of the timing qua perpetration of maltreatment or ill-treatment by the accused upon the deceased on the score aforesaid having been omitted to be divulged with precision at the first instance by the complainant. Obviously then with imprecision qua the time of meting of maltreatment and ill-treatment upon the deceased by the accused constituted by their acts of tormenting her or taunting her for not rearing or bearing a child and theirs constituting traumatization of her mental psyche for goading her to commit suicide, as a corollary dis-empowers this Court or defacilitates this Court to conclude that the maltreatment or ill-treatment on the score aforesaid meted by the accused upon the person of the deceased was neither in close proximity to the fateful occurrence nor it can be construed to be the fomentary cause for the deceased to commit suicide.

11. Furthermore, the factum of an occurrence in the testimony of PW-1 qua demand of dowry having been raised by the accused from the deceased is to be construable to be not constituting maltreatment or ill-treatment meted by the accused to the deceased which ultimately instigated her to commit suicide especially when there is want of a disclosure with precision qua the time when such demands of dowry were raised. Consequently, with imprecision qua the time when such demands of dowry were raised by the accused, renders open an inference that the demands of dowry, if any, were raised, the same were raised improximate to the fateful occurrence. Hence, with the imprecision qua the timing of the demands of dowry raised by the accused while constituting perpetration of maltreatment and ill-treatment upon the deceased cannot render them to be construable to be a fomentary or actuatory cause for the deceased to commit suicide. A wholesome analysis of the deposition of PW-1-complainant gives leeway to an inference that the deposition on oath of PW-1 comprised in her examination-in-chief qua the accused having subjected the deceased to mental as well as physical cruelty arising from the facts aforesaid are incredible.

In sequel her testimony does not inspire confidence qua the fact of the accused having, by taunting her for hers not bearing a child, maltreated and ill-treated the deceased hence traumatized her mental psyche and that too in close proximity to the fateful occurrence, as so to goad her or foment her to commit suicide.

12. Moreover, the departure of the deceased to her parental home where she stayed for three months and when she on a compromise having been arrived into inter se her and the accused returned along with her husband to her matrimonial home, though concerted by the prosecution to bring home the fact of an existing discord inter se the accused and the deceased. Nonetheless, the fact aforesaid of bickerings existing inter se the deceased and the accused, though purportedly portray the substantiation of maltreatment meted out to the deceased by the accused yet even the fact aforesaid stands to be discarded rather is belittled by the deposition of PW-4, who, to the contrary, in her deposition deposed that the deceased had come to his parental home on account her ailment, as such, it cannot be construed that she on account of hers having been maltreated or ill-treated by the accused left for her parental home. The deposition of PW-2, Reena Devi bespeaks the factum of the accused torturing the deceased for her inability to bear a child. The torture as perpetrated by the accused upon the deceased has been deposed by her to have led her to come to her parental house whereafter she was taken back to her matrimonial home by accused Subhash Chand and her sister. However, her statement existing in her examination-in-chief, on further incisive evaluation of her deposition comprised in her cross-examination stands overwhelmed especially when she therein deposes that she cannot recall the date, month and year of the incident aforesaid, as such, when she concedes to the factum of there being no disclosure with precision qua the date, month and year of maltreatment, in sequel, it has to be inferred that her statement cannot, facilitate this Court to render, a conclusive finding that the accused in close proximity to the fateful occurrence perpetrated physical as well as mental cruelty upon the deceased so as to constitute such maltreatment and ill-treatment, to be an instigatory factor for fomenting or goading the deceased to commit suicide, rather her generalized statement is shaky or nebulous for formidably concluding that it constitutes the best evidence with precision qua the time of the meting of the purported acts of maltreatment or ill-treatment upon the deceased by the accused. Obviously, for reiteration with the imprecision qua the timing of attribution by PW-2 to the accused of the purported acts of maltreatment and ill-treatment which purportedly instigated the deceased to commit suicide, they are to be construable to be improximate to the fateful occurrence, besides lacking in potency and vigour to hence drive or instigate the deceased to commit suicide. Both, the PW-1 and PW-2 are interested witnesses being relatives of the deceased. Even though the testimonies of interested witnesses are not discardable, however, when their testimonies are ridden with or seeped with grave infirmities or are discrepant for recording findings qua the guilt of the accused necessarily then their probative worth stands denuded. Apart from the recording of the depositions of the interested witnesses, whose testimonies are discardable for the reasons aforesaid, the investigating conducted by the Investigating Officer has to be faulted for his inability to record the statements of the local independent witnesses, where the deceased resided. However, apart from the testimonies of the interested witnesses, the Investigating Officer has not recorded the statements of the persons residing in the immediate neighbourhood of the deceased. The omission of recording of statements of the persons residing in the immediate neighbourhood of the deceased would render the investigation carried out by the Investigating Officer to be acquiring the taint and vice of partisanship. Besides, the independent witnesses/ persons residing in the neighbourhood of the deceased would have constituted the independent and best evidence qua the allegations leveled against the

accused by the complainant. The omission by the Investigating Officer to join the persons residing in the neighbourhood of the deceased, fosters an conclusion that they have been omitted to be joined by the Investigating Officer as he carried out a slanted and tainted investigation qua the incident. Obviously, no implicit reliance can be placed upon by this Court upon a slanted and tainted investigation carried out by the Investigating Officer. The only effort made by the Investigating Officer to join independent witnesses is by his proceeding to record the testimony of PW-4. However, PW-4 has turned hostile and has not supported the prosecution case. Hers being an independent witness and hers not supporting the prosecution case has delivered a severe jolt to the genesis of the prosecution case anvilled upon the testimonies of the interested witnesses, inasmuch as on the testimonies of PW-1 and PW-2. Her testimony assumes significance, inasmuch as she therein has undermined the efficacy of the deposition of PW-1 qua the fact of existence of discord and estrangement in the marital relations inter se the accused and the deceased, which purportedly led the deceased to come to her parental home whereafter on a compromise having been struck inter se the deceased and the accused she along with accused having returned to her matrimonial home. Furthermore, on the contrary, when she deposes that the deceased had come to her parental home as she had fallen ill belittles the legal worth of the testimonies of PW-1 and PW-2 of the deceased having come to his parental home on account of maltreatment and ill-treatment having been meted out to her by the accused at her matrimonial home. Moreover, it renders rudderless the testimonies of PW-1 and PW-2 that it was only on a compromise having been struck inter se the accused and the deceased that the deceased returned to her matrimonial home. Hence no incident spurring maltreatment and ill-treatment meted by the accused upon the deceased having been with specificity in timing not substantiated by the prosecution to have occurred in close proximity to the fateful occurrence and it being of a grave enormity so as to constitute it, to be construable to be the fomentary cause for the deceased to commit suicide, rather there being generalized allegations of ill-treatment and maltreatment meted by the accused to the deceased which while having remained in the realm of haziness are hence not at all to be construable to be the instigatory causes for the deceased to commit suicide. Preeminently, the deposition of PW-4 during the course of her cross-examination by the defence counsel that the accused never gave beatings to the deceased Rajni rather the deceased being under depression for not bearing a child committed the suicide, fosters an apt conclusion that the deceased dehors any instigation purportedly meted by the accused to her, had engineered her suicide. The fact of the deceased having engineered her suicide shorn of any instigation having been furnished by the purported inculpatory events attributed by the prosecution to the accused, gains further momentum from the fact of the deceased having disclosed to her on the fateful night that she had set herself afire as she was not bearing a child. The said deposition of PW-4 while constituting a dying declaration of the deceased, hence, has probative vigour, necessarily then it is un-discardable for forming a formidable conclusion that there is no substance in the attribution of an inculpatory role to the accused by the prosecution.

13. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of acquittal has committed any legal misdemeanor, inasmuch as it having mis-appreciated the evidence on record or omitted to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned trial Court merit interference.

14. In view of the above discussion, we find no merit in this appeal which is accordingly dismissed and the judgment of the learned trial Court is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

Dan Singh & another .....Petitioners

Versus

PNB Bank & others .....Respondents.

CWP No. 2869 of 2015
Decided on : 4.6.2015

Constitution of India, 1950- Article 226- Respondent No. 2 advertised 18 vacancies of peon- petitioners appeared for interview- Interview Committee selected respondents No. 3 and 4- petitioner contended that name of respondent No. 3 was not registered with the Employment Exchanges of Mandi and Kullu which was necessary in view of advertisement notice- there was bias in as much as respondent No. 4 was a driver of Circle Head of Punjab National Bank, Mandi – held, that restriction imposed in the advertisement notice regarding registration of Mandi and Kullu District is violative of Articles 14 and 16 of the Constitution of India- the Court cannot question the marks awarded by Selection Committee- petition dismissed.

For the Petitioners: Mr. Onkar Jairath, Advocate.
For the Respondents: None.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The respondent No.2 advertised 18 vacancies of Peons. The advertisement occurred in "Hindi Danik Jagran Daily" on 28.11.2014. The petitioners applied for the post advertised. The petitioner No.1 appeared for interview before the duly constituted selection committee on 19.3.2015, whereas, petitioner No.2 appeared for interview on 20.3.2015 before the duly constituted selection committee. Respondents No. 3 and 4 were declared selected. The Selection of respondents No. 3 and 4, as, peons by the interviewing committee/selection committee, has been assailed by the petitioners. The espousal in the writ petition of the selection of respondents No. 3 and 4 as peons by the interviewing board/selection committee concerned, being vitiated is anchored on the fact that the advertisement notice aforesaid inviting applications of the aspirants for theirs being considered for selection to the post of Peons, explicitly with specificity enumerated an express condition of the aspirants being liable for consideration for selection, only in the event of their names standing registered with the employment exchanges of Mandi & Kullu Districts only. However, the restriction aforesaid as imposed in the advertisement notice comprised in Annexure P-1 and P-1/T, inasmuch, as, only those applicants being eligible for consideration for selection as peons whose names stand registered with the employment exchanges of Mandi and Kullu Districts

has been contended to have been transgressed by the respondents comprised in their act of theirs selecting respondent No.3 whose name stands not registered with the employment exchanges of Mandi and Kullu Districts, and respondent No.4 whose selection has been contended to be ingrained with the vice of nepotism and favoritism on the score of his being a private driver of the Circle Head of Punjab National Bank, Mandi. Even the selection of respondent No.3 has been contended to be ingrained with the vice of nepotism inasmuch as his being the son of the Sr. Manager, Circle Office, PNB Hamirpur and it being the motivating factor for his selection as peon by the respondents. Adverting to the initial espousal before this Court by the learned counsel for the petitioners of the name of respondent No.3 though not registered with the employment exchanges of Kullu and Mandi Districts, though enjoined by the advertisement notice comprised in Annexure P-1 and P-1/T to be standing registration with the employment exchanges aforesaid, hence rendering his selection to the post aforesaid by the selection committee concerned to be flawed, is a perse fallacious argument besides antithetical to the constitutional tenets of equality of opportunity in public employment. The argument as espoused by the learned counsel for the petitioners when stands muted by the overpowering effect of constitutional tenets of equality of opportunity in public employment, necessarily then the selection of respondent No.3 by the interviewing committee concerned for appointment to the post of Peon, cannot stand to be not faulted. Even otherwise the restriction or the fetter imposed in the advertisement notice, inasmuch, as its curtailing the right of participation, to only those aspirants whose names stood registered with the employment exchanges of Mandi and Kullu Districts, is rather restrictive of a wider participation of all eligible aspirants. If the said restriction is permitted to hold sway it would abridge as well as trammel the right of all eligible aspirants which for reiteration would be afflicted with the malady of its infringing the constitutional tenets of equality of opportunity in public employment. As such, the restriction imposed in the advertisement notice to the extent that only those candidates/aspirants whose names stand registered with the employment exchanges of Mandi and Kullu Districts would be fit to be considered for selection as Peons under the respondents No.1 and 2, is declared ultra vires articles 14 and 16 of the Constitution of India. In face thereof the factum of respondent No.3 standing not registered with the employment exchanges of Mandi and Kullu Districts would not outweigh his selection by the interviewing/selection committee concerned. Now adverting to the contention canvassed by the learned counsel for the petitioners that the selection of respondents No. 3 and 4 is harbored or hinged upon nepotism and favoritism for the reasons aforesaid as meted out in the petition, also cannot carry any weight or substance, especially when the post for which they aspired to be considered for selection, is not a selection post, rather is a class IV post, the suitability for appointment to which post is to be gauged and fathomed on the parameters as deemed fit to be formulated by the interviewing board/selection committee concerned. The awarding of marks by the selection committee concerned to them on the basis of subjective assessment of their suitability, on an evaluation of their personality synchronizing with the apposite formulated parameters designed by the selection committee concerned, renders as such their subjective assessment by the interviewing/selection committee concerned, especially when they stood selected not against a selection post rather to a class IV post, to be invulnerable to impeachment especially when their suitability for selection within the formulated parameters have been concluded by the selection committee concerned, to be not wanting in any respect. Moreover hence it cannot also be said with any formidability that their selection for appointment is besmirched by any taint of

favoritism. There is not merit in the petition, the same is accordingly dismissed, so also, the pending applications, if any.

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

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

Cr. Appeal No.: 298 of 2008
Reserved on: 29.5.2015
Date of Decision : 4th June, 2015

Indian Penal Code, 1860- Section 302- Deceased, a Baba, was found dead in his Kutiya- deceased had told that he was under the debt of 8-10 lacs- accused was arrested for the murder of the deceased- there were contradictions in the testimonies of prosecution witnesses- as per medical evidence deceased had died on or around 19.10.2006- prosecution version that accused was in the vicinity of Kutiya at that time was not established- Diary stated to have been maintained by Baba was not proved in his handwriting –weapon of offence i.e. axe was not connected with the accused as no finger prints existed on the handle of the axe - held, that in these circumstances, acquittal of the accused was justified.

(Para-8 to 16)

For the Appellant: Mr. P.M.Negi, Dy. Advocate General.
For the respondent: Mr. Chaman Negi, Legal Aid Counsel.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, *Judge*

This appeal is directed against the judgment of acquittal rendered on 29.12.2007 by the learned Additional Sessions Judge, Shimla H.P. in Sessions Trial No.1-S/7 of 2007 whereby the learned trial Court acquitted the respondent for his having committed offence punishable under Section 302 of the Indian Penal Code.

2. The prosecution story, in brief, is that on 22.10.2006 at about 5 p.m. Ajeet Singh and Basant Lal alighted from a bus at Lambidhar. One Inder Singh met them there. There lived a Baba belonging to Punjab Area in a Kutiya at Lambidhar. By nature the Baba appears to be a religious kind of person. On the same day, the persons aforesaid went to the Baba's Kutiya and knocked the door. On no response having been received therefrom, Ajeet Singh then entered the Kutiya and found that the Baba was lying under the quilt. He lifted the quilt from one side and noticed that there was blood on the bed. Foul smell started coming out. Thereafter he informed the police. The police arrived at the spot. SHO recorded the statement of Ajeet Singh under Section 154 of Cr.P.C. It was stated by Ajeet Singh that the Baba had disclosed him that he was under debt to the extent of Rs. 8 to 10 lacs. It was also stated that many people from Punjab area used to come to him. They used to distribute Prasad to the passengers of the vehicle and used to collect offerings from them. He had last seen the Baba about 4 days before. The dead body was sent for postmortem

examination to the Hospital. During the course of investigation, a ball pen, an axe (Kulhari), spectacles and two trunks with broken kundas lying in the kutiya were taken into possession. Axe was sent to Finger Prints Bureau for examination of prints, if any, on the wooden handle. The spectacles found in the Kutiya were identified by the witnesses as those belonged to the accused. The witnesses had seen the accused wearing those spectacles. During the course of investigation, it was revealed by the witnesses, that accused had been working with Baba on the basis of daily wages for distributing Prasad. Investigation revealed that accused left the Baba's job on the pretext that the Baba was not paying him his outstanding dues. The accused even after leaving the job had been coming to Lambidhar and asking prosecution witnesses to impress upon the Baba to pay his outstanding dues. As per evidence, so collected, one Amar Singh saw him distributing Prasad at Lambidhar on 20.10.2006. This not only show the presence of accused at Lambidhar on 20.10.2006 but also shows that on 20.10.2006 during day time the Baba was alive because work of distribution of Prasad was done by the accused for Baba and the offerings so made by the passengers, used to be given to Baba. Police has suspected that accused had committed the murder of Baba. The accused was arrested by the police. It was found during the course of investigation that accused had been working in Shimla and his attendance used to be marked by the security guards appointed in that building. The attendance register was taken into possession by the Police. As per attendance register and also as per statements of the security guards, the accused was absent from duty from 19.10.2006 to 25.10.2006, the time when the Baba was murdered. After completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court. The trial Court charged the accused for his having committed offence punishable under Section 302 IPC to which he pleaded not guilty and claimed trial.

3. In order to prove its case, the prosecution examined as many as 18 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 to lead evidence in defence.

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

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

6. 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.

7. 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.

8. The instant case does not rest on any vivid eye witness account qua the occurrence rather rests on the circumstantial evidence. In a case resting on circumstantial evidence, each of the links in the chain of circumstances has to be invincibly proved by the prosecution to constrain this Court to reverse the findings of acquittal recorded by the learned trial Court. Besides, the motive which led or prodded the accused to commit the alleged offence is obviously an important link in the chain of circumstances. The motive attributed to the accused to murder the deceased Baba with whom he was employed, is constituted in the fact existing in the depositions of PW-1, PW-3, PW-4 and PW-5, wherein each has testified to the factum of the accused having approached each of them to intervene, to beseech the deceased Baba to release his pending outstanding wages/remuneration.

9. PW-1 deposes that the accused had twice or thrice over his telephone sought his intercession as well as beseeched him to prevail upon the deceased Baba for releasing his pending/outstanding dues. PW-3 has deposed that on 19.10.2006 the accused had met him at Mahasu Peak and entreated him to get his outstanding dues released from the Baba. Moreover, PW-4 and PW-5 have also deposed that the accused had met each of them on 16.10.2006 at Lambidhar and sought their intervention for getting his pending/outstanding dues, withheld by the Baba for theirs being released by the latter to him. The withholding of the outstanding dues of the accused by his employer, the deceased Baba, engineered or nourished the motive in the mind of the accused to murder the deceased. However, the factum of the deceased owing a sum of Rs.270/- to the accused stands admitted by the accused in his statement recorded under Section 313 Cr.P.C. Nonetheless, PW-1 deposes that the accused while being employed by the Baba had been defrayed wages @ 70 per day whereas the accused was demanding Rs.100 per day. On the other hand, PW-3 in contradiction thereto has deposed that the Baba was paying Rs.100 per day, nonetheless a dispute arose interse them qua the number of days for which the accused had rendered work and his being in commensuration thereof being entitled to wages. Now with a marked or stark contradiction inter-se the testimonies of PW-1 and PW-3 qua the core dispute inter-se the accused and the deceased, renders this Court to conclude that their testimonies while being ingrained with the vice of intra-se contradictions, each stands imbued with incredibility. Moreover, the testimony of PW-1 of the accused nursing a motive which prompted him to commit the murder of the deceased, is to be construed to be incredible, on the further count of even though his being the informant yet his having omitted to, in his statement recorded under Section 154 Cr.P.C unravel therein the factum of a core dispute inter-se the accused and the deceased existing over the quantum of outstanding wages or dues payable to the accused by the deceased Baba, rather his coming to depose the said fact only during the course of the recording of his deposition in court, renders the motive reared by the accused arising from the deceased Baba, his employer withholding his admissible dues, to be an improvement and embellishment. In aftermath an embellished and improved version qua the germane factum of the purported motive nursed or nourished by the accused cannot hold sway nor it can hold probative clout. Even otherwise, given the admitted minimal outstanding dues of Rs.270 withheld by the deceased obviously would not constrain this Court to conclude that the accused to obtain them committed the murder of the deceased, besides the testimonies of other prosecution witnesses in tandem to the deposition of PW-1 are to be construable to be incredible while being ingrained with the vice of embellishment and improvement especially when hence they stood engineered at the behest and at the instance of PW-1 in collusion with the Investigating Officer.

10. The post mortem report comprised in Ext.PW-9/E proven by PW-9 records the hereinafter extracted opinion:

> *" in our opinion, the deceased died of head injury, which was antemortem in nature leading to cardiopulmonary arrest and death. The probable time between injury and death was instantaneous and between death and postmortem it was above 48 hours and less than four to five days."*

11. He in his examination in chief has deposed that the injuries observed by him to be existing on the body of the deceased and which sequelled the demise of the deceased are sequelable with the user of knife. He, in his deposition has further voiced the fact that the probable time between injury and death was instantaneous and between death and post mortem was above 48 hours and less than 4 to 5 days. The aforesaid communication, in his deposition provides aid and assistance to this Court in timing the demise of the deceased Baba. Now given the fact that the prosecution witnesses PW-1 and PW-2 have deposed that on 22.10.2006 they detected the body of the deceased in his "kutiya" obviously then with PW-9 having in his deposition unveiled the fact that the duration or the time inter-se the death and postmortem was less than 4-5 days. Consequently, if the demise of the deceased is to be construable to have occurred less than 4-5 days from the day when PW-9 conducted the postmortem on the body of the deceased in as much as, from 23.10.2006, in sequel, the demise of the deceased is to be concluded to be 4-5 days hitherto in as much as it has to be concluded to be 19.10.2006.

12. Now with this Court having timed the date on which the demise of the deceased Baba occurred, it has to be discerned on a keen evaluation of the evidence on record whether the accused was in the vicinity of the site of occurrence, in proximity to the day when the deceased Baba was put to death. The oral evidence on record qua the accused having been noticed in proximity or in the vicinity of the site of occurrence is comprised in the testimony of PW-3, who has deposed that the accused had met him at "Mahasu Peak" and entreated him or beseeched him to prevail upon the Baba to release his outstanding dues. Moreover, both PWs 4 and 5, have also deposed that accused met each of them on 16.10.2006 at Lambidhar with a similar request. Nonetheless the presence of the accused in the vicinity of site of occurrence for accomplishing his motive or for pursuing his demand against the deceased Baba for obtaining his outstanding/pending wages/remuneration from the latter which purportedly constituted the motive or goaded the accused to commit the murder of the deceased Baba, stands dispelled and discounted especially when the prime fact of motive as attributed to the accused to proceed to commit the murder of the deceased stands on a fragile and shaky foundation. Consequently, for reiteration, when the purported motive attributed to the accused by the prosecution witnesses, stands dispelled, the concomitant inference is that the oral evidence of the prosecution witnesses, that the accused met each of them in the vicinity of the site of occurrence to seek their intervention for prevailing upon the deceased Baba to release his outstanding dues also ought to be discredited.

13. Even otherwise, PW-1 has relied upon Ex. P-4 to connote that it was a diary maintained by the deceased Baba to mark the presence of the accused. However, the factum of the deceased having maintained a diary or the entries therein having been scribed by the Baba would, gain credit only in the event it having been proved by best evidence comprised in the report of Handwriting Expert conveying therein the factum of the entries recorded therein being in the hands of deceased Baba. However, absence of the aforesaid best evidence warrants/necessitates an obvious conclusion that neither Ex. P-4 was maintained by the Baba nor the entries recorded therein purportedly displaying the

presence of the accused by the deceased, were scribed by the Baba. Even otherwise, the aforesaid diary was recovered from the subsequent employer of the accused, which recovery from the subsequent employer of the accused, tells upon the veracity of the deposition of PW-1 qua the fact of it having been maintained by the deceased with a concomitant effect of it impinging upon the veracity of his deposition in its entirety. It appears that PW-1 is, with the utmost perseverance and importunacy cultivating an ultra interested version qua the inculpatory role of the accused. Fortifying vigour to the inference aforesaid is acquired by the fact that Ex. P-4 recovered from the subsequent employer of the accused, with the prosecution not having led into the witness box the Security guard appointed by the subsequent employer of the accused to prove that during the period when the accused remained absent from the duties, he had not proceeded to dera rather had proceeded to elsewhere, obviously concomitantly then it has to be concluded that as proved by Ex DX he was at the relevant time or at the time contemporaneous to the time of murder of Baba at Dera.

14. The fact which boosts an inference qua PW-3, PW-4 and PW-5 having, in their respective depositions mis-communicated the propagated fact of theirs having seen the accused in the vicinity of the deceased, is comprised in the factum of Ex. DX proven by DW-1 divulging the factum of the accused having visited the "Radhaswami Satsang Beas" from 17th October to 23rd October. Even though falsity is concerted to be lent to the aforesaid Ex. DX, in its purportedly propagating the factum of its constituting an alibi on the score of its author having been not led into the witness box besides the year of its issuance having been not mentioned therein, as such rendering easy its procurability. The factum of its purported authenticity as concerted to be torn apart by the learned PP stands dispelled by the fact that DW-1 has unequivocally in his deposition deposed that a large number of devotees throng the dera at Beas and perform voluntary service and issue slips to the pilgrims akin to Ex. DX whereas no counterfoil is maintained. Given his deposition that the volunteers in large number throng the Dera at Beas and issue receipts to the pilgrims, cannot portray the factum of the accused having not visited the Dera on 17th October to 23rd October, especially when no counterfoils thereof are maintained so as to facilitate the accused to identify any one amongst the many of the volunteers manning the crowd at Dera to be the author of Ex. DX. More so, when DW-1 has also omitted to convey that a regular staff was maintained by the Dera at Beas to issue slips to the pilgrims, for facilitating the identification of the signatures of the regular staff deployed at the Dera at Beas for manning the pilgrims. Concomitantly hence proof of the authorship of Ex. DX is to be concluded an insurmountable task. In sequel, it has to be held that the testimony of PW-1 has to be believed that one amongst many of the volunteers manning the gathering at Beas issued slips as such, identification of signatures of one of the many volunteers for proving its authorship was not possible. In face thereof when the authorship of Ex. DX has not been disproved by the prosecution besides even when year the succeeding 17th October to 23 October is omitted to be displayed in Ex. DX, the authenticity of the defence version qua the propagation of an alibi constituted by the factum of the accused being not at the site of occurrence rather at "Radha Swami Satsang Beas" is to be not either construed to have been whittled down or suffered erosion. Moreso the propellant motive which goaded the accused to commit the murder of deceased Baba and which purportedly led him to visit site of occurrence has stood for the reasons recorded hereinabove emasculation. In sequel, the alibi propagated by the defence on the anvil of Ex.DX is to be believed. Obviously then, the oral testimonies of the prosecution witnesses that theirs having noticed the accused in proximity to the site of occurrence also stands in the realm of incredibility. More so, for

reiteration, when their testimonies qua the presence of the accused in the vicinity and in proximity of the deceased, on the score of his entreating them or beseeching them at Lambidhar to prevail upon the Baba to release his outstanding dues, for the reasons aforesaid are construed to be an invention or a concoction.

15. The further link in the chain of circumstances connecting the accused in the commission of the offence has been concerted by the prosecution to be constituted by the recovery of axe Ex-P-1 by the Investigating Officer under recovery memo PW-1/C. The singular reason which enfeebles the recovery of Ex. P-1 under memo Ex. PW-1/C from the Kutiya of the deceased Baba and its being not attributable to the accused is of there being no previously recorded disclosure statement of the accused qua the place of its keeping and hiding, in sequel whereof its recovery was effected at his instance by the Investigating Officer. The said recovery of axe is an infirm link or a feeble link in the chain of circumstances especially when the Finger Prints Bureau, to whom it was transmitted to render an opinion whether its handle bore the finger impressions of the accused rather has underscored in his opinion comprised in PW-17/F the factum that it bore no finger prints, so as to on their comparison with the finger prints of the accused foster an apt conclusion that it was wielded by the accused for committing the murder of the deceased. Consequently, it has to be firmly concluded especially when the Finger Prints Bureau has emphatically recorded an opinion that no finger prints of the accused existed on the handle of the axe. In sequel it has to be concluded that its mere recovery is an engineered as well as a well devised machination on the part of the Investigating Officer to falsely implicate the accused. Further conclusion is that it was not used or wielded by the accused to inflict injuries on the deceased Baba. Moreover, the prosecution has tried to connect the accused in the commission of the offence of murder of the deceased on the score of Ex. P-5, the spectacles seen to be worn by the accused as deposed by PW-1, having been found or recovered from the Kuitya, wherefrom the body of the deceased was found. With PW-1 expressing inability that it bore any distinct insignia or carried an exceptional identification mark so as to relate it to the accused rather his deposing that Ex. P-5 is easily procurable from the market, renders his deposition to be shaky, nebulous and infirm qua the similarity or likeness of the spectacles worn by the accused with the one found in the kutiya of the deceased.

16. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court neither suffers from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of acquittal has committed any legal misdemeanor, in as much, as, it having mis-appreciated the evidence on record or omitted to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned trial Court merit inference.

17. In view of the above discussion, we find no merit in this appeal, which is accordingly dismissed, and, the impugned judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith

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

Cr. Appeal No. 349 of 2012
a/w connected matters
Reserved on: 4.6.2015
Decided on :5.6.2015.

1. **Cr. Appeal No. 349 of 2012**	
Nitish	.....Appellant.
Versus	
State of H.P	.....Respondent.
2. **Cr. Appeal No. 360 of 2012**	
Parveen	.....Appellant.
Versus	
State of H.P	.....Respondent.
3. **Cr. Appeal No. 361 of 2012**	
Sumit Bhardwaj	.....Appellant.
Versus	
State of H.P	.....Respondent.
4. **Cr. Appeal No. 436 of 2012**	
Rohit	.....Appellant.
Versus	
State of H.P	.....Respondent.
5. **Cr. Appeal No. 466 of 2012**	
State of H.P	.....Appellant.
Versus	
Sumit Bhardwaj & others	.....Respondents.

Indian Penal Code, 1860- Sections 302, 307, 120-B, 148 and 149- Complainant party was returning to their house- 'K' had parked his bike at Maszid Gali- 'C', 'K' and 'S' were about to leave to their home when the accused armed with the knives appeared at the spot- accused Sumit attacked Shelly with the knife when 'C' and 'K' tried to rescue Shelly- accused 'N' stabbed 'C' on his abdomen and accused Sumit hit Sanju on his body who collapsed on the spot- accused Sumit and others intercepted Sunil and Anil and stabbed them with knives- post mortem report showed that deceased had suffered injuries by means of knife, danda, base ball and stick- it was duly proved that items were recovered from the possession of the accused- the incident was deposed by the prosecution witnesses consistently- accused had also sustained injuries in the incident- complainants and accused had indulged in a free fight- therefore, accused cannot be held liable for the commission of offence punishable under Section 302 of IPC but for the commission of offence punishable under Section 304(I) of IPC – conviction and sentence modified accordingly. (Para-10 to 20)

For the Appellant(s): M/s B.B Vaid, Jagdish Vats, Karan Singh Kanwar, Naresh K Gupta, Advocates (in appeal No. 349, 360, 361, 436).
Mr. P.M Negi, Deputy Advocate General, for appellant in Cr. Appeal No. 466 of 2012.

For the Respondents: Mr. P.M Negi, Deputy Advocate General for respondent-State in all appeals except Cr. Appeal No. 466 of 2012.
Mr. J.L Bhardwaj, Advocate for respondent No. 4 and 5, Mr. Karan Singh Kanwar, Advocate for respondents No. 3 to 7, Mr. Ashok K Tyagi, Advocate for respondent No.8 in Cr. Appeal No. 466 of 2012.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Cr. Appeal Nos. 349, 360, 361 and 436 of 2012.

The instant appeals are directed against the impugned judgment rendered on 29.6.2012, by the learned Additional Sessions Judge, Sirmaur District at Nahan, in Sessions trial No. 7/N/7 of 2011, whereby, the learned trial Court convicted and sentenced the accused/appellants as under:

Section 302/34 IPC: to undergo rigorous imprisonment for life and to pay a fine of Rs.20,000/- each and in default to further undergo simple imprisonment for a period of three months;

Section 307/34 IPC: to undergo 4 years rigorous imprisonment each and to pay a fine of Rs. 5000/- each and in default of payment of fine to further undergo simple imprisonment for 1 month;

Section 120-B IPC: to undergo rigorous imprisonment for 6 months.

However, the learned trial court acquitted the accused/appellants of the charge under Sections 148 and 149 of Indian Penal Code. Remaining accused Devinder Kumar, Gurprit Singh, Ajay Kumar and Ravi Kumar were acquitted by the learned trial Court of the charges framed against them.

Cr. Appeal No. 466 of 2012

2. The instant appeal has arisen against the impugned judgment rendered on 29.6.2012, by the learned Additional Sessions Judge, Sirmaur District at Nahan, Himachal Pradesh in Sessions trial No. 7-N/7 of 2011, whereby, the learned trial Court acquitted the accused Devinder, Gurpreet, Ajay Kumar and Ravi Kumar for the charges framed against them as also acquitted all the accused for theirs having allegedly committed offences punishable under Sections 148 and 149 of Indian Penal Code.

Cr. Appeal No. 349 of 2012 a/w connected matters

3. Brief facts of the case are that on 23.3.2011, reporter Naresh Kumar alongwith Kuldeep, Chetan, Sandeep, Jaswant, Narender, Shelli, Sunil, Anil and Sanju after visit to the fair at Paonta Sahib were returning to their house situated at village Hirpur. Kuldeep parked his motor bike at Maszid Gali. At about 8.30 p.m. Chetan, Kuldeep and Shelly were about to leave to their home, all of a sudden, accused Sumit Bhardwaj alias Tota alongwith other co-accused had appeared on the spot. They were armed with knives. Accused Sumit at once pounced upon Shelli near Maszid wali gali and attacked with knife. When Chetan and Kuldeep has started rescuing shelli from the clutches of accused Sumit, then accused Nitish stabbed Chetan on his abdomen. Thereafter, Sumit Bhardwaj and others hit Sanju on his body, he collapsed on the spot. Accused Sumit Bhardwaj and others

had intercepted Sunil and Anil and stabbed them with knife. The injured were then removed by the local residents to the Civil Hospital, Paonta Sahib. Naresh Kumar reporter had come to know that Sunil, Anil and Sanju had succumbed to their injuries. The police reached Civil Hospital, Paonta Sahib on receipt of telephonic information and had recorded statement of Naresh Kumar, which was endorsed to police station, Paonta Sahib for acknowledgment of crime. After registration of the case, the investigation was carried out. After fulfillment of codal formalities, the autopsy of deceased sunil Kumar was conducted by the Medical Board, which had revealed that he had died of stab wound on left side of chest which damaged his left lung and heart and the death was immediate. The postmortem examination of the dead body of deceased Anil Kumar was conducted by the Medical Board and they opined that deceased probably died of sharp long instrument which injured his left lung and left side heard and death was immediate. Postmortem of deceased Sanjeev Kumar had revealed per opinion of Medical Board the deceased had died of multiple stab wound which injured left lung, heart and right kidney. Death was immediate. During the course of investigation, MLRs of injured Chetan and Shallender were collected from Herbertpur Christian Hospital, District Dehradun, in which it was opined that there was penetrating injury left side of abdominal wall and nature of the injury was grievous. The accused persons were arrested. Accused were medically examined. On disclosure statements made by accused Sumit, Nitish, Praveen Kumar, Rohit and Ravi Kumar, weapons of offence i.e Knives, Danda and Baseball stick were recovered. On disclosure statements made by accused Devinder Kumar, Gurpreet Singh and Ajay Kumar, scene of the crime was identified and got demarcated. In the presence of witnesses, one blood stained stick, earth sample and controlled earth sample were put in packets and then in cloth parcel by the police. During investigation, police on spot Y, had collected the blood stained stick, earth sample which was put in a packet and then in cloth parcel. Injured Chetan had produced blood stained pant, T Shirt, vest and underwear to the police which were taken into possession vide separate seizure memo. Injured Shalender had also produced blood stained jean pant, shirt, vest and underwear to the police, which were taken into possession by the police vide separate seizure memo. Site plans of the spot and place of recoveries were drawn. All samples i.e costumes, blood samples and other samples of sticks etc were then sent to the FSL Junga. After analyses, State FSL, Junga vide report dated 31.5.2011 opined that blood of group A was detected on exhibit 1a pants of Sanjeev Kumar, Exhibit 1b shirt of Sanjeev Kumar, Exhibit 2a pants of Sanjeev Kumar , Exhibit 5 blood sample of Anil Exhibit 8 blood stained wooden piece and exhibit 9 blood stained Bajari taken from Maszid Road, Human blood of group B was detected on exhibit 3a pants of Sunil, exhibit 3 c T shirt of Sunil and exhibit 6 blood sample of Sunil. Human blood was detected on exhibit 1 c underwear of Sanjeev Kumar, exhibit 1 d vest of sanjeev Kumar, exhibit 2 c vest of Anil, Exhibit 2d underwear of Anil, exhibit 3 b shirt of Sunil, exhibit 11 bloodstained soil taken from near indane gas agency and exhibit 12 blood stained soil taken from main road Paonta Bazar, but the result were inconclusive in respect of blood groups. It has also been reported by the FSL that soil in exhibit E/7 is similar to the soil in exhibit E/9. The soil in exhibits E/10, E/11 and E/12 are similar. Human blood group A was detected on exhibit 1 a shirt of Sumit, exhibit 1 b pants of Sumit exhibit 1 b pants of Sumit, exhibit 2 blood sample of Sumit and exhibit 6 blood sample of Praveen Kumar. Human blood was detected on exhibit 1d underwear of Sumit and exhibit 3 d underwear of Nitish Kumar but the results were inconclusive in respect of blood groups. Human Blood of group O was detected on exhibit 3 a vest of Nitish Kumar, exhibit 3 b T-Shirt of Nitish Kumar, Exhibit 3c pants of Nitish Kumar and Exhibit 4 blood sample of NItish Kumar. Human Blood of group B was detected in exhibit 8 blood sample of Devender Kumar. Blood was not detected on exhibit 7 b pants of

Devender and exhibit 7 c underwear of Devender. Further report submitted by the Assistant Director, Biology/Serology Division, SFSL, Junga shows that human blood was detected in exhibit-1 blood sample of Gurpreet Singh, exhibit 3 blood sample of Ajay Kumar, exhibit 4a underwear of Rohit, exhibit 5 blood sample of Rohit and exhibit 7 knife, but the results were inconclusive in respect of blood groups. Blood was not detected on exhibit 2 pants of Ajay Kumar and exhibit-6 Knife. Human blood of group B was detected on exhibit 4a T-Shirt of Rohit and exhibit-4b vest of Rohit. Further report of SFSL, Junga reflects that the soil adhering on the knife in exhibit E/1 is similar to the soil in exhibit E/10. Report of Dr. G.C Thakur had revealed that human blood of group B was detected on exhibit 1 a pans of shailnder, exhibit 1 b shirt of shailender, exhibit 1 c vest of Shailnder, exhibit 2 b shirt of chetan and exhibit 2 c vest of chetan, Human Blood was detected on exhibit 1 d underwear of shalender, exhibit 2a pants of Chetan, exhibit 2d underwear of Chetan, exhibit 3 dagger and exhibit 4 blood sample of Chetan but the results were inconclusive in respect of blood groups. On conclusion of the investigation, into the offence, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court.

4. The accused/appellants were charged for theirs having committed offences punishable under Sections 120-B, 149, 302, 307, 148, 324, 326 of the Indian Penal Code, by the learned trial Court to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 33 witnesses. On closure of prosecution evidence, the statements of the accused, under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication. They chose to lead evidence in defence.

6. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the appellants/accused, namely, Nitish, Praveen, Sumit Bhardwaj and Rohit for theirs having committed offences punishable under Sections 120-B, 302 and 307/34 IPC and acquitted the accused/respondents, namely, Devinder Kumar, Gurprit Singh, Ajay Kumar and Ravi Kumar for the offences charged.

7. The learned counsel appearing for the appellants/accused have concertedly, and, vigorously contended, that, the findings of conviction, 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 the material on record. Hence, they, contend that the findings of conviction, be, reversed by this Court, in, exercise of its appellate jurisdiction, and, be replaced by findings of acquittal.

8. The learned Deputy Advocate General has with considerable force and vigour, contended that the findings of conviction, recorded by the Court below against the appellants/accused are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication. The learned Deputy Advocate General further contends that the findings of acquittal recorded in favour of respondents Devinder Kumar, Gurprit Singh, Ajay Kumar and Ravi Kumar , be, reversed by this Court, in, exercise of its appellate jurisdiction, and, be replaced by findings of conviction. On the other hand, the learned counsel appearing for the respondents-accused submit that the findings of acquittal, recorded by the learned trial Court in favour of the respondents-accused are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

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

10. The ill-fated incident occurred on 23.3.2011 at about 8-8.30 p.m. at Maszid Gali, Paonta Sahib. The accused are alleged to by the incriminatory acts attributed to each of them put to death Sunil, Anil and Sanjeev, besides, the accused are also alleged to have committed offences constituted under Section 307 of the Indian Penal Code qua PWs 3 and 4. The post mortem reports qua the deceased are comprised in Exhibits PW-16/A, PW-16/B and PW-16/C. The clinching emanation which ensues on a perusal of the Post Mortem reports comprised in Exhibits PW-16/A, PW-16/B and PW-16/C, proven by the deposition of PW-16, is of the demise of each of the deceased being attributable to the injuries found on their person being sequallable by the user of knife, danda and baseball stick respectively. With firm and invincible evidence having been led by PW-16 qua the demise of the deceased being attributable to the injuries existing on their person and their being sequallable by the user of weapons aforesaid, the prosecution in tandem thereto relies upon the factum of recovery of weapons of offence comprising of Knives (Ex. P-7, 14 and 15), Danda (Ex. P-8) and baseball stick (Ex. P-9) recovered under memos comprised in Ex PW-3/B, PW-9/C, PW-13/B, PW-29/A, PW-29/C, recoveries whereof stands preceded by the disclosure statements of accused Nitish (Ex. PW-9/A), Praveen (PW-9/B), Sumit (Ex, PW-29/B) and Ravi Kumar (Ex. PW-13/A), to canvas that the offences for which the accused stood charged and tried had come to be formidably proved. However, though the aforesaid un-impeachable evidence read in conjunction with vivid credible eye witnesses account qua the occurrence having been rendered by the injured/ complainant does constrain at this stage an apt conclusion that the prosecution has proven the fact of the accused/convicts having committed offences for which they came to be charged and tried. Nonetheless for reasons to be assigned hereinafter, the factum of disclosure in MLCs qua the accused/convicts, underlining the factum of theirs also having on the ill-fated day sustained injuries, has yet not to be undermined, as the learned trial Court has remained oblivious to, especially when for the further reasons as would be attributed hereinafter on a thorough and threadbare analyses of the testimonies of the prosecution witnesses underscoring the factum of a free sudden fight having occurred inter-se the two warring groups comprising the accused/convicts and the complainants which factum, rather foments a conclusion of the offences, as such constituted by the incriminatory acts attributed to each of the accused, hence constituting an offence rather under Section 304 (I) of Indian Penal Code than under Section 302 of the IPC. Consequently, it would render open or pave way for an inference that the conviction and sentence of the accused/convicts for theirs having committed offences punishable under Section 302 readwith Section 34 of IPC is commutable to conviction under Section 304(I) read with Section 34 of Indian Penal Code.

11. The prosecution version has been voiced in the deposition comprised in the examination-in-chief of PW-1 Naresh Kumar. He has communicated therein the factum that on 23.3.2011 at about 8-8.30 p.m., he alongwith Kuldeep, Chetan, Sandeep, Shelli, Jaswant, Narender, Sunil, Sanju and Anil after having paid a visit to a fair of Paonta Sahib were returning home to their village named Heerpur. At that time, when they arrived at Maszid Wali Gali, Kuldeep had parked his motor bike there and when he was about to leave to village Heerpur , then in the meantime all the accused identified by this witness in Court had all of a sudden appeared on the spot. The accused have been deposed by this witness to be armed with dandas and knives. Accused Sumeet Bhardwaj has been deposed by this witness to have attacked Shelly with a knife, in sequel whereof he suffered a hurt near his armpit. Though a statement exists in his deposition that his companion Chetan and

Kuldeep had started rescuing Shelly from the clutches of Sumeet, however, accused Nitish stabbed Chetan with knife on his abdomen. Shelly injured has been deposed by this witness to have raised an alarm to flee from the site as they suffered wounds by stabbing. He continues to depose that Kuldeep had taken Chetan and Shelli on his Motor Bike to Puran Hospital for treatment. He also deposes that Devinder @ Billa had caught Anil Kumar and accused Sumeet Bhardwaj had stabbed him near his left armpit. Anil has been deposed by this witness to have collapsed on the spot. Accused Gurpreet Singh and accused Ajay Kumar have been deposed by this witness to have caught Sunil Kumar and accused No.1 Sumit has been deposed by this witness to have stabbed him near his armpit. He also collapsed and died on the spot itself. He continues to depose that their companion Sanju absconded from the spot through Masjid Gali and from the opposite direction accused No.6 Rohit had hit him with knife on his abdomen while accused Ravi and accused No.3 hit him with Dandas. Subsequently all the accused stabbed Sanju on his abdomen and on his back. The aforesaid Sanju has been deposed to have been carried to the hospital however enroute he succumbed to the injuries sustained by him. After the crime had come to be consummated, the accused left the spot. In his deposition on oath he voices the fact that 400-500 people alongwith police officials were present on the spot and witnessed the scene however, none came to the rescue. In addition he deposes that accused No.1 Sumit was inimical towards Shelli as they had some quarrel in the school. This witness is stated to have joined the investigation and in his presence the SHO had taken into possession blood stained piece of stick, controlled earth and concrete from Masjid wali Gali where the occurrence had taken place. The controlled earth were put in small bottles while piece of wood was inserted in different parcel and sealed with seal impression X at three places. To the above effect seizure memo Ex. PW-1/B and Ex. PW-1/C were prepared on which he and Ram Lal appended their signatures. The said parcels on being opened with the permission of the Court were identified by this witness to be the same. In his cross-examination he concedes to the factum of deceased Shelly being his real brother. Moreover, in his cross-examination he concedes to the factum of he and his companions numbering 8 to 9 whereas the numerical strength of all the accused being 8. The factum of accused No. 6 having sustained injuries his being hit by Sanju in the course of his i.e. latter rescuing himself, stands conceded by this witness. However he denies the fact that other accused also sustained injuries in the scuffle that ensued inter-se the accused and the complainant party. Further more, in this cross-examination he deposes that none of the people had prevented the accused from fleeing from the spot. He concedes to the factum of Sanju having been attacked in front of the Dhaba of Asgar. However he deposes that Sanju was attacked after the initial assault having been perpetrated on the person of Sunil and Anil. Nonetheless, he deposes that when the initial assault was perpetrated on the person of Sunil and Anil a number of people were present at the site. Jaswant, Sandeep and Narender have been deposed by this witness to have run away from the street to save themselves. Preponderantly, he deposes that on the day preceding the occurrence he was mercilessly beaten up by accused Sumeet and his companions and he had sustained injuries. In his further cross-examination he deposes that his village is housed with Bahati Community. He denies that on 24.3.2011 they set afire the houses belonging to the Balmiki Community. However, he concedes to the fact that FIR No. 107 under Sections 436/427 IPC under Sections SC & ST Act was registered against them. He denies that the names of accused Ajay and Praveen have been falsely included in Ex. PW-1/A. He feigns ignorance whether the stick used by Sanju remained at the spot or not. Sanju has been deposed to have been given 3-4 danda blows on the head. A scuffle inter-se him and accused Ravi has been deposed to have occurred on 22.3.2011. The deposition of this witness, an eye witness to

the occurrence has received corroboration from PW-3. PW-3 deposes that he remained associated with the investigation. He further deposes that one jean pant, one T-Shirt, Baniyan and underwear were taken into possession vide seizure memo comprised in Ex. PW-3/A. On the aforesaid parcel being permitted to be opened by the Court and the items contained therein having been retrieved therefrom the same have been identified by him to be the same as were given by him to the police on 6.4.2011. He deposes that the police of Paonta Sahib got the accused Nitish identified from him. He further deposes that he had disclosed to the police that he was the stabber. He continues to depose that accused Nitish got recovered one knife from a place near burial ground in the bushes behind the broken boundary. Knife Ex. P-7 has been identified by this witness to be the same, which was recovered at the instance of accused Nitish under memo Ex. PW-3/B. In his cross-examination he concedes to a quarrel having erupted inter-se PW-1 and other persons on 22.3.2011.

12. PWs 4, 6, 7 and 12 also support and corroborate the ocular version qua the incident deposed by PW-1.

13. PW-5 Gurdas Ram is witness to seizure memo Ex. PW-4/A, under which Shalender Kumar handed over his blood stained clothes to the police. PW-9 Mohan Chaudhary is witness to recovery memo Ex. PW-3/B under which knife Ex. P-7 was taken into possession by the police, in pursuance to the disclosure statement of accused Nitish. PW-10 Deepak Kumar prepared the site map of the spot Ex. PW-10/A.

14. PW-11 in his examination-in-chief deposed that on the ill-fated day a quarrel had occurred between two groups. However since he resiled from his previous statement recorded in writing, hence he was declared hostile and was permitted by the trial Court on the request of learned PP to be cross-examined. In his cross-examination he deposes that he and his wife tried to rescue Sanju. He also deposes that the accused Sumit, Rohit and Nitish were grappling with Sanju. He continues to depose that accused persons who belong to the Basti were known to him. In his cross-examination by the learned defence counsel he admits the fact that the complainant party had knives and dandas in their hands.

15. PW-13 HC Kamlesh Kumar deposes that on the disclosure statement made by accused Ravi Kumar comprised in Ex. PW-13/A, baseball stick was got recovered and same was taken into possession vide seizure memo Ex. PW-13/B in presence of Balbir Singh and Jagdish Chand. PW-14 and PW-15 Balbir Singh and Jagdish Chand are the witnesses to recovery memo Ex. PW-13/B under which baseball stick was recovered.

16. PW-16 Dr. N.K Bhardwaj had conducted post mortem examination on the body of deceased Sunil, Anil and Sanjeev Kumar on application moved by the police. He deposes that committee of doctors in Post mortem report comprised in Ex. PW-16/A opined that deceased Sunil died owing to stab wounds on the left side of chest, which damaged his left lung and heart. He continues to depose that committee of doctors in post mortem report comprised in Ex. PW-16/B opined that the deceased Anil died owing to left stab wounds on left side of chest which damaged his left lung and heart. He further deposes that deceased Sanjeev Kumar died owing to multiple stab wounds which injured left lung, heart, stomach and right kidney. His post mortem report is comprised in Ex. PW-16/C. He continues to depose that all the injuries found on the persons of deceased Anil, Sunil and Sanjeev Kumar are possible with knife, stick and baseball stick.

17. PW-17 Dr. Rakesh Kumar conducted the medical examination of accused Sumit & Nitish. Theirs MLCs are comprised in Ex. PW-17/A and PW-17/B. PW-18 Dr. Kamal Pasha examined accused Gurpreet Singh and issued MLC comprised in Ex. PW-18/A. PW-19 Dr. K.K Prashar conducted the medical examination of accused Devinder and Rohit and issued MLCs PW-19/A and PW-19/B. PW-27 Dr. Daniel examined Chetan and Shalender and opined that the injuries on their person are grievous in nature. He further deposes that the injuries found on their person were possible with stabbing.

18. The oral depositions of the eye witnesses to the occurrence whose testimonies are bereft of any inter-se or intra-se contradictions qua the inculpatory and incriminatory acts of the accused/convicts hence when they have deposed in harmony qua the incident which occurred on the ill-fated day, as a corollary then their testimonies constitute credible evidence against the accused/convicts. The credibility foisted to the ocular versions qua the incident narrated by the prosecution witnesses besides gains momentum from the effectuation of recovery of Knives (Ex. P-7, P-14 and P-15), Danda (Ex. P-8) and baseball stick (Ex. P-9) under memos comprised in Ex PW-3/B, PW-29/A, PW-29/C, PW-9/C, PW-13/B at the instance of accused Nitish, Rohit,Sumit Praveen and Ravi Kumar, concomitantly then the recoveries aforesaid at the instance of the aforesaid lend succor to the ocular version qua the incident narrated by the prosecution witnesses aforesaid. Formidable efficacy to the recovery of weapons of offence stands pronounced besides underlined in the Post Mortem Reports comprised in PW-16/A, PW-16/B and PW-16/C wherein they have been communicated to be the weapons whose user at the instance of the accused sequelled the injuries on the persons of the deceased and ultimately caused the demise of each of the deceased. The recovery of weapons of offence, at the instance of the accused/convicts, does not hence suffer from any illegality or inefficacy so as to discount their concomitant user by each of the accused on the person of deceased as well as upon the injured/complainants, who too have communicated a consistent hence credible ocular version qua the occurrence. Consequently with infirm evidence existing on record qua the factum of recovery of weapons of offence at the instance of the accused/convicts being legally inefficacious, accordingly their user at the instance of the accused upon the persons of each of the deceased as well as on some of the prosecution witnesses who, too then were recipients of injuries as displayed in MLC comprised in Ex. DB and Injury reports comprised in PW-27/A and PW-27/B, does also lend reinforced vigour, succor and sinew to the depositions of the ocular witnesses to the occurrence. Even though a conclusion has been drawn by this Court qua the accused/convicts hence having delivered blows with knife, baseball stick and Danda on the person of each of the deceased as well as upon the complainant/prosecution witness who witnessed the occurrence. Nonetheless, the prosecution witnesses have smothered the factum of the accused too having received injuries on their person. The factum of the accused/convicts having received injuries on their person stands underscored by apposite portrayals in MLCs, qua the accused/convicts. The perusal of MLCs aforesaid discloses that at the time contemporaneous to the ill-fated incident, the accused/convicts too had sustained injuries on their person. The portrayals in the MLCs comprised in PW-17/A to PW-17/C, PW-18/A & PW-19/C qua the accused/convicts and their underlining the evident fact of injuries existing on their person and their being contemporaneous to the ill-fated incident, gives leverage to an inference that the injuries existing on the person of the accused/convicts, were sustained by them in the ill-fated occurrence. However, it appears that, even when the accused/convicts too sustained injuries in the free fight which occurred on the ill-fated day, the Investigating Officer carried out a partisan/slanted investigation, borne out by the fact of his having omitted to recover the weapon/weapons of offence used by the complainant party/injured

witnesses to inflict injuries on the person of the accused. Consequently, the natural concomitant deduction is that, given the numerical strength of all the accused/convicts and the complainant each indulged in a free fight. The deposition existing in the cross-examination of PW-1 wherein he has feigned ignorance qua the fact whether the stick used by the deceased Sanju remained placed on the spot or not, does obviously foment a deduction that the deceased Sanju was carrying a stick, which was used by him for perpetrating an assault on the person of the accused. Further more, naturally then he was not unarmed. Moreover, given the admission existing in the cross-examination of PW-11 Asgar whose presence at the site of occurrence remains un-disputed, especially when on his having come to be cross-examined by the learned defence counsel during course whereof on an apposite suggestion having been put to him by the learned defence counsel qua the factum of the complainant party also wielding knives and Dandas, his rendering an answer thereto in the affirmative, does foist or succor an inference qua the truth of the said factum, especially when the fact aforesaid disclosed by him has remained un-concerted to be shattered by the learned PP by recalling this witness for his re-examination, for eliciting an explanation qua the aforesaid fact existing in his cross-examination. Consequently, given the factum existing in the cross-examination of PW-1, wherein he feigned ignorance qua the fact whether the stick used by Sanju remained placed on the spot or not, hence, communicative of the fact, especially when he omits to in the subsequent part of his testimony wherein the said fact occurs, clarify that the deceased Sanju was not carrying any stick, that the deceased Sanju was wielding a stick which, read in conjunction with the factum existing in the cross-examination of PW-11 of the complainant party wielding knives and dandas, does rear and nurse an inference that the complainant party as well as the accused/convicts while being equal in numerical strength, besides being armed indulged in a free scuffle. Necessarily when law does not ordain an initial determination being rendered qua the initiator of aggression nor when such a determination is indispensable, for rendering a further conclusion on the strength of the evidence existing on record, that the offence as connoted by oral as well as documentary evidence to have been committed by the accused/convicts while carrying the requisite mens rea in their mind, given the severity of assault with lethal weapons on vital parts of the body of the deceased, hence stands subdued or mitigated in gravity, in as much as with exception 4 to Section 300 IPC alongwith its explanation while constituting an exception to the offence under Section 302 IPC while omits to render open its invocation or applicability only in the event of a determination emanating from the court qua the initiator of aggression, rather with the mandate of the explanation to it, permitting its application or invocation even when the initiators of the aggression are the accused/convicts, especially when in the duel or the sudden fight which occurred in the heat of passion inter-se the accused/convicts and the complainant, blows were exchanged inter-se them nor also it is mandated in exception 4 to Section 300 IPC that in the event of the accused inflicting lethal blows, with deadly or lethal weapons besides the lethal blows being disproportionate to the injuries received by them, its applicability or invocation would not come to the rescue of the accused/convicts. Tritely in aftermath the factum of eruption of a sudden duel inter-se both the accused/convicts and the complainant with both being armed and equal in numerical strength, in course whereof in the heat of passion both warring groups exchanged blows, received injuries, as such, even if the enormity or magnitude of the blows delivered on the person of the participants in the duel begot the demise of some of them, yet if in the assault the lethal injuries inflicted upon the person of the deceased were disproportionate to the injuries received by the complainant or the accused, the mitigatory effect of exception 4 to Section 300, in as much as its diluting the rigor of section 302 IPC to an offence under Section 304(I) IPC would yet come to be

attracted. Moreover, the evident fact which further provides a pedestal to the applicability and invocation of exception 4 to section 300 IPC is comprised in the MLCs qua each of the accused/convicts. Succinctly without determining the factum whether the accused/convicts or the complainant initiated the aggression, with the *sine qua non* of the parameters enshrined in exception 4 to section 300 IPC alongwith its explanation having stood satiation comprised in the aforesaid evidentary facts would hence render their prompt and immediate attraction to the facts of the instant case.

19. Now adverting to the role of acquitted accused named Devinder, Gurpreet, Ajay and Ravi, it is apt to advert to the testimony of PW-1. PW-1, the informant in his examination-in-chief has imputed an inculpatory role to accused Devinder, Gurpreet and Ajay. However in his cross-examination he has admitted to the suggestion put to him by the learned Defence counsel that in his previous statement recorded in writing, he had omitted to disclose the name of the aforesaid accused. Consequently, the omission on the part of PW-1, the informant to divulge to the Investigating Officer, the names of the accused aforesaid in his previous statement recorded in writing and his imputing in his examination-in-chief an inculpatory role to them, constitutes his deposition on oath wherein he has imputed an inculpatory role to the accused aforesaid to be an improvement and embellishment over his previous statement recorded in writing. In sequel, his deposition on oath imputing an inculpatory role to accused aforesaid is to be concluded to be carrying no probative worth. Further more the depositions of other prosecution witnesses wherein they have also imputed an inculpatory role to the accused Devinder, Gurpreet and Ajay, also cannot stand to gain any credibility theirs having deposed a version too, in variance and in contradiction to the factum of the initial reporting qua the occurrence where there is no attribution of any inculpatory role to the accused aforesaid, besides hence their testimonies too are to be construed to be engineered at the behest of PW-1 and the Investigating Officer. Moreover, their testimonies too then acquired the taint of an embellishment and improvement. Moreover the accused namely Devinder and Ajay have not gained/sustained injuries on their respective person which pronounces upon the factum of theirs been not present at the site of occurrence as well as theirs having concomitantly not participated in the duel which occurred inter-se the complainant and accused party. Moreover, the learned counsel for accused Ravi Kumar has been able to efficaciously prove the factum of his propagated alibi, in as much as the fact of his being else-where than at the site of occurrence stands substantiated by the deposition of DW-1. Aggravated momentum and impetus to the said inference is garnered by the factum of recovery memo comprised in Ex. PW-13/B qua baseball stick purportedly recovered by the Investigating Officer at the instance of accused Ravi Kumar falsely disclosing the fact of it having come to be recovered from Shakti Nagar at Paonta Sahib whereas there is a communication in the testimony of PW-13 and PW-14 that Shakti Nagar is not located at Paonta Sahib as erroneously reflected therein rather is located at Nahan. Consequently, with mis-reflection qua the place of recovery of Baseball stick purportedly recovered at the instance of accused Ravi, it appears that the recovery of the aforesaid weapon of offence attributed to accused Ravi Kumar is engineered or contrived by the Investigating Officer to falsely implicate the accused Ravi Kumar.

20. The appeals of the accused/convicts namely Sumit Bhardwaj, Nitish, Praveen and Rohit are dismissed. The conviction and sentence of the aforesaid for theirs having allegedly committed offences under Sections 120-B, 302 and 307/34 of Indian Penal Code, is modified and commuted to conviction and sentence under Section 120-B, 307 and 304(I) read with Section 34 of the Indian Penal Code.

21. Also the appeal filed by the State is dismissed. The appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of acquittal in favour of Devinder Kumar, Gurpreet Singh, Ajay Kumar and Ravi Kumar has committed any legal misdemeanor, in as much as, it has either mis-appreciated the relevant evidence or omitted to appreciate relevant and admissible evidence on record. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned trial Court merit any interference. Let the accused/convicts be heard on quantum of sentence on 18.6.2015.

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

Joginder Singh .....Petitioner.
Versus
State of H.P. & another .....Respondents.

Cr.MMO No. 278 of 2014.
Reserved on 01.06.2015.
Date of Decision : 15th June, 2015.

Code of Criminal procedure, 1973- Sections 451 and 457- Complainant claimed exclusive possession of the premises on the ground that his father had delivered the possession to him- as per application filed under Sections 451 and 457 of Cr.P.C. room are in possession of 'J', brother of the complainant- one room is in possession of the complainant- complainant stated that she proceeded to open the shutter of his shop, his brother, his wife, his sons and his daughter attacked him with lathis and threatened to do away with his life- FIR was registered and premises were sealed by the police on which application was filed and learned CJM handed over the possession to the complainant subject to the furnishing on supardari bond- a revision was preferred before learned Sessions Judge which was dismissed- held, that Court can deal with the immovable property under Sections 451 and 457 of Cr.P.C- Court can deal with the immovable property under Section 456 of Cr.P.C- therefore, order passed by courts below set aside and police directed to re-seal the premises. (Para-2 to 9)

For the Petitioner: Mr. George, Advocate.
For Respondent No.1: Mr. Vivek Singh Attri, Dy. A.G. for respondent No.1.
For Respondent No.2: Mr. D.K. Khanna and Mr. Harit Sharma, Advocates.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Respondent No.2 herein/complainant/applicant claimed exclusive possession to the disputed premises wherein he was operating his business of a "Manyari", on the score of his deceased father Jagdish Chand during his life time having delivered its possession to him. The deceased father of respondent No.2 herein, and of the accused Joginder Singh/petitioner herein, had constructed a house at Ghawandal Chowk, Shri Naina Devi Ji, District Bilaspur comprising of six rooms on the ground floor and two rooms in the upper storey. The rooms in the aforesaid premises are disclosed in the application

filed under Sections 451 and 457 of the Cr.P.C. to be in possession of his brother Joginder Singh/petitioner herein. However, one room in the upper storey is averred in the aforesaid application to be in the possession of the complainant/respondent No.2 herein. The business of a "Manyari" is averred to be operated by respondent No.2 from the said room in the upper storey since the last 20 to 25 years by him even during the life time of his deceased father Jagdish Chand. However, on 16.01.2009, when respondent No.2 herein/applicant before the learned trial Court had gone to Hissar, he on his returning to his native place had on 18.01.2009 proceeded to at about 7.00 p.m. open the shutter of his shop, then his brother Joginder Singh, his wife Smt. Usha, his sons Arun and Rohit and his daughter Suman allegedly attacked him with lathis and also abused him and threatened to do away with his life. A report qua the incident was lodged with the police post concerned which resulted in the recording of FIR No.14/09 of 19.01.2009 at Police Post Shri Naina Devi Ji under Police Station Kot Kehloor, District Bilaspur, H.P. The alleged offences constituted in the FIR arising from the incriminatory/penal acts of the accused were recorded therein to be falling under Sections 147, 148, 323, 448, 504, 506 read with Section 149, IPC. In consequence to the lodging of the FIR, the police sealed the disputed shop as accused Joginder Singh had installed his two locks upon the lock of the respondent No.2/complainant. The police had taken into possession the keys of the locks put on the shop by respondent No.2 herein as well as by accused/petitioner herein from their respective possession. The premises from where respondent No.2 operated his business of "Manyari" having come to be sealed by the police constrained the respondent No.2, to institute an application under Sections 451 and 457 of the Code of Criminal Procedure, 1973 before the learned Chief Judicial Magistrate, Bilaspur claiming the relief therein that the disputed premises sealed by the police be unsealed so as to facilitate him to operate his business of "Manyari". The learned Chief Judicial Magistrate, Bilaspur on considering the material on record comprised, in the no objection furnished by the learned APP to the application being allowed besides, the statement of the accused Joginder Singh revealing therein that in consonance with a compromise effected before the Gram Panchayat concerned inter se him and the complainant/respondent No.2 herein, the disputed shop/premises was to remain allotted or consequentially in possession of respondent No.2 herein only for 11 months, whereafter it is to be vacated, was constrained to allow the application preferred by the applicant/respondent No.2 herein. A direction was also rendered by the learned Chief Judicial Magistrate to the Station House Officer of the police station concerned to unseal the sealed premises and handover its temporary possession to the applicant/respondent No.2 herein till the conclusion of the trial of the case arising from the lodging of the FIR No.14 of 2009. The handing over of the temporary possession of the disputed shop/premises by the learned Chief Judicial Magistrate to the applicant/respondent No.2 herein was also subject to the condition of the latter furnishing a supurdari bond in the sum of Rs.1,00,000/- along with one surety in the like amount.

2. The decision rendered by the learned Chief Judicial Magistrate, Bilaspur was assailed in revision by the petitioner herein before the learned Sessions Judge, Bilaspur. However, the learned Sessions Judge, Bilaspur affirmed the conclusions and findings recorded by the learned Chief Judicial Magistrate in his order impugned before the learned Sessions Judge, Bilaspur.

3. The accused/petitioner herein stands aggrieved by the findings and conclusions concurrently arrived at and recorded against him by the learned Chief Judicial Magistrate, Bilaspur and by the learned Sessions Judge, Bilaspur, on an application

instituted under Sections 451 and 457 of the Code of Criminal Procedure before the learned Chief Judicial Magistrate, Bilaspur by the respondent No.2 herein.

4. Both, the petitioner herein/accused and respondent No.2 herein/ complainant/applicant are brothers. The property qua which the dispute arose inter se the petitioner herein and the respondent No.2 herein is "immovable property". The incident which preceded the lodging/recording of the FIR in the police station/police post concerned as allegedly attributed to the accused/petitioner herein is, of his alongwith his family members on 18.01.2009 at about 7.00 p.m., when the respondent No.2/ applicant/ complainant proceeded to open the shutter of the shop wherefrom he was operating his business of a "Manyari", having attacked the latter with lathis and abused him as also threatened to do away with his life, besides his having installed his locks upon the locks installed by the complainant/respondent No.2 herein on the shutter of the disputed shop/premises, so as to preclude him or prevent him to operate his business of a "Manyari" therefrom. The disputed premises were sealed and the keys of the locks installed on the shutter by the petitioner herein and respondent No.2 herein were taken into possession by the police.

5. The gravamen of the core issue which besets this Court is whether the exercise of jurisdiction by the learned Chief Judicial Magistrate, Bilaspur in ordering the delivery of temporary possession of the shop in dispute to respondent No.2 herein by the SHO of the police station concerned, besides the orders of the learned Sessions Judge, Bilaspur in affirmation to the orders rendered by the former, withstand the test of theirs being free from any jurisdictional error. The appropriate provisions of law in the Code of Criminal Procedure, 1973 whereunder the respondent No.2 had cast his application for obtaining relief from the learned Chief Judicial Magistrate, Bilaspur and which relief was afforded in his favour stand engrafted in Sections 451 and 457, which provisions stand extracted hereinafter:

> "**451. Order for custody and disposal of property pending trial in certain cases.-** When any property is produced before any Criminal Court during an inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary order it to be sold or otherwise disposed of.
>
> *Explanation*-For the purpose of this section, "property" includes-
>
> (a) property of any kind or document which is produced before the Court or which is in its custody.
>
> (b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.
>
> **Section 457. Procedure by police upon seizure of property.**- (1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the

> Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.
>
> (2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detail it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

6. The factum, whether the orders rendered by both the learned Courts below are free from any jurisdictional error would depend upon an interpretation of the provisions of Sections 451 and 457 of the Cr.P.C. whereunder the respondent No.2 had cast his application before the learned Chief Judicial Magistrate, Bilaspur. A plain and literal reading of the provisions of Section 451, Cr.P.C. expressly pronounces the open fact that the Criminal Court of competent jurisdiction, is empowered to, pending the conclusion of an inquiry and trial, on its being satisfied on a portrayal by the evidence recorded by it, that the property as produced before it, is subject to speedy and natural decay, render an order for its sale and disposal. However, the property qua which an order for its sale or disposal on it being precedingly concluded on a discernment of the evidence as adduced before it, that pending the conclusion of the inquiry or trial, such property would speedily or naturally decay, obviously necessitates an inference that the contemplated order for disposal or sale of property, is to be obviously construable to be relatable to only movable property. An impetus to the inference aforesaid of Section 451, Cr.P.C. envisaging besides, enunciating that pending any inquiry or trial the Criminal Court of competent jurisdiction may render an order for sale or disposal of only such property which is open to speedy and natural decay, hence, qua only movable property, is that the condition of speedy and natural decay can only be begotten by moveable property and not by immovable property. Even otherwise the opening phraseology used in the provisions of Section 451 of the Cr.P.C., is both, lucid and explicit in communicating the fact that the Criminal Court of competent jurisdiction when proceeds to, during the pendency of an inquiry or trial, render an order for sale and disposal of such property on its receiving evidence qua the preeminent factum probandum of its being subject to speedy and natural decay, then such property necessarily is enjoined to be "produced" before the Criminal Court of competent jurisdiction. In other words, the contemplation and enunciation in Section 451 of the Cr.P.C., when read harmoniously is of the Criminal Court of competent jurisdiction being vested with the authority or power to render an order qua the sale or disposal of property, on its concluding, on receiving evidence that it is subject to speedy and natural decay, besides on the property qua which such orders are rendered, having come to be produced before the said Court. Moreover, the production of the property in Court qua which the contemplated orders in Section 451 of the Cr.P.C., are renderable by the Criminal Court of competent jurisdiction, is an enjoined mandatory or indispensable condition for foisting tenability or validity to them. As a corollary, no property other than movable property can be construed to be liable for production in a Criminal Court of competent jurisdiction, to hence empower the Criminal

Court of Competent jurisdiction, to render an order qua its sale or disposal during the pendency of an inquiry or trial before it. In other words, only moveable property as a natural concomitant can be concluded to be the subject matter or the dominant corpus qua which the Criminal Court of competent jurisdiction can acquire both power and authority, to render an order qua its sale or disposal within the contemplation of Section 451 of the Cr.P.C.

7. Furthermore, for reiteration the power of sale or disposal of property contemplated in Section 451 of the Cr.P.C., besides can be concluded to encompass only moveable property and that too when concluded on an evaluation of evidence as adduced before the Criminal Court of competent jurisdiction qua its being subject to speedy and natural decay. Naturally, immovable property which is neither subject to speedy or natural decay nor liable to be produced nor producible before the Court, obviously then hence no order for its disposal or sale during the pendency of an inquiry or trial can be rendered by the Criminal Court of competent jurisdiction. The Explanation (b) to Section 451 of the Cr.P.C., manifesting the fact that the property as defined in the substantive provisions of Section 451 of the Cr.P.C., is also construable to be any property regarding/qua which an offence appears to have been committed or which appears to have been used for the commission of any offence, is also in amplification of the substantive provisions of Section 451 of the Cr.P.C., wherein the sine qua non ingredients, to be mandatorily borne by "property", qua which an order for its disposal or of sale are jurisdictionally renderable by the Criminal Court of competent jurisdiction during the pendency of any inquiry or trial before it, after the recording of evidence, are of its being hence concluded to be subject to speedy and natural decay besides, its being producible before the Court. Moreover, the orders envisaged or contemplated to be renderable in the substantive provisions of Section 451 of the Cr.P.C., are with a manifest salutary object to preclude or prevent the proven speedy and natural decay of property. The contemplation and intent of explanation (b) to Section 451 of the Cr.P.C. cannot extend nor enlarge nor substitute the substantive provisions of Section 451, Cr.P.C., so as to render open an inference, that even when the accused/petitioner herein has allegedly committed offences comprised in his act of installing his locks upon the locks installed by the complainant/respondent No.2 on the disputed premises warranting the sealing of the said premises at the instance of the police, yet when obviously the disputed premises is an immovable property, hence, un-producible in Court nor liable for production in Court, that hence during the pendency of an inquiry or trial against the petitioner herein/accused qua the commission of offences constituted under Sections 147, 148, 323, 504, 506 read with Section 149 of the IPC, besides when it is neither subject to natural or speedy decay, it would befittingly empower the Criminal Court of competent jurisdiction to during the pendency of the inquiry or trial render an order for its sale or disposal, as facilitating or lending boost to the aforesaid inference on the anvil of explanation (b) to Section 451 of Cr.P.C. would be erosive of the intent and contemplation of the substantive provisions of Section 451 of the Cr.P.C. Explanation (b) to Section 451 of the Cr.P.C., cannot be read in a manner so as to denude the salutary purpose of the substantive provisions of Section 451 of the Cr.P.C., with a loud communication therein of the intent of the legislature, of its being available for invocation only when the sine qua non conditions pronounced therein standing substantiation inasmuch, as the property qua which, during the pendency of an inquiry or trial, the Criminal Court of competent jurisdiction may render an order qua its sale or disposal, having come to be produced in Court, as also, a firm conclusion on an discernment of evidence adduced before it preceding the rendition of an order qua its sale or disposal, that it is subject to speedy and natural decay. Necessarily then when the offences allegedly committed by the accused is upon and

qua immovable property yet even then when it neither subject to speedy or natural decay nor was produced besides, un-producible at the time of rendition of the impugned orders by both the learned Courts below, the enshrined substantive provisions of Section 451 of the Cr.P.C., as enjoined to be substantiated for its invocation would hence be rendered meaningless as well as redundant, in case yet, hence, as untenably done, its temporary possession is ordered to be delivered to respondent No.2 herein. The substantive provisions of Section 451 of the Cr.P.C., when pronouncing upon the conditions which are to be satisfied, before the Criminal Court of competent jurisdiction proceeds to render an order in terms thereof, cannot but be allowed to remain intact or uneroded. Any effort or concert while relying upon Explanation (b) in Section 451, Cr.P.C., to erode them would beget an anomalous scenario which was never within contemplation of the legislature. Therefore, no succor is to be drawn from explanation (b) to Section 451 of the Cr.P.C., to extend or enlarge the purpose and intent of the substantive provisions of Section 451 of the Cr.P.C., so as to empower the Criminal Court of competent jurisdiction to take within its ambit and scope immoveable property for hence empowering it to render an order qua its disposal during the pendency of the inquiry or trial. Besides, to permit such enlargement or extension to the meaning of explanation (b) in Section 451 of the Cr.P.C., would manifestly be militative of, besides would beget conflict with the substantive provisions of Section 451, Cr.P.C. with the mandatorily enjoined proven conditions enunciated therein of the property qua which the contemplated orders under Section 451 of the Cr.P.C., are renderable by the Criminal Court of competent jurisdiction on its having come to be produced before it, besides satisfaction having come to be on available evidence that it is subject to speedy and natural decay. In sequel the orders rendered by both the learned Courts below are infirm especially when they rendered qua immovable property qua which the rendition of the impugned orders are outside the contemplation of Section 451 of the Cr.P.C.

8. Furthermore, amplifying vigour to the inference aforesaid is lent by the factum of special provisions existing or standing in Section 456 of the Cr.P.C., wherein a power is vested in the Court concerned to, on convicting an offender/accused on conclusion of trial qua offences constituted under Section 506, IPC when on whose proven commission sequels an unlawful dispossession of the complainant/victim from immovable property, hence, render an order for restoration of its possession to the complainant from whom its forcible possession under intimidation was taken by the accused/convict. The provisions of Section 456 of the Cr.P.C. are extracted hereinafter:-

> "**456. Power to restore possession of immovable property**.- (1) When a person is convicted to an offence attended by criminal force or show of force or by criminal intimidation, and it appears to the Court that, by such force or show of force of intimidation, any person has been dispossessed of any immovable property, the Court may, if it thinks fit, order that possession of the same be restored to that person after evicting by force, if necessary, any other person who may be in possession of the property:
>
> Provided that no such order shall be made by the Court more than one month after the date of the conviction.
>
> (2) Whether the Court trying the offence has not made an order under sub-section (1), the Court to appeal, confirmation or revision my, if it thinks fit, make such order while disposing of the appeal, reference or revision, as the case may be.

> (3) Where an order has been made under sub-section (1), the provisions of section 454 shall apply in relation thereto as they apply in relation to an order under Section 453.
>
> (4) No order made under this section shall prejudice any right or interest to or in such immovable property which any person may be able to establish in a civil suit."

With the existence of special provisions in Section 456 of the Cr.P.C., whose provisions could well have been, on an application preferred before it by the complainant resorted to, by the Criminal Court of competent jurisdiction on convicting the petitioner/accused for his having committed offences punishable under Section 506, IPC, for affording the relief qua its possession being delivered to him. Obviously when only on proven commission of offence constituted under Section 506, IPC at the instance of the accused, that hence a warrantable conclusion could stand drawn that the possession of the disputed premises (immovable property) was taken by the convict/accused under threat or intimidation, from the complainant/respondent No.2 necessarily then the apt statutory provisions engrafted in Section 456 Cr.P.C., , hence, vested jurisdiction in the Criminal Court of competent jurisdiction to order for restoration of possession of immovable property to the victim/complainant. Therefore, with apt and special provisions to afford relief to the respondent No.2/complainant qua immovable property standing pronounced in Section 456 Cr.P.C., resort to the provisions of Sections 451 and 457 of the Cr.P.C., when the contemplation and mandate engrafted therein dis-empowers, for the reasons aforestated, the Criminal Court of competent jurisdiction, to during the pendency of trial and inquiry order the handing over of temporary possession of the disputed premises/shop i.e. immovable property to the respondent complainant, was grossly improper as well as inapt. Moreover, when the power to restore possession to respondent No.2/complainant, for reiteration are enjoined to be exercisable by the Criminal Court of competent jurisdiction only on its recording an order of conviction against the accused for his having committed offences constituted in the FIR lodged against him and his family members under Sections 147, 148, 323, 448, 504, 506 read with Section 149 of the IPC, the invocation of the inapt provisions of Sections 451 and 457 of the Cr.P.C., by both the learned Courts below in favour of the complainant/respondent No.2 herein is obviously grossly untenable besides, in transgression to the mandate of the special apt provisions engrafted in Section 456 of the Cr.P.C. Even otherwise if some interim directions were warrantable qua the disputed premises/shop/immovable property in that event the respondent No.2/complainant could well have initiated proceedings under Section 145 of the Cr.P.C., before the Executive Magistrate concerned. The scope, width and amplitude of the provisions of Section 145 of the Cr.P.C. especially with sub-section (2) thereof taking within its ambit buildings, as such, encompassing the disputed immovable property, as a natural concomitant then besides with Section 145 of the Cr.P.C., being the relevant, apt and germane provisions for galvanization at the instance of the complainant/respondent No.2, to claim interim relief, his act of having untenably cast an application Under Section 451 and 457 of the Cr.P.C. is to be dis-approbated. Moreover, the interim directions rendered on his misconceived application under Section 451 and 457 of the Cr.P.C., by both the learned Courts below too stands to be discountenanced. For re-iteration, the appropriate application which was institutable at the instance of respondent No.2/complainant was one under the provisions of Section 456 of the Cr.P.C., and that too only on an order of conviction having come to be recorded by the Criminal Court of competent jurisdiction against the petitioner herein, besides for interim relief under Section 145 of the Cr.P.C., and that too before the Executive

Magistrate concerned who rather was empowered hence to render any interim order qua the person entitled to temporary possession of the disputed property.

9. For the foregoing reasons, the instant petition is allowed and the impugned orders rendered by the learned Courts below are quashed and set aside. The Station House Officer of the Police Station concerned is directed to re-seal the disputed shop/premises. However, on conclusion of trial pending before the learned Chief Judicial Magistrate, he shall, in case records findings of conviction against the petitioner herein/accused, render an appropriate order qua the disputed premises under Section 456 of the Cr.P.C., besides it will be open to the applicant/complainant/respondent No.2 herein to move the Executive Magistrate concerned to obtain interim temporary possession of the disputed premises with an appropriate application laid before him under Section 145 of the Cr.P.C. All pending applications, if any, also stand disposed of.

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

Shamnath ...Appellant

Vs.

Julgu ...Respondent.

FAO No. 336 of 2014
Reserved on : 3.6.2015
Decided on : 15.6.2015

Code of Civil Procedure, 1908- Order 41- Plaintiff filed a civil suit in which a plea of adverse possession was taken by the defendant- however, all the co-owners of the property were not impleaded in the suit- held, that the plea of the defendant could not have been adjudicated in absence of the co-owners- therefore, Appellate Court had rightly remanded the suit with the direction to implead all the co-owners as parties. (Para-2 to 4)

For the Appellant: Mr. Dilip K Sharma, Advocate.
For the Respondent: Mr. G.D Verma, Sr. Advocate with Mr. B.C Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant FAO has arisen against the judgment of 18.7.2014, rendered by the learned Additional District Judge, Shimla, camp at Rohru, whereby the appeal preferred by the plaintiff/respondent herein was accepted and the judgment and decree rendered by the learned Civil Judge (Jr. Div) Court No. II Rohru, District Shimla was set aside and the case was remanded to the learned Lower Court with a direction to decide the same afresh in accordance with law.

2. The plaintiff/respondent herein uncontrovertedly stands recorded as co-owner in the undivided holdings comprising the suit land. The appellant/defendant has raised/reared an apple orchard, besides has raised a house thereon. The dependence in the plaint by the plaintiff/respondent herein qua the fact of the appellant/defendant having

reared an apple orchard thereon as also his having raised a house on the suit property, is anvilled upon a demarcation report prepared by the Assistant Collector 2nd Grade, in sequel to his in the presence of the appellant/defendant having demarcated the suit property. The defendant/appellant had concerted to nonsuit the plaintiff/respondent, by his canvassing in the written-statement the plea of his having acquired title to the suit property by adverse possession. However, even when the said plea was canvassed by the defendant/appellant in the written-statement, he omitted to, at the earliest stage, institute an appropriate application for begetting impleadment of all the co-owners in the undivided holdings comprising the suit property, for facilitating their participation in the suit, even when he had in the written-statement palpably pleaded the factum of the suit being bad for non-joinder of necessary parties, as such communicating the fact of other co-owners too having an interest in the suit property. The non-participation in the suit, of the aforesaid, sequelled the rendition of a decree qua the suit property, in their absence, concomitantly entailing the sequel of their rights in the suit property hence being gravely and severely affected. However, the said omission on the part of the defendant/appellant to, at the earliest stage, institute an appropriate application before the learned trial Court to beget addition of all the co-owners in the array of plaintiffs/Proforma defendants while theirs being necessary parties, has been endeavored to be extenuable on the score of there existing an averment in paragraph 5 of the plaint of the plaintiff having instituted a plaint against the defendant, on behalf of other co-owners, hence there being no necessity to seek impleadment of other co-sharers either in the array of plaintiffs or in the array of proforma defendants. However, even if the said averment in the plaint may tentatively render open an inference, that the assertion or espousal of a stand by the defendant/appellant in the written-statement, of his having acquired title to the suit property by adverse possession constitutes an assertion against the other co-owners as well besides rendering unnecessary the participation of other co-owners in the array of plaintiffs or in the array of proforma defendants. Nonetheless, the effect of the above averment stands waned as well as overcome by the factum of the defendant having acquiesced to the factum of rendition of an order for addition of other co-owners by the learned trial Court on an application instituted before it under Order 1 Rule 10 CPC by the plaintiff for begetting addition in the array of Proforma defendants or in the array of plaintiffs, constituted by his act of abstaining or omitting to assail it before the competent Court. In face thereof, when the orders rendered by the learned trial Court, on an application instituted before it, by the plaintiff/respondent herein under Order 1 Rule 10 CPC hence having attained finality as well as conclusiveness, as a natural corollary, then with the addition of other co-owners in the array of Proforma defendants, a right of participation to them in the lis has hence accrued or ensued, obviously then for facilitating their fair, just and effective participation in the lis, especially when their rights, in the suit property, in case the espousal of the defendant in his written-statement of his having acquired title to the suit property by adverse possession stands revered or vindicated, would obviously come to be trammeled as well as crippled, renders their participation to be imperative as well as essential. Consequently, the decree of dismissal of the suit of the plaintiff rendered by the learned trial Court in case gains approbation from this court even when there was want of participation or absence of the proposed defendants, in the array of proforma defendants or in the array of plaintiffs, would fetter as well as benumb the rights of the aforesaid, who are co-owners in the undivided holdings alongwith the plaintiff against whom, too acquisition of title to the suit property by adverse possession has been canvassed by the appellant/defendant to have been begotten. Moreover, the factum of the defendant in his written-statement having canvassed the factum of the suit being bad for non-joinder of necessary parties, yet his having omitted to even when he projected a right of his having

acquired title to the suit property by adverse possession, institute an appropriate application for facilitating the participation of the other co-owners in the array of plaintiffs or in the array of Proforma defendants, which has been extantly undone, cannot stand impeachment, especially when his aforesaid omission portrays his acquiescence to the factum of necessity as well as imperativeness of their participation for rendering an efficacious executable decree qua the suit property. Further, the learned trial Court though seized of the Jamabdandi qua the suit property with a disclosure therein of the suit property being jointly owned by other co-owners alongwith the plaintiff, has yet in a most cursory and mechanical manner overlooked as well as slighted its effect. In case it had at the initial stage, given the factum of the framing of an appropriate issue, anvilled upon the pleadings of the defendant in the written-statement of the suit being bad for non-joinder of necessary parties, in as much, as other co-owners in the suit property alongwith the plaintiff having been omitted to be joined in the array of plaintiffs or in the array of proforma defendants, facilitated its proof by adduction of evidence at the instance of such party to the lis upon whom the onus of proving the issue was cast, no injustice would have accrued to the other co-owners as now palpably has. The learned first Appellate Court while noticing the aforesaid infirmity had done justice by ordering for the transmission/remand of the lis to the learned trial Court after affording of an opportunity to the parties to the lis, to implead all the recorded co-owners as parties to the lis.

3. Even though, the learned first Appellate Court had not struck any issue for re-determination after evidence being received on it, by the learned trial Court nor it had with specificity enumerated the remanded issue/issues on which a fresh determination was enjoined to be rendered by the learned trial Court. Nonetheless the factum probandum of omission of participation of other co-owners alongwith the plaintiff in the lis, to whom injustice would accrue in case a decree of dismissal of the suit of the plaintiff was permitted to stand vindication or their rights in the suit property would hence come to be trampled upon in the event of vindication by the learned first appellate Court of an espousal of the defendant in his written-statement of his having become owner of the suit property by adverse possession. Obviously to mitigate injustice as accruable to other co-owners alongwith the plaintiff in the suit property, the impleadment of all the other co-owners in the array of proforma defendants has been tenably, on 20.10.2014 in consonance with the verdict of the first Appellate Court, ordered by the learned trial Court. As a corollary, when at the stage of rendition of a judgment and decree by the learned trial Court dismissing the suit of the plaintiff with an obvious approbation of and countenancing of the plea of the defendant of his having become owner of the suit property by adverse possession, the other-owners did not then participate in the lis, who now have been permitted to participate in the lis, ensuably then for ensuring their effective and full participation, so as to abort derogation of their rights in the suit property, it is incumbent upon the learned trial Court to return findings on all the issues agitated upon inter-se them. In sequel the order of retrial of the suit afresh was within the ambit and scope, besides was permissible under the provisions of order 41 Rule 23A whose provisions stand extracted hereinafter.

> *"Remand in other cases-Where the Court from whose decree and appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23."*

4. In aftermath when in the face of the aforesaid nature of controversy which has beset the parties at lis, the retrial of the suit is considered just and essential for hence

facilitating a re-determination of the lis inter-se the parties at contest amongst whom now the proforma defendants who previously were not arrayed in the array of either plaintiffs or proforma defendants now stand arrayed as party defendants. In nutshell the impugned order rendered by the learned First Appellate Court does not merit any interference obviously then it is upheld. However since now issue qua non-joinder and mis-joinder of necessary parties stands overwhelmed by the factum of all the necessary parties having come to be joined in the lis, the learned trial Court shall not render fresh findings on the issue occurring at Sr. No.4, however, it shall render fresh determination on all other issues inter-se the extant parties to the lis. Parties are directed to appear before the learned trial Court on 16/07/2015.

With the aforesaid observations, the present appeal stands disposed of, as also, the pending applications, if any. Records be sent back.

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

Pushpa Devi & Others ...appellants.
Versus
Girdhari Lal Sharma ...Respondent.

RSA No. 550 of 2009.
Reserved on: 27th May, 2015
Decided on : 20th June, 2015.

Specific Relief Act, 1963- Section 20- Plaintiff filed a suit asserting that predecessor-in-interest of the defendant had entered into an agreement regarding the sale of the suit land - he was put in possession- the defendants started interfering with the possession of plaintiff on which a suit for injunction was filed –plaintiff came to know during the pendency of the suit that the loan on the land was repaid by the defendant, hence suit for injunction was withdrawn – a fresh suit was filed for seeking specific performance of the agreement- the trial Court found that the agreement was executed but instead of granting specific performance, the relief of refund of earnest money was granted- relief of specific performance was granted in appeal - the agreement provided that on refusal to execute the sale deed, the plaintiff will be entitled to recover the amount mentioned in the agreement - the plaintiff had not filed the suit during the life time of the executants- suit land was never mortgaged as pleaded by the plaintiffs - held that the decree of specific performance granted by the Appellate Court is not justified. (Para 18-41)

Cases referred:

Dadarao and Another versus Ramarao and Others, 2000 (1) SLJ, 159
Dadarao and Another versus Ramarao and Others, (1999) 8 SCC 416
P. D'Souza versus Shondrilo Naidu, (2004) 6 SCC, 649
Bank of India & Another versus K. Mohandas & Others, (2009) 5 SCC 313
M.L. Devender Singh & others versus Syed Khaja, (1973) 2 SCC, 515
Rajasthan State Industrial Development and Investment Corporation and Another versus Diamond & GEM Development Corporation Ltd. & Another, (2013) 5 SCC 470

For the appellants : Mr. Rajnish K. Lall, Advocate.
For the respondent : Mr. Rajnish Maniktala,Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Defendants are in second appeal before this Court. They are aggrieved by the judgment and decree dated 29.9.2009, passed by learned Additional District Judge (I), Kangra at Dharamshala in Civil Appeal No. 21-G/05, whereby the appeal preferred by respondent-plaintiff has been allowed and the suit decreed whereas the cross-appeal they filed dismissed.

2. It is seen that learned Civil Judge (Senior Division), Dehra, District Kangra has dismissed Civil Suit No.139/96, qua relief of specific performance of the agreements dated 22.6.1983 and 9.5.1986 Ex.PW-6/A and Ex.PW-4/A, respectively, however, decreed the same for the alternative relief i.e. recovery of Rs.12,000/- against the appellants-defendants.

3. The bone of contention between the parties is land measuring 0-31-35 hectares bearing Khasra No.82 situate in Mohal Sudhangal, Mauza Chokath, Tehsil Dehra, District Kangra. Hukam Chand, the predecessor-in-interest of the defendants, was owner-in-possession thereof. The respondent-plaintiff claims that said Shri Hukam Chand entered into an agreement dated 22.6.1983 Ex.PW-6/A with him qua sale of the suit land in a sum of Rs.12,000/-. On payment of the sale consideration in lump sum he was put in possession of the suit land. The sale deed was agreed to be executed on and after the land is got redeemed from mortgage. So the time was extended vide subsequent agreement Ex.PW-4/A, dated 9.5.1986. Said Shri Hukam Chand failed to execute the sale deed during his life time. On his death the suit land came to be inherited by the defendants being his legal heirs. When they started causing interference in the suit land, he filed, a civil suit bearing registration No.266/95 for seeking decree of permanent prohibitory injunction came to be filed against them. It is during the pendency of the said suit, the plaintiff came to know about the loan raised against the suit land stands paid by defendant No.2 on 15.3.1993 from reply to the notice dated 7.8.1995, he served upon the defendants. The previous suit i.e. Civil Suit No.266 of 1995 was dismissed as withdrawn vide order dated 9.3.1999 Ex.D-5. On coming to know that the loan raised against the suit land was paid by the defendants, the present suit has been filed for the decree of specific performance of the agreement dated 22.6.1983 read with agreement dated 9.5.1986 qua the sale of the land entered in Khewat No. 24 min, Khatauni No.42 min old Khewat No.22, Khatauni No.41 new Khasra No.82 measuring 0-31-35 hectares (8 kenals 3 marlas) with a further direction to the defendants to execute the sale deed in favour of the plaintiff and on their failure to do so through the nominee of the Court. By way of the decree of Permanent Prohibitory Injunction, the defendants have been sought to be restrained from causing interference, in any manner, in the possession of the plaintiff over the suit land and also that in case they succeed in taking the possession thereof forcibly to decree the suit for the relief of possession also. In the alternative, the suit was sought to be decreed for the recovery of Rs.12,000/- together with interest @ 12% per annum from the date of agreement Ex.PW-6/A i.e. 22.6.1983 till payment thereof.

4. The defendants have contested the suit. In the preliminary they have raised objections regarding the maintainability of the suit in the present form, estoppel and that the same is barred under Order 2 Rule 2 of the Code of Civil Procedure. On merits, while admitting that the owner of the suit land was their predecessor-in-interest Shri Hukam Chand, it is submitted that on his death they inherited the same. It is denied that said Shri Hukam Chand had executed agreements dated 22.6.1983 and 9.5.1986 agreeing thereby to sell the suit land to the plaintiff in a sum of Rs.12,000/- and deliver the possession thereof also to them. It is also denied that the suit land was mortgaged with Soil Conservation Department, however, it is admitted that their predecessor-in-interest Shri Hukam Chand had raised loan to the tune of Rs.1,881.16/- from the said department to carry out improvements in the suit land. The land was neither attached nor ever mortgaged. The loan so raised was paid by them.

5. In replication, the plaintiff has denied the contents of the preliminary objections being wrong and on merits reiterated his case as set out in the plaint.

6. Such pleadings on record have led in framing the following issues on 28.9.1999:-

1. Whether late Shri Hukam Chand predecessor in title of the defendants had entered into sale agreement dated 22.6.1983 with the plaintiff as alleged? OPP
2. Whether the plaintiff was and is ready and willing to perform his part of sale agreement? OPP
3. Whether the plaintiff is entitled for the specific performance of sale agreement dated 22.6.1983? OPP
4. Whether in the alternative the plaintiff is entitled for the recovery of Rs.12,000/- from the defendants? OPP
5. Whether the plaintiff is entitled for the relief of injunction? OPP
6. Whether this suit is not maintainable in the present form? OPD
7. Whether this suit is barred by limitation? OPD
8. Whether this suit is barred under the provisions contained under Order 2 Rule 2 CPC? OPD
9. Whether this suit is not properly for the purposes of court fee and jurisdiction? OPD
10. Relief.

7. One additional issue i.e. issue No.9-A, which reads as follows,

"9-A Whether the suit property in the name of Shri Hukam Chand qua coparcenery property and if so, its effect? OPD"

Came to be framed subsequently on 14.9.2001.

8. The parties, when put to trial, have produced evidence comprising oral as well as documentary. PW-1 Makhan Lal is the elder brother of the plaintiff. PW-2 is Veena Devi whereas PW-3 Saran Dass. They all have been examined by the plaintiff to prove his possession over the suit land. PW-4 Shri M.R. Bhatti Advocate is a marginal witness to the agreement dated 9.5.1986, Ex.PW-4/A whereas PW-5 Shri H.C. Dogra, Advocate is the scribe of this document. PW-6 Shri R.C. Dhiman is a marginal witness to another agreement dated 22.6.1983, PW-6/A whereas PW-7 Shri Jagdish Chand is scribe thereof. The plaintiff

has himself stepped into the witness box as PW-8 and tendered in evidence the documents Ex.P-1 to P-9.

9. On the other hand, defendant No.2 Ashwani Kumar has stepped into the witness-box as DW-1. The defendants have also examined Shri Jagdish Chand as DW-2 and Mehar Chand as DW-3 to prove that deceased Hukam Chand had never sold the suit land to the plaintiff. Learned counsel representing the defendants has tendered in his own statement the documents Ex.D-1 to D-15, D-1A and D-2B.

10. Learned trial Court on appreciation of the evidence produced by the parties on both sides though held that agreement Ex.PW-4/A and Ex.PW-6/A were executed by Shri Hukam Chand, predecessor-in-interest of the defendants and also that the plaintiff was ready and willing to perform his part of the contract, however, he was not held entitled to the decree of specific performance of the agreement while answering issues No.1 and 2 in favour of the plaintiff and issue No.3 against him. The plaintiff, however, was held entitled to recover Rs.12,000/- from the defendant while deciding issue No.4. He was also not held entitled to the decree for permanent prohibitory injunction in view of the reasons recorded while answering issue No.5. Remaining issues No.6 to 9 formal in nature were answered against the defendants. While answering issue No.9-A, learned trial Court has concluded that the suit property was not coparcenery in the hands of Hukam Chand, hence the issue was decided against the defendants.

11. As noticed, at the very outset, the plaintiff feeling aggrieved by the dismissal of the suit for the relief of specific performance of the agreement had preferred civil appeal No.21-G/05, in the lower appellate Court, whereas the defendants against the decree for recovery of Rs.12,000/- passed against them had preferred cross-appeal No. 11-G/06. Learned lower appellate Court has reversed the findings on issue No.3 and decreed the suit for the relief of specific performance of the contract whereas the cross-appeal dismissed vide judgment and decree under challenge in this Court.

12. The complaint herein is that while reversing the findings recorded by learned trial Court on issue No.3 and decreeing the suit for specific performance of the agreement, learned lower appellate Court has mis-read and mis-construed the oral as well as the documentary evidence particularly agreements Ex.PW-4/A and Ex.PW-6/A. Placing reliance on the judgment of the apex Court in ***Dadarao and Another*** versus ***Ramarao and Others***, ***2000 (1) SLJ, 159***, it is contended that the trial Court has rightly denied the relief of specific performance of agreements to the plaintiff. Learned lower appellate Court while interpreting such law and the facts of the case wrongly has erroneously decreed the suit. The factum that the agreements pertain to the year 1983 and 1986 whereas the suit having been filed at a belated stage i.e. on 11.3.1996, hence time barred; has not been appreciated. The factum of the value of the land gone considerably high during the intervening period has also not been taken into consideration and to the contrary, the decree for specific performance was passed in an unjust and inequitable manner.

13. On proper construction of the agreements Ex.PW-4/A and Ex.PW-6/A, the defendants were not bound to sell the property and at the most liable to refund the money or damages to the parties. This aspect of the matter has not been appreciated by learned lower appellate Court and thereby the findings to the contrary recorded have vitiated. The suit land was never mortgaged and as such there was no question of redemption thereof. The suit therefore, was not only time barred but also hit by the provisions contained under Order 2 Rule 2 CPC as no leave was sought to file fresh suit at the time of withdrawal of the

previous suit relating to the same subject matter of dispute. The suit land otherwise also being ancestral could have not been sold by their predecessor-in-interest Shri Hukam Chand. Neither the execution of the agreements Ex.PW-4/A and Ex.PW-6/A nor readiness and willingness on the part of the plaintiff to perform his part of the contract is proved, however, irrespective of that learned lower appellate Court has erroneously decreed the suit for the relief of specific performance of the agreements.

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

1. Whether the suit of the plaintiff for specific performance of agreement dated 22.6.1983 and 9.6.1985 filed on 11.3.1996 was barred by time and disentitled the plaintiff to specific performance of the agreement of sale more particularly when the plaintiff was not ready and willing to perform his part of the contract?
2. Whether the suit of the plaintiff was barred by limitation and not maintainable in view of the fact that Hukam Chand was owner of only half share and could not sell and deliver the possession of the specific portion of the undivided property?
3. Whether on the proper construction of the documents Ext.PW-4/A and Ext.PW-6/A, the decree for specific performance could be granted when the terms specifically provided for payment of damages, more particularly, in view of the changed equities and filing the suit after more than 12 years of the agreement of sale?

15. Shri Rajnish K. Lall, Advocate appearing on behalf of the appellants-defendants has vehemently argued that in view of the express conditions in the agreements Ex.PW-4/A and PW-6/A, on the failure of the execution of the sale deed by Shri Hukam Chand, aforesaid, he could have been held liable to refund double of Rs.12,000/- he received towards sale consideration. The defendants cannot be compelled to execute the sale deed. According to Mr. Lall, learned trial Court while placing reliance on the judgment of the Hon'ble apex Court in ***Dadarao and Another*** versus ***Ramarao and Others***, ***(1999) 8 SCC 416*** has rightly dismissed the suit for the relief of specific performance of the agreements, however, according to him learned lower appellate Court has mis-interpreted and mis-construed the law laid down by the apex Court in the judgment supra. Reliance on behalf of the appellants-defendants have also been placed on the judgment of the apex Court in ***P. D'Souza*** versus ***Shondrilo Naidu, (2004) 6 SCC, 649*** and ***Bank of India & Another*** versus ***K. Mohandas & Others, (2009) 5 SCC 313***. Impugned judgment and decree passed in Civil Appeal No.21-G/05 by the lower appellate Court has been sought to be quashed and set aside.

16. On the other hand, Shri Rajnish Maniktala. Advocate while supporting the impugned judgment and decree has urged that the law laid down by the apex Court in ***Dadarao's*** case supra could have not been relied upon in view of the law laid down by the apex Court in ***P. D'Souza's*** case supra. According to Mr. Maniktala, a condition in the agreement to pay liquidated damages without conveying the property sold cannot frustrate the agreement. In ***P. D'Souza's*** case similar condition was there in the agreement and the apex Court while granting the decree for specific performance of the agreement has held that such conditions should not be used to frustrate the terms and conditions of the agreement. It has, therefore been urged that learned lower appellate Court has rightly decreed the suit for the relief of specific performance of the agreements and the findings so recorded not call for any interference.

17. Now examining the substantial questions of law in the light of the rival submissions, I propose to take up for consideration substantial question No.3 first. Whether on the face of the agreements Ex.PW-4/A and Ex.PW-6/A, the decree for specific performance thereof could have been passed or a direction to the defendant to pay Rs.12,000/- sought to be recovered in the alternative could have been issued, reappraisal of the evidence available on record is required.

18. The first agreement Ex.PW-6/A is dated 22.6.1983. This document, no doubt, provides for sale of the suit land to the plaintiff in a sum of Rs.12,000/- and the sale deed was agreed to be executed on getting the land redeemed from mortgage created at the time of raising loan for lift irrigation scheme. Further conditions of this document is that failure on the part of the executant to execute the sale deed would entail in refund of double of the sale consideration i.e. Rs.12,000/- he already received.

19. The second agreement is dated 9.5.1986, Ex.PW-4/A. This agreement also reveals that the executant Shri Hukam Chand had agreed to execute the sale deed within one month from the date the suit land becomes free from all encumbrances. Also that on his refusal to execute the sale deed, he shall pay double of Rs.12,000/- i.e. Rs.24,000/-, he already received from the plaintiff. If he failed to pay the amount in question the plaintiff shall be at liberty to recover the same from him together with interest. PW-7 is the scribe of agreement Ex.PW-6/A, whereas PW-6 is marginal witness thereto. Similarly PW-5 is scribe of agreement Ex.PW-4/A whereas PW-4 is marginal witness thereto.

20. Both Courts below have held that both the agreements have been executed by Hukam Chand. Though the execution thereof has been disputed by the appellants-defendants before this Court, however, merely for rejection as no arguments qua this aspect of the matter was addressed nor the appeal admitted on any such substantial question of law.

21. The moot question, which needs adjudication, therefore, would be that the decree qua specific performance of the contract passed by learned lower appellate Court is not based upon proper construction of the agreements in question. Learned trial Court on construction of these documents i.e. agreement Ex.PW-4/A and PW-6/A and applying the ratio of the law laid down by the apex Court in ***Dadarao's*** case supra had non-suited the respondent-plaintiff, so far as the relief of specific performance of the agreements is concerned. Learned lower appellate Court has, however, placed reliance on subsequent judgment of the apex Court in ***P. D'Souza's*** case, in which the judgment in ***Dadarao's*** case has been held to be *per in curium* on account of having not taken into consideration the law laid down by the apex Court in earlier precedent i.e. ***M.L. Devender Singh & others*** versus ***Syed Khaja***, ***(1973) 2 SCC, 515*** and has concluded that learned trial Court has wrongly placed reliance on ***Dadarao's*** case while declining the relief for specific performance of the agreement.

22. It is seen that learned lower appellate Court after having taken note of the law laid down by the apex Court in ***P. D'Souza's*** case supra has examined the evidence qua execution of the agreements in question by Hukam Chand and concluded that the execution thereof stand duly proved. Also that since Hukam Chand failed to redeem the suit land during his life time; the sale deed could not be executed. The question of limitation has also been examined by learned lower appellate Court in the light of the evidence available on record and concluded that since the information qua redemption of the suit land was

received by the respondent-plaintiff on 7.8.1995, therefore, he could have filed the suit only thereafter and the suit so filed has been held to be well within the period of limitation.

23. Surprisingly enough learned lower appellate Court has no where touched the stipulation in the agreements as to what will happen in case the sale deed is not executed. As a matter of fact, execution of the agreements by Hukam Chand stands proved and this Court has concluded so at the outset, however, in view of the stipulation in the agreements, "in case sale deed is not executed, as agreed upon, double of the sale consideration i.e. Rs.12,000/- received shall be payable to the vendee i.e. respondent-plaintiff. Also that on the failure of the vender Hukam Chand (since dead) to make the payment, the vendee shall be entitled to recover the same from him together with interest" the matter should have been examined to see that in view of such stipulation in the agreements, the same were still enforceable or not. This aspect of the matter has not at all been gone into by learned lower appellate Court. At this juncture, I would like to make reference to the law laid down by the apex Court in ***Rajasthan State Industrial Development and Investment Corporation and Another*** versus ***Diamond & GEM Development Corporation Ltd. & Another, (2013) 5 SCC 470***, which reads as follows:

> "23. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however is reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without giving any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. (Vide: United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal, AIR 2004 SC 4794; Polymat India P. Ltd. & Anr. v. National Insurance Co. Ltd. & Ors., AIR 2005 SC 286).

24. It is thus seen from the law laid down supra that the contract being a creature of an agreement between the parties has to be interpreted to give literal meaning unless there is some ambiguity therein. In the agreement Ex.PW-6/A, no doubt, deceased Hukam Chand agreed to sell the suit land for sale consideration and to execute the sale deed within one month from the date of payment of the loan amount and the same becomes free from all encumbrances. Similar are the recitals in subsequent agreement Ex.PW-4/A. There is nothing on record to show that the suit land was under mortgage with Soil Conservation Department, from where loan was raised by deceased Hukam Chand. The contents of para 3 of the written statement reveal that deceased Hukam Chand had raised loan in the sum of Rs.1881.16 from the department for carrying out improvements in the land comprised as field Nos. 28, 29, 43, 58, 59,37, 31, 284, 308, 306, 309, 310, 311, 312 and 207. The number of suit land is 82, the same does not figure in this para of the written statement. There is nothing in this regard in the replication. Anyhow no mortgage was ever created against the suit land; of course, loan was raised by deceased Hukam Chand. Respondent-plaintiff, if was a bonafide purchaser, should have satisfied himself about each

and every detail of the suit land including the same having been mortgaged or encumbered in lieu of the loan so raised. The respondent-plaintiff, therefore, should have not waited for redemption of the so called mortgage, which was never in existence till the year 1995, when the suit was filed. He rather should have been vigilant and taken steps for getting the sale deed executed, during the life time of deceased Hukam Chand.

25. Whether in these circumstances, he can plead equity is doubtful. There is another important aspect, which has escaped the notice of both Courts below. In the agreements there is no stipulation that on the death of the executant Shri Hukam Chand, the same will be binding on his legal heirs and successors also. Therefore, whether the respondent-plaintiff can seek enforcement of the agreements against the defendants of course successors of deceased Hukam Chand is doubtful and on this score also, the agreements cannot be sought to be enforced against the defendants. Learned lower appellate Court has omitted to take note of such vital factual aspects and decreed the suit for the relief of specific performance of the agreements on being persuaded that the execution thereof stands proved and that the respondent-plaintiff could have sought the enforcement thereof only on redemption of the so called mortgage of the suit land. The findings so recorded are definitely the result of misreading, misappreciation and misconstruction of the given facts and circumstances and evidence available on record.

26. True it is that judgment rendered by the apex Court in ***Dadarao's*** case has been held to be *per in curium* in subsequent judgment rendered in ***P D'Souza's*** case. In ***P. D'Souza's*** case, the apex Court has distinguished the law laid down in ***Dadarao's*** case on the ground that the relevant terms stipulated in ***Dadarao's*** case were different from that in ***P. D'Souza's*** case. Also that judgment in ***Dadarao's*** case does not create a binding precedent having not noticed the statutory provisions contained under Section 23 of the Specific Relief Act and also an earlier binding precedent. I reproduce the relevant part of ***P. D'Souza's*** case as under:-

> 34. In Dadarao whereupon Mr Bhat placed strong reliance, the binding decision of M.L. Devender Singh was not noticed. This Court furthermore failed to notice and consider the provisions of Section 23 of the Specific Relief Act, 1963. The said decision, thus, was rendered per incuriam.
>
> 35. Furthermore, the relevant term stipulated in Dadarao was as under: (SCC p. 417, para 2)
>
> > "Tukaram Devsarkar, aged about 65, agriculturist, r/o Devsar, purchaser (GHENAR) - Balwantrao Ganpatrao Pande, aged 76 years, r/o Dijadi, Post Devsar, vendor (DENAR), who hereby give in writing that a paddy field situated at Dighadi Mouja, Survey No. 7/2 admeasuring acres belonging to me hereby agree to sell to you for Rs 2000 and agree to receive Rs 1000 from you in presence of V.D.N. Sane. A sale deed shall be made by me at my cost by 15-4-1972. In case the sale deed is not made to you or if you refuse to accept, in addition of earnest money an amount of Rs 500 shall be given or taken and no sale deed will be executed. The possession of the property has been agreed to be delivered at the time of purchase. This agreement is binding on the legal heirs and successors and assigns." (emphasis supplied)

Interpreting the said term, it was held: (SCC p. 418, paras 6-7)

> "6. The relationship between the parties has to be regulated by the terms of the agreement between them. Whereas the defendants in the suit had taken up the stand that the agreement dated 24-4-1969 was really in the nature of a loan transaction, it is the plaintiff who contended that it was an agreement to sell. As we read the agreement, it contemplates that on or before 15-4-1972 the sale deed would be executed. But what is important is that the agreement itself provides as to what is to happen if either the seller refuses to sell or the purchaser refuses to buy. In that event the agreement provides that in addition to the earnest money of Rs 1000 a sum of Rs 500 was to be given back to Tukaram Devsarkar and that 'no sale deed will be executed'. The agreement is very, categorical in envisaging that a sale deed is to be executed only if both the parties agree to do so and in the event of any one of them resiling from the same there was to be no question of the other party being compelled to go ahead with the execution of the sale deed. In the event of the sale deed not being executed, Rs 500 in addition to the return of Rs 1000, was the only sum payable. This sum of Rs 500 perhaps represented the amount of quantified damages or, as the defendants would have it, interest payable on Rs 1000.
>
> 7. If the agreement had not stipulated as to what is to happen in the event of the sale not going through, then perhaps the plaintiff could have 511 asked the Court for a decree of specific performance but here the parties to the agreement had agreed that even if the seller did not want to execute the sale deed he would only be required to refund the amount of Rs 1000 plus pay Rs 500 in addition thereto. There was thus no obligation on Balwantrao to complete the sale transaction."

36. Apart from the fact that the agreement of sale did not contain a similar clause, Dadarad does not create a binding precedent having not noticed the statutory provisions as also an earlier binding precedent. [See Govt. of W.B. v. Tarun K. Roy1 (SCC para 26).]

27. If coming to the stipulation in agreement in ***P. D'Souza's*** case, the same reads as follows:-

> 27. The clause as regards payment of damages as contained in clause (7) of agreement of sale reads as under:
>
> > "(7) That if the vendor fails to discharge the mortgage and also commits any breach of the terms in this agreement and fails to sell the property, then in that event he shall return the advance of Rs 10,000 paid as aforesaid and shall also be liable to pay a further sum of Rs 2000 as liquidated damages for the breach of the agreement."

28. Such stipulation in ***Dadarao's*** case has already been reproduced in this judgment in para supra.

29. Now if coming to the stipulation in both agreements in the case in hand, the same reads as follows:-

> *"....rakwa uparlikhit bamay digar rakwa par maine Lift Irrigation se karza liya hua hai, jiske ebaz main bhumi rehan hai. Jabki rakwa free from all encumbrances ho jaye, uske bad ek mah ke ander-ander bainama baham kreta kra dunga. Yadi Bainama karane se mukkar ho jaun to ada shuda rakam ka dugna rupya wapus karane ka zimmewar hunga. Yadi ise ada na karun to kreta bajriya nalish bamay kharcha basul kar sakta hai..."*

30. In terms of the provisions contained under Section 10 of the specific relief Act, the Court may direct the enforcement of the contract when there exists no standard for ascertaining the actual damage caused due to non-performance of the act agreed to be done or when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. The explanation to Section 10 provides that unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. Therefore, Section 10 of the Act raised a presumption that a contract to transfer immovable property should be ordered to be enforced and the payment of compensation in money is no excuse.

31. Anyhow presumption is always rebuttable. The same in the case in hand stands rebutted or not can be decided with the help of the law applicable and the given facts and circumstances of this case. Learned Lower appellate Court has placed reliance on the law laid down in ***P D'Souza's*** case while decreeing the suit. In the opinion of this Court, with all humility and respect in command the law laid down by the apex Court in ***P D'Souza's*** case is not applicable to the facts of this case for the reasons that the stipulation in that case as referred to hereinabove was that if the vender fails to discharge the mortgage and also commits any breach of the terms of the agreement as well as fails to sell the property, in that event he had to return the sale consideration received in advance and also to pay a further sum of Rs.2,000/- as liquidated damages for the breach of the agreement. Similar, however, is not the stipulation in the agreement Ex.PW-6/A and Ex.PW-4/A because here the vender had bound himself to pay double of the sale consideration, he received, if failed to executed the sale deed. The respondent-plaintiff had agreed to such stipulation. There is no ambiguity in the agreement, therefore, giving liberal meaning to the agreement as has been held by the apex Court in ***Rajasthan State Industrial Development & Investment Corporation's*** case supra, the respondent-plaintiff, cannot seek enforcement of the agreement in question in view of the stipulation in the agreements referred to hereinabove and has to satisfy himself by receiving double of the sale consideration he paid, which he has not claimed and as such only Rs.12,000/- were sought to be recovered from the defendants.

32. In ***P D'Souza's*** case, the apex Court has held the judgment in ***Dadaroa's*** case *per in curium* on the ground that the same does not take notice of a binding precedent of the apex Court in ***M.L. Devender Singh's*** case supra.

33. If coming to the law laid down in ***M.L. Devender Singh's*** case supra, the apex Court while taking note of the provisions contained under Section 20 and 23 of the Specific Relief Act, has held as under :-

> "20. The fact that the parties themselves have provided a sum to be paid by the party breaking the contract does not, by itself, remove the strong presumption contemplated by the use of the words "unless and until the contrary is proved." The sufficiency or insufficiency of any evidence to remove such a presumption is a matter of evidence. The fact that the parties themselves specified a sum of money to be paid in the event of its breach is, no doubt, a piece of evidence to be considered in deciding whether the presumption has been repelled or not. But, in our opinion, it is nothing more than a piece of evidence. It is not conclusive or decisive."

34. Therefore, the apex Court has held that making the provisions in the contract to pay money in lieu of the breach of the contract by the parties mutually is a piece of evidence of course neither conclusive nor decisive. Looking to the present case, the provision in the agreements qua payment of double of the amount received towards sale consideration, on the failure of the vender to execute the sale deed is a piece of evidence duly proved on record. It may not be conclusive or decisive, however, if weighed in the light of the facts and circumstances that the respondent-plaintiff failed to verify the factual position qua status of the suit land in revenue record, which was never mortgaged or encumbered in any loan transaction and remained slept over the matter for years together, with the efflux of time, has lost the right to seek enforcement of the contract that too when the contract not binds the successors of deceased Hukam Chand. Therefore, the provisions qua payment of double of the amount deceased Hukam Chand received towards sale consideration in the agreements coupled with the factual aspect as well as the evidence discussed supra, render the respondent-plaintiff disentitled to seek the decree for specific performance of the Contract.

35. As a matter of fact, looking to the stipulation qua payment of double of the sale consideration received; on account of failure to execute the sale deed brings the present case in the category of cases where the contract on payment of the amount in lieu of the conveyance to be made itself stands enforced. I draw support in this regard from the ratio of the judgment in ***M.L. Devender Singh's*** case reproduced hereinbelow:

> "13. If the Legislative intent was that the mere proof that a sum is specified as liquidated damages or penalty for a breach should be enough to prove that a contract for the transfer of immovable property could be adequately compensated by the specified damages or penalty, Section 20 of the old Act will certainly become meaningless. It is true that Section 20 of the old Act does not mention the case of an express contract giving an option to a promiser to either carry out the contract to convey, or in the alternative, to pay the sum specified, in which case the enforcement of the undertaking to make the payment would be an enforcement of the contract itself and no occasion for rebutting the presumption in the explanation to Section 21 would arise. In such cases the contract itself is specifically enforced when payment is directed in lieu of the conveyance to be made."

36. In view of the above, I find substance in the submissions that the lower appellate Court has misinterpreted and misappreciated the law laid down by the apex Court in ***P. D'Souza's*** case supra.

37. If coming to substantial question of law No.1, no doubt in the agreement recital was qua the loan having been raised and the suit land mortgaged. Such recitals on the face of it are, however, false. The suit land was never mortgaged and rather the loan was raised by deceased Hukam Chand from Soil and Conservation Department for carrying out improvements in his land, field numbers whereof have been given in para 3 of the written statement. The suit land was also included therein or not remained un-explained. However, on 22.6.1983 or 9.5.1986, when the agreements Ex.PW-6/A and Ex.PW-4/A were executed, the suit land was neither mortgaged nor attached in connection with any loan transaction. The entries in remarks column of Jamabandi for the year 1990-91 Ex.P-1/P-8/D-2 and 1995-96 Ex.P-9/D-11 reveal that the charge against the suit land was created in favour of Government of Himachal Pradesh in a loan transaction of Rs.14,825/- and rapat No.29 in this regard was entered in Rapat Rojnamcha Vakyati on 21.9.1987. No evidence has been produced that before 21.9.1987 also, the suit land was either mortgaged or charge created on the same in connection with any land transaction. Meaning thereby that on 22.6.1983 and 9.5.1986, when the agreements were executed, the land was free from all encumbrances.

38. It is not the case of the plaintiff that he had gone through the revenue record pertaining to the suit land and came to know about the same having been mortgaged. No doubt, in the agreement there is a reference of encumbrance of the suit land in some loan transaction, however, the respondent-plaintiff being a bonafide purchaser normally should have not believed such recital or representation made by Hukam Chand as gospel truth and rather satisfied himself on perusal of the revenue record that any such encumbrances have been made or not. The respondent-plaintiff rather should have been vigilant as is expected from a bonafide purchaser.

39. The suit for specific performance of the agreement is required to be filed within three years from the date of execution of the agreement. Taking into consideration the specification of the agreement dated 9.5.1986 Ex.PW-4/A, the suit should have been filed on or before 8.5.1989. The same having been filed on 11.3.1996 is, therefore, time barred. Both Courts below have not looked into this aspect of the matter, in the light of given facts and circumstances and rather misconstrued and misread the evidence available on record in this regard. He failed to take steps to get the sale deed executed during the life time of Hukam Chand. Agreements as stated hereinabove do not bind the successors of the executant, Hukam Chand. Reply Ex.P-3 from defendant No.2 received by the respondent-plaintiff on 7.8.1995, therefore, does not extend time for filing the suit. The suit having been filed on 11.3.1996 is, therefore, time barred. The findings to the contrary recorded by both Courts below are the result of misappreciation and misconstruction of the evidence available on record. Therefore, on this count also, the judgment and decree under challenge is perverse, hence legally unsustainable.

40. There is, however, no substance in 2nd substantial question of law for the reason that a co-sharer in possession of the joint property is competent to sell the same to the extent of his share and also put the vendee in possession thereof. The entries in the revenue record produced in evidence make it crystal clear that the suit land was in the possession of deceased Hukam Chand in the capacity of co-owner. He, therefore, is competent to sell the same and also to put the vender in possession thereof.

41. In view of what has been said hereinabove, the decree for specific performance of the agreement could have not been granted in the present lis. Learned trial Court, therefore, has rightly dismissed the suit. The reversal of the judgment and decree passed by learned trial Court, by learned lower appellate Court is not at all legally sustainable. The judgment and decree under challenge in the present appeal is, therefore, quashed and set aside. The suit of the respondent-plaintiff for the relief of specific performance of the contract is hereby ordered to be dismissed.

42. In view of what has been said hereinabove, this appeal succeeds and the same is accordingly allowed. The judgment and decree passed by learned Lower appellate Court is quashed and set aside. No order so as to costs.

****

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

Subhash Chand. ...Petitioner.

Versus

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

CWP No. 704/1994
Reserved on : 30.5.2015
Decided on: 20.6.2015

Constitution Of India, 1950- Article 226- Petitioner pleaded that his land measuring 42 kanals 3 marlas was allotted to other right holders and in lieu thereof he was allotted land measuring 23.17 standard kanals during consolidation- he further alleged that presently he is not in possession of either parcel of the two - S.D.M Hamirpur was appointed as Local Commissioner to ascertain the actual position of the spot- Petitioner was found in possession of the minor portion of both the parcels - consolidation proceedings proceeded further in the meantime and consolidation Director filed affidavit showing the land and area being allotted to the petitioner - petitioner agreed to the proposal and was later on put in possession of the land proposed in affidavit- writ petition disposed off accordingly.

(Para 8 to 15)

For the Petitioner: Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.

For the Respondents: Mr. Parmod Thakur, Addl. A.G. with Mr. Neeraj K. Sharma, Dy. A.G. for the respondent-State.

Mr. R.K. Sharma, Sr. Advocate with Ms. Anita Parmar, Advocate for respondents No.4 to 6.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge:

Petitioner instituted Civil Suits No. 423/70/62 of 1977 and 382/78 for possession in the court of Sub Judge, Hamirpur in respect of the land as detailed in Annexure PA. Decree for possession was passed on 27.1.1981. Different appeals were preferred against the judgment and decree dated 27.1.1981 before the first appellate court. These were dismissed on 1.6.1981. Two Regular Second Appeals were carried against the

judgment and decree dated 1.6.1981 bearing RSAs No. 63/81 and 65/81. These Regular Second Appeals were dismissed on 1.12.1989. Proceedings under H.P. Holding (Consolidation and Prevention of Fragmentation) Act, 1971 were initiated in the year 1981. Initially, land of the petitioner was kept out of consolidation proceedings on account of litigation amongst the co-owners, as per the orders of the Settlement Officer of Consolidation Department dated 11.1.1983. Petitioner assailed order dated 11.1.1983 by filing revision before respondent No.1. Respondent No.1 passed the orders that decision for partition during consolidation proceedings be carried out by keeping the decision of civil court in consideration and subject to final decision by this Court vide Annexure PD. Respondent No.2 heard the objections and ordered that re-partition proceedings be carried out in accordance with the scheme and the estate right holders be kept in cultivatory possession of the land as per Annexures PE and PE-1. Respondent No.3 passed further order on 22.3.1988 that petitioner be allotted standard 23.17 kanals of land in lieu of his original holding of 42 kanals 3 marlas. Petitioner filed objections before the Settlement Officer to the effect that his land has been fragmented. Respondent No.3 passed the order for delivery of possession vide Annexure PG-2 and PG-3. However, this order was not complied with. The consolidation scheme was withdrawn on 3.4.1994. It is in these circumstances petitioner filed writ petition before this Court.

2. Learned Single Judge passed the following order on 22.4.2003:

> "Heard for some time. The case of the petitioner is that his land measuring 42 kanals 3 marlas was allotted to other right holders and in lieu thereof he was allotted land measuring 23.17 standard kanals. His grievance is that though the possession of 42 kanals 3 marlas allotted to the right holders was taken over by them, yet he was never put in possession for 23.17 standard kanals of land which was allotted to him. According to the petitioner, he is not in possession of any piece of land out of 42 kanals 3 marls as well as 23.17 standard kanals. The respondents in their reply affidavit have, inter alia, averred that 42 kanals 3 marlas of land continues to be in possession of the petitioner, as per the revenue records as such, there is no question of putting him in possession of 23.17 standard kanals of land allotted to him in view of the revocation of consolidation.
>
> In order to put an end to the controversy raised in the present writ petitions, the Sub Divisional Magistrate, Hamirpur is appointed as Local Commissioner to give his report on the following points:
>
> i) Whether the petitioner is in possession of any piece of land out of 42 kanals 3 marlas and/or 23.17 standard kanals?
>
> ii) If the petitioner is not in possession of any portion of these lands who are in possession thereof and in which capacity? Whether they were put in possession as a result of consolidation proceedings or otherwise?
>
> The Local Commissioner will give his report within a period of six weeks. His fee is fixed at Rs. 5,000/- which will be paid to him on the spot by the petitioner. The parties are at liberty to supply the

certified copies of the documents relating to the controversy in question. The Local Commissioner will give advance notice to the petitioner or his learned counsel as well as to the Settlement Officer (Consolidation), Hamirpur for his visit on the spot."

3. Thereafter, learned Single Judge passed the following order on 10.3.2004:

"When this case was taken up today, learned counsel for the parties stated that report of the SDM Hamirpur is there on the file. It has been examined, while hearing the case further.

A perusal of the said report suggests that no finality is attached to the consolidation proceedings under Section 30 (2) of the HP Holdings (Consolidation and Prevention of Fragmentation) Act, 1971. Alongwith the report of the SDM, annexures are also attached. Fact remains that after revocation of consolidation proceedings, status quo ante as it existed prior to the initiation of these proceedings stood restored. In these circumstances, SDM Hamirpur is directed to report as to how the land which was admittedly owned by the petitioners and which matter had been set at rest in civil litigation is to be restored and how the area of such land is to be made good? He will also report as to how the persons other than the petitioner claim possession over the land which was initially owned by the petitioner and what is the effect of revocation of the consolidation operations in the village. Let needful be done by 15.4.2004 and report submitted by SDM. List thereafter.

Parties through their learned counsel are directed to appear before the SDM Hamirpur alongwith the certified copy of this order on 20.3.2004.

Copy dasti."

4. Learned Single Judge passed the following orders on 14.10.2004 and 26.10.2004:

14.10.2004:

"In terms of the orders passed by this Court, report has been submitted by the Sub Divisional Magistrate, Hamirpur. With the assistance of the learned counsel for the parties present, both the report, as well as record of the writ petition has been examined.

Petitioner is making a grievance that he was the owner of the land measuring 42.3 Kanals. During consolidation, he was allotted 23.17 standard kanals. Though he has projected in the writ petition that he is no in possession of either of the two areas. However, as per report of the Sub Divisional Magistrate, Hamirpur, received in the Court in the month of September 2003, out of the area measuring 42.3 Kanals, petitioner is in possession of 5 Kanals 18 Marlas. Out of the area of 23 Kanals 17 marlas allotted to him during the consolidation proceedings, he is in physical possession of 3 Kanals 17 marlas in standard Karams. In the aforesaid background, case of the petitioner is that on the one hand, he has been deprived of the land owned by him at the time of consolidation and on the other hand, he is also deprived of the land allotted to him during the course

of consolidation proceedings, whereas stand of the respondents on the other hand, is that in the year 1994, the village was de-notified for consolidation purposes under the provisions of HP Holdings (Consolidation and prevention of Fragmentation) Act, 1971. Sum and substance of the pleadings of the parties and claim of the petitioner is that he is neither in possession of the land which originally belonged to him at the time of notifying the village for consolidation, nor is he in possession of the land allotted to him during the course of consolidation. Irrespective of the fact whether the village is covered for the purpose of consolidation or not, petitioner cannot be deprived of his property by respondents and for that purpose by any other person, including a private party. Either possession of the land which was originally owned by him measuring 42.3 Kanals is to be restored to him or the area allotted to him i.e. 23.17 standard kanals during consolidation, is to be restored to him. It is the bounden duty of the authorities under the aforesaid Act to ensure that by acts of anyone of them, petitioner is not deprived of his property.

Learned Advocate general stated that while following letter of law, petitioner has to be not only allotted, but put into possession of the land allotted to him during the consolidation proceedings and for carrying out the purpose of consolidation, authorities have been constituted under the Act. He submitted that sometime may be given to him to examine the matter to see how admissible relief in accordance with law can be granted to th petitioner. Prayer allowed.

List this case on 26.10.2004, alongwith CWP No. 1333 of 2001. On this date, Secretary (Revenue) and Director consolidation will remain present alongwith the original record of this case, with a view to ensure that how legitimate grievance of the petitioner, if any, can be met with by the functionaries of the State who notified the village for consolidation.

A duly authenticated copy of this order by the Court Secretary of the court, will be made available to the learned counsel for the parties by 15.10.2004.

26.10.2004

Shri Chandel, learned Advocate General, on instructions from the officers who are present in Court, stated that proceedings under the HP Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 were revoked earlier from the stage of formulation of the Scheme. He further stated, also on instructions, that because of pendency of this writ petition, respondents could not proceed further to take-up the consolidation proceedings to the logical end. According to Mr. Chandel, his clients have now decided to start consolidation proceedings after formulation of the Scheme in terms of the order dated 30.4.1994, passed by Director Consolidation, HP, exercising the power of the State Government under Section 54 of the Act supra, in case No. 756/1986, titled as Piar Chand and others versus Subar alias Subhash Chand. He further stated that while preparing fresh Scheme, his clients shall obtain “no objection” of all the right holders of the village for preparing the Scheme in terms of the order dated 30.4.1994 supra. Let no objection from all the right holders of the villagers of

village Bhater Chimbian, Tappa Bajuri, Distt. Hamirpur, be placed on record alongwith affidavit of Director, Consolidation, by or before 31.12.2004

List this case in the first week of January, 2005 alongwith CWP No. 1333 of 2001, for further proceedings. In his affidavit, Director shall also state as to within how much minimum time frame, the entire process will be completed by the department. "

5. In sequel to order dated 26.10.2004, the Director Consolidation filed affidavit of compliance. Operative portion of the affidavit reads as under:

"i) The petitioner can again be delivered possession of Khasra numbers as per decree sheet on spot in respect of whole Khasra Numbers viz. 183, 287, 380, 640, 1099, 751, 547, 782, 756, 908, 1327/278, 1335/915, 1328/278, 914, 1329/278, 1339/915, 464, 468, 480, 485, 532, 606, 763, 708, 892, 894, 895, 957, 958, 1066, 274, 465, 168, 712, 166, 169, 171, 184, 333, 381, 385, 508, 548, 612, 630, 635, 644, 651, 785, 868, 872, 962, 963, 1025, 1041, 1077, 1180/388, 710, 786, 1219/859, 1229/955, 1164/182, 1172/321, 386, 1195/528, 1346/974, 1067, 1163/182, 219, 1173/321, 1196/528, 1346/974, 1067, 1163/182, 219, 1173/321, 1196/528, 1220/850, 1353/318, 690, 1345/974, 1352/318, 1181/388, 1230/955, 1160/87, 761, 956, 688, 819, 1159/87 and 1158/87, Kita 85, measuring 36 Kanals 6 Marlas.

ii) In so far as the question of delivering of possession of land in Khewat No. 19 and 25, in which the petitioner has joint share with other co-owners in Khasra Numbers 924, 1350/1100, 1349/1100, 965, 1351, 1100, 359, 360, 1007 and 1109, Kita-9, measuring 11 Kanals 19 Marlas in which the petitioner's share is ½ i.e. 6 Kanal. It is submitted that the petitioner has to get these Khasra Numbers partitioned under HP Land Revenue Act and thereafter, the possession can be delivered."

6. Mr. G.D. Verma, learned Senior Advocate for the petitioner, agreed that the petitioner will be satisfied if sub-clauses (i) and (ii) of para 5 of the affidavit, as reproduced hereinabove, are implemented in its entirety. In view of this, the writ petition was disposed of on 27.6.2007 and the respondents were directed to implement within 8 weeks. Thereafter, petitioner was put in possession on 16.10.2007 vide Rapat Rojnamcha No.46 Annexure A-4 of the supplementary affidavit dated 22.4.2015. The possession of the left out area was delivered to the petitioner on 17.10.2007 vide Rapat Rojnamcha No.47 dated 17.10.2007 as per Annexure A-5. The exchange of land took place between the parties vide Rapat Rojnamcha No.257 dated 25.3.2008 as per Annexure A-6. However, fact of the matter is that respondents No. 4 to 10 filed LPA No. 137/2010 against the judgment dated 27.6.2007 on the ground that they were not made party in the present petition.

7. It would be apt at this stage to note that private respondents had also filed CWP No.4915/2009. It was disposed of by the learned Division Bench by giving opportunity to respondents No.4 to 10 to file an appeal instead of a writ petition. The Division Bench vide judgment dated 12.12.2011 set aside the judgment dated 27.6.2007 and remanded the matter back to this Court.

8. Respondents No.4 to 10 have filed detailed reply, to which rejoinder has also been filed by the petitioner. Sur-rejoinder has also been filed by respondents No. 4 to 10.

9. Mr. G.D. Verma, learned Senior Advocate has vehemently argued that private respondents knew throughout about the proceedings of this petition and were also aware of the factum of land being delivered to the petitioner vide Annexures A-4, A-5 and A-6 of the supplementary affidavit dated 22.4.2015. He then contended that his client could not be deprived of his property during consolidation proceedings.

10. Mr. R. K. Sharma, learned Senior Advocate has strenuously argued that petitioners were not taking physical possession of the land in question.

11. I have heard learned counsel for the parties, including Mr. Parmod Thakur, learned Additional Advocate General, at length.

12. Petitioner had filed civil suit Nos. 423/70/62 of 1977 and 382/78. These civil suits were decreed by the trial court on 27.1.1981 and the appeals filed against the judgment and decree dated 27.1.1981 were dismissed by the first appellate court on 1.6.1981. The Regular Second Appeals No. 63/81 and 65/81 filed against the judgment and decree dated 1.6.1981 rendered by the first appellate court were also dismissed by this Court on 1.12.1989. The consolidation proceedings were commenced in the year 1981. However, petitioner was neither put in physical possession nor he was compensated. Case of the petitioner precisely is that his land measuring 42 kanals 3 marlas was allotted to other right holders and in lieu thereof he was allotted the land measuring 23.17 standard kanals. His grievance is that though the possession of 42 kanals 3 marlas allotted to the right holders was taken over by them, yet he was never put in possession for 23.17 standard kanals of land, which was allotted to him. Rather, he was not put in possession of any piece of land out of 42 kanals 3 marlas as well as 23.17 standard kanals. This Court on 22.4.2003 appointed the Sub-Divisional Magistrate, Hamirpur as Local Commissioner to give his report on the following points:

i) Whether the petitioner is in possession of any piece of land out of 42 kanals 3 marlas and/or 23.17 standard kanals?

ii) If the petitioner is not in possession of any portion of these lands who are in possession thereof and in which capacity? Whether they were put in possession as a result of consolidation proceedings or otherwise?

13. This Court on 10.3.2004 examined the report of the Sub Divisional Magistrate, Hamirpur. The Sub Divisional Magistrate, Hamirpur was directed to report as to how the land, which was admittedly owned by the petitioners and which matter had been set at rest in civil litigation was to be restored and how the area of such land was to be made good. He was also directed to report as to how the persons other than the petitioner claim possession over the land which was initially owned by the petitioner and what was the effect of revocation of the consolidation operations in the village. The Sub Divisional Magistrate, Hamirpur submitted the report. According to the report of the Sub Divisional Magistrate, Hamirpur, out of the area measuring 42.3. kanals, petitioner was in possession of 5 kanals 18 marlas and out of the area of 23 kanals 17 marlas allotted to him during the consolidation proceedings, he was in physical possession of 3 kanals 2 marlas in standard karams. Fact of the matter is that petitioner was deprived of the land owned by him at the time of consolidation and on the other hand, he was also deprived of the land allotted to him during the course of consolidation proceedings. This Court observed on 14.10.2004 that either the possession of the land which was originally owned by him measuring 42.3 kanals was to be restored to him or the area allotted to him, i.e. 23.17 standard kanals during

consolidation was to be restored to him. In view of this development, the matter was ordered to be listed on 26.10.2004. According to the statement made by the learned Advocate General, State has decided to start consolidation proceedings after formulation of the scheme in terms of order dated 30.4.1994 passed by the Director Consolidation, H.P. He also stated that while preparing fresh scheme, State shall obtain "no objection" of all the right holders of the village for preparing the scheme in terms of order dated 30.4.1994. Thereafter, the Director Consolidation filed an affidavit, as noticed hereinabove, on 28.12.2004.

14. Mr. G.D. Verma, learned Senior Advocate, had agreed to the proposal of sub-clause (i) and sub-clause (ii) of para 5 of the affidavit dated 28.12.2014 and the petitioner was put in possession of the property on 16.10.2007, 17.10.2007 and 25.3.2008. Complete justice has been done to the petitioner by putting him in physical possession of the property. Since he was deprived of earlier land measuring 42.3 kanals and during consolidation, he was allowed 23.17 kanals of land. He was in possession of 5 kanals 18 marlas out of 42.3 kanals and out of 23.17 kanals, he was in physical possession of only 3 kanals 17 marlas in standard karams. Petitioner was deprived of his property without any authority of law. The Sub Divisional Magistrate, Hamripur has submitted reports, according to which the correct position on the spot was reflected and which led to passing of various orders and ultimately handing over of physical possession of the land to the petitioner. Respondents No.4 to 10 throughout knew about the proceedings but has only preferred CWP No. 4915/2009, which was withdrawn with liberty reserved to file LPA No. 137/2010. Petitioner has been put in possession of land on 16.10.2007, 17.10.2007 and 25.3.2008 and the petition was filed only in the year 2009.

15. It is evident from the order dated 26.10.2004 that Consolidation Officer, Hamirpur was asked to obtain "no objection" from all the right holders of the village while preparing fresh scheme. The consolidation Officer, Hamirpur along with his staff visited the village on 18.11.2004. 24 Right holders who were duly informed were present along with Pradhan and Ward Punch of the village. Statements of these right holders and the Pradhan were recorded. Few of the right holders stated that they were still in possession of the land which was with them prior to consolidation. The Consolidation Officer, Hamirpur also noticed on the spot that one group was opposing the consolidation proceedings and the second group consisting of four land owners including the petitioner and his brother were agreeable to consolidation. There is also a reference in the affidavit that land measuring 42.6 kanals was decreed in favour of the petitioner in case No. 423/1970 decided on 27.1.1981 rendered by the learned Civil Judge, Hamirpur and in compliance to the decree, mutation Nos. 157, 158 and 159 were attested in favour of the petitioner. Before the attestation of mutations, rapat Nos. 133, 353 and 301 were entered in the rojnamcha Waqyati and physical as well as symbolic possession was delivered to the petitioner and consequently mutations were attested on 29.5.1986 and 2.9.1987, respectively. It is in these circumstances the Director Consolidation has suggested the relief which could be granted to the petitioner as per sub-clause (i) and sub-clause (ii) of para 5 of the affidavit dated 28.12.2014.

16. Accordingly, in view of the analysis and discussion made hereinabove, the present writ petition is disposed of, so also the pending application(s), if any. No costs.

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

Namesh Kumar .....Petitioner
Versus
State of H.P & others .....Respondents.

CWP No. 4060 of 2014
Reserved on : 5.6.2015.
Decided on : 24.6.2015

Constitution of India, 1950- Article 226- University advertised a post of Assistant Professor in the Department of Education, which was reserved for Other Backward Classes-candidature of the petitioner was rejected on the ground that he had failed to get any marks under the head publication - respondent No. 3 was selected by the University – record showed that Interview Committee had awarded five marks under the head publication in the year 2010 but the marks were not awarded to the petitioner in the impugned interview-this shows that subsequent Interview Committee had not applied its mind and had deliberately omitted to award marks under the head publication- petition allowed and respondents No. 1 and 2 directed to award five marks under the head publication and thereafter to proceed in accordance with law. (Para-2 and 3)

For the Petitioner: Mr. Sanjeev Bhushan, Advocate.
For the Respondents: Mr. P.M Negi, Deputy Advocate General with Mr. Ramesh Thakur, Assistant Advocate General for respondent No.1-State.
Mr. J.L Bhardwaj, Advocate for respondent No.2.
Mr. Ajay Mohan Goel, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The respondent-University advertised a post of Assistant Professor in the Department of Education. The advertised post aforesaid was reserved for "other backward classes". The petitioner belongs to the said category. In pursuance to the post aforesaid having come to be advertised, the petitioner applied for his being considered for selection and appointment against the post aforesaid. The respondent-University served a call letter upon the petitioner for warranting his appearance on 12.5.2012 before the Interviewing committee. The petitioner, though had initially concerted to by applying under RTI obtain information from the respondent aforesaid qua the result of the interview conducted aforesaid. Yet, his initial endeavor to elicit information from the respondent concerned qua the result of the interview conducted on 12.5.2012, remained futile. Nonetheless, the petitioner re-endeavored and re-concerted to obtain information qua the result of the interview conducted by the respondent to the advertised post of Assistant Professor by applying to the concerned under RTI. The information applied for, came to be furnished to the petitioner by the respondents concerned on 28.2.2014. On the petitioner receiving information qua the result of the interview conducted by the respondent concerned on 12.5.2012, he was startled to know that the respondent No.3 stood selected, whereas his candidature suffered rejection on the ground of the respondent having, not in the scoresheet

awarded to him five marks for "publications", even though the interviewing committee concerned in the previous interview for the same post had meted to him five marks on the parameter of "publications".

2. The Respondents have filed detailed reply(s) to the writ petition, wherein the gravamen of their contest is qua the tenability of the grievance ventilated by the petitioner in the writ petition being devoid of any force or vigour. The respondent No.3 in his reply to the writ petition has contended that the petition is barred by delay and laches, inasmuch, as, the petition has been filed on 2.6.2014 whereas his selection and appointment to the post of Assistant Professor, in the department of education occurred in the year 2012. Therefore, a contention is reared in the reply of the respondent No.3 that, as such with an inordinate delay having occurred in the institution of the writ petition at the instance of the writ petitioner and the delay having remained un-explained, the grievance ventilated by the petitioner in his petition entails its outright rejection and dismissal. On the other hand, the contention as foisted in the reply of the respondents No.1 and 2 to omit or to abstain from awarding five marks to the petitioner on the parameter of "publications" in the scoresheet apposite to him, is grooved in the factum of the petitioner having, not at the time of his appearing before the interviewing board produced before it, the necessarily enjoined "publications" for warranting the awarding of five marks to him thereon. The gravamen or the core controversy which exists inter-se the parties at contest is whether the omission on the part of the respondent/interviewing board concerned to abstain or to omit to accord five marks to the petitioner on the parameter of "publications" for his withholding the apposite papers on whose anchorage he could tenably foist a claim for marks apposite to them being awarded in his favour on the parameter of afoersaid, is justified or not. Obviously, the espousal of the respondents No. 1 and 2, of the interviewing committee concerned omitting to or abstaining to award five marks to the petitioner arising from his withholding the apposite papers, whose production alone would have enjoined upon the interviewing board to award him five marks as claimed by him does arouse the vindication of this Court. Nonetheless the factum of the petitioner having previously come to be interviewed on 23.9.2010 for the very same post by the interviewing board concerned and the latter having proceeded to award five marks for the petitioner's then holding the papers/documents necessary for his being awarded five marks on the parameter of "publications", is not to be slighted, rather is a preeminent fact which would facilitate, hence an inference, for the reasons to be afforded hereinafter that the subsequent omission on the part of the interviewing board/committee concerned to award five marks to the petitioner for his withholding papers apposite to constrain the interviewing board concerned to award five marks on the parameter of "publications", suffers from non-application of mind as well as is flawed and misconceived. A perusal of Annexure P-1 manifestly upsurges the factum of the petitioner having come to be awarded five marks on the parameter of "publications". The said marks were meted in favour of the petitioner by the interviewing board concerned only on his producing or furnishing at the time of his appearing before it, the documents/papers apposite to his warranting the interviewing board/committee concerned to award him five marks on the parameter apposite to them. The inference, which generates, in the Interviewing committee concerned in the year 2010 when the petitioner appeared before it, for his being considered for selection and appointment to the post of Assistant Professor, Education and his being awarded five marks on the parameter of "publications", is that he was possessed of the papers apposite to constrain the Interviewing Board concerned to award him five marks on the parameter of "publications". Necessarily then an apt conclusion which concomitantly surges forth is that the petitioner did hold as well as

possess then the necessary papers/documents empowering him to warrant from the interviewing committee concerned before whom he previously appeared, the awarding of five marks to him on the parameter of "publications". The ground as mooted by respondents No.1 and 2 in their reply(s) that the omission on the part of the respondents aforesaid to abstain or not award him five marks on the parameter of "publications" is prodded by the fact of the petitioner withholding the necessary/apposite papers to constrain the meting to him of five marks on the parameter of "publications", is a wholly contrived stratagem on the part of interviewing board concerned to foist a wholly rudderless plea to oust the petitioner from selection by omitting to him five marks on the ground of "publications", whereas in the previously held interview the interviewing board concerned constituted by the respondents had proceeded to award five marks to the petitioner, on the parameter of "publications". In other words, the mere omission on the part of the petitioner to omit to produce the apposite documents/papers before the interviewing board concerned subsequent to 2010, especially when on his appearing previously before the Interviewing committee concerned, he did possess or hold the necessary papers for his being meted five marks to him on the parameter of "publications" is neither a vigorous nor a sinewed ground available to the respondents to vindicate the omission on their part to omit to award five marks on the parameter of "publications". Fortifyingly so, when the records of the previous interview in which the petitioner participated in the year 2010 were also available with the respondents, concomitantly then with the existence or of the holding of apposite records with/by the respondents, would have enabled as well as facilitated the interviewing committee concerned, to when the petitioner appeared before it, rely upon his previous scoresheet even without insisting upon the petitioner to produce the papers relevant and apposite to his exacting a tenable demand from the interviewing committee concerned to proceed to award him five marks on the parameter of "publications", sequelly its having omitted to do so has upsurged an unwarranted act on the part of the interviewing committee concerned to omit to award to the petitioner five marks on the parameter of "publications". Necessarily then non-production of the apposite papers by the petitioner before the interviewing committee concerned at the time of his participating in the subsequent interview ought not to have constrained the interviewing committee concerned to omit to award five marks to him on the parameter of "publications". Moreso, when no apposite material exists before this Court, to conclude that the petitioner had not at the time of his appearing before the interviewing committee concerned proclaimed the factum of his having been awarded five marks previously by the interviewing committee on the parameter of "publications". Obviously then, it has to be concluded that he did proclaim before the interviewing committee concerned that in the previous interview he had been meted out five marks in the scoresheet for the very same post on the parameter of "publications", necessarily then it was incumbent upon the interviewing board concerned to, dehors the withholding of the apposite papers, by the petitioner proceed to while relying upon the previous scoresheet of the petitioner transpose, in the score sheet of the petitioner apposite to the subsequently held interview, five marks, as had been awarded to him previously on the parameter of "publications". It having omitted to make such an endeavor and its sequelly having omitted to award five marks to the petitioner on the score of "publications" on the flimsy pretext of, withholding of the apposite papers by the petitioner to constrain the interviewing committee to award him five marks on the parameter of "publications", is a flawed as well as a fallible plea which cannot come to be countenanced by this Court.

3. Even though, the selection and appointment of respondent No.3 has been challenged at the instance of the petitioner after a lapse of two years, nonetheless the

factum of a belated institution of the writ petition at the instance of the petitioner would not afflict the writ petition either with the vice of delay and laches nor it would oust the petitioner to claim the relief as ventilated in the writ petition. The reasons for concluding so, is anchored upon the fact of the petitioner having in his writ petition manifested the palpable fact of his having acquired knowledge or information qua the result of the post for which he applied, only in the year 2014 on his having been supplied the apposite information by the respondents on his having instituted an application under RTI before them, whereupon he promptly instituted the writ petition. Now given the fact that the petitioner acquired knowledge of the result of the post for which he as well as the respondent No.3 applied for in the year 2014 and his having in quick spontaneity and with promptitude instituted the instant writ petition before this Court constitutes a sound and a formidable explanation for the belated institution of the petition at the instance of the petitioner against the selection and appointment of respondent No.3. Besides also hence given the prompt institution of the petition at the instance of the petitioner, from the date of acquisition of knowledge by him qua the result of the interview in which he and respondent No.3 had participated, leaves it to be bereft of any vice of delay and laches. The writ petition is accepted and respondents No.1 and 2 are directed to add to the score-sheet of the petitioner five marks on the parameter of "publications". In case the petitioner then is ranked first, then subject to completion of all necessary formalities the respondent concerned shall proceed to in accordance with law appoint him to the post of Assistant Professor, Education. All pending applications, stand disposed of accordingly.

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

Ashwani Kumar .....Appellant.

Versus

State of H.P. .....Respondent.

Cr. Appeal No. 49 of 2013.
Reserved on: 18.6.2015
Decided on : 26th June, 2015.

N.D.P.S. Act, 1985- Section 15- Police received an information regarding sale of poppy straw on which police went to the spot- two persons were found sitting on white coloured sack- accused 'A' was apprehended while the other person ran away–25 kg. of poppy straw was recovered from the sacks- testimonies of the police officials are consistent- there are no major contradictions in their testimonies- however, the police officials had not associated any independent witness, although the market was located at a distance of 100-200 mts. from the place of incident- the police had also not made any effort to associate independent witness, although police had prior information– in these circumstances the fairness of investigation is doubtful - accused acquitted (Para 9-14)

For the Appellant: Mr. N.K Thakur, Sr. Advocate with Mr. Surender, Advocate.
For the Respondent: Mr. P.M Negi, Deputy Advocate General, for respondent-State.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgment of 18.2.2013, rendered by the learned Special Judge, Fast Track Court, Una, H.P., in Sessions case No. 06-VII-2012**,** whereby, the learned trial Court convicted and sentenced the accused/appellant to undergo rigorous imprisonment for a period of ten years and to pay a fine in a sum of Rs.1,00,000/- (One Lac) and in default of payment of fine to further undergo rigorous imprisonment for a period of six months for commission of offence under Section 15 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the ACT").

2. The facts, in brief are that, on 22.9.2011, the police party headed by HC Sanjay Kumar (PW-16) alongwith HC Naresh Kumar, C Ranjeet Singh and C Ram Gopal were on patrolling duty at Una Dhamandri Road at about 9.45 p.m. HC Sanjay Kumar received secret information of the accused Naresh Kumar and Ashwani Kumar being indulged in illegal business of selling poppy straw in the area and they are present at Badsala village near Datwara chowk and huge quantity of contraband can be recovered from them. Finding the information trustworthy, rukka comprised in Ex. PW-2/A was prepared and sent to the Police Station, Una through C Ram Gopal. On the basis of Rukka , FIR comprised in Ex. PW2/B had been registered. In the meantime, ASI Chaman Singh alongwith C Mohit Kumar came to the spot on motorcycle and facts of the case were disclosed to them by HC Sanjay Kumar. Thereafter, the remaining investigation was carried out by ASI Chaman Singh, who prepared reasons of belief report under Section 42(1) (a) Ex. PW-8/A and sent the same through C Ranjeet Singh to Superintendent of Police, Una. At about 10.35 p.m. the police official noticed the shadows of two persons in the bushes and ultimately two persons were found to be sitting on the white coloured sacs. One person on seeing the police party, fled away whereas the other was apprehended by the police. On inquiry, the said person disclosed his name to be Ashwani Kumar S/o Kapoor Singh. He also disclosed the name of the other person, who fled from the spot to be Naresh Kumar S/o Jagdish Ram. The place was isolated and no local person was available. The sacks were opened and all the four sacks were found to be containing another plastic sack inside. The Investigating Officer on smelling and tasting and on the basis of experience opined the contents to be of poppy husk. All the sacks were weighed with spring scale lying in the I.O Kit and first sack was found to be containing 25 kgs, sack No.2, 23 kgs, sack-3, 23 kgs and fourth sack was found to be containing 24 kgs, total 95 kgs. All the sacks were mixed separately with hands and after making them homogenous one sample from each sack weighing I kg each was separated. Photographs were also clicked. The samples were packed in cloth parcels separately and sealed with three seal impressions of T and four sacks were also sealed with the same seal by affixing three seals on each sacks and sacks were marked as P-1 to P-4 and samples were marked as P1/A to P1/D. NCB form was filled in by the IO. Facsimile of seal was separately taken as Ex. PW-16/A. The seal after its use was entrusted to HC Naresh Kumar. The recovered contraband, samples, sacks, NCB forms in triplicate were taken into possession vide memo Ex. PW-16/B. Site plan of place of occurrence was also prepared. Statements of the witnesses under Section 161 of Cr.P.C were also recorded. Personal search of accused was conducted under memo Ex. PW-19/B. The intimation regarding arrest of accused was also given to his brother. The case property, samples, NCB forms and sample seals were handed over to SHO Harjeet Singh, who had resealed the samples, sacks with seal N and impression of seal was also affixed on NCB forms and sample of seal Ex. PW-14/B was taken on a piece of cloth. Special report Ex. PW-

8/B was also submitted to the Superintendent of Police, Una. The I.O had moved an application Ex. PW-15/A to the Superintendent of Police, Una for obtaining call details of the mobile number of the accused. Call details of accused are comprised in Ex. PW-15/B. The IO had also obtained ID Ex. PW-15/C to Ex. PW-15/F. On 9.11.2011 on the directions of the SHO, I.O took the case property i.e. four sacks sealed with seals T and N from Malkhana to the court of learned Chief Judicial Magistrate, Una for inventory and learned chief judicial Magistrate prepared inventory Ex. PW-18/A and after inventory, four sacks and eight samples were sealed with seal SJ and specimen of seal were deposited in Malkhana. The samples etc. were sent to FSL, Junga and their reports comprised in Ex. PW-6/C and Ex. PW-6/D had been received. On conclusion of the investigation, into the offences, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and presented in the Court.

3. The accused was charged, for, his having committed offence punishable under Section 15/61/85 of the NDPS Act, by the learned trial Court, to, which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 21 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. He chose to lead evidence in defence.

5. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant.

6. The accused/appellant 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 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 the findings of acquittal.

7. On the other hand, the learned Deputy Advocate General, 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, hence, do not necessitate interference, and rather merit vindication.

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

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

10. The depositions of PW-13, C Mohit Kumar, PW-14 HC Sanjay Kumar, PW-19 HC Naresh Kumar and PW-20 ASI Chaman Singh, are of prime importance as they are the witnesses of interception of accused as well as of recovery of contraband.

11. PW-13 C Mohit Kumar, in his deposition, has voiced that on 22.9.2011 at about 8.30 p.m., he alongwith ASI Chaman Singh, was on patrolling duty in Government vehicle and when they reached on Dhamandari road near Datwara chowk at about 10.05 p.m., HC Sanjay Kumar, HC Naresh Kumar and C Ranjeet Singh met them and HC Sanjay disclosed to them qua his having received a secret information about indulgence of accused Ashwani and one Naresh Kumar in the business of selling of poppy husk. ASI Chaman Lal has been disposed by this witness to have prepared the reasons of belief report under Section 42 (2) of the Act and the same was sent to the Superintendent of Police, Una. He continues to depose that he alongwith ASI Chaman Singh, HC Sanjay and HC Naresh Kumar went towards Dathwara side and at Badsala-Datwara, they noticed shadows of two persons. He deposes that on theirs reaching near the shadows, they found two persons sitting on the plastic sacks, and on seeing the police, one of them has been deposed by this witness to have fled away, whereas the other has been deposed by this witness to have been apprehended by the police. He further deposes that the accused disclosed his name to be Ashwani Kumar and the name of other person was disclosed by accused Ashwani Kumar to be Naresh Kumar. He continues to depose that the place was isolated and no private witness was present there. He further deposes that the photographer came there, in whose presence sacks were opened and weighed. The sacks were found containing poppy straw (Husk). The ASI has been deposed by this witness to have checked the contents of the sacks by smelling and tasting and sacks were made homogenous by ASI with his own hands and first sack was found to be containing 25 kgs contraband, second sack 23 kg, third sack 23 kg and fourth sack was found to be containing 24 kg and total weight of the contraband/poppy straw was disclosed by this witness to be 95 kgs including the weight of the sacks. He continues to depose that out of every sack, one sample of one kgs each i.e. total four samples were taken out and the samples were sealed in parcels of cloth with three seals of T on each parcel. The sacks were also sealed with three seals of impression T and marked as P-1 to P-4 and samples as P-1/A to P-1/D. The photographs of the proceedings were also clicked. The seal of cloth was given to HC Naresh Kumar. The IO had also filled in NCB forms in triplicate and the case property alongwith samples, NCB forms and sample seal were taken into possession vide memo Mark M. Information regarding arrest of the accused had been given to his brother. The case property alongwith the accused had been taken to police Station, Una. IO has been deposed by this witness to have prepared site plan. He further deposes that on 16.11.2011, he took four samples sealed with two seals of SJ on each sample alongwith connected documents to FSL, Junga in safe condition and on return handed over RC to MHC. On 26.12.2011, he had been deputed to bring result from FSL, Junga. On 28.12.2011 he brought four samples sealed with seals of FSL; alongwith result and handed over the same to HC Ajaib Singh. He has also identified sacks Ex. P-1 to P-4 and samples Ex. P5 to P8, P10, P-12 and P15 in the Court. During the course of his cross-examination, he deposes that the distance between Dathwara chowk and SIU, Una is about 10-11 kms. He also admits that there is a market located at a distance of about 100-200 meters towards Una side from Datwara chock. He further deposes that the site of recovery is about 300-400 meters away from Datwara chowk.

12. The other prosecution witnesses, in their depositions have deposed a version in square tandem to the prosecution story, as referred to hereinabove, as also in corroboration to the testimony of PW-13. Consequently, the genesis of the prosecution case

qua the accused being in conscious and exclusive possession of poppy husk has been contended to have been firmly established. However, though the depositions of the official witnesses in the event of their testimonies being bereft of any inter-se or intra-se contradictions, are both trustworthy and credible, for founding thereupon findings of conviction against the accused, even when there is omission on the part of the Investigating Officer to associate independent witnesses in the proceedings relating to search, seizure and recovery of contraband. The omission on the part of the Investigating Officer to associate independent witnesses in the apposite proceedings would not stand in the way of returning findings of conviction against the accused on the strength of the consistent testimonies of the official witnesses qua the genesis of the prosecution case unless the evidence comprised in the testimonies of the official witnesses discloses that independent witnesses were not available for theirs being joined in the proceedings relating to search, seizure and recovery of contraband. However, in the event of evidence on record fortifyingly disclosing that the independent witnesses were available in close vicinity to the site of occurrence, the inability of the Investigating Officer to solicit their participation in the apposite proceedings would taint the genesis of the prosecution version, especially when theirs being joined in the apposite proceedings, a firm conclusion of the investigation having been carried out in an independent and fair manner would be garnered. This Court to disinter whether independent witnesses were available in the vicinity of the site of occurrence for theirs being joined in the apposite proceedings, yet there being a conscious omission on the part of the Investigating Officer to do so, for fostering an apt conclusion that omission on the part of the Investigating Officer to despite their availability solicit their participation in the apposite proceedings, was constrained by an oblique motive on his part to smother the truth qua the genesis of the prosecution case, an advertence is required to be made to the existence of a statement in the cross-examination of PW-13 qua availability of a market located at a distance of about 100-200 meters towards Una Side from Dathwara chowk and the site of recovery being located at a distance of 300-400 meters from Datwara chowk. Given the proximate location of the aforesaid market to the site of occurrence necessarily then the presence of independent witnesses hence cannot be overruled. Consequently, it was only on concerted efforts having been made by the Investigating Officer, by visiting the market aforesaid located in the vicinity of the site of occurrence, that the availability of independent witnesses could be ascertained for hence soliciting their participation in the apposite proceedings. However, there is no evidence on record portraying the fact that any concerted effort was made by the Investigating Officer to ascertain the presence of independent witnesses. Consequently, the omission of concerted efforts on the part of the Investigating Officer to either ascertain the presence of independent witnesses, obviously then, solicit their presence in the apposite proceedings relating to search, seizure and recovery, constrains an inference that despite availability of independent witnesses in the vicinity of the site of occurrence, the Investigating Officer consciously omitted to do so. His conscious omission to associate independent witnesses in the apposite proceedings relating to search, seizure and recovery of contraband naturally foments a conclusion that the said omission was sequelled by an oblique motive on the part of the Investigating officer to smother the truth qua the occurrence. Consequently, this Court would not imbue veracity to a smothered investigation carried out by the Investigating Officer.

13. Fortificatory accentuation to the aforesaid inference to the factum of a conscious and deliberate omission on the part of the Investigating Officer to associate independent witnesses in the proceedings relating to search, seizure and recovery of contraband is lent by the fact that even when this is a case of prior information hence affording ample, abundant, sufficient time and opportunity to the Investigating Officer to

solicit the participation of independent witnesses in the proceedings relating to search, seizure and recovery of contraband. Obviously, the non-solicitation of their participation by the Investigating Officer in the apposite proceedings, appears to have been goaded by a palpable oblique motive on his part to smother the truth qua the genesis of the prosecution case or to falsely implicate the accused.

14. The summum bonum of the above discussion is that the prosecution has not been able to adduce cogent and emphatic evidence in proving the guilt of the accused. The appreciation of the evidence as done by the learned trial Court suffers from an infirmity as well as perversity. Consequently reinforcingly, it can be formidably concluded, that, the findings of learned trial Court merit interference.

15. In view of above discussion, the appeal is allowed and the impugned judgment of 18.2.2013, rendered by the learned Special Judge, Fast Track Court, Una, H.P, is set aside. The appellant/accused is acquitted of the offence charged. The fine amount, if any, 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.

16. The registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of the jail concerned, in conformity with this judgment forthwith. Records be sent down forthwith.

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

Jitender Kumar .....Appellant

Versus

State of H.P. .....Respondent.

Cr. Appeal No. 61 of 2011
Reserved on: 18.6.2015
Decided on : 26th June, 2015

N.D.P.S. Act, 1985- Section 21- Accused was intercepted with 1509 strips of spasmo proxyvon capsules and 138 strips of parvon capsules without permit- evidence to link the case property not cogent-Malkhana registers not carrying the entries about retrieval of the case property to the court and redeposit thereof during trial-possibility that the case property is not of the present case not ruled out- conviction and sentence improper—appeal allowed and accused acquitted. (Para 12 & 13)

For the Appellant: Mr. N.K Thakur, Sr. Advocate with Mr. Surender, Advocate.
For the Respondent: Mr. M.A Khan, Additional Advocate General, for respondent-State.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgment of 5.3.2011, rendered by the learned Special Judge(1) Kangra at Dharamshala, H.P., in Sessions case No. 14-D/VII-

2010, whereby, the learned trial Court convicted and sentenced the accused/appellant to undergo rigorous imprisonment for a period of ten years and to pay a fine in a sum of Rs.1,00,000/- (One Lac) and in default of payment of fine to further undergo rigorous imprisonment for a period of one year for commission of offence under Section 21-61-85 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act").

2. The facts, in brief are that, on 9.2.2010, ASI Ramesh Kumar alongwith HC Duni Chand, HC Sanjeev Walia, C Kuljeet Singh, C Rajinder Kumar and C Sanjeev Kumar were on patrolling duty at Kotwali Bazar-bus stand, Gharoh, Bandi and Kaliara in Government vehicle driven by C Ramesh Kumar. On suspicion, they stopped a motorcycle bearing registration No. HP-53-2848 which was occupied by three persons. On seeing the police party, the accused got perplexed. The person sitting in middle on the motorcycle was holding a plastic bag which he threw on the earth. The persons disclosed their names to the police party to be Jitender Kumar, Rakesh Kumar and Sanjeev Kumar. Accused Jitender Kumar opened the plastic bag which was found to be containing huge quantity of capsules. There were 1509 strips of spasmo proxyvon capsules and 138 strips of parvon capsules and total number of capsules were 13176. The accused could not produce a permit, licence and prescription slip qua the capsules aforesaid. All the capsules were put in a parcel and sealed with seal R at 10 places and sample seal was taken on a separate piece of cloth. NCB forms in triplicate were filled in on the spot. Rukka Ex. PW-9/A was prepared. Spot map is comprised in Ex. PW-9/B. Statements of HC Duni Chand and HC Sanjeev Kumar were also recorded at the spot. Identity certificates of accused Ex. PW-9/C to Ex. PW-9/E were also prepared at the spot. Special report under Section 57 of NDPS Act was also sent to S.P kangra. FSL report is comprised in Ex. PW-9/F. On conclusion of the investigation, into the offence, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and presented in the Court.

3. The accused persons were charged, for, theirs having committed offence punishable under Section 21-61-85 readwith Section 29 of NDPS Act, by the learned trial Court, to, which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 10 witnesses. On closure of the prosecution evidence, the statements of the accused, under Section 313 of the Code of Criminal Procedure, were recorded, in, which they pleaded innocence and claimed false implication. They chose to lead evidence in defence.

5. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant Jitender Kumar whereas other accused were acquitted by the learned trial Court.

6. The accused/appellant Jitender 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 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 the findings of acquittal.

7. On the other hand, the learned Additional Advocate General, 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, hence, do not necessitate interference, and 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. PW-9 ASI Ramesh Kumar deposes that on 9.2.2010, he alongwith HC Duni Chand, HC Sanjeev Walia, C Kuljeet Singh, C Rajinder Kumar and C Sanjeev Kumar was on patrolling duty at Kotwali Bazar-bus stand, Gharoh, Bandi and Kaliara in Government vehicle driven by C Ramesh Kumar. On suspicion, they stopped a motorcycle bearing registration No. HP-53-2848 which was occupied by three persons. He further deposes that on seeing the police party, the accused got perplexed. He continuous to depose that the person sitting in middle on the motorcycle was holding a plastic bag which he threw on the earth. The persons disclosed their names to the police party to be Jitender Kumar, Rakesh Kumar and Sanjeev Kumar. Accused Jitender Kumar has been deposed to have opened the plastic bag which was found to be containing huge quantity of capsules. There were 1509 strips of spasmo proxyvon capsules and 138 strips of parvon capsules and total number of capsules were 13176. The accused could not produce a permit, licence and prescription slip qua the capsules aforesaid. All the capsules were put in a parcel and sealed with seal R at 10 places and sample seal was taken on a separate piece of cloth. NCB forms in triplicate have been deposed by this witnesses to have filled in by him. He further deposes that Rukka Ex. PW-9/A was sent to the police Station Dharamshala. Spot map comprised in Ex. PW-9/B has been deposed to have prepared by him and Statements of HC Duni Chand and HC Sanjeev Kumar were also recorded at the spot by him. He continues to depose that identity certificates of accused Ex. PW-9/C to Ex. PW-9/E were also prepared at the spot. Special report under Section 57 of NDPS Act was also sent to S.P kangra. FSL report is comprised in Ex. PW-9/F. In his cross-examination he has denied the suggestion that he has planted a false case against the accused persons.

10. The other prosecution witnesses, in their depositions have deposed a version in square tandem to the prosecution story, as referred to hereinabove by PW-9, the Investigating Officer.

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

12. The prosecution was required to prove the fact that the case property, as shown to PW-1 (HC Duni Chand) and identified by him on its production in court by the learned P.P, was linkable to the case property as recovered from the site of occurrence in the manner as alleged by the prosecution. Even though, the deposition of PW-1 discloses that the specimen seals placed on the parcel were 8 in number, out of which seven seals placed by the FSL were intact, nonetheless PW-1 in his deposition has deposed that one seal was not visible. For omission of or non-existence of a statement to the effect that the case

property as shown to him in Court by the learned P.P on production at his instance in Court, was handed over to him or to some other official by the Incharge, Police Malkhana, concerned after its having been retrieved from the police Malkhana, concerned, wherein it was kept in safe custody, besides omission of a disclosure in the statement of PW-1 that when he received the case property, after its retrieval by the Incharge, police Malkhana from the police Malkhana, the official concerned recorded an apposite entry in the Malkhana register, renders open a conclusion that the case property as shown in court to PW-1, on its production by the learned P.P, was not handed over by the Incharge, Police Malkhana, to PW-1 rather its entry in Court is to be attributed to an undisclosed source which renders suspect the factum of its constituting the property as was allegedly recovered from the conscious and exclusive possession of the accused. What fortifies the factum of the case property as shown to PW-1 in Court by the learned PP being not the property/contraband allegedly recovered at the site of occurrence from the conscious and exclusive possession of the accused, is the fact that there is no existence or occurrence in the deposition of PW-3 qua the person to whom he handed over the case property for its production in Court at the instance of the learned PP for its being shown to PW-1. Besides there being no apposite entry in the Malkhana register contemporaneous to the date of its production in Court at the instance of the learned PP, portraying the fact that it, was on the date on which it was shown to PW-1 by learned PP, retrieved from the Police Malkhana and thereupon handed over to an unnamed official for its being at the instance of the learned PP shown to PW-1. Consequently, even if the seal impressions on parcels remained intact and the seal impression borne on the parcels tallied with the seal impressions, as displayed in the report of the FSL, nonetheless for lack of a contemporaneous entry in the malkhana register depicting its retrieval therefrom on the date on which it was at the instance of learned PP produced in Court, besides there being also no enunciation in the deposition of PW-3 qua the person to whom he handed over the parcels, renders its appearance in Court at the instance of learned PP to be suspect. Obviously then it cannot be construed to be the case property as was recovered from the purported, alleged, conscious and exclusive possession of the accused at the site of occurrence.

13. The summum bonum of the above discussion is that the prosecution has not been able to adduce cogent and emphatic evidence in proving the guilt of the accused. The appreciation of the evidence as done by the learned trial Court suffers from an infirmity as well as perversity. Consequently reinforcingly, it can be formidably concluded, that, the findings of the learned trial Court merit interference.

14. In view of above discussion, the appeal is allowed and the impugned judgment of 5.3.2011, rendered by the learned Special Judge(I), Kangra at Dharamshala, is set aside. The appellant/accused is acquitted of the offence charged. The fine amount, if any, 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.

15. The registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of the jail concerned, in conformity with this judgment forthwith. Records be sent down forthwith.

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

Hoshiar Singh & ors. .....Appellants.

Versus

Rakesh Singh Sandhu & ors. .....Respondents.

RSA No. 534 of 2014.
Decided on: 29.6.2015.

Specific Relief Act, 1963- Section 6- Plaintiff instituted a suit for possession of suit land pleading that suit land was earlier in possession of 'K' (predecessor-in-interest of the plaintiffs and defendant No. 4) as tenant under the previous owners- he was tenant at will for the last more than 50 years- he became owner after the commencement of H.P. Tenancy and Land Reforms Act- defendants claimed to be the purchasers of the shares in the suit land from some of the landlords- they threatened to disturb the peaceful possession of 'K' in the year 1966- K filed a suit for injunction on which defendants stopped interference- the suit was dismissed as cause of action had not survived- defendants claimed that they were in possession of suit land since the date of purchase and name of 'K' was wrongly recorded in the jamabandi - it was specifically held in the civil suit filed by 'K' that he had become owner after the commencement of H.P. Tenancy and Land Reforms Act automatically- defendants had not produced the sale deed and the fact that 'K' had become owner was duly reflected in the revenue record- defendants had also failed to file any affidavit executed by 'K' before Tehsildar- appeal dismissed. (Para-12 to 17)

For the appellant(s): Mr. Ashwani Kaundal, Advocate.

For the respondents: Mr. N.K.Thakur, Sr. Advocate, with Mr. Ramesh Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge (II), Una, H.P., dated 1.3.2014, passed in Civil Appeal No.09 of 2012.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondents-plaintiffs (hereinafter referred to as the plaintiffs) instituted a suit for possession of land measuring 0-12-17 hectares bearing Khewat No. 722 min, Khatauni No. 960, Kh. No. 5925, as per *Missal Hakiat Bandobast Jadid Sani* for the year 1997-98, situated in Mahal Panjawar, Tehsil and Distt. Una (hereinafter referred to as the suit land). According to the plaintiffs, the suit land was formerly in possession of Kartara, predecessor-in-interest of the plaintiffs and defendant No. 4, namely Achhar Singh, as tenant under the previous owners. He was tenant at will under the landlords Mansha Ram etc. for the last more than 50 years. Kartara continued in possession of the suit land as tenant at will, without any interruption and became absolute owner by way of enforcement of H.P. Tenancy and Land Reforms Act, 1972, w.e.f. 3.10.1975. The title of erstwhile landlords was extinguished. The appellants-defendants (hereinafter referred to as the defendants) alleged themselves to be purchaser of share of land from some of the landlords. They interfered and threatened to disturb the peaceful possession of Kartara in the year **1966**. Kartara

instituted suit against the defendants for injunction, however, later on the defendants did not interfere further in the possession of Kartara. The suit was dismissed as Kartara admitted that there was no interference on the part of the defendants. Kartara died during the pendency of the suit filed by him.

3. The suit was contested by the defendants. According to them, they were coming in possession of the suit land since the date of purchase i.e. 16.5.1967. The plaintiff has no locus standi to file the civil suit. The name of Kartara entered in the Jamabandi as tenant was against the spot position. The defendants have also moved an application for removing Kartara's name from the revenue record but the same was dismissed.

4. The replication was filed by the plaintiffs. The learned Civil Judge (Jr. Divn.), Court No. II, Una, Distt. Una, H.P., framed the issues on 13.10.2006. The learned Civil Judge (Jr. Divn.), Court No. II, Una, decreed the suit on 16.12.2011. The defendants, feeling aggrieved, preferred an appeal before the learned Addl. District Judge, Una, H.P. The learned Addl. District Judge, Una, dismissed the same on 1.3.2014. Hence, this regular second appeal.

5. Mr. Ashwani Kaundal, Advocate, for the appellants, on the basis of the substantial question of law framed, has vehemently argued that the findings returned by both the Courts below to the effect that Kartara was owner of the suit land was contrary to the provisions of H.P. Tenancy and Land Reforms Act, 1972. He then contended that both the Courts below have misread and misconstrued the oral as well as documentary evidence on record. On the other hand, Mr. N.K.Thakur, Sr. Advocate, for the respondents has supported the judgments and decrees passed by both the Courts below.

6. Since the substantial questions of law are interconnected, they are being discussed together to avoid repetition of discussion of evidence.

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

8. PW-1 Karnail Singh has proved Ext. P-1, copy of Misal Hakiat Bandobast for the year 1997-98. He has also proved Ext. P-2, judgment and decree dated 29.4.2005, Ext. P-5 copy of Jamabandi for the year 2001-02, Ext. P-6 Aks Shajra Kishtwar and Ext. P-7 copy of order dated 23.11.2006.

9. DW-1 Hoshiar Singh, has led his evidence by filing affidavit Ext. DW-1/A. According to him, his father had purchased 6-9 marlas of land from Kh. No. 3362 and 3363 vide registered sale deed dated 16.5.1967 from Mansha Ram, Gurdass Ram etc. He also stated that Kartara had sworn in an affidavit before the Tehsildar on 25.3.1981 to the effect that he was not in physical possession of the land. He further stated that they have become owners of the suit land by way of adverse possession.

10. DW-2 Jagjit Singh, has led his evidence by filing affidavit. According to him, Kartara was never in possession of the suit land and the entries of Kartara as non-occupancy tenant were wrong. He also admitted that no registered sale deed was executed in his presence. He also showed his ignorance that since 1962-63, Kartara was recorded in possession as non-occupancy tenant.

11. DW-3 Satish Kumar, has also led his evidence by way of affidavit. According to him also, the defendants have purchased the suit land from Mansha Ram etc. in the year 1967. He could not narrate the Khasra numbers of the suit land. He came to know about the sale of the year 1967 from the defendants.

12. The precise case of the plaintiffs' before the Courts below was that Kartara has remained tenant at will for 50 years and has become absolute owner after coming into force of H.P. Tenancy and Land Reforms Act, 1972. The suit land, as per copy of *Missal Hakiat* for the year 1997-98 Ext. P-1, is recorded in the ownership of defendants No. 1 to 3 but in possession column Kartara son of Faquiria has been entered, being non-occupancy tenant, under the tenancy of Kaushalya Devi, Hoshiar Singh etc. In Ext. P-2 copy of *Misal Hakiat Istemal* for the year 1997-98, Kartara son of Faquiria has been recorded as owner-in-possession of the land. Ext. P-5 is the copy of jamabandi for the year 2001-02, wherein again Kartara has been recorded as tenant over the suit land under the tenancy of Kaushalya etc.

13. According to the judgment Ext. P-3 rendered in Civil Suit No. 199/66, Kartara had filed suit for permanent injunction against the defendants. The Court after framing specific issue No. 5 returned findings that Kartara had become owner of the land in Kh. No. 3448, Khewat No. 1224, Khatauni No. 1803 under the H.P. Tenancy and Land Reforms Act, 1972, automatically. It is apparent that the judgment rendered in Civil Suit No. 199/96 dated 29.4.2005 had attained finality.

14. The case of the defendants was that they have purchased 2/3rd share in the suit land. However, sale deed has not been produced. According to the defendants, mutation Nos.2986 and 3066 were sanctioned in their favour. There is no documentary evidence to prove the same.

15. Mr. Ashwani Kaundal, Advocate, has vehemently argued that the defendants have challenged the wrong entries whereby Kartara was shown as tenant in the revenue record by moving an application for correction. However, application was dismissed. The defendants have not placed any tangible evidence on record to prove that such application was moved by them before the Revenue Agency.

16. Now, as far as the execution of the alleged affidavit dated 25.3.1981 filed before the Tehsildar by Kartara is concerned, the same has not seen the light of the day. Moreover, the affidavit does not constitute evidence as per the Indian Evidence Act, 1872. DW-2 Jagjit Singh has admitted that no sale deed was executed in his presence. The plaintiffs have conclusively proved that Kartara had become absolute owner after coming into force of the H.P. Tenancy and Land Reforms Act, 1972 and the same was reflected in the revenue record prepared thereafter including Jamabandi and *Missal Hakiyat Bandobast/Istemal*. The learned Civil Judge (Sr. Divn.), Una, in Civil Suit No. 199/96, while recording findings on issue No. 5, has declared that the predecessor-in-interest of the plaintiffs' had become owner of the land vide judgment dated 29.4.2005 and the judgment dated 29.4.2005 has attained finality.

17. Accordingly, the Courts below have correctly appreciated the oral as well as documentary evidence available on record and the provisions of the H.P. Tenancy and Land Reforms Act, 1972. The defendants have failed to prove the copy of the registered sale deed dated 16.5.1967 and have also not brought on record the affidavit of Kartara dated 25.3.1981, tendered before the Tehsildar. The substantial questions of law are answered accordingly.

18. Consequently, there is no merit in this appeal and the same is dismissed.

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

Shri Ved Parkash .....Petitioner

Versus

Hari Parkash & others. ....Respondents.

CMPMO No. 167 of 2014
Date of Decision: 29.6.2015

Indian Evidence Act, 1872- Section 65- Secondary evidence of a settlement deed through its photo copy sought to be adduced by the defendant-application rejected by the trial court-original deed is claimed to be in possession of the plaintiff—however, no averment regarding the same was made in the written statement-It was also not asserted in the application that the person in whose possession the document was had omitted to produce it or had delayed its production-the original plaintiff has died and could not reply to the averments made in the application that original document was handed over to him -no adequate material on the record to show that the document was in possession of the deceased plaintiff—held that application for leading secondary evidence was rightly dismissed by the trial court.

(Para- 5 & 6)

For the petitioner: Mr. Ramakant Sharma, Advocate.
For the Respondents: Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The plaintiffs/respondents/non-applicants herein have instituted a Civil Suit before the learned trial Court for quashing and setting aside the order of mutation recorded/attested on the strength of a purported family settlement deed of 18.3.1999 arrived at inter-se the parties at contest, as also their predecessor-in-interest. Preceding to adduction of evidence on the material issue, on which onus was cast upon the defendant/applicant/petitioner herein, an application was instituted at the instance of defendant/applicant/petitioner herein under Section 65 of the Indian Evidence Act, for the according of permission to adduce into evidence, photocopy of settlement deed of 18.3.1999 by way of secondary mode, in substitution to its original. The reasons meted out in the application are encompassed in paragraph 4 of the application, whose contents stand extracted hereinafter:-

> *"4. That original of the family settlement deed dated 18.3.1999 and the writing dated 03.07.1998 was with Shri Mani Ram/plaintiff. The original of the writing dated 03.07.1998 was given to Shri Mani Ram on the same day of its wiring and the original of family settlement deed dated 18.03.1999 was given to him i.e. Sh. Mani Ram, after attestation of the mutation on the basis of this deed. The present plaintiffs have taken a false plea that they are not in possession of original of any of the aforesaid deeds. Such plea has been taken by them falsely and fraudulently. Thus, they are not producing the same in the Hon'ble Court."*

2. The respondents/plaintiffs in their reply had launched a vigorous contest to the application being allowed. Their contest was anvilled on an emanation in the cross-examination of the defendant/applicant of none being present at the time of the recording of attestation of mutation on the strength of the aforesaid settlement deed. Given the portrayal in the recitals in the order attesting mutation qua the defendant being present at the apposite stage, hence it is espoused that the possession of the original settlement deed remained with him. As a corollary, it is canvassed that it is now not open to the defendants/petitioners herein to contend before this Court that the copy of purported settlement deed ever remained in the possession of the plaintiffs/non-applicants, besides to contend that the possession of the original settlement deed of 18.3.1999 was ever gained or taken by the plaintiffs/non-applicants.

3. The learned trial Court while seized of the application dispelled the contention of the defendant/applicant whereas countenanced the manifestation made in the reply of the plaintiffs/non-applicants. Preponderantly the reason which prevailed upon the learned trial Court in dismissing the application was grooved in the fact of there being abysmal lack of proof qua loss of the original settlement deed, hence permission to adduce into evidence its photocopy by way of secondary evidence, being not affordable. The learned counsel for the respondents herein also contended that the defendant/applicant in his written-statement has also not contended the factum of its loss or its destruction or the original having been delivered to deceased plaintiff Mani Ram. Therefore, he contends that now when the application at hand has been instituted after the demise of Mani Ram, the defendant/applicant is estopped to aver that subsequent to the attestation of mutation on strength thereof, its possession was delivered to deceased plaintiff Mani Ram.

4. Uncontrovertedly, Mani Ram, the original plaintiff was, at the stage of institution of the Civil Suit, a party thereto, yet he died prior to the filing of the application at hand. Even though, the learned counsel for the defendant/applicant has pressed into service and has concerted to draw leverage from the provisions of Section 65(a) of the Indian Evidence Act, which stand extracted hereinafter to contend that it was not incumbent upon the defendant/applicant to prove the factum of its loss or destruction nor hence the reasons as culled out by the learned trial Court in its impugned order for dismissing the application of the defendant-applicant acquire any legal force, especially when there is a pointed averment in the apposite paragraph of the application at hand qua possession of the original of the settlement deed having been delivered to deceased Mani Ram. He has besides contended that even the contemplated condition, in Section 65(a) qua according of permission to adduce into evidence by way of secondary mode a photocopy of the settlement deed in replacement of its original, in as much, as preceding such according of permission, the defendant/applicant being enjoined to serve a notice upon the person in whose possession it is and his despite his having been served upon a notice by the applicant/defendant to produce it omits to produce it, hence facilitating affording of permission by the Court concerned to adduce photocopy thereof by way of secondary mode, also stands waned, in view of proviso (2) of Section 66 of the Indian Evidence Act which mandates that given the nature of the case, the adverse party is presumed to have knowledge that he would be required to produce it. As a corollary when with a palpable manifestation in the application at hand of the deceased Mani Ram being in possession of the original of the settlement deed, obviously he is presumed to be in the know of the fact that he would be required to produce it, as such, even the serving upon him a notice to produce it, as a pre-requisite to pave way for the application of Section 65(a) of the Indian Evidence Act, was not imperative. Even the acceptance of the above contention of the

learned counsel for the defendant/applicant would not facilitate the according of permission to him to adduce into evidence a photocopy of the original settlement deed by way of secondary mode, for the reason that the person in whose averred possession the original is being no longer alive at the time of institution of the application at hand. In face of his demise, neither any notice to produce the original could be served upon him nor in case he omitted to produce it after his having been served with a notice to produce it as contemplated in Section 65(a) of the Indian Evidence Act, the necessary permission to the defendant/applicant to adduce into evidence a photocopy of the original by way of secondary mode, was hence affordable, nor also, clause (2) of Section 66 envisaging as a pre condition to its invocation the knowledge of the adverse party qua the necessity of its production, hence relieving the defendant/applicant to serve upon him a notice to produce it as envisaged in clause (a) of Section 65 of the Indian Evidence Act, can obviously be of no avail to the defendant/applicant, as the presumption as enshrined in clause (2) of Section 66 of Indian Evidence Act, hence relieving the rigor of clause (a) of section 65 besides of the substantive part of section 66 of Indian Evidence Act is both arouse-able as well as invokable, only in the event of the party in possession of the original document being alive at the time of institution of the application at hand. However, given the factum that Mani Ram in whose averred possession the original of the purported settlement deed was, being dead at the time of institution of the application, consequently, neither in terms of clause (a) of Section 65 of Act, any notice could be served upon him to produce it, besides on his omission to produce it despite notice, no permission to adduce into evidence photocopy of the original by way of secondary mode was affordable nor also clause (2) of Section 66 of the Indian Evidence Act in relaxation of the rigor of substantive provisions of section 66 of the Indian Evidence Act gives any succor to the defendant/applicant to contend with any force or vigour before this Court especially when the person pointedly averred to be in possession of the original, at the time of institution of the application at hand was dead, hence was in the know of the fact that he would be required to produce it. Reiteratedly, the factum of the demise of Mani Ram at the time of institution of the application at hand deprives the defendant/applicant to canvass with any empowerment before this Court that either clause (a) to Section 65 of the Indian evidence Act or clause (2) of Section 66 of the Indian Evidence Act are invokable at his instance. Consequently, the reasons as prevailed upon the learned trial Court in dismissing the application are embedded in the factum of the inability of the defendant-applicant to prove the loss or destruction of the original cannot stand displacement.

> "*65(a) When the original is shown or appears to be in the possession or power-*
>
> *Of the person against whom the document is sought to be proved, or*
>
> *Of any person out of reach of or not subject to, the process of the Court, of*
>
> *Of any person legally bound to produce it*
>
> *And when, after the notice mentioned in Section 66 , such person does not produce it;"*
>
> *"66(2) When, from the nature of the case, the adverse party must know that he will be required to produce it;"*

5. The learned counsel for the petitioner/applicant has also proceeded to contend that the alternative condition in clause (c) of Section 65 of Indian Evidence Act, contemplating the fact that when for reasons other that the original being omitted to be proved to be lost or destroyed, photocopy of the same can be permitted to be adduced, which legislative contemplated condition is constituted in the event of production of the original being not possible and the impossibility of its production not arising on account of any default or neglect on the part of the petitioner herein, hence debarring him to produce it within a reasonable time. However, when Mani Ram to whom the possession of the original was delivered was dead at the time of institution of the application, and who hence had no opportunity to repudiate the factum recited in the application at hand of his being possession of the original settlement deed or its being in his possession or power nor also when the defendant/applicant in his written-statement had averred that the original of the settlement deed was hence in possession of or in the power of Mani Ram. In sequel when the factum of the deceased Mani Ram being in possession or power of the original has remained not substantially established, the defendant/applicant is de-facilitated, to contend that given the possession of the original with deceased Mani Ram at any stage its non-production at the instance of the defendant/applicant does not arise on account of his default or neglect. As such, consequently when no permission hence can be accorded to him to adduce by way of secondary mode a photocopy thereof besides when it is not averred in the application that the person in whose possession it is, omitted to produce it or delayed its production hence to preclude a procrastinated prolongation of adduction of complete evidence at the instance of the defendant/applicant on whom the onus of proving the material issue was cast, he then may be permitted to adduce by way of secondary mode, in substitution to the original, a photocopy thereof. However, when the aforesaid parameters are neither enshrined nor existed in the application at hand, nor when there is adequate proof of Mani Ram since dead in whose purported possession the original settlement deed was, nor also when there is substantial material portraying the factum of his having ever delayed its production hence forestalling the adduction of evidence at the instance of the defendant/applicant on the material issue on which onus was cast upon him, therefore to preempt a prolongation of the exercise of adduction of evidence, a photocopy of the original by way of secondary mode, being permitted to be adduced into evidence at the instance of the defendant/applicant, was affordable. In sequel then, it has to be concluded that neither when deceased Mani Ram is proved to be in possession or in power of the original, as such, the default in the non-production of the original cannot said to be arising at his instance nor it can also be said that the deceased Mani Ram hence omitted to produce it within a reasonable time, hence to preempt a procrastinated prolongation of adduction of evidence, at the instance of defendant/applicant, permission to adduce it by way of secondary mode, is imperative.

6. In aftermath, the contention as advanced before this Court by the learned counsel for the plaintiffs/respondents is countenanced as well as accepted. Moreover, the reasons as afforded by the learned trial Court in dismissing the application at hand also stand vindication. Therefore the impugned order is not ridden with any taint or vice of it being ingrained with any misdemeanor. The petition is dismissed, as also, the pending applications, if any. The parties through their counsel are directed to appear before the learned trial Court on 7th August, 2015. Records be sent back.

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

Lalit Kumar Vaidya. ...Non-applicant.

Versus

State of H.P. ...Respondent.

and

Rajender Singh. ...Applicant.

Cr.M.P.(M) No. 392 of 2014
Decided on: 30.6.2015

Code of Criminal Procedure, 1973- Section 439- Non-applicant was granted bail- applicant filed an application for cancellation of the bail granted to the non-applicant- the police reported that non-applicant had not violated any condition, therefore, the bail granted to the non-applicant cannot be cancelled- petition dismissed. (Para 2 to 4)

Case referred:
Abdul Basit alias Raju and others vs. Mohd. Abdul Kadir Chaudhary and another, (2014) 10 SCC 754

For the Petitioner: Ms. Ambika Kotwal, Advocate for the applicant.
Mr. Peeyush Verma, Advocate for the non-applicant.
Mr. Parmod Thakur, Addl. A.G. with Mr. M.A. Khan, Addl. A.G., Mr. Neeraj K. Sharma
Dy. A.G. and Mr. Ramesh Thakur, Asstt. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge:

The non-applicant was granted bail in Cr.M.P. (M) No. 175 of 2014 vide order dated 18.2.2014 on the following conditions:

> **"(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application.**
>
> **(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;**
>
> **(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police officer; and**
>
> **(d) He shall not leave the territory of India without the prior permission of the Court."**

2. The applicant has filed the present application for cancellation of the bail granted to the non-applicant on 18.2.2014. According to the averments made in the reply to the present application, non-applicant has pleaded that he has not violated any of the terms

and conditions of the bail order dated 18.2.2014. The Superintendents of Police, Shimla and Mandi were directed to conduct inquiry and submit the report to the Court whether the accused has violated terms and conditions of bail order dated 18.2.2014. The Superintendent of Police, Mandi in his report has specifically stated that non-applicant has not violated any of the terms and conditions imposed against him. The Superintendent of Police, Shimla has stated that Kalandra has been prepared under section 107 and 150 of the Code of Criminal Procedure. It was submitted to the Sub Divisional Magistrate (Urban), Shimla on 16.4.2014. The Sub Divisional Magistrate has returned the same with the observation to submit the same before the court of concerned Sub Divisional Magistrate in Mandi District as both the parties permanently reside in Mandi. However, S.H.O., Police Station, Sadar Shimla has requested the court of Sub Divisional Magistrate (Urban) Shimla vide letter dated 7.7.2014 to try the same. The principles of grant of bail and cancellation of bail are different.

3. Their Lordships of the Hon'ble Supreme Court in ***Abdul Basit alias Raju and others*** vs. ***Mohd. Abdul Kadir Chaudhary and another,*** (2014) 10 SCC 754 have spelt out the following grounds for cancellation of bail:

> **"[14]. Under Chapter XXXIII, Section 439(1) empowers the High Court as well as the Court of Session to direct any accused person to be released on bail. Section 439(2) empowers the High Court to direct any person who has been released on bail under Chapter XXXIII of the Code be arrested and committed to custody, i.e., the power to cancel the bail granted to an accused person. Generally the grounds for cancellation of bail, broadly, are, (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. Where bail has been granted under the proviso to Section 167(2) for the default of the prosecution in not completing the investigation in sixty days after the defect is cured by the filing of a charge sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. However, in the last mentioned case, one would expect very strong grounds indeed. Raghubir Singh and Ors. etc. v. State of Bihar, 1987 CrLJ 157.**

4. In the case in hand, the applicant has not made out any case that the non-applicant has violated the terms and conditions imposed upon him while granting bail on 18.2.2014.

5. Accordingly, there is no merit in the present application and the same is dismissed. No costs.

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

RSA No. 228 of 2002 alongwith RSA No. 490/2002
Reserved on: 1.6.2015
Decided on: 1.7.2015

1. **RSA No. 228 of 2002**

Jagdish Chand and others. ...Appellants.

Versus

Amar Singh and others. ...Respondents.

2. **RSA No. 400 of 2002**

State of Himachal Pradesh. ...Appellant.

Versus

Jagdish Chand and others. ...Respondents.

Specific Relief Act, 1963- Section 38- Plaintiffs pleaded that they had Bartandari rights - defendant No.1 had sold his ownership rights- suit land was Banjar Kadim in the shape of 'Charand' in which plaintiffs and other Tikadarans have Bartandari rights- defendants were interfering with those rights- hence, injunction was sought -Wajib-ul-arz and the order of the Financial Commissioner also recognised the rights of Bartandari- land was Shamlat – entry of the Banjar Kadim had been made and defendants could not have acquired proprietary rights over Banjar Kadim land- land vested in the Punjab Govt. and the defendants could not have purchased the same in the year 1968 nor any rights could have been granted to him in respect of shamlat land. (Para-23 to 40)

Cases referred:

Rattan Singh and another vs. The Commissioner, Ambala Division and others, 1993 PLJ 667

Raja Rajinder Chand vs. Mst. Sukhi and others, AIR 1957 SC 286

State of Punjab vs. M/s Vishkarma and Co. and others, 1993 Sup (3) SCC 62

Shish Ram and others vs. State of Haryana and others, (2000) 6 SCC 84

State of H.P. vs. Tarsem Singh and others, (2001) 8 SCC 104

Ramkanya Bai and another vs. Jagdish and others, (2011) 7 SCC 452

Sarjeet Singh (Dead) through Legal representatives vs. Hari Singh and others, (2015) 1 SCC 760

(RSA No.228/2002)

For the Appellants : Mr. Bhupender Gupta, Sr. Advocate with Mr. Ajit Jaswal, Advocate.

Mr. Sameer Thakur, Advocate vice Mr. O.P. Thakur, Advocate for respondents No. 1 to 3.

Mr. Parmod Thakur, Addl. A.G. for respondent No.5.

(RSA No. 490/2002)

Mr. Parmod Thakur, Addl. A.G. for the Appellant-State.

Mr. Bhupender Gupta, Sr. Advocate with Mr. Ajit Jaswal, Advocate for respondents No. 1, 6 to 12.

Mr. Sameer Thakur, Advocate vice Mr. O.P. Thakur, Advocate for respondent Nos. 3 to 5.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Since both the Regular Second Appeals are directed against the common judgment and decree dated 18.4.2002 rendered by the District Judge, Hamirpur in Civil Appeal Nos. 134/1993 and 151/1993, the same were taken up together and are being disposed of by a common judgment.

2. "Key facts" necessary for the adjudication of this appeal are that the legal heirs of plaintiff-respondent Jalha Ram (herein after referred to as 'plaintiff' for convenience sake) instituted a Civil Suit No. 68/1979 against the appellants-defendants and respondent No.4 Tikka Maheshwar Chand for permanent injunction and mandatory injunction in the representative capacity with the averments that the land entered in Khata No.1 min, Khatauni Nos. 7 and 8, Khasra Nos. 751/591 min, 617, 751/591 min measuring 14 kanals and Khata No.91, Khatauni No.111, Khasra Nos. 752/591 and 754/591 measuring 12 Kanals total area of both the khatas measuring 26 kanals, situated in Tikka Jhalan, Mauza Hathol, Tehsil and District Hamirpur, as per jambandi for the year 1970-71 is recorded in the ownership of the defendants and Bartandari rights of the plaintiff and other ***Tikadarans*** of the proprietary body of the Tika Jhalan as per letter No. 1353 dated 11.3.1897 in the remarks column. The suit land was owned by Maheshwar Chand, originally arrayed as defendant No.1 and his ancestors since long and was subject to the ***Bartandari*** rights of the plaintiff and other ***Tikadarans***. Defendant No.1 has sold his ownership rights to appellants-defendants and Jagdish Chand, predecessor-in-interest of defendant Nos. 2 to 8 Paras Ram. The suit land was ***Banjar Kadim*** in the shape of '***Charand'*** in which plaintiff and other ***Tikadarans*** have Bartandari rights of grazing, sandh bihag, extracting land and stones, cutting bushes etc. and burying children and their animals and other rights subservient to it. Defendants No.2 to 9, appellant Jagdish Chand and legal heirs of Paras Ram were unnecessarily interfering in the ***Bartandari*** rights of the plaintiff and other ***Tikadarans***.

3. Defendant No.2, namely, Jagdish Chand and legal heirs of Paras Ram filed their separate written statements. According to them, they have enclosed the suit property for the last 20 years and have also constructed houses. The plaintiff and other ***Tikadarans*** were neither exercising nor allowed to exercise alleged ***Bartandari*** rights over the suit land. The alleged ***Bartandari*** rights were never exercised on the spot over the suit land for over 12 years. The suit land was also under cultivation for more than 12 years.

4. The State of Himachal Pradesh was also ordered to be added as defendant No.10 vide judgment dated 31.5.1985. State Government has also filed written statement. According to the averments contained in the written statement, now under the H.P. Village Common Lands Vesting and Utilization Act, 1974, the land in question was vested in the State of H.P. free from all encumbrances and the rights of ***Tikkadarans*** including plaintiff and defendants No.1 to 9 were put to an end.

5. Separate replications were filed. Issues were framed by the learned Sub Judge 1st Class (II), Hamirpur on 23.12.1980. The suit was decreed on 31.1.1984. Defendant Jagdish Chand and legal heirs of Paras Ram filed an appeal before the District

Judge, Hamirpur. The judgment and decree of the trial court dated 31.1.1984 was set aside by the learned District Judge on 31.5.1985 and the case was remanded back and the plaintiff was permitted to file amended plaint after adding Collector, Hamirpur as defendant No.10. Learned Sub Judge 1st Class (II), Hamirpur framed additional issues on 21.2.1986, including "***Whether the land in suit has been legally vested in the State of H.P***." Learned Sub Judge 1st Class dismissed the suit on 28.4.1986. Plaintiff Jalha Ram instituted an appeal against the judgment dated 28.4.1986. Learned District Judge allowed the appeal on 7.6.1993 and remanded the matter back to the trial court for deciding the suit afresh. The trial court decreed the suit on 19.8.1993. Defendant Jagdish Chand, legal heirs of original plaintiff Jahla Ram and the State of H.P. instituted appeals against the judgment and decree dated 19.8.1993 by way of Civil Appeal Nos. 134/1993, 145/1993 and 151/1993. Learned District Judge on 18.4.2000 allowed Civil Appeal No. 145 of 1993 and the suit was decreed as a whole and the defendants were restrained from causing interference in the ***Bartandari*** rights of the plaintiff and other ***Tikadarans*** over the entire suit land. The appeal filed by defendant No.2 Jagdish Chand and connected appeal No. 151/1993 filed by the State of H.P. were dismissed. Hence, the present Regular Second Appeals. The appeal filed by Jagdish Chand and legal heirs of Paras Ram challenged the judgment and decree dated 18.4.2002 in Civil Appeal No. 134/1993 and the State of H.P. challenged the judgment and decree dated 18.4.2002 in Civil Appeal No. 151/1993. RSA No. 228/2002 was admitted on 16.8.2002 on the following substantial questions of law:

1. **"Whether the first appellate Court had no jurisdiction to go into the question of validity of the conferment of the proprietary rights qua a part of the suit land particularly in the absence of the persons on whom such proprietary rights were conferred, namely, S/Sh. Raj Kumar and Shiv Dutt. If so, its effect?**
2. **Whether the judgment and decree of the first appellate Court is perverse, and against the settled position of law that the land which vests in the State under the H.P. Village Common Land (Vesting & Utilization) Act, vests free from all encumbrances?**
3. **Whether theCivil Courts had no jurisdiction to try the suit?**
4. **Whether the suit was precluded under Order 9 Rule 9 of the Code of Civil Procedure?"**

6. RSA No. 490/2002 was also admitted on the substantial questions of law, on which RSA No. 228/2002 was admitted since both the appeals had arisen from the same judgment and decree. RSA No.490/2002 was connected with RSA No. 228 of 2002 on 12.11.2002.

7. Mr. Bhupender Gupta, learned Senior Advocate, on the basis of the substantial questions of law has vehemently argued that both the courts below have not properly construed oral as well as documentary evidence. He then contended that the Civil Court had no jurisdiction to try the suit.

8. Mr. Parmod Thakur, learned Additional Advocate General has vehemently argued that the property has vested in the State of Himachal Pradesh free from all encumbrances under section 3 of the Himachal Pradesh Village Common Lands Vested and Utilization Act, 1974.

9. Mr. Sameer Thakur has supported the judgment and decree dated 18.4.2002.

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

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

12. This case, as noticed hereinabove, has chequered history. The suit filed by the plaintiff was decreed on 31.1.1984. It was remanded back. The trial court dismissed the suit. It was again remanded back on 7.6.1993. The trial court has partly decreed the suit on 19.8.1993 and the first appellate court has decreed the suit in its entirety on 18.4.2002.

13. According to PW-1 Jahla Ram, the suit land was owned by Raja Nadaun. The residents have rights to burry their dead animals and to use the land for answering the call of nature. These ***Bartandari*** rights were in existence since their ancestors.

14. PW-2 Hans Raj and PW-3 Sunder Singh have corroborated the statement of PW-1 Jahla Ram.

15. DW-1 Jagdish Chand has deposed that he has purchased the land from Raja Sahib in the year 1968. The sale deed was duly registered. Mutation was also attested in his favour. He has enclosed the suit land. He has cultivated the part of the suit land. In his cross-examination, he has deposed that the mutation might have been attested in the year 1968. He did not know the total sale consideration he paid at the time of buying the land. He did not know about the nature of the land. He could not produce the sale deed.

16. DW-2 Dalip Chand has deposed that the land was owned by Jagdish for the last 15-16 years. He has fenced the land. He has admitted in his cross-examination that the residents of the area used to have ***Bartandari*** rights when Raja was owner of the land.

17. DW-3 Om Parkash has deposed that the portion of the land was cultivable and the remaining was ***Banjar***. However, in his cross-examination, he has deposed that in Jamabandi the suit land is entered as ***Banjar Kadim***.

18. In rebuttal, plaintiff has examined Lakha Ram. PW-4 Lakha Ram has deposed that the residents have ***Bartandari*** rights over the suit land. The land never came in possession of the defendants. It was ***Banjar***.

19. PW-5 Rangil Singh has also deposed that neither Jagdish nor Paras Ram became owner of the land. Residents have every right over the suit land.

20. Plaintiff also examined three more additional witnesses, i.e. Gian Singh, Jagdish Chand and Dharam Singh. PW-1 Gian Singh has deposed that the villagers have ***Bartandari*** rights over the suit land. The land was ***Banjar***. PW-2 Jagdish Chand has deposed that the land was previously owned by Raja Nadaun. The villagers have ***Bartandari*** rights over the suit land. PW-3 Dharam Singh has testified that the land was ***Shamlat***. The villagers were having their ***Bartandari*** rights over the same. PW-4 Jahla Ram has also deposed that all the villagers have ***Bartandari*** rights over the suit land. The land in question was ***Shamlat***.

21. DW-1 Jagdish Chand has again reiterated that he has purchased the portion of the land and also taken the land on lease. He used to pay rent @ Rs 2/- and @ Rs.1.50 paisa. He has tendered the receipts in earlier litigation.

22. DW-2 Sikander Singh has deposed that he has seen the ***Shamlat*** land.

23. The plaintiff has proved Ex.P-1 and P-2, copies of Jamabandi for the year 1970-71, Ex.P-3 copy of Wazib-Ul-Aarj, Ex.P-4 list of ***Tikadarans***, Ex.P-5 copy of Jamabandi for the year 1960-61, Ex.P-6 copy of Jamabandi for the year 1944-45, Ex.P-7 copy of Jamabandi for the year 1970-71, Ex.P-8 copy of Jamabandi for the year 1977-78, Ex.P-9 copy of Jamabandi for the year 1965-66, Ex.P-10 and P-11 copies of Jamabandi for the year 1977-78 and Ex.P-12 copy of Jamabandi for the year 1982-83. Defendants have proved copies of Jamabandi, pedigree table and Khasra Girdwari Ex.D-1 to Ex.D-28 alongwith copies of mutations.

24. According to appellant Jagdish Chand, he has purchased the portion of the suit land in the year 1968 and he was also tenant over the suit land and has paid rent @ Rs. 2/- and @ Rs. 1.50 paisa. It is evident from the Jamabandi starting from 1910-1911 till 1968-69 that there is a reference to order passed by the Financial Commissioner dated 11.3.1897 whereby rights of ***Bartandars*** were protected. It is only in the year 1970-71 that the entries were changed whereby defendant Jagdish Chand and predecessor-in-interest of Paras were shown as owners. In these entries also, there is a reference to order of the Financial Commissioner to protect the rights of ***Bartandars***. According to Wazib-ul-arz Ex.P-3 ***Bartandarans*** have common rights over the suit land. The list of ***Bartandarans*** is Ex.P-4. The witnesses of the plaintiffs have also admitted that it was ***Shamlat*** land and was used as such. It is also clear from the entries, as noticed hereinabove, that the land was ***Shamlat*** though entry of ***Banjar Kadim*** has been made. The plaintiffs and other similarly situate persons could exercise their ***Bartandari*** rights if the land was ***Shamlat*** and not otherwise. Jagdish Chand has specifically deposed that he has purchased the land in the year 1968, but he could not produce the sale deed.

25. Now, as far as the conferment of proprietary rights is concerned, there is no order on the basis of which entries in Jamabandi were made conferring the proprietary rights upon Jagdish Chand and others. PW-1 Gian Singh and PW-3 Dharam Singh have admitted that the suit land was ***Shamlat***. The part of the suit land was mutated in favour of the State as owner. The land was used for common purposes by villagers. Moreover, the defendants could not acquire proprietary rights since it was a ***Banjar Kadim*** land. Thus, there was no cultivation on the land.

26. The Punjab Village Common Lands (Regulation) Act, 1953 was repealed by the Punjab Village Common Lands (Regulation) Act, 1961 whereby the ***Shamlat*** lands were vested in the Punjab for the benefits of inhabitants. Sub-section (g) of section 2 defines the ***Shamilat*** land as under:

> **"Shamilat deh" includes-**
>
> **(1) lands described in the revenue records as shamilat deh excluding abodi deh;**
>
> **(2) shamilat tikkas;**
>
> **(3) lands described in the revenue records as shamilat, tarafs, pattis, pannas and tholas and used according to revenue records for the benefit**

of the village community or a part thereof or for common purposes of the village;

(4) lands used or reserved for the benefit of village community including streets, lones, playgrounds, schools, drinking wells, or ponds within abadi deh or gorah deh; and

(5) lands in any village described as banjar qadim and used for common purposes of the village according to revenue Records"

27. Section 3 of the Act defines the lands to which the Act applied. It is evident from sub-clause (3) of clause (g) of section 2 that the land described in the revenue records as *Shamlat, tarafs, patties, pannas and tholas* and used according to revenue records for the benefit of the village community or a part thereof or for common purposes of the village was included in the definition of ***Shamlat deh***. It is also evident from section 2 (g) (5) that of the Punjab Village Common Lands (Regulation) Act that the land in any village described as ***Banjar Kadim*** and used for common purposes of the village according to revenue records would also falls within the expression of "***Shamlat***". The rights of the villagers have been protected by the Financial Commissioner as per letter No. 1353 dated 11.3.1897. These lands vested in the State of Himachal Pradesh after the enforcement of the Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974. It was also made clear that the land to which the Punjab Act was applicable, it would be deemed to be vested with the State of Himachal Pradesh. Thus, the ***Shamlat*** land was required to be vested initially in the Punjab as per the Punjab Village Commons Lands (Regulation) Act, 1961 and thereafter in the State of H.P. free from all encumbrances. The area in question was part of the Punjab and after the Punjab Reorganization Act, 1966 has merged with the State of Himachal Pradesh.

28. Learned Single Judge of Punjab and Haryana High Court in ***Rattan Singh and another*** vs. ***The Commissioner, Ambala Division and others***, 1993 PLJ 667 has held that the land described as ***Banjar Kadim*** will fall in the definition of ***Shamalat*** land. Learned Single Judge has also held that even if the entries in the ***Wajib-ul-arz*** are not repeated in later settlement, evidentiary value of entries remain the same. Learned Single Judge has held as under:

"**4. Learned counsel for the petitioners contended that the land in dispute was not Shamlat Deh as defined in Section 2 (g) (5) of the Act. According to the learned counsel, the land was never used for common purpose of the village as per the revenue record and the same was in possession of the village as per the revenue record and the same was in possession of the petitioners on January 9, 1954. It could only vest in the Gram Panchayat if the same was being used for the benefit of the village community according to the revenue record. The entry 'Makbuja Malkan' appearing in the Jamabandi for the year 1954-55 did not mean that it was being used for the common purposes of the village. The land was Banjar Qadim on January 9, 1954 and was owned and possessed by the Biswedars of Panna Bhuchan. He counsel in support of his submission, placed strong reliance on Gram Panchayat Sadhraur (Foermerly Dhumma) and Gram Sabha Sadhraur v. Baldev Singh and others, 1977 PLJ 276 (Full Bench) and Des Raj and another v. The Gram Sabha of Village Ladhot and another, 1981 PLJ 300.**

6. Section 2 (g) (5) of the Act reads as under: -

"2(g) 'Shamlat Deh' includes –

(5) lands in any village described as banjar qadim and used for common purposes of the village according to revenue records:"

On the relevant date, viz. January 9, 1954, the land in dispute was described in the revenue record as 'Banjar Qadim Makbuja Malkan", The user of the land was not recorded in the Jamabandi for the year 1953-54. It has been found, as already noticed that the land was not in the cultivating possession of co-sharers on the relevant date. It was recorded as Banjar Qadim in possession of the Malkan. The fact that the land was brought under cultivation by the co-sharers after January 9, 1954 would not in any way help them as this act of theirs cannot take away the land out o the definition of Shamilat Deh. The provisions of Section 2 (g)(5) reproduced above are couched in clear language. The land described as Banjar Qadim and used for the common purposes of the village will fall in the definition of Shamilat Deh.

8. It has been held in Jati and others v. Gram Panchayat Bichhpari 1979 PLJ 595, that Sharat Wajib-ul-arz is a part of record of rights and a Revenue Act and even if the entrie in the Wajib-ul-ar are not repeated in the later Settlement, its evidentiary value remains the same. A reading of the entry in the Wajib-ul-arz reproduced above in the contenxt of this case clearly shows that the land in dispute which was recorded as Banjar Qadim Makbuza Malkan, was being used by the village community for common purposes i.e. for grazing the cattle. The cattle of the proprietors and the non-proprietors had thus a right to graze in the land. User of the land for common purposes, though not recorded in the Jamabandi for the year 1953-54 yet the entry in the Wajib-ul-arz would continue to show that the land was being used for common purposes of the village unless this entry was later altered. It was so done somewhere in the year 1963, but that would not make any difference, the relevant date, being Janaury 9, 1954. The land thus in my view has rightly been held to fall in the definition of Shamilat Deh."

29. In the instant case, in Ex.P-3 copy of Wajib-ul-arz, as noticed hereinabove, the land was reserved for the village community, i.e. grazing of cattle, burying of dead animal etc.

30. The first appellate court has come to a wrong conclusion that the suit land was entered in the revenue record as ***Banjar Kadim*** and it would not vests in the State of H.P. free from all encumbrances. The land was always ***Shamlat***. However, the findings recorded by the first appellate court that the defendants have failed to prove that they have become tenants are affirmed. The entries made in Jamabandi for the year 1970-71 in favour of defendants were abrupt/stray and were without any order passed by any competent authority. Even according to Wazib-ul-arz, as noticed hereinabove, ***Bartandars*** have common right over the suit land.

31. Their Lordships of the Hon'ble Supreme in ***Raja Rajinder Chand*** vs. ***Mst. Sukhi and others***, AIR 1957 SC 286 have held that the Wajib-ul-arz, though it does not create a title, gives rise to a presumption in its support which prevails unless the presumption is promptly displaced. Their Lordships have held as under:

"[19] It is not disputed that under S. 31 of the Punjab Land- Revenue Act, 1887, Wajib-ul-arz is a part of the record-of-rights, and entries made therein in accordance with law and the provision, of Ch. IV of the Act and the rules thereunder, shall be presumed to be true (vide S. 44). The Wajib-ul-arz or village administration paper is a record of existing customs regarding rights and liabilities in the estate; it is not to be used for the creation of new rights or liabilities. (see para.295 of the Punjab Settlement Manual, pp.146-147, 1930 ed.). In appendix VIII of the Settlement Manual, Section E, are contained instructions with regard to the Wajib-ul-arz and instruction No. 2 states:

"The statement shall not contain entries relating to matters regulated by law, nor shall customs contrary to justice, equity or good, conscience, or which have been declared to be void by any competent authority, be entered in it. Subject to these restrictions, the statement should contain information on so many of the following matters as are pertinent to the estate:

.....

(h) The rights of cultivators of all classes not expressly provided for by law (for instance, rights to trees or manure, and the right to plant trees) and their customary liabilities other than rent.

.....

(j) The rights of government to any nazul property, forests, unclaimed, unoccupied, deserted, or waste lands, quarries, ruins or objects of antiquarian interest, spontaneous products, and other accessory interest in land included within the boundaries of the estate.

.....

(l) Any other important usage affecting the rights of landowners, cultivators or other persons interested in the estate, not being a usage relating to succession and transfer of landed property"

[20] In the cases before us, the appellant did not base his claim on custom, though referring to his right he said in his plaint - 'this has been the practice throughout'. What he really meant by 'practice' was the land system prevailing under the old independent Katoch rulers. We have already held that the appellant did not get the sovereign right of the independent Katoch rulers; nor did the grant made in 1842 gave him any right to the royal trees. The entry in the Wajib-ul-arz of 1892-93 (Ex. P-5) is not really in his favour, it states that trees of every kind shall be considered to be the property of the owners (adna maliks), but the owners shall have no right to pine trees; for this last part of the entry which is somewhat contradictory of the earlier part, a reference is made to pare. 78 of Anderson's Forest Settlement Report as authority for it. That paragraph, however, stated in clear terms - 'No orders have begin passed by me in regard to trees on fields, as the present enquiry extended only to the waste land'. it is obvious that the entry in the Wajib-ul-arz of 1892- 93 went much beyond what was stated in para. 78 of Mr. Andersons' report, and so far as the right to pine trees on proprietary and cultivated lands was concerned, the statement made a confusion between Government jungle, recently reclaimed land and

proprietary land. On its own showing, the entry was not the statement of an existing custom, because it referred to para.78 of the Forest Settlement Report; far less did it show any surrender or relinquishment of a sovereign right by Government in favour of the Raja. Indeed, it is difficult to understand how the surrender or relinquishment of such a right can be the subject of a village custom or can be within the scope of an entry in the Wajib-ul-arz. The original grant in favour of Raja Jodhbir Chand was by means of a Sanad, and one would expect any additional grant or surrender to be embodied in a similar document. At any rate, if the intention of government was to surrender a sovereign right in favour of the Raja, one would expect such intention to be expressed in unambiguous language. In Khalsa villages, Government did surrender their right to trees on Shamilat lands of adna-maliks on the authority of letter No. 347 of January 6, 1867. Taking the most favourable view for the appellant, the entries in the Wajib-ul-arz in these cases can be said to express the views of certain revenue authorities as to the rights of the Raja or the intention of Government; but the views of the revenue authorities as to the effect or construction of a grant or the intention of government in respect of a grant, do not conclude the matter or bind the civil Courts. (See Rajah Venkata Narasimha Appa Row v. Rajah Narayya Appa Row, 7 Ind App 38 (PC) (B)).

[22] A large number of decisions in which entries of the Wajib-ul-arz of the Riwaji-i-am and the value to be given to them were considered, have been cited before us. In some of them, entries in the Wajib-ul-arz were accepted as correct and in others they were not so accepted, notwithstanding the statutory presumption attaching to the entries under S. 44 of the Punjab Land Revenue Act, 1887. We do not think that any useful purpose will be served by examining those decisions in detail. The legal position is clear enough. As was observed by the Privy Council in Dakas Khan v. Ghulam Kasim Khan, AIR 1918 PC 4 (C), the Wajib-ul-arz, though it does not create a title, gives rise to a presumption in its support which prevails unless the presumption is properly displaced. It is also true that the Wajib-ul-arz being part of a revenue record is of greater authority than a Riwaji-i-am which is of general application and which is not drawn up in respect of individual villages, Gurbakhsh Singh v. Mst. Partapo, ILR 2 Lah 346 : (AIR 1922 Lah 234) (D). Whether the statutory presumption attaching to any entry in the Wajib-ul-arz has been properly displaced or not must depend on the facts of each case. In the cases under our consideration, we hold ,for the reasons already given by us, that the entries in the Wajib-ul-arz with regard to the right of the Raja in respect of chil trees standing on cultivated and proprietary lands of the adna-maliks, do not and cannot show any existing custom of the village, the right being a sovereign right; nor do they show in unambiguous terms that the sovereign right was surrendered or relinquished in favour of the Raja. In our view, it would be an unwarranted stretching of the presumption to hold that the entries in the Wajib-ul-arz make out a grant of a sovereign right in favour of the Raja; to do so would be to hold that the Wajib-ul-arz creates a title in favour of the Raja which it obviously cannot."

32. Their Lordships of the Hon'ble Supreme Court in ***State of Punjab*** vs. ***M/s Vishkarma and Co. and others***, 1993 Sup (3) SCC 62 have held that Wajib-ul-arz is a document included in the record of rights cannot be disputed since it contains the statements on matters envisaged under clauses (a) and (b) of sub-section (2) of section 31 of the Punjab Land Revenue Act, 1887. Their Lordships have held as under:

> **"[7] Brick-earth with which we are concerned in the present appeals, is a minor mineral was not disputed, although it is not any of the mines or minerals covered by Section 41 of the Revenue Act as would make itbecome the property of the State. If the owner of such brick-earth is the State of Punjab, liability to pay royalty for removal of such brick-earth and to obtain permit or licence for such removal, necessarily arises because of the operation of the Act and the Rules. But the courts below have concurrently found that the brick-earth concerned in the suits out of which the present appeals have arisen was in lands which formed the estates of the private owners and as such the same belonged to such landowners. It is so found on their reading of the entries in Wajib-ul-arz pertaining to the concerned estates. That Wajib-ul-arz is a document included in the record-of-rights cannot be disputed since it contains the statements on matters envisaged under clauses (a) and (b) of Ss. (2 of Section 31 of the Act. According to the courts below Wajib-ul-arz document being record-of-rights of estates completed after November 18, 1871, and there being nothing expressly stated in them that the forest or quarry or land or interest in the estates belong to the government, the lands in such estates including brick-earth in them shall be presumed to belong to the concerned landowners as is declared in Ss. (2 of Section 42 of the Revenue Act."**

33. Their Lordships of the Hon'ble Supreme Court in ***Shish Ram and others*** vs. ***State of Haryana and others***, (2000) 6 SCC 84 have held that the definition of Shamilat deh provides that it shall include "lands described in the revenue record as Shamilat deh or (Charand in Haryana) excluding abadi deh". Their Lordships have held as under:

> **"[7] Learned counsel for the appellants then tried to make a distinction between the charand land and the shamilat deh. In support of his contentions he referred to Annexures I and II wherein the land, the subject matter of the dispute has been defined to be charand land. The definition of shamilat deh provides that it shall include "lands described in the revenue record as shamilat deh or (charand-in Haryana) excluding abadi deh". Relying upon the Khushi Puri's case (1978 Pun LJ 78) the High Court in the impugned judgment was, therefore, right in holding that there did not exist any distinction between the charand and shamilat deh and the contention of the appellants that the charand could not vest with the Gram Panchayat under the Act was based upon wrong assumptions."**

34. Their Lordships of the Hon'ble Supreme Court in ***State of H.P.*** vs. ***Tarsem Singh and others***, (2001) 8 SCC 104 while interpreting section 3 of the H.P. Village Common Lands Vesting and Utilization Act, 1973 have held that consequences of vesting of right in the land free from all encumbrances is that the interest, right and title to the land including the easementary right stood extinguished and such rights vested in the State free

from all encumbrances. Contention that easementary rights being over the land rather than "in" the land would not vest in the State was expressly rejected. Their Lordships have held as under:

> **"[9] In the present case, S.3 of the Act starts with a non obstante clause. Notwithstanding contained in any law, agreement, instrument, custom or usage or any decree of the Court, all rights, title and interests in the land shall stand extinguished and all such rights, title and interest shall vest in the State free from all encumbrances. If we accept the argument of learned counsel for the respondents that easementary right being over the land and the same has not vested in the State under S.3 of the Act, the result would be that the land would carry burden or charge affecting possession, interests and rights in the land. Such a meaning cannot be given to the expression 'free from encumbrances.' When the legislature has used the expression 'free from encumbrances,' it means the vesting of land in the State is without any burden or charge on the land, including that of easementary right. We are, therefore, of the view that the consequence of vesting of right in the land free from all encumbrances is that the interest, right and title to the land including the easementary right stood extinguished and such rights vested in the State free from all encumbrances.**

35. Their Lordships of the Hon'ble Supreme Court in ***Ramkanya Bai and another*** vs. ***Jagdish and others***, (2011) 7 SCC 452 have held that Wajib-ul-arz is the record of customs in a village in regard to (i) easements including the right to irrigation and right of way; and (ii) the right to fishing in privately owned/held lands and water bodies. Their Lordships have further held that customary easements are the most difficult to prove among easements. Their Lordships have held as under:

> **"13. It is thus clear that what could be decided under section 131 of the Code is a dispute relating to a claim for a customary easement over a private land, relating to a right of way or right to take water, which is not recognized and recorded as a customary easement in the village Wajib-ul-arz.**
>
> **30. Wajib-ul-arz is thus the record of customs in a village in regard to (i) easements (including the right to irrigation and right of way); and (ii) the right to fishing in privately owned/held lands and water bodies. The entries therein could be modified in the manner provided in sub-section (5) of section 242 of the Code. Though the Code provides for maintaining a record of all customary easements imposed upon privately held lands and water bodies, significantly the Code does not provide the remedies available in the event of disturbance or interference with such easements recorded in Wajib- ul-arz, as the remedy is only way of a suit before the civil court.**
>
> **31. Customary easements are the most difficult to prove among easements. To establish a custom, the plaintiff will have to show that**
>
> **(a) the usage is ancient or from time immemorial;**
>
> **(b) the usage is regular and continuous;**
>
> **(c) the usage is certain and not varied; and**

(d) the usage is reasonable. If the Wajib-ul-arz (where such a record is maintained) records or shows the customary easement, it would make the task of civil courts comparatively easy, as there will be no need for detailed evidence to establish the custom. Be that as it may. If the remedy for violation of a customary easement recognized and recorded in the Wajib-ul-arz is by way of a civil suit, it is inconceivable that in regard to violation of a customary easement not recognized or recorded in the Wajib-ul-arz, the remedy would be only by way of a summary enquiry by the Tahsildar under section 131 of the Code, and not by a suit, before the civil court."

36. Mr. Bhupender Gupta, learned Senior Advocate has vehemently argued on the basis of substantial questions of law that section 10 of the H.P. Village Common Lands Vesting and Utilization Act, 1973 bars the jurisdiction of the Civil Courts. Learned District Judge, Hamirpur while remanding the matter to the trial court vide judgment dated 31.5.1985 has categorically laid down that the three material issues were required to be decided after taking into consider the provisions of the Punjab Village Common Lands (Regulation) Act, 1961 and Himachal Pradesh Village Common Lands (Vesting and Utilization) Act, 1974, more particularly, since case of the plaintiff was that the suit land was ***Shamlat*** and it was recorded in the ownership of Raja Nadaun by the then Financial Commissioner, Punjab who had protected the common rights of the villagers recorded in the Wazib-ul-arz. Thereafter, the trial court has framed the following additional issue:

"Whether the suit was not maintainable in the present form?
OPD-10"

37. The State Government had taken a specific preliminary objection in the written statement, which reads as under:

"That the learned court has no jurisdiction to entertain and try to present suit under H.P. Village Common Lands Vesting & Utilization Act, 1974".

38. This issue has not been considered by the courts below in right perspective by taking into consideration section 10 of the Punjab Village Commons Lands (Regulation) Act, 1961.

39. In a recent judgment, their Lordships of the Hon'ble Supreme Court in ***Sarjeet Singh (Dead) through Legal representatives*** vs. ***Hari Singh and others***, (2015) 1 SCC 760 while interpreting sections 7, 11 and 13 of the Punjab Village Common Lands (Regulation) Act, 1961 have held that the civil court had no jurisdiction to entertain or adjudicate upon any question pertaining to Shamilat deh. Their Lordships have held as under:

"6. 'Shamilat' connotes commonality of possession, in contradistinction to ownership individually or severally. Shamilat deh are common or village lands. Banjar in common parlance means fallow or barren or unproductive hence shamilat banjar common uncultivable lands and banjar qadim common/village lands left fallow for a long period. Patti/Pati has various contextual connotations including a strip of land detached from the original village though dependent on it; it is a subdivision of land.

7. For facility of reference Section 2(g) of the Punjab Village Common Lands (Regulations) Act, 1961 as applicable to Haryana is extracted below:-

2(g) "Shamilat deh" includes -

(1) Land described in the revenue records as Shamilat deh or Charand excluding abadi deh;

(2) shamilat tikkas;

(3) lands described in the revenue records as shamilat, tarafs, pattis, pannas and tholas and used according to revenue records for the benefit or the village community or a part thereof or for common purposes of the village;

(4) lands used or reserved for the benefit of the village community including streets, lanes, playgrounds, schools, drinking wells, or ponds within the sabha area as defined in clause (mmm) of Section 3 of the Punjab Gram Panchayat Act, 1952, excluding lands reserved for the common purposes of a village under Section 18 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 (East Punjab Act 50 of 1948), the management and control whereof vests in the State Government under Section 23-A of the aforesaid Act; and

(4a) vacant land situate in abadi deh or gorah deh not owned by any person;

(5) lands in any village described as banjar qadim and used for common purposes of the village according to revenue records;

Provided that shamilat deh at least to the extent of twenty-five per centum of the total area of the village does not exist in the village;

but does not include land which -

(i) becomes or has become shamilat deh due to river action or has been reserved as shamilat in villages subject to river action except shamilat deh entered as pasture, pond or playground in the revenue records;

(ii) has been allotted on quasi- permanent basis to displaced person;

(iia) was shamilat deh, but has been allotted to any person by the Rehabilitation Department of the State Government, after the commencement of this Act, but on or before the 9th day of July, 1985;

(iii) has been partitioned and brought under cultivation by individual land-holders before the 26th January,1950;

(iv) having been acquired before the 26th January, 1950, by a person by purchase or in exchange for proprietary land from a co-sharer in the shamilat deh and is so recorded in the jamabandi or is supported by a valid deed;

(v) is described in the revenue records as shamilat, taraf, pattis, pannas and thola and not used according to revenue records for the benefit to the village community or a part thereof or for common purposes of the village;

(vi) lies outside the abadi deh and was being used as gitwar, bara, manure pit, house or for cottage industry immediately before the commencement of this Act;

(vii) Omitted by Act No. 18 of 1995;

(viii) was shamilat deh, was assessed to land revenue and has been in the individual cultivating possession of co-sharers not being in excess of their respective shares in such shamilat deh on or before the 26th January, 1950; or

(ix) is used as a place of worship or for purposes subservient thereto; lands reserved for the common purposes of a village under Section 18 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 (East Punjab Act 50 of 1948), the management and control whereof vests in the Gram Panchayat under Section 23-A of the aforesaid Act.

Explanation.- Lands entered in the column of ownership of record of rights as 'Jumla Malkan Wa Digar Haqdaran Arazi Hassab Rasad', 'Jumla Malkan' or 'Mushtarka Malkan' shall be shamlat deh within the meaning of this section.

[8] We shall now return to the facts of the case in hand. The jamabandi relating to the subject land recites that the owner of the subject land is Shamilat Patti. Hardwari and Mangal were holding the land as Gair Marusi having half share each in Gair Mumkin Gitwar Bila Lagan Bawajay Sayak Keti, which the Trial Court has rightly explained as land of which possession has been given by the proprietor, in the present case the Shamilat Patti, to the two named persons for the specific purpose of repairing agricultural implements. Since the allotment is intrinsically in the nature of a licence of common village land for a particular user, it is legally inconceivable that these two persons could have effected an oral exchange with the Defendants. The ownership collectively vested at all times with the Gaon or Shamilat patti. Ergo, none of the litigating parties could assume ownership or exclusive and proprietary possession thereto.

9. Gair Mumkin literally means that which is not possible; and in the present context indicates waste or uncultivable land. Bila Lagan connotes either rent-free grant or one where the rent has not been fixed. Sayar/Sayer literally refers to moveables; it also concerns miscellaneous levies apart from land revenue. As defined in Ganga Devi vs. State of U. P., 1972 AIR(SC) 931, it "includes whatever has to be paid or delivered by a licencee on account of right of gathering produce, forest rights, fisheries and the use of water for irrigation from artificial sources". Sayar or Sayer are variable imposts on movable property and are thus distinct from land revenue.

[11] The Trial Court had decreed the suit, holding that the Plaintiffs were entitled to the possession of the disputed land. It, therefore, directed the Defendants to handover the land in its original shape, to the Plaintiffs and other Co-owners within two months from the date of the decision. This finding has not been disturbed by the First Appellate Court. These two Courts failed to keep in mind that the

land was Shamilat deh and hence no person, including the Plaintiffs, could have laid claims to separate or individual possession thereof. In second Appeal, however, in terms of the impugned Judgment, the High Court has correctly dismissed the Plaintiffs' suit holding that the Plaintiffs shall be at liberty to seek partition of the suit land and other joint land in accordance with law.

[12] Having considered the matter in all its complexities, we are persuaded to uphold the directions of the High Court. However, this is primarily and principally for reasons different to those that have prevailed upon the learned Single Judge. The land in question is admittedly Shamilat Patti Sayar, i.e. common village lands the user of which is not confined strictly to cultivation. The holding of Hardwari and Mangal is thus in contradistinction to that of khewat i.e. proprietorship of the land. This is amply evident from the fact that so far as the grant of Hardwari and Mangal is concerned, it specifically envisages the repairing of agricultural implements of the villagers by them. Hardwari and Mangal were legally incompetent to transfer the possession by mutual compact with any third person, including co-sharers. Shamilat deh require to be carefully and assiduously protected, and this is the avowed purpose of the Punjab Village Common Lands (Regulation) Act, 1961 as applicable to both the States of Punjab and Haryana. The three Courts below have failed altogether in giving effect to Section 7 of the said Act which provides, inter alia, that the Assistant Collector of First Grade alone can eject any person who is in wrongful and unauthorized possession of the shamilat deh of any village and instead put the Panchayat in possession thereof. The Proviso to sub-section 7(1) empowers the Assistant Collector (who is a Revenue Official and not a Civil Court) to even decide a question of title to the land if it happens to be raised. Section 11 of the Act thereafter enables any person, or even a Panchayat, to approach the Collector to decide any claim in respect of the land. It is evident from the reading of these provisions that instead of approaching the Civil Court, if the Plaintiffs had any grievance against the Defendants as regards the possession of the suit land, they ought to have ventilated their grievances before the Collector and not before the Civil Court. The provisions of Sections 7 and 11 thereof have been blatantly violated by the Plaintiffs and ignored by the Courts below. If any doubt remains as to the correct forum for the resolution of the dispute pleaded in the Plaint, Section 13 of the Act makes it clear that the Civil Courts have no jurisdiction to entertain or adjudicate upon any question pertaining to shamilat deh.

[13] It is always a brooding possibility that collusive suits are filed by co-sharers or other persons in the endeavour that shamilat deh may be metamorphosed or transformed into privately owned lands, always to the detriment of the gram sabha and of the villagers collectively. The three Courts below have not been adequately alive to this very important aspect. The land in question was, in fact, licenced to the co-sharers and was not their privately owned properties, individually or severally or collectively."

40. The land stood vested in the Panchayat as per the provisions of the Punjab Village Commons Lands (Regulation) Act, 1961 and the same has further been vested in the State as per section 3 of the Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974 free from all encumbrances. Thus, the appellant-defendant could not purchase the land in the year 1968 nor proprietary rights could be conferred upon them since it was a ***Shamlat*** land. Thus, the suit pertaining to ***Shamlat*** land was not maintainable in the civil court. The remedy provided under the Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974 was required to be invoked by the plaintiff.

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

42. In view of the analysis and discussion made hereinabove, RSA No. 228/2002 is dismissed and RSA No. 490/2002 preferred by the State of H.P. is allowed. Civil Suit No.68/1979 is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Criminal Appeal No. 423 of 2011 a/w
Criminal Appeal No. 379 of 2011.
Judgments Reserved on : 25.5.2015
Date of Decision : July 1, 2015

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1. Cr. Appeal No. 423 of 2011

Jagir Singh ...Appellant

Versus

State of Himachal Pradesh ...Respondent

2. Cr. Appeal No. 379 of 2011

Tarsem Lal & others ... Appellants

Versus

State of Himachal Pradesh ... Respondent.

N.D.P.S. Act, 1985- Section 15- A car was signaled to stop by the police party and when it was checked, three sacks of poppy husk were found in dickey, four sacks were found in the middle of the rear seat and fifth sack was found in the front seat- testimonies of police officials after careful scrutiny, inspire confidence and are found to be trustworthy and reliable, which can form basis of conviction – mere absence of some independent witness does not affect the creditworthiness of the prosecution case- merely because the number of FIR was not mentioned in NCB Forms or it was not mentioned in the challan that seal impression was put in triplicate will not make the prosecution version false- testimony of police official was corroborated by other police official- independent witness had turned hostile but had named the accused who had signed/put their thumb impression on the recovery memo and identification- he admitted the previous statement wherein the search and the presence of the accused were recorded- other witness also admitted that accused had disclosed their names and police had taken into possession gunny sack- hence, they had corroborated the testimonies of the police official- link evidence was proved – non-

production of the seal will not make the prosecution case doubtful – held that accused were rightly convicted by the trial Court- appeal dismissed. (Para-17 to 32)

Cases referred:

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

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

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

Aher Raja Khima v. State of Saurashtra, AIR 1956

Tahir v. State (Delhi), (1996) 3 SCC 338

For the appellant	:	Mr. N. K. Thakur, Sr. Advocate, with Mr. Rohit Bharoll, Advocate, for the appellants in Cr. Appeal No. 379 of 2011. Mr. Peeyush Verma, Advocate for the appellant in Cr. Appeal No. 423 of 2011.
For the respondent	:	Mr. Ashok Chaudhary, Addl. Advocate General and Mr. V. S. Chauhan, Addl. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Assailing the judgment dated 31.5.2011/ 8.6.2011, passed by learned Special Judge, Fast Track Court, Una, District Una, H.P., in Sessions Case No. 19/10 (Sessions Trial No. 19/10), titled as State of Himachal Pradesh vs. Tarsem Lal & others, whereby appellants-accused stand convicted for having committed an offence punishable under the provisions of Section 15 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 10 years each and pay fine of Rs.1,00,000/- each and in default of payment of fine to undergo simple imprisonment for one year each, they have filed the present appeals under the provisions of Section 374 of the Code of Criminal Procedure, 1973. Cr. Appeal No. 423 of 2011 stands filed by convict Jagir Singh whereas Cr. Appeal No. 379 of 2011 stands filed by convicts Tarsem Lal, Jasvinder Kaur and Baljinder @ Kali.

2. It is the case of prosecution that on 21.8.2010, police party headed by Inspector R.R. Thakur (PW-11) comprising of ASI Harjit Singh, HHC Purshotam Lal (PW-8), HC Albel Singh (PW-3) and HHG Jasbir Singh were on patrolling duty at Ajnouli. They had left the police station after recording entry (Ext. PW-5/D) in the daily diary. Same day at about 6.00 p.m., when the police party reached near railway crossing Ajnouli, they signalled car bearing registration number CH-1B-5078 to stop. The said car was driven by accused Tarsem Lal and accused Jagir Singh was sitting beside him. On the rear seat, accused Jasvinder Kaur and Baljinder Kaur were sitting. When the car was checked, police found five sacks containing poppy husk. Three sacks were kept in the dickey, one sack in the middle of the rear seat and the fifth sack was kept near the front seat. Checking was done in the presence of independent witnesses Dharam Pal (PW-1) and Sham Lal (PW-2). The contraband substance was weighed with the scales belonging to Dharam Pal. Sacks marked as A - 1 to A - 5 (Ext. P-1 to P-5) were found to be 17.200 k.g., 20.500 k.g., 19 k.g., 19.200 k.g. and 19.100 k.g. respectively. The sacks were sealed with seal impression-A and taken into possession vide memo (Ext. PW-1/B). NCB form (Ext. PW-5/A), in triplicate, was filed

up on the spot. Ruka (Ext. PW-3/A) was sent for registration of case through HC Albel Singh (PW-3). Resultantly F.I.R. No. 272/2010, dated 21.8.2010 (Ext. PW-3/B) was registered against the accused under the provisions of Section 15 of the Act, by Inspector Rajinder Kumar (PW-10) at Police Station Una Sadar, Distt. Una. Accused were arrested and necessary investigation conducted on the spot. The contraband substance was resealed in the police station by the Officiating SHO, SI Yashpal (PW-9) with seal impression-B and deposited in the maalkhana with MHC Ajaib Singh (PW-5) who made entries in the maalkhana register and handed over the sacks to Constable Surinder Singh (PW-6) for being deposited at the State Forensic Science Laboratory, Junga, for chemical analysis. Special report (Ext. PW-4/A) was sent to the superior officer through Constable Manoj Kumar (PW-7), which was received by ASI Surjit Singh (PW-4). Report (Ext. PW-11/J)) of the Forensic Expert was obtained by the police. Investigation revealed, complicity of the accused in the alleged crime, hence challan was presented in the Court for trial.

3. Accused were charged for having committed an offence punishable under the provisions of Section 15 of the Act, to which they did not plead guilty and claimed trial.

4. In order to prove its case, in all, prosecution examined as many as eleven witnesses and statements of the accused under Section 313 Cr. P.C. were also recorded, in which they took up the following common defence:

> "We were going to Pir Nighah in a vehicle No. DL-8-0174 and the car was developed mechanical defect and was parked at Kalia Filling Station and were searching a mechanic on Hamirpur road near bus stand Una where we were apprehended by the police and a false case was registered against us."

In defence accused examined Dr. Kapil Sharma (DW-1).

5. Appreciating the material on record, including the testimonies of the witnesses, trial Court convicted all the accused of the charged offence and sentenced as aforesaid. Hence, the present appeals.

6. We have extensively heard learned counsel appearing on both the sides and perused the record.

7. Mr. Peeyush Verma, learned counsel assails the judgment, bringing out the contradiction in the testimonies of the prosecution witnesses, with regard to the place where the contraband substance was weighed, which according to him are absolutely fatal. It is further argued that the appellant stands falsely implicated without any justifiable reason or cause. Also genesis of the prosecution case stands belied from the testimonies of independent witnesses who were declared hostile.

8. Mr. N. K. Thakur, learned Senior Counsel has argued that : (i) Prosecution story of having set up a Naaka on the spot stands falsified, in fact belied, through the testimonies of independent witnesses as also HC Albel Singh (PW-3) and Inspector R.R. Thakur (PW-11). (ii) Shri Harjit Singh, author of the Rukka, was not examined in Court. (iii)Sample seal was not produced by Dharam Pal (PW-1) in the Court. (iv) Prosecution has failed to examine the recipient of the case property at the Forensic Science Laboratory, Junga. Also, the mode of transportation, through which the contraband substance was carried, has not been proved on record. All this had rendered the prosecution case to be fatal.

9. On the other hand, Mr. Ashok Chaudhary and Mr. V. S. Chauhan, learned Addl. A.Gs. have supported the impugned judgment for the reasons set out therein.

10. It is a settled proposition of law that merely because a witness has turned hostile, his entire evidence cannot be termed to be unworthy of credence. It is for the Court to consider, whether as a result of contradiction, witness stands fully discredited or part of his testimony can still be believed. If the credit of a witness is not fully shaken, Court can rely upon that part of the testimony which appears to be creditworthy.

11. It is also a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other 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 the 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. [*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 testimony of prosecution witnesses.

16. Inspector R.R. Thakur (PW-11) who was posted as SHO, Police Station Sadar, Una, in court, has deposed that on 21.8.2010, he alongwith other police officials was on patrolling duty at Ajnouli in a government vehicle. Report (Ext. PW-5/D) stands proved on record to such effect. He further states that at about 6.00 p.m., near Ajnouli railway crossing, they noticed a maruti car bearing No. CH-1B-5078 coming from Samoor Kalan side. On signal, the vehicle stopped and was checked. Accused Tarsem was on the wheels and accused Jagir Singh was sitting beside him. On the rear seat, accused Jasvinder Kaur and Baljinder Kaur were sitting. Police found one sack kept near the front seat and one sack kept in the middle of the rear seat. When the dickey of the car was searched, three plastic sacks were recovered. The sacks were opened in the presence of independent witnesses who also were present on the spot. These sacks contained poppy husk. Each sack was weighed and found to be 17.200 k.g., 20.500 k.g., 19 k.g., 19.200 k.g. and 19.100 k.g. respectively. The recovered sacks were sealed with seal impression-A, sample of which was taken on a piece of cloth (Ext. PW-1/A). Sacks (Ext. P-1 to P-5) were taken into possession vide recovery memo (Ext. PW-1/B). Driving licence (Ext.PW-11/A) of accused Tarsem Lal was also taken into possession. NCB forms (Ext. PW-5/A), in triplicate, were filled up on the spot and the sample seal handed over to witness Dharam Pal vide memo (Ext. PW-1/C). The memos were signed by the witness and the accused on the spot. He sent ruka (Ext. PW-3/A) through HC Albel Singh, on the basis of which F.I.R. (Ext. PW-3/B) was registered at Police Station Sadar Una, Distt. Una. Subsequently, with the completion of necessary formalities, he arrested the accused and informed them of the grounds of arrest (Ext. PW-11/C to Ext. PW-11/F). Statements of the witnesses under Section 161 Cr.P.C. were recorded. Statement of witness Sham Lal is Ext. PW-11/G and that of Dharam Pal is Ext. PW-11/H. The case property was entrusted to SI Yashpal (PW-9) who resealed the same with seal impression-B, impression of which was also taken on a piece of cloth (Ext. PW-9/A). Thereafter, case property was entrusted to MHC Ajaib Singh (PW-5). He prepared special report (Ext. PW-4/A) which was sent through Constable Manoj Kumar to the superior officer. Report of the chemical analyst (Ext. PW-11/J) was received and taken on record.

17. Perusal of cross examination part of testimony of this witness, in no manner, raises any doubt in our mind about the credibility or veracity of his statement. He is clear in deposing the events which took place on the spot. He has explained as to who all were accompanying him. Categorical denial of the suggestions put by the accused does not even remotely reflect his version to be untrue or false.

18. Now simply because there is no mention of the number of the F.I.R. in the NCB form (Ext. PW-5/A), as he admits in his testimony or that in the challan there is no reference of the seal impression so embossed in triplicate, would not render the genesis of the prosecution story to be false or prosecution case to be fatal. This we say so for the reason that there is overwhelming evidence on record linking the accused to the crime,

clearly establishing the prosecution story of recovery of the contraband substance from their conscious possession.

19. HC Albel Singh (PW-3) has corroborated the version of Inspector R.R. Thakur (PW-11). However, we find that there is slight contradiction in his version and that being, as to whether the contraband substance was taken to the shop of Dharam Pal where it was weighed or whether the scale and weights were brought from his shop to the spot where it was weighed. Now, even this contradiction, we do not find to be major or material for it stands explained by Inspector R. R. Thakur that the depot (shop) of Dharam Pal was just near the place of recovery of the contraband substance.

20. On material facts with regard to (a) presence of the police officials on the spot; (b) presence of accused persons on the spot; and (c) recovery and seizure, after resealing, of the contraband substance from the conscious possession of the accused, we find the testimonies of Inspector R.R. Thakur (PW-11) and HC Albel Singh (PW-3) corroborated by Constable Parshottam Lal (PW-8).

21. When we examine the testimony of Dharam Pal, we find him to have fully supported the prosecution case on material facts. The witness was declared hostile only when, in court, he refused to identify the accused persons from whose possession the contraband substance was recovered. However when cross examined by the Public Prosecutor, he categorically named the accused who signed/put their thumb impression on the memo of recovery/identification (Ext. PW-1/A), on which, he also appended his signatures. He also admits the memo of possession of the contraband substance as also the vehicle in question to have been taken into possession by the police and the same to have been signed/thumb marked by the accused persons in his presence. He admits portion A to A of the statement (Ext. PW-11/H), with which he was confronted, to be correct wherein it is recorded that "*you in presence of me and Sham Lal checked a white coloured maruti car bearing No. CH-01-B-5078 in which two male persons and two females were found sitting of which the females were sitting on the rear seat. The driver on asking disclosed his name as Tarsem Lal and the other person sitting next to him disclosed his name as Jagir Singh whereas the females sitting on the rear seat disclosed their names as Jasvinder Kaur and Baljinder Kaur @ Kali*". Witness admits the sacks taken into possession by the police to be the ones produced in court. In this view of the matter, his earlier version of not remembering the names/identity of the four persons, two males and two females, travelling in the car, which was checked by the police, pales into insignificance.

22. We notice that even Sham Lal (PW-2) refused to identify the accused persons, but however when cross examined by the Public Prosecutor he clarified that "*It is correct that male accused persons told their names to be Tarsem Lal and Jagir Singh*". The said persons are the accused. Though he does not state anything with regard to the identify of the two females present on the spot, but however he admits his signatures on memos (Ext.PW-1/A, 1/B and 1/C) recording their presence. The witness also admits that the police had taken into possession sacks (Ext. P-1 to P-5) from the spot when the vehicle was checked. Thus, in our considered view, version of the police officials, in fact, stands corroborated, to a large extent, by the independent witnesses.

23. We find that even by way of link evidence, prosecution has been able to establish its case. SI Yashpal (PW-9) has categorically deposed that he resealed the parcels with his seal impression-B. The specimen seal was produced by him in court.

24. MHC Ajaib Singh (PW-5) also states that the case property was handed over to him by SI Yashpal. He made entries in the register (Ext. PW-5/C). He further states that on 23.8.2010, the contraband substance alongwith the road certificate and NCB forms were handed over to Constable Surinder Singh for being deposited at the State Forensic Science Laboratory, Junga, which version stands corroborated by Surinder Singh (PW-6). SI Yashpal, HC Ajaib Singh and Constable Surinder Singh, in their un-rebutted testimonies, have stated that so long as the case property remained in their custody, it was not tampered with. Report of the Forensic Science Laboratory clearly establishes the contraband substance to be a psychotropic substance. PW-6 has explained that he took the case property in a Government vehicle which he deposited with the appropriate authority at the State Forensic Science Laboratory, Junga. Report (Ext. PW-11/J) clearly establishes such fact which was never disputed before the trial Court.

25. Further we find that special report (Ext. PW-4/A) prepared by Inspector R.R. Thakur was sent to the office of the Superintendent of Police, through Constable Manoj Kumar (PW-7) whose testimony remains un-controverted. This witness handed over the same to ASI Surjit Singh (PW-4) who admits the report to have been received by him.

26. It is true that Dharam Pal and Sham Lal have deposed that the police had set up a naaka on the spot whereas police officials are silent on this aspect. Would this fact render the genesis of the prosecution case to be doubtful? In our considered view, no. Inspector R.R. Thakur states that at about 6.00 p.m., police party, in a government vehicle, went from bus stand Una to Ajnouli and reached at the railway crossing. He does not state that from the moving vehicle the maruti car was signalled to stop. In any event, presence of the police on the spot stands acknowledged by Dharam Pal and Sham Lal.

27. Absence of examination of SI Harjit Singh, author of the ruka (Ext. PW-3/A), in no manner, renders the prosecution case to be doubtful. After all Inspector R. R. Thakur does state that the ruka prepared on the spot was sent through HC Albel Singh, which was received in the police station, as is so deposed by Inspector Rajinder Kumar (PW-10), who registered the F.I.R. in question.

28. Non production of the sample seal by Dharam Pal would also not render the prosecution case to be doubtful in view of other overwhelming evidence with regard to the sealing of the contraband substance in the presence of independent witnesses. Version of Inspector R.R. Thakur with regard to handing over the sample seal to Dharam Pal cannot be discredited only for the reason that Sham Lal has not supported the prosecution, since we find other independent witness to have supported the prosecution on this issue.

29. It is brought to our notice that there is cutting in the document (Ext. PW-5/B), reverse portion of the Road Certificate, rendering the prosecution version to be doubtful. We are not in agreement with the learned counsel on this issue. Word “four parcel” has been cut out to read as “five”, but however from the Road Certificate itself we find that five parcels were sent, which were also received at the State Forensic Science Laboratory, Junga, as is evident from report (Ext. PW-11/J).

30. From the material placed on record, it stands established by the prosecution witnesses that the accused are 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 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.

31. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that accused committed the charged offence.

32. For all the aforesaid reasons, there is no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Findings of conviction cannot be said to be erroneous or perverse. Hence, the appeals are dismissed.

33. Appeals stand disposed of, so also pending application(s), if any. Records of the Court below be immediately sent back.

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

Puran Chand son of Shri Khub Ram ....Applicant
Versus
State of H.P. ....Non-Applicant

Cr.MP(M) No. 721 of 2015
Order Reserved on 18th June 2015
Date of Order 1st July, 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 353, 332 read with Section 34 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- applicant had joined investigation- police had not claimed that custodial interrogation of the applicant is required in the present case- therefore, releasing the applicant on bail will not adversely affect the interests of the general public and state- bail granted. (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
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702

For the Applicant: Ms. Jyotsana Rewal Dua, Advocate.
For the Non-applicant: Mr.M.L.Chauhan, Additional Advocate General with Mr.J.S.Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with FIR No. 74 of 2015 dated 18.5.2015 registered under Sections 353, 332 read with Section 34 IPC at P.S. Manali District Kullu (H.P.)

2. It is pleaded that applicant is President of Him Anchal Taxi Operator Manali. It is pleaded that applicant is innocent and applicant has been falsely implicated in present case. It is further pleaded that investigation of present case is completed and applicant will not tamper with prosecution evidence. It is pleaded that applicant is not previous convict and applicant will cooperate in trial of the case and any condition imposed by Court will be complied by applicant. Prayer for acceptance of anticipatory bail sought.

3. Per contra police report filed. As per police report on dated 18.5.2015 complainant C.Parvesh Kumar No. 392 Third IRBN Pandoh District Mandi H.P. and C.Suresh Kumar No.302 and C.Lalit No. 393 were on traffic duty at place Kothi and were checking the vehicles proceeding from Manali to Rohtang. There is recital in police report that at about 7.15 AM vehicle having registration No. HP-33T-8247 came, which was directed to stop. There is further recital in police report that complainant requested the applicant to park the vehicle upon one side of the road and thereafter driver of vehicle and 3-4 persons travelling in the vehicle came outside the vehicle and beaten the complainant with legs and fist blows and also torn two buttons of official dress and also torn jacket of complainant. There is further recital in police report that complainant sustained injuries upon his mouth and nose. There is further recital in police report that thereafter accused persons fled away from the spot in the vehicle. There is also recital in police report that case was registered. There is recital in police report that thereafter investigation was conducted and site plan was prepared. There is also recital in police report that photographs obtained and torn dress of complainant and jacket also took into possession vide seizure memo. There is also recital in police report that applicant Puran Chand had violated the direction of Hon'ble National Green Tribunal and also obstructed the public official from discharging his duty. There is recital in police report that applicant has participated in the investigation of case on dated 12th, 14th, 15th and 16th June 2015. Prayer for rejection of bail application sought,

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the non-applicant and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether anticipatory bail application filed under Section 438 Cr.P.C. by applicant is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

Findings on Point No.1

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

7. Another submission of learned Advocate appearing on behalf of the applicant that applicant will join the investigation and any condition imposed by Court will be binding upon the applicant and on this ground anticipatory bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. There is recital in police report that applicant has joined the investigation of case on 12th, 14th, 15th and 16th June 2015. There is no recital in police report that custodial interrogation of applicant is required in present case. It is well settled law that accused is presumed to be innocent till convicted by competent Court of law. Court is of the opinion that it is expedient in the ends of justice to allow the application filed by applicant. Court is of the opinion that if anticipatory bail is granted to applicant then interest of general public and State shall not be adversely affected.

8. Submission of learned Additional Advocate General appearing on behalf of non-applicant that if anticipatory bail is granted to applicant then applicant will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional anticipatory bail will be granted to applicant and if applicant will flout the terms and conditions of anticipatory bail order then prosecution will be at liberty to file application for cancellation of bail strictly in accordance with law. In view of the fact that applicant has participated in investigation of case as per report of the police it is expedient in the ends of justice to allow the anticipatory bail application. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final Order)

9. In view of my findings on point No.1 bail application filed by applicant under Section 438 Cr.P.C. is allowed and interim order dated 8.6.2015 is made absolute. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 438 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 438 of Code of Criminal Procedure stands disposed of.

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

Sachin Kumar son of Shri Ram Dass ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 706 of 2015
Order Reserved on 24th June 2015
Date of Order: 1st July 2015

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offences punishable under Sections 341, 323, 395, 367, 147, 148, 149, 120-B 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-investigation had been completed and challan had been filed in the Court- releasing the applicant on bail will not affect the interests of the state and general public- therefore, applicant ordered to be released on bail of Rs.1 lac with two sureties. (Para-6 to 10)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702

For the Applicant: Mr. Amit Sharma, Advocate.
For the Non-applicant: Mr. J.S.Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 28 of 2015 dated 5.3.2015 registered under Sections 341, 323, 395, 367, 147, 148, 149, 120-B IPC at P.S. Nadaun, District Hamirpur (H.P.)

2. It is pleaded that applicant is innocent and applicant has been falsely implicated in present case as there is a long standing animosity between the complainant and brother of the applicant. It is pleaded that no purpose would be served by keeping the applicant in jail for the alleged offences. It is further alleged that applicant has been in custody for more than two months and nothing is required to be recovered from the applicant. It is pleaded that applicant is innocent and applicant will abide all terms and conditions imposed by Court. It is further pleaded that applicant will join the investigation and will attend the Court. It is also pleaded that applicant will not induce and threat the prosecution witnesses. Prayer for acceptance of bail sought.

3. Per contra police report filed. As per police report on dated 4.3.2015 at about 10.10 PM information received that one person was brought for his medical treatment in CHC Sujanpur. There is recital in police report that Deep Sharma is taxi driver by profession and owner of vehicle No. HP-01-H-1316. There is recital in police report that on dated 4.3.2015 when Deep Sharma reached outside his house then two boys aged 20-25 years told him that they would go to Chabutra. There is recital in police report that Deep Sharma took those two boys to Chabutra in his vehicle and thereafter accused persons told Deep Sharma to take them to Karot in his vehicle. There is further recital in police report that thereafter Deep Sharma brought the accused persons to Karot and thereafter accused persons told Deep Sharma to take them to Jihan in his vehicle. There is recital in police report that thereafter when Deep Sharma and accused persons reached at Bhou road accused persons directed Deep Sharma to stop his vehicle. There is further recital in police report that thereafter Deep Sharma was dragged outside from vehicle and was beaten with sticks and fist blows. There is also recital in police report that Rs.10,000/- (Rupees ten thousand only) of Deep Sharma could not be traced out. There is recital in police report that matter was investigated and Deep Sharma was medically examined and as per report Deep Sharma had sustained fifteen injuries on his body. As per further police report the site plan was prepared and statements of prosecution witnesses recorded under Section 161 Cr.P.C. There is further recital in police report that two sticks were also recovered as per Section 27 of Indian Evidence Act and Rs.1000/- (Rupees one thousand only) were also recovered as per disclosure statement given by accused. There is recital in police report that Gurdev Singh raised alarm and thereafter when Gurdev Singh raised alarm accused persons fled away. There is further recital in police report that as per MLC report Deep Sharma had sustained simple injuries. There is further recital in police report that if applicant is released on bail then applicant will threat the prosecution witnesses. Prayer for dismissal of bail application sought.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the non-applicant and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether bail application filed under Section 439 Cr.P.C. by applicant is liable to be accepted as mentioned in memorandum of grounds of bail application?

2. Final Order.

Findings on Point No.1

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

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is completed and challan stood filed in the competent Court of law and applicant requires medical treatment and on this ground bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the

accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period. In view of the fact that investigation is completed in present case and in view of the fact that challan already stood filed in present case and in view of the fact that case will be disposed of in due course of time, Court is of the opinion that it is expedient in the ends of justice to release the applicant on bail at this stage. Court is of the opinion that if applicant is released on bail at this stage then interest of State and general public will not be adversely affected.

8. Submission of learned Additional Advocate General appearing on behalf of non-applicant that if bail is granted to applicant then applicant will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional bail will be granted to applicant and condition will be imposed in the bail order to the effect that applicant will not induce and threat the prosecution witnesses. Court is of the opinion that if applicant will flout the terms and conditions of bail order then non-applicant will be at liberty to file application for cancellation of bail in accordance with law. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order)

9. In view of my findings on point No.1 bail application filed by applicant under Section 439 Cr.P.C. is allowed subject to furnishing personal bond to the tune of Rs. 1 lac (Rupees one lac only) with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That the applicant will join the investigation of case whenever and wherever directed by Investigating Officer in accordance with law. (ii) That applicant will attend the proceedings of learned trial Court regularly till conclusion of trial of case. (iii) That applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iv) That the applicant will not leave India without the prior permission of the Court. (v) That applicant will give his residential address in written manner to the Investigating Officer and Court so that applicant can be located in short notice. (vi) That applicant will not commit similar offence qua which he is accused. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 439 of Code of Criminal Procedure stands disposed of.

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

Smt. Saroj Chauhan ....Petitioner

versus

The Bajaj Allianze Insurance Co. Ltd. ....Respondent.

CMPMO No. 240 of 2015
ORDER decided on: 1.7.2015.

Motor Vehicles Act, 1988- Section 169- Compensation was awarded in favour of the petitioner- petitioner filed an application for releasing of the awarded amount before MACT-III Shimla who directed that 25% of the awarded amount be released- held, that petitioner is in urgent need of money and, therefore, entire amount was ordered to be released along with interest in favour of the petitioner.

For the petitioner: Mr. B.M. Chauhan, Advocate.
For respondent: Mr. Aman Sood, Advocate.
(Respondents No. 1 and 2 deleted vide order dated 6.6.2015).

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

MACT Petition RBT No. 9-S/2 of 2014/11 was decided on 5.6.2014 by the Motor Accident Claima Tribunal (III) Shimla. Thereafter appeal was finally disposed of by the Hon'ble High Court of H.P. Thereafter Smt. Saroj Chauhan filed application for release of award amount before the learned Motor Accident Claims Tribunal (III) Shimla and the learned MACT (III) Shimla directed that 25% of the award amount relating to the share of Smt. Saroj Chauhan be released. Court is of the opinion that as of today Smt. Saroj Chauhan is in urgent need of money. Court is of the opinion that it is expedient in the ends of justice to release the entire share of the award amount of Smt. Saroj Chauhan along with up to date interest. Learned Advocate appearing on behalf of the Insurance Company submitted that in view of the statement of learned Advocate appearing on behalf of Insurance Company before the learned MACT Shimla that he has also no objection if the share of award amount of Smt. Saroj Chauhan is released, he has no objection if the share qua Smt. Saroj Chauhan is released. In view of the above stated facts order dated 31.3. 2015 passed by learned MACT (III) Shimla is modified and it is ordered that entire award amount qua the share of Smt. Saroj Chauhan along with up to date interest will be released in payee account of Smt. Saroj Chauhan. Petition is disposed of. No order as to costs. Pending applications if any also disposed of.

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

Sushil Kumar @ Sunil Kumar son of Sh.Ramesh Chand ....Applicant

Versus

State of H.P. ....Non-applicant

Cr.MP(M) No. 558 of 2015
Order Reserved on 24th June 2015
Date of Order 1st July 2015

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offences punishable under Sections 341, 323, 395, 367, 147, 148, 149, 120-B 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-investigation had been completed and challan had been filed in the Court- releasing the applicant on bail will not affect the interests of the state and general public- therefore, applicant ordered to be released on bail of Rs.1 lac with two sureties. (Para-6 to 10)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702

For the Applicant: Mr. Bhuvnesh Sharma, Advocate.
For the Non-applicant: Mr. J.S.Rana, Assistant Advocate General.

The following order of the Court was delivered;

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 28 of 2015 dated 5.3.2015 registered under Sections 341, 323, 395, 367, 147, 148, 149, 120-B IPC at P.S. Nadaun, District Hamirpur (H.P.)

2. It is pleaded that applicant is innocent and applicant has been falsely implicated in present case. It is pleaded that due to detention of applicant w.e.f. 13.03.2015 applicant is unable to get proper medical treatment from PGI Chandigarh. It is pleaded that medical care of applicant is required for caring his teeth. It is pleaded that applicant has suffered loss of weight of 4 Kg. during the period of detention and health of applicant is deteriorating day by day. It is pleaded that applicant is innocent and applicant will abide all terms and conditions imposed by Court. It is pleaded that investigation is completed and nothing is to be recovered from applicant. It is further pleaded that applicant will join the investigation and will attend the Court. It is also pleaded that applicant will not induce and threat the prosecution witnesses. Prayer for acceptance of bail sought.

3. Per contra police report filed. As per police report on dated 4.3.2015 at about 10.10 PM information received that one person was brought for his medical treatment in CHC Sujanpur. There is recital in police report that Deep Sharma is taxi driver by profession and owner of vehicle No. HP-01-H-1316. There is recital in police report that on dated 4.3.2015 when Deep Sharma reached outside his house then two boys aged 20-25 years told him that they would go to Chabutra. There is recital in police report that Deep Sharma took those two boys to Chabutra in his vehicle and thereafter accused persons told Deep Sharma to take them to Karot in his vehicle. There is further recital in police report that thereafter Deep Sharma brought the accused persons to Karot and thereafter accused persons told Deep Sharma to take them to Jihan in his vehicle. There is recital in police

report that thereafter when Deep Sharma and accused persons reached at Bhou road accused persons directed Deep Sharma to stop his vehicle. There is further recital in police report that thereafter Deep Sharma was dragged outside from vehicle and was beaten with sticks and fist blows. There is also recital in police report that Rs.10,000/- (Rupees ten thousand only) of Deep Sharma could not be traced out. There is recital in police report that matter was investigated and Deep Sharma was medically examined and as per report Deep Sharma had sustained fifteen injuries on his body. As per further police report the site plan was prepared and statements of prosecution witnesses recorded under Section 161 Cr.P.C. There is further recital in police report that two sticks were also recovered as per Section 27 of Indian Evidence Act and Rs.1000/- (Rupees one thousand only) were also recovered as per disclosure statement given by accused. There is recital in police report that Gurdev Singh raised alarm and thereafter when Gurdev Singh raised alarm accused persons fled away. There is further recital in police report that as per MLC report Deep Sharma had sustained simple injuries. There is further recital in police report that ten criminal cases are pending against the applicant. There is further recital in police report that applicant is operating gang in the area. There is further recital in police report that applicant has created terror in the area and if applicant is released on bail then applicant will threat the prosecution witnesses. Prayer for dismissal of bail application sought.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the non-applicant and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether bail application filed under Section 439 Cr.P.C. by applicant is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

Findings on Point No.1

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

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is completed and challan stood filed in the competent Court of law and applicant requires medical treatment and on this ground bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an

indefinite period. In view of the fact that investigation is completed in present case and in view of the fact that challan already stood filed in present case and in view of the fact that case will be disposed of in due course of time, Court is of the opinion that it is expedient in the ends of justice to release the applicant on bail at this stage. Court is of the opinion that if applicant is released on bail at this stage then interest of State and general public will not be adversely affected.

8. Submission of learned Additional Advocate General appearing on behalf of non-applicant that ten FIRs have been registered against the applicant and on this ground bail application filed by applicant be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. There is no evidence on record that applicant has been convicted by any Criminal Court of law. It is well settled law that accused is presumed to be innocent till convicted by Competent Court of law.

9. Submission of learned Additional Advocate General appearing on behalf of non-applicant that if bail is granted to applicant then applicant will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional bail will be granted to applicant and condition will be imposed in the bail order to the effect that applicant will not induce and threat the prosecution witnesses. Court is of the opinion that if applicant will flout the terms and conditions of bail order then non-applicant will be at liberty to file application for cancellation of bail in accordance with law. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order)

10. In view of my findings on point No.1 bail application filed by applicant under Section 439 Cr.P.C. is allowed subject to furnishing personal bond to the tune of Rs. 1 lac (Rupees one lac only) with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That the applicant will join the investigation of case whenever and wherever directed by Investigating Officer in accordance with law. (ii) That applicant will attend the proceedings of learned trial Court regularly till conclusion of trial of case. (iii) That applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iv) That the applicant will not leave India without the prior permission of the Court. (v) That applicant will give his residential address in written manner to the Investigating Officer and Court so that applicant can be located in short notice. (vi) That applicant will not commit similar offence qua which he is accused. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 439 of Code of Criminal Procedure stands disposed of.

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

Udho Ram .....Petitioner.

Versus

Industrial Tribunal –cum-Labour Court Shimla & another. ....Respondents.

CWP No. 4438 of 2013
Decided on : 1.7.2015

Industrial Disputes Act, 1947- Section 25- A reference was made to the Industrial Tribunal regarding the retrenchment of the petitioner- Tribunal ordered the re-engagement of the petitioner along with seniority, however, the back wages were not awarded in favour of the petitioner- petitioner had specifically asserted in his statement that he was not gainfully employed since his termination which was not challenged in cross examination- petition allowed and respondent directed to pay 50% of the back wages to the petitioner from the date of the retrenchment till re-engagement. (Para-3 to 5)

For the Petitioner: Ms. Sunita Sharma, Advocate.
For the Respondent: Mr. Hamender Chandel, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petition is directed against the impugned award of 31.5.2011, rendered by the Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla, whereby it, while answering the hereinafter extracted reference in favour of the workman determined that given its findings qua the workman/petitioner having come to be illegally retrenched or disengaged by the respondent No.2, he be reinstated or reengaged in service.

> "*Whether the termination of services of Shri Udho Ram S/o Shri Govind Ram workman by the Commissioner, Municipal Corporation Shimla, H.P w.e.f 19.1.1999 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits the above aggrieved workman is entitled to?*"

2. The relief of reinstatement of the petitioner in service by the respondent concerned, was ordered with the benefit of seniority to be computed from the date of his illegal termination. However, the learned Industrial Tribunal-cum-Labour Court, Shimla omitted to grant back wages to the petitioner herein. The petitioner herein is aggrieved by the omission on the part of the Industrial Tribunal-cum-Labour Court concerned to award him back wages from the date of his illegal retrenchment/termination from service at the instance of the respondent No.2 till his reengagement in service. The said portion of the award rendered by the learned Industrial Tribunal-cum-Labour Court Shimla, stands impugned before this Court at the instance of the petitioner/workman herein.

3. It is settled law that the relief of back wages would only be affordable to the workman on his retrenchment/disengagement from service having been concluded to be illegal, besides in the event of material existing on record portraying that since his illegal retrenchment/disengagement from service till his reinstatement in service at the instance of the respondent concerned in pursuance to an executable order rendered by the Court/Forum concerned, he was not gainfully employed. The evidentiary material on record which portrays the factum of the petitioner herein being not gainfully employed since his illegal retrenchment/termination till his reinstatement in service at the instance of the respondent concerned in pursuance to the impugned award comprised in Annexure P-1, is comprised in the testimony of petitioner in his examination in chief. The veracity of the statement of the petitioner comprised in his examination-in-chief while unfolding the factum of his having remained not gainfully employed from the period of his illegal retrenchment/disengagement from service till his reinstatement in service, has not been concerted to be shred apart or shattered by the learned counsel for the respondent, by

proceeding to put an apposite suggestion partying, its contest to the said fact. Consequently, omission on the part of the respondents to concert to repudiate or tear apart the veracity of the deposition of the petitioner in his examination in chief unearthing the factum of his having remained not gainfully employed since his illegal termination/disengagement from service by the respondent No.2 till his reinstatement in service imputes/lends credibility to it, besides leads to the sequel that the respondents acquiesce to the factum of the petitioner having not remained gainfully employed since his illegal retrenchment/disengagement in service, till his reinstatement in service, at the instance of the respondent No.2 in pursuance to the impugned award comprised in Annexure P-1. Consequently, with hence ample proof emanating qua the factum of the petitioner having remained not gainfully employed since his illegal retrenchment/disengagement from service till his reinstatement in service, it was incumbent upon the Presiding judge, Industrial Tribunal-cum-Labour Court, Shimla to proceed to award back wages in the quantum of 50% from the date of his illegal retrenchment/disengagement from service till his reinstatement in service at the instance of the respondent No.2 in pursuance to Annexure P-1. However his having omitted to do so has sequelled perpetration of injustice upon the petitioner, which hence necessitates its being undone.

4. The learned counsel for the respondent No. 2 has with vehemence contended before this Court that the belated raising of the industrial dispute at the instance of the petitioner/workman ought to preclude this Court to determine back wages. However, the said submission succumbs in the face of the learned counsel for the respondent aforesaid having not pleaded the said fact in its response to the claim instituted by the petitioner/workman before the Industrial Tribunal-cum-Labour Court. The aforesaid omission sequelled non-framing of an apposite issue qua it, obviously no findings could be returned thereupon. The effect thereof is that the respondents hence acquiesce to the factum of the industrial dispute raised at the instance of the petitioner/workman being not vitiated with staleness. As such, his contention before this Court that with hence the industrial dispute being vitiated with the vice of staleness the relief of back wages is unaffordable to the petitioner, gets emaciated.

5. Consequently, the impugned award is interfered with, to the extent that its omitting to award back wages to the petitioner in the quantum of 50% from the date of his illegal retrenchment/disengagement till his reinstatement in service is quashed and set aside. The respondents are directed to hence defray 50% of the back wages to the petitioner from the date of his illegal retrenchment/disengagement till his re-engagement in service within a period of six weeks from the date of receipt of copy of this judgment. In view of above, the present petition stands disposed of, as also, the pending applications, if any.

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

Union of India and another ……Petitioners.

Vs.

Shri Bhuvneshwar Sen …..Respondent.

CWP No. 1879 of 2008
Reserved on : 25.06.2015
Date of decision: 01.07.2015

Constitution of India, 1950- Article 226- Father of the respondent died in harness- respondent moved an application seeking compassionate appointment which was rejected initially- respondent filed an application before the Tribunal pleading that his case was required to be considered for two more occasions- held, that as per instruction of the Government of India, the case of the respondent was required to be reviewed for two years subject to the availability of regular vacancy- Tribunal had only directed the petitioner to consider the case of the respondent for two more years by taking into account number of vacancies- there was no illegality in the order passed by Tribunal- Writ petition dismissed.

(Para-2 and 3)

For the petitioners: Mr. Ashok Sharma, Assistant Solicitor General of India.
For the respondent: Mr. T.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

This petition is instituted against the order, dated 27.05.2008, rendered in O.A. No. 497-HP-2006 by the learned Central Administrative Tribunal, Circuit Bench at Shimla.

2. Key facts necessary for the adjudication of this petition are that the respondent's father was serving in the Department of Posts. He died in harness on 11.08.2004, leaving behind his wife and two sons. Respondent moved an application seeking compassionate appointment for the post of Postal Assistant. Case of the respondent was considered for compassionate appointment by the Circle Selection Committee on 28.07.2005. Initially, the case of the respondent was rejected by the Circle Selection Committee taking into consideration the pensionery/retiral benefits received by the family of the respondent. Case of the respondent before the Tribunal was that his case was required to be considered for two more occasions. It is evident from the Office Memorandum, dated 5th May, 2003 that a decision has been taken that if compassionate appointment to genuine and deserving cases, as per the guidelines contained in the above Office Memorandum, dated 5th May, 2003 is not possible in the first year, due to non-availability of regular vacancy, the prescribed Committee may review such cases to evaluate the financial conditions of the family to arrive at a decision as to whether a particular case warrants extension by one more year, for consideration for compassionate appointment by the Committee, subject to availability of a clear vacancy within the prescribed 5% quota. It is further stipulated in the Office Memorandum, dated 5th May, 2003, that the maximum time a person's name can be kept under consideration for offering compassionate appointment will be three years, subject to the conditions that the prescribed Committee has reviewed and certified the penurious condition of the applicant at the end of the first and the second year.

3. In the instant case, the case of the respondent has been considered only once on 28.07.2005. It was required to be reviewed for two years subject to availability of regular vacancies and on the basis of evaluation of the financial condition of the respondent's family. The respondent approached the learned Central Administrative Tribunal by way of O.A. No. 497-HP-2006, seeking directions to the petitioners to offer him appointment on compassionate grounds. Case of the respondent before the learned Central Administrative Tribunal, precisely was that his case for compassionate appointment has

been considered only once and not for two more occasions as per the guidelines contained in Office Memorandum, dated 5th May, 2003. The learned Central Administrative Tribunal vide order, dated 27.05.2008, while allowing the Original Application has directed the petitioners to consider the case of the respondent for two more years by taking into account number of vacancies and if the selection committee finds the respondent No. 2 to be eligible, he be offered appointment on compassionate grounds. The petitioners were directed to keep the name of the respondent in their register for two more occasions for review and take appropriate action. Thus, there is no perversity or illegality in the order, dated 27.05.2008 passed by the Central Administrative Tribunal, Circuit Bench at Shimla. .

4. Consequently, there is no merit in this writ petition and the same is dismissed, so also the pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Avinash Chauhan .....Petitioner

Versus

P.C. Dhiman and others ....Respondents

COPC No. 308 of 2015
Judgment reserved on: June 18, 2015
Decided on: July 2, 2015

Contempt of Court Act, 1971- Section 12- A direction was issued by the Court to consider the application of the applicant for compassionate appointment in accordance with the policy prevalent at the time of the death of the petitioner's father - respondents failed to obey the direction on which a contempt petition was filed, which was disposed of with a direction to comply with the earlier order passed by the Court- the case of the petitioner was considered and was rejected on the ground that income of the family of the petitioner was more than the prescribed limit- the benefits granted at the time of the death of the father of the petitioner were taken into consideration contrary to the express judgment of the court - another contempt petition was filed, which was disposed of with a direction to comply with the order passed by the Court – the case of the petitioner was rejected on the ground that he did not fall within the income criteria fixed by the government on which 3rd contempt petition was filed by the petitioner - held that the respondents had counted the service benefits granted to the family after the death of the employee contrary to the judgment of the High Court - it was not open to the respondent to violate the order passed by the Court- this is a contumacious conduct on the part of the respondent, hence the notices ordered to be issued to the respondent as to why they be not punished for the contempt of the Court. (Para 10-20)

For the Petitioner: Mr. Onkar Jairath, Advocate.

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

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge

Complaint herein is that the respondents have failed to implement the judgment dated 9.12.2013, passed by a Division Bench of this Court in CWP No.7674 of 2013, in letter and spirit, despite having been directed to implement the same repeatedly. They allegedly have shown scant regard to the judgment passed by this Court and thereby undermined the majesty and dignity of this Court, hence rendered themselves liable for being punished for the contempt of this Court.

2. Shri Piar Singh, father of the petitioner, was working as PET in the Education Department of Himachal Pradesh. He died in harness in the year 2006. The qualification of the petitioner is plus two. Besides, he did degrees in Bachelor of Physical Education (BPE) and Master of Physical Education (M.P. Ed.). He made an application, seeking appointment on compassionate ground commensurate with his educational qualification in the year 2006 itself. The same was considered and rejected. Consequent upon the issuance of communication OM No. EDN-H(1)(b(4)241/2004-05-Comp. Appt. dated 20.10.2012 (Annexure P-15 to the writ petition) qua rejection of his application, Deputy Director Higher Education, Bilaspur, informed the petitioner, vide letter dated 21.11.2012 Annexure C-3 to this petition that in view of income of his family as Rs.63,000/- per annum i.e. beyond the income criteria fixed by the Government under the Scheme to make appointment on compassionate ground, his application was rejected.

3. The above decision came to be challenged by the petitioner in CWP No.7674/2013. A division Bench of this Court has allowed the writ petition after taking into consideration the given facts and circumstances and also the law applicable with the following observations:

> "8. If that be the sole ground for rejection, in the circumstances, we quash and set aside Annexures P-15 and P-16 and hold that two orders do not detail the facts holding that the income of the petitioner is Rs.63,000/- (Annexure P-16), in fact we find Annexure P-16 to be a non-speaking and terse order without in any manner forms any ground for decision. Writ petition is allowed. A direction is issued to the respondents to consider the application of the petitioner in accordance with the policy prevalent at the time when the father of the petitioner died in terms of the law supra.

4. As a matter of fact, the action of the respondents to take into consideration the amount received by the mother of the petitioner by way of retiral benefits, including pension, for the purpose of computation of annual income of the family has been quashed and set aside by this Court in the judgment supra with a direction to the respondents to consider the application of the petitioner in accordance with the policy prevalent at the time when the father of the petitioner died and in terms of the law discussed in the judgment.

5. When the respondents failed to implement the judgment passed by this Court, the petitioner filed Contempt Petition (C) No.121/2014 against them. The same was disposed of vide order dated 5.5.2014 Annexure C-8, which reads as follows:

> "This contempt petition is disposed of by directing the respondents to comply with the Court directions dated 9.12.2013, passed in CWP No.7674 of 2013, within six weeks, if not already complied with and report compliance before the Additional Registrar (Judicial).

> 2. The Registry to convey the order to the respondents and also furnish the copy of the same to the learned Advocate General. The petition stands disposed of."

In compliance to the orders so passed in the Contempt Petition, the 3rd respondent has filed affidavit, stating therein that the Administrative Department had taken up the matter with the Finance Department for consideration and the Finance Department has found the income of the family of the petitioner at the time of death of his father as Rs.1,19,034/- per annum. Therefore, the petitioner was not found entitled to employment on compassionate ground. He was informed about the decision so taken by the respondents vide letter dated 25.3.2014 Annexure C-9 (colly). This led in filing another Contempt Petition (C) No. 283/14. The same was also disposed of on 13.8.2014 vide order Annexure C-10, which reads as follows:

> "Issue notice. J.K. Verma, learned Deputy Advocate General waives notice on behalf of the respondents.
>
> 2. This contempt petition is disposed of by directing the respondents to comply with the Court directions, dated 9th December, 2013, passed by this Court in CWP No. 7674 of 2013, within a period of six weeks, if not already complied with and report compliance before the Additional Registrar (Judicial).
>
> 3. The Registry to convey the order to the respondents and also furnish the copy of the same to the learned Advocate General. The petition stands disposed of alongwith pending application."

6. Consequent upon the order ibid, the 1st respondent passed the order dated 10.11.2014 Annexure C-11. A perusal thereof reveals that the said respondent, after taking note of the operative portion of the judgment rendered by this Court in CWP No.7674 of 2013 and also the opinion obtained from the Finance Department, has concluded that case of the petitioner does not fall in indigent circumstances nor does it fulfill the financial/income criteria fixed by the Govt. in the year 2006. The claim of the petitioner for appointment on compassionate ground has, therefore, been rejected.

7. It is seen from the Order Annexure C-11 that respondent No.1 on the advice of Finance Department has included the amount of pension in the income of the family which as per the judgment passed in CWP No.7674/2013 could have not been included.

8. The petitioner filed CMP No.18778 of 2014 in Contempt Petition (C) No.283/2014 supra, with the submissions that the respondents have not complied with the order passed by this Court despite repeated directions. As per the orders passed in this application on 1.12.2014 and 1.1.2015, the respondents were directed to comply with the directions issued by this Court. Anyhow, the application came to be dismissed vide order Annexure C-13, of course with liberty reserved to the petitioner to file a fresh contempt petition.

9. It is in this backdrop, the present, i.e the 3rd Contempt Petition, came to be filed against the respondents-contemnors.

10. Respondent No.1 vide order dated 21.5.2015, passed in this petition, was directed to comply with the directions contained in judgment dated 9.12.2013 passed in CWP No.7674/2013 and in default to appear in person before the Court on 18.6.2015. On the date so fixed, neither compliance report was filed nor 1st respondent appeared in person

before this Court.

11. Learned Advocate General has pointed out from the record that by passing the order Annexure C-11 by the 1st respondent, the judgment stated to have been violated, stands complied with.

12. We have considered the matter in the light of the material placed on record and the arguments addressed on both sides.

13. The 1st respondent has rejected the application of the petitioner for appointment on compassionate ground purely on income criteria on the advice obtained from the Finance Department. In the order Annexure C-11, the income of the family of the petitioner finds mention as Rs.1,19,034/-. The order is silent as to on what basis the income of the family of the petitioner was computed as Rs.1,19,034/- However, the recitals therein that the compassionate employment can only be given where the family of the deceased servant is left in indigent circumstances and that the benefit received by the family on account of family pension and other retiral benefits also needs to be taken into consideration while computing the income of the family of the petitioner, leads to the only conclusion that the income of the family from pensionary benefits has also been included to compute the annual income, because otherwise there was no occasion for the respondents to have computed the income of the family of the petitioner as Rs.1,19.034/-, for the reasons that at the time of death of Shri Piar Singh, the father of the petitioner, the income of the family of the petitioner from all sources was Rs.11,500/- per annum and by including the amount received by way of pension therein, it was Rs.96,000/- per annum. It is so established on record from the perusal of certificates dated 3.10.2006 and 30.10.2006, Annexures C-1 and C-2, respectively.

14. The order Annexure C-11 further reveals that the manner in which the respondent No.1 has rejected the application of the petitioner amply demonstrates that the said respondent has sit over the judgment of this Court as an appellate authority and thereby not only surpassed the judgment in question, but also undermined the dignity and majesty of this Court. It is worthwhile to mention here that an order passed by a Court of law may be illegal, but still the same is binding on the parties to a lis, until and unless it is set aside by a competent Court having jurisdiction over the matter. It is not open to the respondent-contemnor to justify his/her action in not complying with the Court's order on the basis of any new contention on merits. It is well settled at this stage that unless and until the order of the Court about which the non-compliance is complained, is held to be without jurisdiction or void ***ab initio*** by a competent Court having jurisdiction over the matter, the parties thereto are bound to comply with it in letter and spirit, even though it may be illegal. It is not open to the respondent-contemnor to justify his/her contumacious conduct on the basis of some new contentions contrary to the judgment complained to be violated.

15. If not shocking, it is painful to point out that despite the findings recorded by a Division Bench of this Court in its judgment rendered on 9.12.2013 in CWP No.7674/2013 that the amount received by the family under family pension scheme, gratuity under the Payment of Gratuity Act and the provident fund paid under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, cannot be made the basis for denying appointment on compassionate ground, the 1st respondent on the advice of the Finance Department while computing the annual income of the family of the petitioner has again included therein, pensionary benefits received by his mother and rejected the application. As a matter of fact,

rejection of the application of the petitioner by the respondents on the same ground and the decision so taken by them conveyed to him vide Annexure-16 to the writ petition has been held illegal by the Division Bench while allowing the writ petition holding the order Annexure P-16 as non-speaking and terse order.

16. Taking again a similar decision contrary to the judgment of this Court is nothing else but a contumacious conduct attributed to respondent No.1 and also respondents No.2 and 3 to disgrace the judgment in question.

17. The judgment is clear and unequivocal. As per its true import and meaning, the income from pension or other retiral benefits cannot be included while computing the income for the purpose of appointment on compassionate ground. Respondent No.1 being a senior bureaucrat and posted as Principal Secretary (Education) to the Government of Himachal Pradesh; whereas respondents No.2 and 3 occupying equally high position in the Government being Director and Under Secretary, Higher Education can reasonably be believed to have correctly understood the true import and meaning of the judgment. It was their bounden duty to have implemented the judgment in letter and spirit. They, however, have conducted themselves in a manner bringing thereby the authority and majesty of law and judgment into disrespect and disregard.

18. The judgment complained to be violated has attained finality, because the legality and validity thereof has not been challenged any further in the Apex Court or in any other and further proceedings. The action of the respondents to include the income of the family from pension has already been set aside and quashed by this Court with clear cut findings that the income from family pension and other retiral benefits cannot be included while computing the income of the family for the purpose of consideration of application for appointment on compassionate ground. The action of the respondents in computing the income of the family of the petitioner again by taking into consideration the amount received by his mother by way of family pension, amounts to gross and willful disobedience of the judgment. The true import and meaning of the judgment, in question, is that the application of the petitioner for appointment on compassionate ground has to be considered taking into consideration his family income from all sources excluding the income from family pension and retiral benefits, if any. The computation of family income by including therein the income from family pension, again amply demonstrates that it has been done to bypass the judgment intentionally and deliberately.

19. Such willful act and conduct on the part of the respondents constitutes the basic ingredients for the offence of contempt. The orders passed in Contempt Petition (Civil) Nos.121/2014, 283/2014 and application CMP No.18778/2014 filed in Contempt Petition (Civil) No.283/2014, Annexures C-8, C-10 and C-12 (colly), respectively, whereby the respondents were directed to report compliance to the judgment complained to be violated persuade this Court to form such opinion. Despite repeated directions, the failure on the part of the respondents to comply with the judgment in its letter and spirit, leads to the only conclusion that they have scant regard to the judgment/orders passed by this Court.

20. Therefore, in our opinion, the respondents are in contempt, because they have violated the judgment of this Court intentionally and deliberately. We, therefore, order to issue notice to them in terms of Form No.1 to the Contempt of Court (Himachal Pradesh) Rules, 1996, to appear in person on **9.7.2015** and show cause as to why they be not punished for contempt of this Court.

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

Shri Brij Lal Thakur .....Petitioner.

Vs.

Himachal Road Transport Corporation and another .....Respondents.

CWP No. 1459 of 2015
Reserved on : 25.06.2015
Date of decision 02.07. 2015

Constitution of India, 1950- Article 226- Petitioner was appointed as a conductor with the respondent- the respondent adopted Voluntary Retirement Scheme subject to receipt of funds from the State Government for ex-gratia payment– the petitioner filed an application seeking voluntary retirement and prayed that his five years service be counted for the purpose of pensioner/retiral benefits- however, respondent did not count the service and contended that the five years service benefit is not available at the time of voluntary retirement- held that the purpose of the voluntary retirement is to infuse new blood in the organization by permitting the incumbents to seek voluntary retirement-these provisions have to construed fairly–a person getting voluntary retirement cannot be discriminated from other person- the petition allowed. (Para 3-8)

Case referred:
Bank of India and another Vs. K. Mohandas and others (2009) 5 Supreme Court Cases 313

For the petitioner: Mr. J. L. Bhardwaj, Advocate.
For the respondents: Mr. B.N. Sharma, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

The petitioner was appointed as Conductor with the respondent-Corporation on 07.01.1983. The respondent-Corporation has adopted the Voluntary Retirement Scheme vide Annexure P-2, dated 23rd November, 2004. According to this communication, the voluntary retirement was made subject to receipt of funds from the State Government for ex-gratia payment under the Scheme. No requests for retirement under Voluntary Retirement Scheme in respect of those employees facing disciplinary proceedings was to be entertained. Petitioner submitted an application seeking voluntary retirement vide Annexure P-1, dated 7th January, 2005. Petitioner's application was allowed on 31.07.2005. He has rendered 22 years 7 months and 24 days service with the respondent-Corporation. Petitioner submitted a representation that his five years' service be counted for the purpose of pensionery/retiral benefits as per Rules 29 and 48-B of the Central Civil services (Pension) Rules, 1972 applicable to the employees of the Corporation. However, the fact of the matter is that the petitioner's five years service has not been counted for the purpose of pensionery/retiral benefits as per Rule-48 B of the Central Civil Services (Pension) Rules, 1972.

2. Case of the respondent-Corporation, in a nut-shell, is that since the petitioner had sought voluntary retirement, he would not be entitled to get the benefit of five years' service under Rule48-B of the Central Civil services (Pension) Rules, 1972.

3. The question raised in this petition is no more *res integra* in view of the law laid down by their Lordships of the Hon'ble Supreme Court in **Bank of India and another** Vs. **K. Mohandas and others** (2009) 5 Supreme Court Cases 313. Their Lordships have held as under:-

> *"24. The principal question that falls for our determination is : whether the employees (having completed 20 years of service) of these banks (Bank of India, Punjab National Bank, Punjab & Sind Bank, Union Bank of India and United Bank of India) who had opted for voluntary retirement under VRS 2000 are entitled to addition of five years of notional service in calculating the length of service for the purpose of the said Scheme as per Regulation 29(5) of Pension Regulations, 1995 ?*
>
> *42. The contention was raised on behalf of the banks that if Regulation 29(5) of the Pension Regulations, 1995, is applied for the purposes of VRS 2000, the same would create an anomalous situation inasmuch as two different classes of employees for the purpose of granting pension would be created, namely, a class of employees who had completed 15 years of service but less than 20 years of service and this class would not be entitled to receive benefits under Regulation 29(5) while the employees who had completed 20 years service or more would be entitled to receive the benefit under Regulation 29(5).*
>
> *43. It was submitted that by such construction a class within the class would be created which is impermissible. We do not agree. If a special benefit under Regulation 29(5) is available to the employees who had completed 20 years of service or more, by no stretch of imagination, can it be said that it is discriminatory to those employees who had completed 15 years of service but not completed 20 years. In view of the provision contained in Regulation 29 (5), if the optees who have not completed 20 years get excluded from the weightage of five years which has been given to optees who have completed 20 years of service or more, it is no discrimination. Such provision can neither be said to be arbitrary nor can be held to be violative of any constitutional or statutory provisions. The weightage of five years under Regulation 29(5) is applicable to the optees having service of 20 years or more. There is, thus, basis for additional benefit. Merely because the employees who have completed 15 years of service but not completed 20 years of service are not entitled to weightage of five years for qualifying service under Regulation 29(5), the employees who have completed 20 years of service or more cannot be denied such benefit.*
>
> *45. It is misplaced assumption that by reading Regulation 29(5) in the Scheme, the Pension Regulations would get altered or amended. Can it be said that statutory relationship of employee and employer brought to an end prematurely by contractual VRS 2000 amounted to alteration or amendment in the statutory Regulations. Surely, answer has to be in negative and that must answer this contention.*
>
> *48. It is true that validity and legality of Regulation 28 has not been put in issue. It was apparently not done because, according to the*

employees, amended Regulation 28 although made retrospective could not have affected the concluded contract. We have already indicated above as to how the amendment in Regulation 28 in the year 2002 with effect from September 1, 2000 could not have applied to the optees under the Scheme who had completed service of 20 years. Lack of challenge to the Regulation 28 by the employees is, therefore, not very material. It is not correct to say that by taking recourse to Regulation 29, the amendment to Regulation 28 is rendered otiose.

50. It is true that VRS 2000 is a complete package in itself and contractual in nature. However, in that package, it has been provided that the optees, in addition to ex-gratia payment, will also be eligible to other benefits inter alia pension under the Pension Regulations. The only provision in the Pension Regulations at the relevant time during the operation of VRS 2000 concerning voluntary retirement was Regulation 29 and clause(5) thereof provides for weightage of addition of five years to qualifying service for pension to those optees who had completed 20 years service. It, therefore, cannot be accepted that VRS 2000 did not envisage grant of pension benefits under Regulation 29(5) of the Pension Regulations, 1995, to the optees of 20 years service along with payment of ex-gratia.

51. The whole idea in bringing out VRS 2000 was to right size workforce which the banks had not been able to achieve despite the fact that the statutory Regulations provided for voluntary retirement to the employees having completed 20 years service. It was for this reason that VRS 2000 was made more attractive. VRS 2000, accordingly, was an attractive package for the employees to go in for as they were getting special benefits in the form of ex-gratia and in addition thereto, inter alia pension under the Pension Regulations which also provided for weightage of five years of qualifying service for the purposes of pension to the employees who service for the purposes of pension to the employees who had completed 20 years service."

Rule 48-B reads as under:

"(1) The qualifying service as on the date of intended retirement of the Government servant retiring under Rule 48(1) (a) or Rule 48-A or Clause (k) of Rule 56 of the Fundamental Rules or Clause (i) of Article 459 of the Civil Service Regulations, with or without permission shall be increased by the period not exceeding five years, subject to the condition that the total qualifying service rendered by the Government servant does not in any case exceed thirty three years and it does not take him beyond the date of superannuation.

(2) The weightage of five years under sub-rule (1) shall not be admissible in cases of those Government servants who are prematurely retired by the Government in the public interest under Rule 48(1)(b) or FR 56(j)."

4. It is evident from the plain language employed in Rule 48-B that the qualifying service as on the date of intended retirement of the Government servant with or without permission shall be increased by the period not exceeding five years, subject to the condition that the total qualifying service rendered by the Government servant does not in any case exceed thirty three years and it does not take him beyond the date of superannuation.

5. In the instant case, the petitioner had worked for 22 years, 7 months and 24 days at the time of his seeking voluntary retirement on 31.07.2005. Rule 48-B would apply even if the petitioner has sought voluntary retirement. The voluntary retirement is a golden handshake and the purpose of the Scheme is to induce new blood by permitting the incumbents to seek voluntary retirement after putting in number of years service, as prescribed under the Scheme. The provisions governing the benefits of services of employees must be construed in a fair and reasonable manner, as held by the Hon'ble Supreme Court in the judgment cited hereinabove.

6. The learned Single Judge of Delhi High Court in **N.K. Sharma** Vs. **BSES and ors**., W.P. (C) No. 4806/2011, decided on 27th September, 2013, had an occasion to consider the applicability of Rule 48-B of the Central Civil services (Pension) Rules, 1972 qua the employees, who have sought voluntary retirement under the Voluntary Retirement Scheme. The Learned Single Judge has held as under:

> "*5. Applying the provision of Rule 48-B and the ratio of the judgment in Pawan Vohra's case (supra), both the petitioners will get benenfit of additional five years of service and therefore, the qualifying service of each of the petitioners will be taken as 15 years plus five years which comes to a total of 20 years of service.*
>
> *7. A bare reading of the aforesaid Rule 13 shows that even officiating or temporary service period has to be added for determining qualifying service.*
>
> *10. Learned senior counsel for respondent No. 1 further sought to argue that there is a difference between the eligibility and qualifying service. It is argued that first a person must become eligible by completing 20 years of service and only thereafter, qualifying service can be taken to determine the pension. I am unable to accept this argument which is without any substance whatsoever because eligibility and qualifying service are effectively the same because pension is paid as per qualifying service which is determined as per Rule 13. Nowhere in the pension rules, it is provided that eligibility must first take place by completing 20 years of service and thereafter the qualifying service will be determined for calculating pension. In fact, Rule 13 provides exactly the opposite and states that qualifying service is to be determined as per the said provision and the period of temporary service is added to determine the total qualifying service and which qualifying service will entitle grant of pension. Also, if I agree with the argument urged by learned senior counsel for respondent No. 1, the effect would be to wholly negate Rule 48-B, and as per which, a bonus period of five years is added to the period of service in order to determine the qualifying service. It only bears reiteration and repetition that pension is paid as per qualifying service, and that nothing can be added to Rule 13 and nothing can be subtracted from Rule 13 for deciding the qualifying service for determining the pension.*
>
> *16. In view of the above, I find that the petitioners by virtue of Rule 48-B of the CCS Pension Rules will have benefit of additional five years of service as bonus period of service to be added to their 15 years of actual service that stood completed on 31.12.2003, and thus their total service period comes to 20 years. The petitioners, therefore, had qualifying service of 15 years plus 5 years i.e., 20 years."*

7. Mr. B.N. Sharma, learned counsel for the respondents has drawn the attention of the Court to Annexure P-3, whereby it is specifically provided that the benefit of addition of five years qualifying service as contained in Rules 29 and 48-B of Central Civil Service (Pension) Rules, 1972 shall not be applicable to the employees seeking retirement under Voluntary Retirement Scheme. The employees whether they retire by seeking voluntary retirement or retire according to the other provisions of the Central Civil Service (Pension) Rules, 1972 constitute a homogeneous class. The homogeneous class cannot be divided by denying the benefit to a particular class, merely, on the ground that he/she has sought voluntary retirement for the purpose of addition of five years qualifying service. Rule-19 is not applicable in this case.

8. Accordingly, the writ petition is allowed. Annexure P-3, dated 30th November, 2004 is quashed and set aside. The respondents are directed to grant the benefit of five years qualifying service to the petitioner from the date of his retirement, i.e., 31.07.2005 and revise the pension from the due date and also to release other retiral benefits alongnwith interest @ 9% per annum from the due date till its realization. The miscellaneous application(s), if any, also stand(s), disposed of. No costs.

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

Jangli Ram .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 4204 of 2013.
Reserved on: July 01, 2015.
Decided on: July 02, 2015.

Indian Penal Code, 1860- Section 376- Accused stayed in the house of PW-2 after attending the marriage- PW-1 heard the cries in the night and switched on the light – she noticed that accused was standing in the room and zip of his pant was open – PW-1 also noticed the blood on the legs of the prosecutrix- accused ran away from the spot after the incident – prosecutrix supported the prosecution version- Medical Officer had also noticed the injuries on her person and stated that possibility of sexual assault could not be ruled out- prosecutrix was minor on the date of incident- testimony of prosecutrix was corroborated by independent witnesses and Medical Officer- held, that in these circumstances, accused was rightly convicted. (Para-19 to 21)

For the appellant: Mr. N.S.Chandel, 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 and order dated 5/8.7.2013, rendered by the learned Sessions Judge (Forests), Shimla, H.P. in Sessions Trial No. 25-S/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 rigorous imprisonment for ten years 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 PW-1 Vidya Devi, PW-2 Murat Singh alongwith the prosecutrix and three sons were putting up at Malyana as tenants. PW-2 Murat Singh was working as mason. He was having one room and one kitchen. The prosecutrix was student of second class in the year 2012. Her date of birth was 18.10.2004, as per the birth certificate Ext. PW-10/B and family register Ext. PW-10/C. On 26.4.2012, the marriage of the brother of Yashpal, who was residing in the neighborhood of PW-2 Murat Singh had been fixed. It was attended by him. PW-1 Vidya Devi alongwith the children stayed back in the house. The accused also attended the marriage alongwith PW-8 Atma Ram. Thereafter, PW-2 Murat Singh, PW-8 Atma Ram and other persons consumed liquor in the marriage. Accused went to the house of PW-2 Murat Singh to spend night. During night, accused alongwith two sons of PW-1 Vidya Devi and PW-2 Murat Singh had slept on single bed in the kitchen and one son and prosecutrix had slept on the floor in the room where the accused was sleeping. At about 11:00 PM, prosecutrix cried for help and on hearing her cries, PW-1 Vidya Devi went to the room and switched on the light. She noticed that accused was standing in the room and zip of his pant was open. PW-1 Vidya Devi also noticed blood on the legs of the prosecutrix. Thereafter, the accused escaped from the spot. PW-1 Vidya Devi narrated the incident to PW-2 Murat Singh. The prosecutrix had disclosed that wrong thing was done with her private part by the accused. Thereafter, PW-2 Murat Singh went in search of the accused alongwith PW-3 Roshan Lal but they could not find the accused. The police recorded the statement of PW-1 Vidya Devi and FIR Ext. PW-9/A was registered. The prosecutrix was examined by PW-5 Dr. Geetika. She issued the MLC Ext. PW-5/B. The clothes of the prosecutrix were taken into possession. These were sent to FSL. The opinion of the FSL is Ext. PW-5/C. The police also took photographs of the spot. The accused was arrested. He was also got medically examined. The matter was investigated and challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 19 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C to which he pleaded not guilty. He denied the entire case of the prosecution. The learned Trial Court sentenced and convicted the accused on 5/8.7.2013. Hence, the present appeal.

4. Mr. N.S.Chandel, 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, appearing for the State has supported the judgment of the learned trial Court dated 5/8.7.2013.

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

6. PW-1 Vidya Devi testified that her husband is working as a mason. They had one room and one kitchen on rent. Her daughter was studying in 2nd class. On 26.4.2012, the marriage of brother of Yashpal, who resides in their neighborhood had been fixed. Her husband had gone to attend the same. She and her children had stayed back in the house. Her husband came back from the marriage at about 10:30 PM alongwith the accused. Her two sons and the accused slept on the double bed. She and her husband

slept in the single bed inside the kitchen and the remaining two children slept on the floor. Accused and her husband had consumed liquor in the marriage. At about 11:00 PM, her daughter cried. She went to the room and switched on the light. She saw the accused standing near her daughter and the zip of the pant was open. She noticed blood on the legs of her daughter. Her husband was still asleep. The moment she started lifting her daughter, by that time, the accused had run away from the spot. Thereafter, she woke up her husband. When she asked her daughter the reason of her cries, she told her that the accused had done wrong thing with her in her private part. She had also told her that she was feeling pain in her private part. Her husband went out in search of the accused, but he could not be traced. She made statement to the police vide Ext. PW-1/A. The police took her daughter from Dhalli to the Hospital for conducting her medical examination. In her cross-examination, she deposed that she served food to children at 10:00 PM and at about 10:30 PM, her husband had reached. Her husband had telephonically informed the police. In her cross-examination, she admitted that on that night, they had neither sought nor tried to seek help from their neighbours.

7. PW-2 Murat Singh, corroborated the statement of PW-1 Vidya Devi, the manner in which the incident had happened on 26.4.2012. He came to his house at 10:30 PM. The accused also accompanied him to his house. He told his wife to arrange bedding for the accused. His son and daughter who were younger and used to wet the bed during night had also slept in the same room on the floor. He had gone to sleep by 10:45 PM. At 11:00-11:30 PM, he was woken up by his wife. His wife and daughter were weeping and at that time, the accused was not present. He had seen condition of his daughter and had found blood on her private part. On asking, her daughter told him that the uncle who had come had committed bad act with her. His wife took the daughter for medical examination at 6:30 AM.

8. PW-3 Roshan Lal deposed that PW-2 Murat Singh had visited his house on the intervening night of 26th /27th April, 2012 at about 12:30 AM. Murat Singh told him that in the night, accused had come to his house with him and had done wrong act with his daughter and ran away from there. He along with Murat Singh had searched for the accused but could not be found. The police took into possession the bed sheet vide memo Ext. PW-2/A. It was signed by him.

9. PW-4 Dr. Aman Madaik, has examined the accused and issued MLC Ext. PW-4/C. In his opinion, there was nothing to suggest that accused was incapable of performing sexual intercourse.

10. PW-5 Dr. Geetika, has medically examined the prosecutrix. She has noticed following injuries on the body of the prosecutrix:

> "i) A vertical scratched abrasion on right cheek 2 cm lateral to ala of nose, which was 1 cm in size, reddish in colour, which was blunt/tip of sharp. The said injury was less then 12 hours.
>
> ii) There was bruise 5 cms. below left nipple of .5 x .5 cms. size, which was bluish in colour and was caused by a blunt weapon within probable duration of less than 72 hours.
>
> iii) There was a bruise bilateral elbow of 1 cm x 1 cm size which was bluish in colour caused by a blunt weapon within probable duration of less than 72 hours.

iv) There was a bruise on left chin of 1 x 2 cms. size, oval in shape which was bluish in colour caused by a blunt weapon within probable duration of less than 72 hours."

In her opinion, there was a penetration into introitus and there were injuries on body. Her final opinion based on the chemical examination FSL report that sexual assault could not be ruled out.

11. PW-7 Desh Raj, proved the date of birth of the prosecutrix at Sr. No. 155 of the Register brought by him. Her date of birth was recorded in the register as 18.10.2004. He proved certificate Ext. PW-7/A.

12. PW-8 Atma Ram, deposed that there was marriage ceremony on 26.4.2012. The accused had come to his workshop. He had told him that he had come in connection with Court case in Shimla. During night, he and accused had gone to attend the marriage. Murat Singh had also met them. They had consumed liquor in the marriage. One another person Madan was also with them. After taking drinks and food, Murat Singh and accused started talking something with each other for about ten minutes and during that period he and Madan got to one side and they both came to the workshop. Murat Singh and accused remained there talking to each other. He was declared hostile and cross-examined by the learned Public Prosecutor. He admitted in his cross-examination by the learned Public Prosecutor that accused was not invited in the marriage but he had gone with them as his guest. However, on cross-examination by the Advocate on behalf of the accused, he admitted that accused had come to his workshop at first instance and at that time he had told him that he was to take some money from Murat Singh. He was again cross-examined by the learned Public Prosecutor. He deposed that he had told this fact for the first time in the Court and he had also not disclosed this fact to the police under statement made under Section 161 Cr.P.C. mark-A.

13. PW-10 HC Narian Singh proved the birth certificate Ext. PW-10/B and copy of family register vide Ext. PW-10/C.

14. PW-15 HHC Dula Ram deposed that the accused identified the room where he had committed the sexual offence with the victim.

15. PW-17 Lakhi Ram deposed that he being the Secretary Gram Panchayat Gohar had supplied the birth certificate of the prosecutrix vide Ext. PW-10/B, Ext. PW-10/C and copy of family register Ext. PW-10/D to the police.

16. The prosecutrix was also examined as PW-18 on oath. She stated that one year back, her father had gone to attend the marriage. During night, the accused came alongwith her father. She identified the accused in the Court. During night time, she alongwith her brother Pardeep had slept on the floor and accused had slept on the bed alongwith her brother Kamlesh. During night time, accused committed wrong thing with her private part. She felt pain and cried. Thereafter, her mother entered the room and accused fled away. The accused was arrested by the police and she identified him. She was medically examined by the doctor. The clothes worn by her were also taken into possession by the doctor. Her father brought other clothes and those were worn by her. In her cross-examination, she specifically deposed that nobody had tutored her to make statement in the Court. Volunteered that she was aware of it. Her mother accompanied her to the hospital. Her clothes were taken into possession by the doctor.

17. PW-19 ASI Sewa Singh has investigated the matter. He alongwith the police party went to the spot. He recorded the statement of PW-1 Vidya Devi vide Ext. PW-1/A. FIR Ext. PW-9/A was recorded. The prosecutrix was medically examined. He took into possession bed sheet vide memo Ext. PW-2/A. He clicked the photographs.

18. This is the entire evidence led by the prosecution. The case of the prosecution, precisely, is that he accused came to stay overnight in the house of PW-2 Murat Singh. He sexually assaulted the prosecutrix. PW-1 Vidya Devi noticed the accused on the spot. She also woke up her husband. In the meantime, accused ran away. The prosecutrix was medically examined.

19. The prosecutrix was examined as PW-18. She has categorically testified that she was sexually assaulted by the accused during night time. She felt pain and cried. Thereafter, her mother entered the room and the accused ran away. She identified the accused in the Court. She was medically examined by PW-5 Dr. Geetika. The doctor has noticed the injuries, as noticed by us while discussing the statement of PW-5 Dr. Geetika. She has categorically opined on the basis of clinical examination and FSL report that sexual assault could not be ruled out. In her opinion, there was penetration into introitus and there were injuries on the body.

20. The statement of PW-18 prosecutrix has been duly corroborated by PW-1 Vidya Devi and PW-2 Murat Singh. The date of birth of the prosecutrix was 18.10.2004. The school certificate alongwith the copy of the parivar register has been duly proved by the prosecution. There was no enmity of the family of the prosecutrix with the accused.

21. Mr. N.S.Chandel, Advocate, appearing on behalf of the accused submitted that the father of the prosecutrix has to pay some money to the accused and thus his client has been falsely implicated. There is no force in this submission. There is no evidence on record to show that the father of the prosecutrix has to pay some money to the accused. Even if, hypothetically it is assumed that the money was to be paid, no self respecting father would ever try to falsely implicate the accused in such a heinous crime where the honour of the family and the prosecutrix is also involved. Thus, the prosecution has fully proved the case against the accused as per the statement of PW-18, prosecutrix and PW-5 Dr. Geetika, duly corroborated by PW-1 Vidya Devi and PW-2 Murat Singh.

22. Accordingly, there is no merit in this appeal and the same is dismissed. There is no occasion for this Court to interfere with the well reasoned judgment and order of the learned trial Court dated 5/8.7.2013.

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

M/s Hill Construction and Engineering Company .....Petitioner.

Versus

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

CWP No. 1286 of 2015.
Reserved on: 01.05.2015.
Date of Decision : 2nd July, 2015.

Constitution of India, 1950- Article 226- Respondent No. 3 invited bids for construction work by e-tendering- petitioner submitted his bid along with work certificate but bid was declined on the ground that necessary condition of previous work was not fulfilled - it was found that although petitioner had carried out work but it was not similar in nature as the work for which bids were invited- it was contended that during the pendency of the proceedings, similar work was allotted to the petitioner – held that, the court cannot interfere unless it is proved on record that technical committee had over looked relevant consideration or had taken some extraneous matter into consideration – the opinion of technical committee which consists of the experts cannot be reappraised by the Court- petition dismissed. (Para-2 to 5)

For the Petitioner: Mr. Sumeet Raj Sharma, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. M.A. Khan, Addl. A.G. and Mr. Anup Rattan, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The petitioner company is a duly constituted partnership firm with Mr. Ashwani Goel and Sh. Sanjeev Kapila as partners thereof. The petitioner company is enlisted as a Class-A contractor with the Himachal Pradesh Irrigation and Public Health Department. The said enlistment stands renewed from time to time. The respondent No.3 invited bids for the construction works nomenclatured "Augmentation of NOs LWSS in Matiana under IPH Sub Division Matiana, Tehsil Theog, District Shimla with estimated cost of Rs.8,03,93,250/-" by way of e-tendering. The notice inviting tenders and its containing the eligibility criteria and other terms and conditions stands comprised in Annexure P-2. The petitioner company purchased the tender document and submitted its bid online. The eligibility criteria necessitating fulfillment at the instance of the bidders are extracted hereinafter:-

> "24) Eligibility Criteria:-
>
> A contractor/firm would be considered pre qualified for work if:-
>
> The bidder during the last 7 years has completed three similar works costing each not less than 40 % of the amount
>
> Or
>
> The bidder during the last 7 years has completed two similar costing each not less than 50 % of the amount put to tender.
>
> Or
>
> The bidder during the last 7 years has completed one similar works costing each not less than 80% of the amount put to tender."

Even though the petitioner had submitted a work certificate, comprised in Annexure P-4, obtained from the Executive Engineer concerned regarding completion of work Aug. of WSS Shimla Town River Giri (SH: Providing, Laying and commissioning of twin Rising main 450 mm dia API 5L pipe of Grade X-60 RD-0 to 5850 (1st stage) for lifting of water from Balyong to Ukhaldhar in Tehsil Theog, District Shimla) of more than Rs.13,39,28,077), nonetheless, the respondents as evident from the reply furnished by them to the writ petition, declined the bid of the petitioner herein on the ground that, the Technical Committee constituted by the respondents for finalization of the bids of the bidders, on scrutinizing the technical bid of

the petitioner was constrained to decline the awarding of the proposed work to it, as compliance to the prescribed criteria, of the petitioner "during the last 7 years having completed three similar works costing each not less than 40 % of the amount or during the last 7 years having completed two similar works costing each not less than 50 % of the amount put to tender, besides during the last 7 years has completed one similar work costing not less than 80 % of the amount put to tender", had remained unfulfilled.

2. The effect of the opinion rendered by the Technical Committee constituted to scrutinize the bid of the petitioner for determining whether the eligibility criteria stood fulfilled at the instance of the petitioner, inasmuch as it, having during the last 7 years completed one similar work costing not less than 80% of the amount put to tender, was anvilled upon the fact that the work done certificate submitted by the petitioner before it in purported compliance thereof, pertained to execution of work of Water Supply Scheme, patently dissimilar to the one proposed to be executed, hence, was construed to be carrying no worth in its constituting or meeting compliance with the aforesaid enshrined eligibility criteria, to render the petitioner firm to be fit for its being awarded the proposed work. The opinion of the Technical Committee in construing that the previous work executed by the petitioner firm qua which the work done certificate was issued by the Executive Engineer concerned was qua work not similar to the work put to tender, hence, its while not achieving compliance with the enshrined eligibility criteria as extracted hereinabove, as such, rendered the petitioner disqualified and ineligible to claim the awarding of work to him, is to be presumed to be founded upon sound satisfaction having been drawn by it, on an incisive consideration of the material placed before it. Good and vigorous reasons have been portrayed in the reply filed by the respondents to the writ petition that the previous work though claimed to be similar to the work proposed to be executed, was not similar to the work proposed to be executed, hence, rendering the petitioner disqualified for its being awarded the proposed work. With the pronouncement of pointed dis-similarity of works inasmuch as the previously executed work and the proposed work claimed to be awarded on the score of both not being similar, when stands sustained by sound reasons besides, when no material has been placed on record by the petitioner to discountenance the satisfaction drawn by the Technical Committee in ousting the petitioner, from its being awarded the proposed work, as a sequel then, the opinion as formed by the Technical Committee, in proclaiming that given the dissimilarity of the work proposed to be executed and the work previously executed by the petitioner, the petitioner had not satiated the eligibility criteria, is un-dislodgeable.

3. Moreover, the work done certificate as submitted by the petitioner, was contended by the respondents to be with respect to work executed 7 years prior to the execution of the proposed work, as such, its infracting the eligibility criteria prescribing that the previous purported similar work costing less than 80% amount put to tender, was to be demonstrably executed prior to completion of 7 years, hence, rendering the petitioner ineligible. The third reason which prevailed upon the Technical Committee to decline the awarding of the proposed work to the petitioner is comprised in the fact that the previous work of the petitioner was of poor workmanship quality. The last reason as prevailed upon the respondents to decline the awarding of the proposed work to the petitioner was entrenched in the fact that the performance of the petitioner firm was consistently of poor quality, besides its failing to complete many previously awarded work within time, for which it stood penalized for, on various occasions.

4. The learned counsel for the petitioner has concerted to upset and destabilize the findings recorded by the Technical Committee which for the reasons aforesaid declined to accept the bid of the petitioner firm, on the score of a portrayal in his application bearing CMP No. 4934 of 2015, of the respondents having during the same period awarded works similar to the one qua which tenders were invited from the competing firms and that too, on the basis of a similar work done certificate furnished by the petitioner firm to the respondents herein. Consequently, it is argued that the subsequent awarding of works similar to the one proposed to be executed by the petitioner firm, on the strength of a paramateria/similar "work done" certificate as previously furnished by the petitioner firm to the respondents, constitutes acceptance qua the petitioner firm having fulfilled the eligible criteria besides, renders the findings and conclusions arrived at, by the Technical Committee in construing the work done certificate to be not qua similar work as proposed to be executed, hence, concomitantly rendering the petitioner firm to be disqualified, to stand waned and enfeebled.

5. The aforesaid submission as addressed before this Court by the learned counsel for the petitioner to overcome the rejection by the Technical Committee of his bid for the proposed work, for the reasons as attributed hereinabove, cannot gain succor or potency, only on the strength of the respondents having subsequently awarded works similar to the one as proposed to be executed and that too on the basis of a work done certificate similar to the one as furnished by the petitioner firm to the respondents, for the simple reason that the subjective satisfaction as drawn by the Technical Committee constituted by the respondents herein was drawn on an incisive discernment of the material on record displaying the evident facts as enunciated in the reply of the respondents, of the petitioner, hence, having not either fulfilled or accomplished the eligibility criteria, for rendering it eligible for its being awarded the execution of the proposed work. The technical committee as seized of the matter while making or arriving at a decision qua the disqualification of the petitioner firm for the awarding of the proposed work cannot suffer displacement, unless abundant material exists on record connoting the palpable fact of its having overlooked the germane considerations or it while making a decision in ousting the petitioner, from the awarding of the proposed work having taken extraneous material into consideration. It was an expert committee and its assessment qua the fitness of the petitioner firm, to execute the proposed work, as also, its decision qua the petitioner firm having not fulfilled the eligibility criteria, cannot be gone into or disturbed by this Court in the exercise of writ jurisdiction. Even if, the respondents subsequently awarded works similar to the one as proposed to be executed, on the strength of a similar work done certificate furnished by the petitioner firm to the respondents, yet cannot give strength to the petitioner firm to obtain the awarding of works proposed to be executed by the respondents. The subsequent awarding of works to the petitioner on the findings and recommendation of the subsequently constituted Technical Committee, concerned construing a paramateria work done certificate to be portraying similarity vis-à-vis the works subsequently awarded to the petitioner, cannot render reversible nor can disturb the findings and opinion rendered by the Technical Committee concerned constituted by the respondents herein whereby the aforesaid paramateria work done certificate was previously construed to be not portraying execution of works by the petitioner, similar to the one proposed to be executed. Even if, conflicting decisions stand arrived at by the previous and the subsequently constituted Technical Committees, the conflicting decisions, hence, cannot facilitate the petitioner to claim the awarding of the proposed work, unless there was portrayal at the instance of the petitioner by placing on record adequate material that the technical committee constituted by the respondents herein while arriving at a decision qua

non fulfillment of the criteria was goaded and motivated by extraneous considerations. In short, the mere awarding of subsequent purportedly similar works to the one as proposed to be executed by the respondents arising from the factum of a paramateria work done certificate and that too on the recommendations of the Technical Committee, hence purportedly communicating the fact of the petitioner having fulfilled the eligibility criteria, would not per se constitute waiving off or acquiescence by the respondents of the recommendations of the Technical Committee constituted by the respondents herein, to assess the eligibility of the petitioner for the awarding of the proposed work, to it. Given the aforesaid discussion, even if one of the reasons which weighed and prevailed upon the respondents to decline the awarding of work to the petitioner is embedded in the factum of the respondents herein having imposed penalties upon it, for not previously having completed the awarded work within the prescribed time limit besides, the work previously executed being of poor workmanship and quality, yet especially, when the penalties as hence imposed upon the petitioner firm stood rescinded by the Arbitrator, to whom the dispute was referred and whose decision is subjudice before this Court, hence, rendering the penalties imposed upon the petitioner firm by the respondents, to be not carrying any legal leverage nor constituting a good and valid reason for debarring or ousting the petitioner from its being awarded the proposed work. Nonetheless, even if, the said argument as projected by the respondents for debarring and ousting the petitioner from awarding of the proposed work may be legally invigorous, yet the prime and preeminent factum probandum of the petitioner firm having neither achieved nor fulfilled the eligibility criteria, inasmuch as its, not having completed during the last 7 years one work similar to the one costing not less than 80% of the amount put to tender, is rather to be not slighted. On the contrary, the aforesaid preeminent reason has to assume force in prodding this Court to conclude that as such the respondents had tenably and legitimately refused the awarding of the proposed work to the petitioner company, naturally when the legally invigorous reason for the refusal of the awarding of work to the petitioner stands submerged or subsumed in the preeminent fact aforesaid, of the petitioner having not fulfilled for the reasons aforesaid the eligibility criteria as extracted hereinabove, it cannot sustain the contention of the learned counsel appearing for the petitioner, that as such the petition be allowed.

6. For the foregoing reasons, there is no merit in this petition which is accordingly dismissed. All pending application also stands disposed of.

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

Sh. Prabhat Sharma and another …Petitioners

Versus

State of Himachal Pradesh and others …Respondents.

Cr. MMO No. 197 of 2015

Date of decision : 2nd July, 2015

Code of Criminal Procedure, 1973- Section 482- Petitioner No. 1 is major, aged 26 years and petitioner No. 2 is aged 20 years- they had married and had executed affidavits before Executive Magistrate- parents of the petitioner No. 2 started harassing petitioner No. 1 in order to compel him to produce petitioner No. 1 before the police- petitioner filed a petition for seeking a direction to the respondents No. 2 and 3 not to harass them and to protect

them from respondents No. 4 and 5- held, that the major girl is free to marry or live with anyone she likes and no offence is committed by her by residing with petitioner No. 1/her husband- no person has any right to interfere with their lives- direction issued to the respondents No. 2 and 3 to ensure that petitioners are not harassed by anyone, not subjected to threats or act of violence. (Para-5 to 8)

Case referred:
Lata Singh vs. State of U.P. and another AIR 2006 SC 2522

For the Petitioners : Mr. Ashok Kumar Thakur, Advocate.
For the Respondents: Mr. V.K.Verma and Ms. Meenakshi Sharma , Addl. A.Gs., with Ms. Parul Negi, Dy. A.G., for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

This joint petition has been filed on behalf of the petitioners, who claim to be the husband and wife, for directing respondents No.2 and 3, i.e. the Superintendent of Police, Mandi, and the Station House Officer, Police Station, Sundernagar, District Mandi to protect the life and liberty of the petitioners and further directing them not to harass the family of petitioner No.1 at the behest of respondents No. 4 and 5.

2. The petitioner No.1, who claims to be a major and aged about 26 years, whose date of birth is 7.7.1989, whereas the petitioner No.2 is stated to be aged about 20 years and her date of birth alleged to be 31.3.1994. Certain documents in support of the age have also been annexed.

3. Both the petitioners belong to 'Brahmin Community' and alleged to have solemnized marriage out of free will and consent with each other on 4.2.2014. They later appeared before the Executive Magistrate, Ghumarwin, District Bilaspur, H.P. where the parties filed their affidavits and whereafter the statements were also recorded. It is alleged that when the factum of marriage came to the notice of respondents No. 4 and 5, who are the parents of petitioner No.2, they began harassing the parents of petitioner No.1 in order to compel them to produce petitioner No.2 before the police. It is in this background that the present petition has been filed.

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

5. Love marriages and thereafter tussles between the families of the couple is an age old issue and one similar issue came up before a Division Bench of this Court in ***Priyanka and another*** vs. ***State of Himachal Pradesh and others,*** Cr. W.P. No. 8 of 2014, decided on 23.4.2014 and this Court passed the following directions:

> *"3. We are not oblivious to the fact that the cases of such nature relating to 'run away couples' are repeatedly coming before this Court and, therefore, it is not only high time but imperative that certain guidelines and directions are issued to deal with such cases. Accordingly, we proceed to issue following guidelines and directions:-*

(i) Whenever any representation is received by the S.P. of concerned District regarding the marriage of a young couple under a threat or an apprehension of infringement of the right of life and liberty at the instance of the family members of one of the spouses or even at the instance of the police, the S.P. concerned will consider the representation and will himself/herself look into the matter and issue necessary directions to maintain a record of the said intimation under Chapter 21 of the Punjab Police Rules.

(ii) On receipt of abovesaid intimation of marriage by any police officer, necessary directions will be issued to the concerned Police Station to take necessary steps in accordance with law to enquire into the matter by contacting the parents of both boy and the girl. The matter regarding age, voluntary consent of the girl and grievance of her family will be determined.

(iii) In the eventuality of any complaint of kidnapping or abduction having been received from any of the family members of the girl, the boy (husband) will not be arrested unless and until the prejudicial statement is given by the girl(wife). Arrest should generally be deferred or avoided on the immediate receipt of a complaint by the parents or family members of the girl taking into consideration the law laid down by the Hon'ble Supreme Court in Joginder Kumar Versus State of U.P. and others (1994) 4 SCC 260.

(iv) If the girl is major (above 18 years), she cannot forcibly be taken away by police to be handed over to her parents against her consent. Criminal force against the boy cannot be used.

(v) In case of threat to the young couple of criminal force and assault at the hands of the private persons, the same will be dealt with in accordance with law.

(vi) In case of any threat to the breach of peace at the hands of the family members of either of the couple it will always be open to the State authorities to take up the security proceedings in accordance with law.

(vii) It will not be open to the "run away couple" to take law in their hands pursuant to the indulgence shown by the police on the basis of their representation sent to the SP of the concerned District.

(viii) If despite the intimation having been sent to the SP there is an apprehension or threat of violation of right of personal life and liberty or free movement, the remedy of approaching the High Court should be the last resort.

(ix) In case there is an authority constituted for issuance of marriage certificate as per the law laid down by the Supreme Court in Seema (Smt) Versus Ashwani Kumar (2006) 2 SCC 578, (2008) 1 SCC 180, (2008) 7 SCC 509 case in the concerned districts, the couple of so called 'run away marriage' should get the marriage registered in compliance with the directions of the Supreme Court and a copy of the same should also be forwarded to the police alongwith the representations or any time subsequent thereto.

(x) In case, it is found that the girl, who has been enticed away, is a minor and is either not willing to go with her parents or her parents have refused to accept and take her home, then she will be taken to the 'Nari Niketan' or other Shelter Homes where her protection and safety shall be of paramount consideration and ensured at all costs. In no case would the minor girl be permitted to accompany her alleged husband since the marriage is void, abinitio being in contravention of Section 12 of the Hindu Marriage Act;

(xi) *Nothing said hereinabove will prevent the immediate arrest of a person who fraudulently entices a girl with false promises and exploits her sexually as per the statement of the girl."*

6. A perusal of the documents annexed with the petition, prima facie goes to show that both the petitioners are major. A major girl is free to marry anyone she likes or live with anyone, she likes and in case she is now married and residing with petitioner No.1, then no offence has been committed by her. The petitioners, have a right to live their lives the way it suits them and no person or authority much less the parents of the parties can interfere with their lives, what to talk of trying carry out threat, intimidation or even terrorise the petitioners.

7. The Hon'ble Supreme Court in ***Lata Singh*** vs**. *State of U.P. and another AIR 2006 SC 2522*** while dealing with a case of harassment by the parents of the boy and girl, who had entered into an inter-caste marriage, had issued directions to the administration/ police authorities throughout the country in the following terms:

"17....."We, therefore, direct that the administration/ police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and any one who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law."

8. Though, as observed earlier, this is not a case of inter-caste or inter-religious marriage. However, directions issued therein definitely have bearing to the facts of the present case.

9. Accordingly, the present petition is allowed by directing respondents No. 2 and 3 to ensure that the petitioners are not harassed by anyone nor subjected to threats or act of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation will be taken to task by instituting criminal proceedings against him and further stern action shall be taken against such person as provided by law. In the meanwhile, the petitioners in terms of the directions passed in ***Priyanka's*** case (supra), shall approach the Superintendent of Police concerned, who shall proceed with the matter in accordance with the guidelines and directions issued by this Court (supra). The petition is disposed of in the aforesaid terms. Copy dasti.

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

Surender Singh .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 4110 of 2013
Reserved on: July 01, 2015.
Decided on: July 02, 2015.

Indian Penal Code, 1860- Section 302- Prosecution witnesses heard a noise and smoke coming out from the upper storey of the house of accused- they ran towards house and found that the accused was walking on the lintel of his house while his mother was taking bath in the bathroom- deceased was taken out of the room who had sustained burn injury- she was taken to Hospital- she was declared unfit to make statement- she died on the way to IGMC, Shimla- prosecution witnesses deposed that accused used to maltreat the deceased after consuming alcohol- daughter of the accused deposed that accused used to keep the can of petrol in the room in which her mother was burnt- prosecution witnesses had seen the accused bolting the door from outside- held, that in these circumstances, prosecution case was proved beyond reasonable doubt. (Para-17 to 24)

For the appellant: Mr. Anoop Chitkara, 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 dated 15.7.2013, rendered by the learned Sessions Judge, Sirmaur at Nahan, H.P. in Sessions Trial No. 32-ST/7 of 2012, 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. 5,000/- and in default of payment of fine to further undergo rigorous imprisonment for one year under Section 302 IPC.

2. The case of the prosecution, in a nut shell, is that on 24.5.2012 at about 9 or 9:30 AM when PW-2 Guman Singh, PW-3 Vipin, PW-4 Manoj Kumar and Prem Pal were working in their fields situated near the house of accused, they heard a noise and smoke coming out from the upper storey of the house of accused. They rushed towards his house and found that the accused was walking on the lintel of his house while his mother was taking bath in the bathroom on the lower storey of the house. They opened the door and broke open the window panes so that the smoke could come out. Thereafter, PW-4 Manoj Kumar entered the room and brought Pariksha (deceased) out of the room. She had severe burn injuries on her person and her clothes were also burnt. She was not in a position to speak. Thereafter, she was removed to Rajgarh in the Car of accused and on the way she was shifted to 108 Ambulance which was called from Rajgarh. The Medical Officer, CH Rajgarh, informed the police about the incident. PW-11 HC Islam visited CH Rajgarh and

deceased was declared unfit to make statement by the M.O. She was referred to Regional Hospital, Solan by MO, CH Rajgarh. In the meanwhile, brother of deceased PW-1 Hari Dass received information about this occurrence and he alongwith his mother visited Solan hospital and found that the deceased was not in a position to speak. From Regional Hospital, Solan the deceased was referred to IGMC, Shimla. She died on the way to IGMC, Shimla. FIR Ext. PW-1/A was lodged. The post mortem was conducted on the dead body. 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 17 witnesses. The accused was also examined under Section 313 Cr.P.C. He has pleaded innocence. 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. Anoop Chitkara, Advocate for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. Ramesh Thakur, learned Asstt. Advocate General, appearing on behalf of the State, has supported the judgment of the learned trial Court dated 15.7.2013.

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

6. PW-1 Hari Dass is the brother of deceased Pariksha. She was his younger sister. She was married to accused about 12 years back. On 24.5.2012, Surender informed him on telephone that his sister Pariksha has been burnt and she was taken to Rajgarh. He rang up accused Surender Pal, however, the call was answered by his nephew Kamal Raj who told him that his sister has been referred from Rajgarh to Solan. Thereafter, he alongwith his mother left for Solan and on reaching at Solan hospital, accused, his nephew and Pradhan Madan Singh were present there. When he saw his sister Pariksha, he found that her entire body was burnt. She was not in a position to speak and she was asking for water. From Solan hospital, his sister was referred to IGMC Shimla for further treatment. She died on the way to IGMC, Shimla. The accused used to mal-treat his sister and was giving beatings to his sister. This fact was disclosed to him by his sister as and when she visited their house. His sister Raksha Devi told him that accused Surender gave beatings to his sister and thereafter he put some inflammable substance on her and set her on fire and bolted the room from outside. Thereafter, Manoj, Guman Singh broke open the door and also the window panes and entered into the room and brought her outside the room. She had suffered severe burn injuries. Prior to the marriage of his sister with accused, the accused was married to Sarla who is serving as JBT teacher but their marriage was dissolved by a decree of divorce. The accused wanted to bring his previous wife back to his house. He lodged FIR Ext. PW-1/A. In his cross-examination, he admitted that they have not lodged any complaint with the Panchayat or Police about the beatings given to his sister. His sister had told them that the accused had established relations with his previous wife. The villagers of the accused person Manoj and Guman Singh etc. disclosed to him about the breaking of the door and pulling out his sister from the room in burnt condition and also setting on fire by the accused by throwing some inflammable material on her person.

7. PW-2 Guman Singh, deposed that on 24.5.2012 at 9 or 9:30 AM, strange noise was heard from the house of accused and smoke was coming out from the bed room of accused. Prem Pal, Birender, Manoj, Amit and Vipin etc. were also working in their fields

near the house of accused person and on hearing the noise, all of them rushed towards the house of the accused. At that time, accused Surender was walking on the lintel of his house and his mother was taking bath on the lower storey. They first went to the kitchen of the accused person and found that the gas cylinder was intact. When they went upstairs towards the bed room of the accused, they found the same to be bolted from outside. Accused Surender bolted the door from outside and thereafter, they broke the window panes and there was lot of smoke inside the room. Majoj entered into the room in the first instance and he took out the deceased from the room. At that time, she had severe burn injuries on her person. She was not in a position to speak and her clothes were burnt. They took her to Rajgarh hospital, from where she was referred to Solan and then referred to IGMC, Shimla. She died on the way to IGMC, Shimla. He had heard and seen several times accused quarrelling with his wife under the influence of liquor as he is living in the neighbourhood of accused. The accused had earlier divorced his wife Sarla. The police had taken into possession one head gear (Dhattu), three pieces of broken glass, hair of Pariksha, partly burnt mattress and a dictionary from the bed room of the accused vide memo Ext. PW-2/A. In his cross-examination, he deposed that his fields were situated at a distance of 100 meters away from the house of the accused. The fields of other persons named by him were also situated near his field. His residence was situated at a distance of 200 meters from the house of the accused. The mother of the accused person came on the first floor when they reached there. The bolt of the door was broken but brush was inserted in the place of the bolt. The smoke was coming out from the door as well as through the window. He has denied the suggestion that the door was just closed and the same was not bolted from outside by brush or otherwise.

8. PW-3 Vipin Kumar, deposed that on 24.5.2012 when school children were going to school, at that time he was working in his field. Near his fields other persons were also working in their fields. He reached on the spot and found that smoke was coming out from the house of accused on hearing the noise. He alongwith Guman Singh, Prem Pal, Birender and Manoj also reached on the spot. They reached on the spot and accused Surender was in the courtyard. They could not enter the room as there was thick smoke. Thereafter, they broke open the window panes. In the meantime, Manoj brought Pariksha, wife of the accused outside the room and she was in burnt condition and unconscious. Thereafter, he called ambulance 108. He was declared hostile and cross-examined by the learned Public Prosecutor. He has admitted in his cross-examination that he made statement to the police that on hearing noise and seeing smoke coming out of the house of accused, he alongwith others rushed to the house of accused person. He also admitted that when they checked the gas cylinder in the house of accused, it was found intact. He also admitted that the mother of the accused had shouted to save her daughter-in-law. He also admitted that he alongwith Guman Singh, Birender, Manoj etc. climbed the upstairs. He did not make statement to the police that the door was bolted from outside. He was confronted with portion A to A of statement mark-A, wherein it is so stated. He made the statement to the police that accused was roaming about on the lintel. Volunteered that he had once gone one side and thereafter gone another side. He also admitted that Pariksha was having severe burn injuries and her clothes were completely burnt. He did not make any statement to the police that the accused Surender used to give beatings to the deceased under the influence of liquor. He was confronted with portion B to B of statement mark-A, wherein it is so recorded. In his cross-examination by the learned counsel for the accused, he deposed that the field in which he was working was situated at a distance of 200 meters from the house of the accused. His house was situated after one or two houses from the house of accused Surender. When they reached on the spot, accused Surender and his

mother were present on the lintel of the room of ground floor. He also deposed that after breaking the window panes when he saw the accused person, he had black stains on his face and his hands were burnt. When he came back breaking the window panes, by that time, Manoj had dragged the deceased outside the room and he had seen the hands of the accused burnt at that time.

9. PW-4 Manoj Kumar deposed that on 24.5.2012, at about 9:00 AM, he alongwith Birender and Prem Pal was working in his fields. On hearing noise and noticing smoke coming out from the house of accused Surender, they rushed towards his house. The mother of the accused was shouting from the lintel of the house to save her daughter-in-law. He had seen accused Surender bolting the door from outside. When they went up on the first floor of accused, by that time, the door of the room was open and the accused was present on the lintel of the house and was moving here and there. Before entering the room, he asked the other person to broke the window panes so that the smoke could come out and when he entered the room, there was thick smoke and he could see the legs of the deceased. Thereafter, he came out and brought a blanket and entered the room and put the blanket on Pariksha and then dragged her out of the room. In the meantime, someone called the ambulance. In his cross-examination, he deposed that the house of the deceased was situated at a distance of about 100 meters from the house of the accused. He saw the accused person closing the door when he was coming towards the house of accused person from the field. When he reached there, the mother of accused was shouting to save her daughter-in-law.

10. PW-5 Raksha Devi is the sister of the deceased. According to her, on 24.5.2012, some person from Kotla Mangan gave information on the mobile of her husband that accused Surender had burnt his sister Pariksha by pouring petrol and she was being brought to Rajgarh for treatment. She alongwith her husband went to Rajgarh hospital. She found that Pariksha had suffered burn injuries and was not in a position to speak. On her persistent asking, she signaled towards the accused Surender by looking towards him. She died on way to IGMC hospital, Shimla.

11. PW-6 Sunil Kumar deposed that Pariksha was his sister. On 24.5.2012, when he was present at his home, his cousin Ved Prakash rang him from Rajgarh and informed him that accused Surender had burnt his sister by pouring some inflammable substance on her. She was brought to Rajgarh hospital. She died on way to IGMC hospital, Shimla.

12. PW-8 Kumari Aanchal Chauhan, is the daughter of the deceased. Her mother was burnt but she was not aware as to who had put her on fire. Her father had kept the can of petrol on the second storey of the house on which her mother was set on fire. Her father had asked her to keep the can of petrol in the room in which her mother was burnt. When her mother was burning, her grandmother was shouting to save her. The room was bolted from outside in which her mother was burning. At the time of occurrence, Vipin, Prem Pal, Guman and others had reached on the spot. When her mother was burning, her father was present outside on the lintel. The police had visited the spot and made enquiries from her.

13. PW-14 Dr. Jitender Thakur, has issued MLC Ext. PW-14/A. The police has sought his opinion regarding the fitness of the patient to make statement, however, after his clinical examination, he found that she was unfit to make statement. He gave his opinion

vide Ext. PW-14/B. The signatures of the patient could not be obtained on the MLC as the patient was 100% burnt.

14. PW-15 Dr. M.P.Singh, has conducted the post mortem examination alongwith Dr. Ashish Sharma. He issued report Ext. PW-15/A. According to him, the deceased died due to extensive whole body superficial to dermal deep burns leading to hypo-volumnic shock. No poison was detected nor was any inflammable material contents observed.

15. PW-16 C.L.Sharma, has proved report Ext. PW-13/A. According to him, in all the articles, physically and chemically, no poison/inflammable material could be detected in the contents of the same. He also deposed that petroleum is volatile compound as it evaporates immediately and it leaves behind no smell and residue after burning.

16. PW-17 ASI Rajesh Pal, has carried out the investigation. He visited the spot and prepared the site plan. He took photographs Ext. P-11 and P-12. He lifted Dhattu Ext. P-2, broken piece of glass Ext. P-4, burnt pieces of mattress Ext. P-6, dictionary Ext. P-8, hair Ext. P-10 from the bed room and put them in different parcels. In his cross-examination, he deposed that he did not find any can, tin or plastic on the spot but some plastic material was present. He did not found any residue of plastic can. He did not record the statement of mother and daughter Anchal of accused. The daughter of the accused was not present as she was taken by her maternal Aunt Raksha. He also admitted that none of the witnesses had stated about the presence of Anchal at the spot. The statement of Anchal was recorded on 5.8.2012.

17. The prosecution has relied upon the following circumstances to connect the accused with the charged offence:

> "(i) That the accused used to maltreat the deceased as he wanted to remarry his previous divorced wife;
>
> (ii) That the accused brought petrol and kept the same in the bed room in which the deceased was burnt;
>
> (iii) That the accused was seen bolting the door from the outside;
>
> (iv) That the accused did not raise any alarm and tried to save the deceased when she was burning; and
>
> (v) That the explanation offered by the accused that the deceased committed suicide not probable;
>
> (vi) That the accused had also suffered burn injuries on his hands and feet."

18. Now, as far as maltreatment of the deceased by accused is concerned, it has come in the statement of PW-1 Hari Dass that his sister used to complain about the maltreatment and beatings given to her by the accused as and when she visited their house. PW-2 Guman Singh also deposed that he had heard several times accused quarrelling with his wife under the influence of liquor as he was living in neighbourhood of the accused. PW-4 Manoj Kumar also deposed that he had asked several times accused person to mend his ways but he did not listen to their advise. he also deposed that accused person did not make any attempt to save his wife. PW-5 Raksha Devi has also deposed that the accused used to give beatings to his sister after consuming liquor because he wanted to bring back his first wife to whom he was previously divorced. PW-6 Sunil Kumar has also deposed that

the accused used to give beatings to his sister and this fact was disclosed to him by her when he had come on leave in April, 2012.

19. Mr. Anoop Chitkara, Advocate, for the accused has vehemently argued that in case the accused was given beatings to the deceased, the matter should have been reported either to the Panchayat or the Police. The Court can take judicial notice of the fact that generally in matrimonial discords; the parties hesitate to make complaints either to the police or the Panchayat to save their honour. In the FIR Ext. PW-1/A, it is specifically stated that the accused used to harass and torture the deceased. It is duly established from the statements of PW-1 Hari Dass, PW-2 Guman Singh, PW-4 Manoj Kumar, PW-5 Raksha Devi and PW-6 Sunil Kumar that the deceased was maltreated and given beatings by the accused.

20. Now, as far as procurement of the petrol by the accused is concerned, this fact is duly proved by the statement of PW-8 Kumari Anchal. She is the daughter of the deceased. There was no occasion for the PW-8 Kumari Anchal to depose against her father. According to her, her father had told her to keep can of petrol in the room in which her mother was burnt. She has denied the suggestion that the police had told her to make statement regarding keeping of the can. It is true that the statement of Kumari Anchal was recorded after two months, but suggestion was put to the I.O., who has stated that since Kumari Anchal was taken away by her maternal Aunt Raksha, her statement could not be recorded. Merely that the statement of PW-8 Kumari Anchal was not recorded promptly, will not in any way affect her statement made in the Court.

21. The accused has bolted the room from outside as per the statements of PW-2 Guman Singh, PW-4 Manoj Kumar, and PW-8 Kumari Anchal. According to PW-2 Guman Singh, the accused had bolted the door from outside. He has denied the suggestion in his cross-examination that the door was just closed and not bolted from outside. PW-4 Manoj Kumar has infact seen the accused bolting the door from outside. PW-8 Kumari Anchal is the daughter of the accused who has testified that the door of the room was bolted from outside.

22. Now, as far as the statement of DW-2 Amit Kumar is concerned, he was earlier cited as witness of the prosecution. He was given up, being won over and thereafter cited as DW-2 in defence of the accused. There is ample material placed on record to establish that the door was bolted from outside by none else other than the accused. The behavior of the accused was also unusual when PW-2 Guman Singh, PW-3 Vipin Kumar and PW-4 Manoj Kumar reached on the spot. The accused was moving around on the lintel of his house. He has neither raised any hue and cry and nor made any attempt to save his wife. The defence taken by the accused that due to thick smoke he could not enter the room cannot be believed. The villagers who had reached on the spot had broken window panes and by breaking open the door have entered the room and dragged the deceased out from the room.

23. Mr. Anoop Chitkara, Advocate, for the accused has argued that the accused has also received injuries on hands and feet. His argument cannot be believed that accused received the injuries while saving his wife. PW-4 Manoj Kumar had entered the room and dragged the deceased out. The accused had suffered injuries on his hands and feet while he poured the petrol on his wife and set her ablaze. PW-2 Guman Singh, PW-3 Vipin Kumar and PW-4 Manoj Kumar have also denied that when the door of the room was opened, the

accused person had suffered burn injuries as he entered the room to search for keys of the Car.

24. Mr. Anoop Chitkara, Advocate, has also argued that it was a case of suicide. We have scanned the entire evidence and only conclusion which can be safely drawn is that the accused has set his wife ablaze, which led to her death. She had received 100% injuries. The learned counsel for the accused had lastly argued that there was no smell of combustible material found on the parcel sent to chemical examination. It has come in the statement of PW-16 C.L. Sharma that the petroleum, being volatile compound, evaporates immediately and leaves behind no smell and residue after burning. In these circumstances, no smell and residue was found on the parcel sent for chemical examination. The deceased has died due to extensive whole body superficial to dermal deep burns leading to hypo-volumnic shock.

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

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

Gurvinder Singh & another ...Appellants

Versus

Yoginder Singh & others ...Respondents

FAO No. 429 of 2014
Date of decision: 03.07.2015

Motor Vehicles Act, 1988- Section 149- Insured stated on oath that he had examined the driving licence of the driver and had taken all the steps required under law- this was not rebutted by the insurer and no evidence was led to disprove this fact- insurer is liable to indemnify the insured and to satisfy the award. (Para-15 to 20)

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

Oriental Insurance Company Ltd. versus Smt. Rikta alias Kritka & others, ILR (2015) XLIV(VI) H.P. 1163

For the appellant : Ms. Bhavana Datta, Advocate.

For the respondents: Mr. Ajay Sharma, Advocate, for respondents No. 1 to 3.
Mr. Deepak Bhasin, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Subject matter of this appeal is the award, dated 23rd January, 2014, made by the Motor Accident Claims Tribunal-II, Hamirpur, H.P. (hereinafter referred to as "the

Tribunal") in MAC Petition No. 03 of 2011, whereby compensation to the tune of Rs.10,69,700/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimants-respondents No. 1 to 3, herein and against the owner and driver-appellants, herein (for short, the "impugned award"), on the grounds taken in the memo of appeal.

2. The claimants and the insurer have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. The insured-owner and driver have questioned the impugned award on the ground that the Tribunal has fallen in error in saddling them with liability.

4. It is necessary to give a brief summary of the case, the womb of which has given birth to the present appeal.

5. The claimants being victims of the motor vehicular accident, had invoked the jurisdiction of the Tribunal, in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988, for short "the Act", for grant of compensation to the tune of Rs.50,00,000/-, as per the break-ups given in the claim petition. It is averred in the claim petition that driver, namely, Manoj Kumar, had driven the vehicle-Canter bearing registration No. PB-12-G-4649, rashly and negligently, on 03.12.2009, at about 4.30 p.m., at Sector-48, Chandigarh (UT), hit Dr. Gaurav Thakur, who was driving motor-cycle bearing registration No. HP-22-5289, caused injuries to him, who succumbed to the injuries.

6. The respondents contested the claim petition on the grounds taken in their memo of objections.

7. Following issues came to be framed by the Tribunal:

"1. *Whether the deceased Shri Gaurav Thakur died on 03.12.2009 because of rash and negligent driving of vehicle, i.e. Canter bearing registration No. PB-20-G-4649 by respondent No. 2, as alleged?* ...OPP

2. If issue No. 1 is proved in affirmative, whether the petitioners are entitled to compensation, if so, how much amount and from whom? ...OPP

3. Whether the petition is not maintainable, as alleged? ...OPR-3

4. Whether the driver of the vehicle in question was not having a valid and effective driving licence at the relevant time, if so, its effect? OPR-3

5. Whether the vehicle in question was being driven against the terms and conditions of the insurance policy at the relevant time, if so, its effect? OPR-3

6. Relief"

8. The claimants examined Dr. Himmat Mohan, (PW-1), Sunny Chadda (PW-3) and Sub Inspector, Nikka Ram (PW-4). Claimant Yoginder Singh appeared in the witness box as PW-2. The insured-owner appeared in the witness box as RW-1 and the driver examined himself as RW-2. The insurer has not led any evidence.

9. The Tribunal after scanning the entire evidence passed the impugned award and the claimants were held entitled to compensation to the tune of Rs.10,69,700/- with interest @ 7.5% per annum from the date of the claim petition till realization of the award amount. The insured-owner and driver were saddled with liability.

10. The dispute in this appeal is-whether the Tribunal has fallen in an error in saddling the appellants, i.e. owner-insured and owner with liability.

Issues No. 1 & 3.

11. The findings returned on these issues are not in dispute. Accordingly, the findings returned by the Tribunal on these issues are upheld.

Issues No. 2, 4 & 5.

12. These issues are inter-linked, hence taken up together.

13. The Tribunal in para-39 of the impugned award has recorded that the driving licence Ext. RW-2/A was renewed in terms of the order made by the District Transport Officer, Mansa.

14. The question is whether-in the given circumstances, it can be said that the Tribunal has rightly saddled the appellants-, i.e. owner-insured and driver with liability. The answer is in the negative for the following reasons.

15. It was for the insurer to prove that the owner of the offending vehicle has committed willful breach of the terms and conditions of the insurance policy and mere plea here and there cannot be a ground for seeking exoneration, as held by the Apex Court in **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in subsection (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of available the Act."

16. It is also profitable to reproduce para 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** hereinbelow:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran 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."

17. This Court in **FAO No. 322 of 2011**, titled as **IFFCO-TOKIO Gen. Insurance Company Limited versus Smt. Joginder Kaur and others**, decided on 29.08.2014 and **FAO No. 523 of 2007,** titled as **Oriental Insurance Company Ltd.** versus **Smt. Rikta alias Kritka & others,** decided on 19.12.2014, has laid down the same principle.

18. The insured-owner appeared in the witness box as RW-2 and stated that he had examined the driving licence Ext. RW-2/A, which was renewed and had taken all the steps which were required, which is neither rebutted by the insurer nor it has led any evidence to that effect, as discussed herein above. Ext. RW-2/B is the proof of the fact of renewal with effect from 12.11.2007 to 23.12.2013.

19. In the given circumstances, the insurer has not led any evidence and has failed to prove that the owner has committed any breach.

20. Having said so, the Tribunal has fallen in error in saddling the appellants i.e. owner-insured and driver with liability. The factum of insurance is admitted. Accordingly, it is held that the insurer has to satisfy the award.

21. Viewed thus, the impugned award is modified, as indicated above. The appeal is disposed of.

22. Send down the records after placing copy of the judgment on record.

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

Kanta Devi and others ...Appellants.

Versus

Nilima Devi and others ...Respondents.

FAO No. 1 of 2008
Decided on: 03.07.2015

Motor Vehicles Act, 1988- Section 166- MACT had applied multiplier of '14' and had taken loss of dependency as Rs. 27,000/- per annum, which was correct- the impugned award upheld and the appeal dismissed. (Para-7)

Cases referred:
Sarla Verma (Smt.) and ors. vs 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. V.S. Chauhan, Advocate.
For the respondents: Nemo for respondents No. 1 to 3.
Mr. Ashwani Sharma, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

There is no representation on behalf of respondents No. 1 to 3. Hence, they are set ex-parte.

2. This appeal is directed against the judgment and award, dated 13.11.2007, made by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, H.P. (for short "the Tribunal") in R.B.T. No. 9-S/2 of 2005/2000, titled as Smt. Kanta Devi and others versus Sh. Roshan Lal Aggarwal and others, whereby compensation to the tune of Rs.4,38,000/- with interest @ 9% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (for short "the impugned award").

3. The appellants-claimants have questioned the impugned award on the ground of adequacy of compensation.

4. Mr. Ashwani Sharma, learned counsel for respondent No. 4-insurer, stated at the Bar that this Court has considered the matter in FAO No. 20 of 2008, titled as National Insurance Company Ltd. versus Smt. Kanta Devi & others, which stands disposed of vide judgment and order, dated 22.05.2015. His statement is taken on record.

5. I have gone through the judgment (supra), perusal of which does disclose that, though, this Court has reduced the rate of interest from 9% to 7.5%, but, the question of adequacy of compensation was not determined.

6. Thus, the question to be determined in this appeal is - whether the amount awarded is adequate?

7. The Tribunal has discussed the issue in para 20 of the impugned award and I am of the considered view that the Tribunal has rightly applied the multiplier of '14' while keeping in view the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "MV Act") read with the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120,** and has rightly held that the claimants have lost source of income/ dependency to the tune of Rs 27,000/- per annum, at the relevant point of time, needs no interference.

8. Having said so, the appeal merits to be dismissed and the impugned award is to be upheld. Accordingly, the impugned award is upheld and the appeal is dismissed.

9. 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 through payee's account cheque.

10. Send down the record after placing copy of the judgment on Tribunal's file.

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

RFA Nos.4107 of 2013 alongwith
RFA Nos. 59/2014, 230/2014 and 263/2014
Date of Decision: 3.7.2015

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1. **RFA No. 4107/2014**
Kundan Lal ..Appellant
Versus
Land Acquisition Collectors and another ..Respondents

2. **RFA No.59/2014**
Dehlu ..Appellant
Versus
Land Acquisition Collector and another ..Respondents

3. **RFA No.230/2014**
Sewa Nand ..Appellant
Versus
Land Acquisition Collector and another ..Respondents

4. **RFA No.263/2014**

Het Ram ..Appellant

Versus

Land Acquisition Collector and another ..Respondents

Land Acquisition Act, 1894- Section 18- Land of the petitioners was acquired for the construction of Koldam-the petitioners filed a reference petition before the court– the record shows that notices were not issued to the petitioners and were only issued to the respondent no. 1 – Petitioners had never instructed any advocate to appear on their behalf – held that the award was announced by the Court behind the back of the petitioners – the matter remanded to the Court with the direction to decide the same afresh after affording an opportunity to the petitioners. (Para 2 to 6)

For the Appellant: Mr. Arvind Sharma, Advocate in all the appeals.

For the Respondents: Mr. Virender Verma, Additional Advocate General, in all the appeals.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge *(oral)*

This judgment shall dispose of the present appeal and also RFA Nos.59/2014, 230/2014 and 263/2014, involving identical questions of law and facts.

2. The land of the appellants-petitioners has been acquired for the construction of "Koldam" in District Bilaspur. Notification under Section 4 of the Land Acquisition Act was issued on 26.2.2005. On completion of procedural requirements, the 1st respondent assessed the market value of the acquired land and made the award. The appellants-petitioners being dissatisfied with the award preferred references under Section 18 of the Act for enhancement of compensation awarded by the 1st respondent. The references they presented before the 1st respondent on 16.4.2008 were forwarded to the Court of District Judge, Mandi. The same were assigned to learned Additional District Judge, Mandi.

3. On 6.1.2010, the Court below has ordered to issue notice in the reference petitions to the parties in terms of Section 20 of the Act for 6.4.2010. The report made by the Dealing Hand on the margin of Zimni order dated 6.1.2010 is qua service of notice upon respondents No.1 and 2 only. It appears that the Dealing Hand, taking the references like other matters has issued notice only to the respondents and omitted to issue notice to the appellant-petitioners. The Ahlmad/Dealing Hand also seems to have omitted to go through the order dated 6.1.2010 vide which notices were ordered to be issued to the parties. The fact, therefore, remains that on receipt of the reference petitions in the Court below and its registration, notices were never issued or served upon the appellants-petitioners.

4. The record reveals that on the returnable date, i.e. 6.4.2010, Shri Tejeshwai Sharma, Advocate has put in appearance as vice counsel on behalf of the appellants-petitioners in all these cases. On the next date, i.e. 7.7.2010, Shri O.P. Verma, Advocate has put in appearance as vice counsel on their behalf. However, on the next date, i.e. 9.11.2010 and the date(s) subsequent thereto, no one had put in appearance on their behalf and the reference petitions were tried in their absence. The same ultimately were dismissed for the reasons recorded on issues No.1 and 2, which read as follows:

"Issue No.1.

11. No evidence has been led by the petitioner to prove that inadequate compensation as paid to the petitioner. Hence, this issue is answered in negative and is decided against the petitioner.

Issue No.2

12. xxxxxxxxx xxxxxxx xxxxxxxxx

RELIEF

13. In view of the above, it is held that land Acquisition Collector has properly assessed the market value and no enhancement is required. Hence, the present reference petition is dismissed. The file after completion be consigned to Record Room"

5. The legality and validity of the impugned awards has been challenged on common grounds, mainly that the same having been passed behind the back of the appellants-petitioners, are not legally sustainable.

6. A perusal of the record amply demonstrates that notices to the appellants-petitioners were never issued or served upon them consequent upon the order dated 6.1.2010 passed by learned trial Court. As already pointed out, it seems to have happened due to Ahlmad having omitted to go through the order ibid, as the notices have only been issued to respondents No.1 & 2 and not to the appellants-petitioners. Had the same been issued to the appellants-petitioners also, the copies thereof would have been available on the record of the reference petitions. The factum of notices having not been issued to the appellants-petitioners seems to have escaped the notice of learned trial Judge also. The appellants-petitioners never instructed Shri Tejeshwai Sharma and Shri O.P. Verma, Advocates to appear on their behalf on 6.4.2010 and 7.7.2010. They have filed reference petitions through Shri Arvind Sharma, Advocate. His Power of Attorney is available on record. Shri Arvind Sharma, who is representing them in this appeal also, has categorically stated that S/Shri Tejeshwai Sharma and O.P. Verma, Advocates were never instructed to appear on behalf of the appellants-petitioners. Therefore, without procuring the presence on behalf of the petitioners, the trial Court should have not proceeded further in the reference petitions. Therefore, proceedings conducted in the reference petitions are vitiated on account of the absence of the appellants-petitioners. Consequently, the awards under challenge in these appeals are not legally sustainable. The same rather deserve to be quashed and set aside and the reference petitions remanded to learned trial Court for fresh disposal in accordance with law.

7. In view of what has been said hereinabove, these appeals succeed and the same are accordingly allowed. Consequently, the awards under challenge are quashed and set aside and the reference petitions remanded to learned trial Court for fresh disposal in accordance with law. The parties through learned counsel representing them are directed to appear in the Court of learned Additional District Judge (I), Mandi, on 20.7.2015. The records be sent back forthwith so as to reach in the trial Court well before the date fixed. All the appeals stand disposed of accordingly.

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

Luxmi Devi .....Appellant.

Vs.

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 99 of 2014
Reserved on: 02.07.2015
Date of decision: 03.07. 2015

Indian Penal Code, 1860- Sections 302 and 201 read with Section 120-B- Deceased was residing with his children in a rented accommodation- accused lodged a complaint regarding the fact that her husband was missing- subsequently, a complaint was lodged that accused in connivance with B and S had committed the murder of her husband- it was found during the investigation that deceased had quarreled with the accused- accused called B and S- they took the deceased and strangulated him by pressing his neck with her dupatta- dead body was buried in the forest- accused made a disclosure statement and got the dead body recovered- S also made a disclosure statement and got a spade recovered- PW-4 deposed that accused made a confession before him that she had killed the deceased with dupatta- extra judicial confession was made in the presence of PW-4, PW-8 and PW-13 and FIR was lodged by PW-8 but there was no reference to the extra judicial confession in the same- Medical Officer did not establish that death was caused due to strangulation leading to asphyxia, hypoxia or there was any venous congestion- held, that in these circumstances, guilt of the accused was not established. (Para-24 to 33)

Cases referred:

Jagta Vs. State of Haryana, AIR 1974 Supreme Court 1545

The State of Punjab Vs. Bhajan Singh and others AIR 1975 Supreme Court 258

Udiya Vs. State of Rajasthan 1997 Cri. L.J. 516, the Division Bench of Rajasthan High Court

For the appellant : Mr. B.M. Chauhan, Legal Aid Counsel.

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

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

This appeal is instituted against the judgment and order, dated 02.09.2013/05.09.2013, whereby the appellant-accused (hereinafter referred to as 'the accused' for the sake convenience), who was charged with and tried for offences punishable under Sections 302, 201 read with Section 120-B of the Indian Penal Code, has been convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.2000/- and in default of payment of fine, she was further ordered to undergo imprisonment for one month under Section 302 of the Indian Penal Code. She was also sentenced to undergo punishment for three years and to pay a fine of Rs.2000/- and in default of payment of fine, to undergo imprisonment of one month under Section 201 of the

Indian Penal Code. She was also ordered to undergo imprisonment of two years under Section 120-B of the Indian Penal Code. All the sentences were ordered to run concurrently.

2. Case of the prosecution, in a nut-shell, is that Biru Ram Khatri (deceased) alongwith his children was residing at a place known as Rajhana in a rented accommodation owned by PW-2 Geeta Ram. On 21.01.2012, accused lodged a complaint qua missing of her husband. Thereafter, on 24.01.2012, PW-8 Rahul lodged a complaint that accused in connivance with Basant and Som Raj, juvenile in conflict with law, had committed murder of Biru Ram. On the basis of this information, FIR Ex. PW-11/G was registered. The police visited the spot and the matter was investigated. The children of the accused disclosed that deceased Biru Ram had quarreled with accused and he left the house. Biru Ram consumed liquor and again quarreled with the accused in the evening. Thereafter, the accused called Basant Kanwar and Som Raj, who were residing in a rented accommodation in the same house occupied by the accused. The accused alongwith aforesaid persons took away Biru Ram and thereafter the deceased was strangulated by pressing his neck with *dupatta* of the accused. The dead body was packed in a plastic sack and was buried in Kufri forest. Accused made a disclosure statement Ex. PW1/A before PW-1 Sh. P.K. Taak, Magistrate and other witnesses and thereafter led the police party for recovery of the dead body. The dead body was taken into possession by the police and was sent for post mortem examination. Spot map was prepared. The articles were also taken into possession from the spot. The statements of the witnesses were recorded. Som Raj had also made disclosure statement Ex. PW2/A and got recovered a spade. Post mortem report Ex. PW10/B was obtained and the case property was sent to FSL for chemical analysis and FSL reports Ex. PW6/A and Ex. PW7/A were obtained. Statement of PW-13 Varinder minor son of the deceased was also recorded under Section 164 Cr. P.C. The matter was investigated and after completion of all the codal formalities, the challan was put up in the Court.

3. The prosecution has examined number of witnesses to support its case. The accused was also examined under Section 313 of the Cr. P.C. According to her, Som Raj and Basant had threatened to kill her husband, since her husband used to vomit and urinate on their roof and due to this reason they committed murder and disposed of the dead body of her husband in the forest. She examined her daughter Ms. Minakshi as DW-1 in defence.

4. Mr. B.M. Chauhan, learned Legal Aid Counsel for the appellant has vehemently argued that the prosecution has failed to prove the case against the appellant/accused.

5. Mr. P.M. Negi, learned Deputy Advocate General has supported the judgment and order, dated 02.09.2013/05.09.2013.

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

7. PW-1 Sh. P.K. Taak, testified that on receiving a telephonic information from the police, he went to Rajhana and joined the investigation. Accused gave her statement vide Ex. PW1/A that she had concealed the dead body of her husband and she could get the same recovered. At that time, Chet Ram Pradhan Rajhana was also present there. The statement is Ex. PW1/A. He signed it. Accused Laxmi Devi had also appended her thumb impression. Chet Ram had also signed it. Som Raj and Basant Ram also took part in concealment of the dead body. Laxmi and Som Raj took the police party and they identified the place and in the presence of witnesses at a distance of 50 feet from the path, the land was dug and one dead body was recovered. The dead body was in a plastic bag. It was

identified by Laxmi Devi as her husband. Rahul and Virender were also present there. A memorandum was prepared vide Ex. PW1/B. On the neck, *Chunni* was tied. Dead body was seized through memorandum Ex. PW1/B. Chet Ram also signed memorandum. Laxmi Devi had also put her thumb impression on the same. In his cross-examination, he has deposed that the statement Ex. PW1/A was recorded near the house of Laxmi Devi. ASI had recorded the statement. He did not know his name. In his presence, only one disclosure statement of Laxmi Devi was recorded. This statement was recorded between 11:00 and 12:00 noon. At that time, Chet Ram and other members of community were present there. Som Raj and other persons had dug the place with hands.

8. PW-2 Sh. Geeta Ram deposed that he knew Biru Ram, husband of Laxmi Devi. On 23.01.2012, Rahul came to his house and informed that Basant, Som Raj and Laxmi Devi had killed Biru Ram. He had asked accused Laxmi about her husband before 23.01.2012 and she told that he had gone to Kalibari for work. On 24.01.2012, she had taken her father to Tenjin Hospital. He was told that police had come to her house. Police came on 26.01.2012. Som Raj gave statement under Section 27 of the Indian Evidence Act that he had concealed the Faruwa. Statement was recorded and it was signed by him and Pradhan Chet Ram. Som Raj had also signed the document, which is Ex. PW2/A. Som Raj got recovered the Faruwa (spade) from the cow shed. It was seized through memorandum Ex. PW2/B.

9. PW-3 Smt. Mala Devi deposed that Biru Ram was doing labour work near Kalibari. He told her that he had strained relations with his wife as she was not keeping good moral. He told her that he has danger to his life from persons like Basant and another boy. He also told that his wife would get him killed. She had seen him in the first week of January, 2012. Thereafter, she had not seen him. She contacted her sister Bimla Devi who was working with Biru at Kalibari and she had informed her that she had not seen Biru attending work from 9.1.2012. She told her husband Rahul that Biru was not seen. She asked her husband to inquire from Laxmi Devi. Laxmi Devi did not tell anything and her husband asked Laxmi Devi to lodge missing report of Biru. Laxmi Devi had lodged the report to the police. On 23.01.2012, she, her sister, Varinder and Rahul went to the house of Laxmi Devi. Laxmi Devi did not tell anything, but children informed that there was quarrel between parents. Varinder had told that his father has been killed by two neighbours Basant and Hem Raj. The son had told that his father was killed in the night with the help of Laxmi Devi. Laxmi told that Basant and Hem Raj had killed her husband. Varinder had reported the matter to police. Police came on the spot on the next day.

10. PW-4 Sh. Tek Singh deposed that on 23.01.2012, many Nepali had gathered in the compound of Biru. He, Sita Ram and Geeta Ram went there. Som Dutt and Basant Kanwar told that they killed Biru and *Chunni* was given by his wife. Basant told that dead body was buried in the *jungle.* Laxmi Devi had also confessed that she had given *Chunni* with which he was killed. Children of Biru also told the same thing. He had told them to lodge the FIR.

11. PW-5 Sh. Puran Mal is a formal witness. PW-6 Sh. C.L. Sharma proved the report, Ex. PW6/A. PW-7, Sh. Naseev Singh Patiyal has proved the report Ex. PW7/A.

12. PW-8 Sh. Rahul Kumar deposed that Biru was residing in Rajhana alongwith his wife Laxmi Devi. They had two sons and two daughters. Biru was working at Kalibari. Som Raj and Basant were residing near his house. They had been visiting house of Biru Ram and contacting his wife Laxmi. Biru had been telling him that Som Raj and Basant

used to sit with his wife Laxmi Devi and Som Raj and others used to give him threats. He had been telling him that his wife would get him killed. Biru was not seen for the last one week. It was January, 2012. He telephoned to Bimla to know about Biru. Bimla told him that he had not come for the last 8-9 days to Kalibari. He and his wife inquired about Biru from Laxmi Devi. Perhaps it was 16th or 17th day of January. He did not remember the date. Laxmi told them that Biru had gone to Kalibari. She said that Biru had gone to Kalibari and had not returned for the last 6-7 days. Then, he returned to his quarter. He, Varinder, his wife alongwith other persons went to the house of Laxmi Devi on 23.01.2012 in the evening. They inquired from Laxmi Devi and Varinder. Laxmi told that Biru was killed by Basant and Som Raj. Laxmi Devi told that she was present with them. Varinder had told that his father had gone to work. On 24.01.2012, he reported the matter to the police at 8:30 a.m. Police came to the spot and recorded statement of Laxmi Devi. Police took Som Raj and Laxmi Devi to jungle. They showed the place where the dead body was kept. The dead body was exhumed. Dead body was in the gunny bag. A *duppata* was found tied with the neck. He identified the dead body to be of Biru Ram. Police took the photographs. In his cross-examination, he admitted that he had not lodged the FIR. He had informed the police on telephone on 23rd January. Police had reached in the evening. His statement was recorded on 24th January at about 9-10 a.m.

13. PW-9 Sh. Udham Singh is a formal witness. PW-10, Dr. Manoj Sharma, has conducted the post mortem. He has issued post mortem report Ex. PW10/B. According to his opinion, death of deceased was consistent with ligature strangulation in a case where blood alcohol level was 102.63 milligram percent. The time that has elapsed between death and post mortem was 2 to 3 weeks. The duration between injury and death was immediate.

14. PW-11 H.C. Ravinder Chaudhary deposed that the case property was deposited with him, the details of which have been entered in the *malkhana* register. He had sent all these parcels through Constable Gurmeet Singh to FSL, Junga for analysis.

15. PW-12 Constable Gurmeet Singh deposed that he has deposited the case property at FSL, Junga. PW-13 Sh. Varinder Khatri is the son of deceased. His statement was recorded on oath, though he was minor. He testified that in the year 2012, he alongwith his parents was residing in the building of Geeta Ram at Village Rajhana. One Som Raj and Basant were residing below the room occupied by his parents. When his father used to go out, Som Raj and Basant had been coming to their room. His father used to object the entry of Som Raj and Basant in their house in his absence. His father told his mother that in case these persons will not stop coming to their house, then she should also go with them. On 09.01.2012, his mother (accused) and his father had heated arguments. Thereafter, his father left the house. At about 8:00/8:30 p.m., his father came back after consuming liquor and was also having a bottle of liquor with him. Thereafter, his father had altercation with his mother and his mother pushed him outside the room and called Som Raj and Basant. Som Raj and Basant had also quarreled with his father. Thereafter, the room was bolted from outside and his father was taken away by the aforesaid persons. At about 11:00 p.m., his mother, Som Raj and Basant were talking to each other and he heard that they had committed murder of his father and the dead body was disposed of in a jungle at Kufri. He had also noticed his mother and Basant who had come to the room and had taken out a plastic sack. He had also heard that his mother was saying that she had frightened in the jungle and at this, Basant told her not to be frightened any more, since they had killed Biru. During that night Som Raj and Basant slept in their room and at about 8:00 a.m., he had noticed that they left the room. Thereafter, he inquired from his mother about the reason for killing of his father. She disclosed that since his father used to torture her, due to this

reason she had eliminated his father. She also instructed him not to disclose this fact to any person. On 21.01.2012, his mother lodged missing report of his father at Police Station, New Shimla. On 23.01.2012, Rahul and Varinder came to their house and they inquired about the whereabouts of his father from his mother. Thereafter, his mother disclosed to them that his father was killed by her in connivance with Som Raj and Basant. She had disclosed that neck of his father was pressed with the help of *dupatta* and dead body was buried in a forest. On 24.01.2012, Rahul reported the matter to the police. The police interrogated his mother and Som Raj. Thereafter, they led the police party to forest at Kufri and got recovered dead body of his father. In his cross-examination, he admitted that sometimes, his father used to vomit and urinate in the room, which used to trickle down in the room of Som Raj and Basant. He also admitted that due to this reason, Som Raj and Basant had altercation with his father and threatened his father to do away with his life. He also admitted that on the day of occurrence, his father had come after consuming liquor and had urinated in the room, volunteered that his father had earlier altercations with his mother and she used to call them. He also admitted that his father was taken away by Som Raj and Basant. He had heard that Som Raj and Basant had pressed the neck of his father with *dupatta*. He had not raised any alarm since he had no apprehension that his mother, Som Raj and Basant will kill his father. On 10.01.2012, he had disclosed this fact to his friends named Bhim and Jeet.

16. PW-14, Head Constable Inder Singh deposed that police recorded the statement of accused Laxmi Devi Ex. PW1/A under Section 27 of the Indian Evidence Act. Statement of Som Raj was also recorded in his presence vide Ex. PW2/A. On the identification of Laxmi Devi and Som Raj, the Investigating Officer recovered the dead body from a pit in Kufri forest.

17. PW-15 Ram Pal Sharma has carried out the investigation. FIR Ex. PW-11/G was registered under Section 302 read with Section 34 of the Indian Penal Code. He went to the spot and accused Laxmi Devi alongwith her children was present in her rented accommodation owned by Geeta Ram at Rajhana village. Rahul and Varinder were also present there. Thereafter, he interrogated accused Laxmi Devi and her children. They had disclosed that deceased Biru Ram had quarreled with accused Laxmi Devi during day time and in the evening, he came after consuming liquor and quarreled with accused Laxmi. Thereafter, accused Laxmi called Basant and Som Raj, who were residing below their quarter. Accused Basant Kanwar and Som Raj were inside the room and door was bolted from inside when deceased Biru Ram knocked at the door and door was opened, Basant Kanwar slapped Biru Ram and inquired about the quarrel with accused Laxmi Devi. It was also disclosed that all the three persons took away deceased Biru Ram outside the room and thereafter pressed the neck of deceased with *dupatta* (*Chunni)* of accused Laxmi Devi and strangulated the deceased and committed murder of Biru Ram. Thereafter, they came to room and a plastic sack was taken out. The dead body of Biru Ram was packed in that plastic sack alongwith *dupatta* and black colour wooden shawl. The dead body was buried at Rajhana in the Kufri forest. Thereafter, accused Laxmi Devi was arrested and she made a disclosure statement Ex. PW1/A in the presence of Tehsildar Rural and Chet Ram that she could get the dead body recovered and identify the place in Kufri forest where it was buried. Som Raj accused was also present there. Thereafter, accused Laxmi Devi led the police party to a place in Kufri forest and got recovered the dead body of her husband vide memo Ex. PW1/B. The dead body was identified by Rahul, Varinder and accused Laxmi Devi. The spot map of house Ex. PW15/A and spot map of forest Ex. PW15/B were prepared. The dead body was taken into possession and inquest papers Ex. PW-8/A were filled and the dead

body was sent for post mortem examination through ASI Taranjit Singh. The case property was sent to FSL for chemical examination and its reports Ex. PW6/A and PW7/B were obtained. Thereafter, these reports were produced before the doctor and final opinion on Ex. PW10/B was obtained.

18. DW-1, Ms. Minakshi Devi was minor. Her statement was recorded on oath. According to her, her father used to consume alcohol and after consuming alcohol, he used to quarrel with her mother. On 09.01.2012, her father came to the house after consuming liquor. He urinated and vomited in the room, which trickled from the floor to the room occupied by Som Raj and Basant. They came up and had altercations with her father. They were also giving beatings to her father on earlier occasions. They requested Som Raj and Basant Kanwar not to give beatings to their father, however, they threatened them and the door was bolted from outside and her father was taken away by accused Som Raj and Basant Kanwar. She alongwith her mother, i.e., accused, her brother Varinder, Shankar, Sanjna remained locked in the room. Thereafter, since her father had not turned, her mother inquired about her father from accused Som Raj. He disclosed that they had only given beatings to deceased Biru Ram and thereafter, they were not aware about his whereabouts. Thereafter, her mother inquired from her aunt (*Bua)* and other persons. Thereafter, her mother lodged a missing report on 21.01.2012. The police had come to their house on 23.01.2012. In her cross-examination, she denied that she has been tutored by her mother outside the Court. She stated that her father had come at 8:30 p.m., on that day. He urinated and vomited after half an hour. She denied the suggestion that her father had objected the presence of accused Basant Kanwar and Som Raj in his presence. She denied that her mother had disclosed to her brother in their presence that her father was killed by her mother in connivance with accused Som Raj and Basant Kanwar. She also denied that her mother had alone gone with accused Basant Kanwar and Som Raj on that night and had committed murder of her father.

19. PW-2 Sh. Geeta Ram deposed that on 23.01.2012, Rahul came to his house and informed that Basant, Som Raj and Laxmi Devi had killed Biru Ram. PW-3, Smt. Mala Devi told her husband Rahul that Biru was not seen. She asked her husband to inquire from Laxmi Devi. Varinder had told that his father has been killed by two neighbours Basant and Hem Raj. Son had told that father was killed in the night with the help of Laxmi Devi. However, accused Laxmi Devi told that Basant and Hem Raj had killed her husband.

20. PW-8 Sh. Rahul Kumar deposed that he telephoned to Bimla to know about Biru. Bimla told him that Biru had not come for the last 8-9 days to Kalibari. He and his wife inquired about Biru from Laxmi Devi (accused). He, Varinder, his wife alongwith other persons had gone to the house of Laxmi Devi on 23.01.2012 in the evening. They asked from Laxmi Devi (accused) and Varinder. Accused Laxmi Devi told that Biru was killed by Basant and Som Raj and she was present with them. Varinder had told that his father had gone to work. On 24.01.2012, he reported the matter to the police at 8:30 a.m.

21. PW-13, Sh. Varinder Khatri is a material witness. He was 16 years old at the time of incident. According to him, His father used to object the entry of Som Raj and Basant in their house in his absence. On 09.01.2012, his mother and father had exchanged heated arguments. His father came back at 8:00/8:30 p.m. after consuming liquor and was also having a bottle of liquor with him. Thereafter, his father had altercation with his mother and his mother pushed him outside the room and called Som Raj and Basant. Som Raj and Basant had also quarrled with his father. Thereafter, the room was bolted from outside and his father was taken away by the accused. At about 11:00 p.m., his mother, Som Raj and

Basant were talking with each other and he heard that they had committed murder of his father and the dead body was disposed of in a jungle at Kufri. On 23.01.2012, Rahul and Varinder came to their house and they inquired about the whereabouts of his father from his mother. Thereafter, his mother disclosed to them that his father was killed by her in connivance with Som Raj and Basant. His mother has told him not to disclose this incident to anyone. In his cross-examination, he has categorically stated that he has not raised any alarm. His statement was also recorded under Section 164 Cr. P.C. In his cross-examination, he has stated that he had disclosed this fact to his friends, namely, Bhim and Jeet on 10.01.2012. If he has told this incident to his friends, namely, Bhim and Jeet on 10.01.2012, who were not examined, then what prevented him from disclosing this incident in his relations, who were making quarries from his mother about Biru. Moreover, PW-13 Varinder Khatri, being young boy should have raised alarm when his father was allegedly taken out by the accused and when according to him, he has heard the conversation that the accused had killed his father.

22. According to PW-1 Sh. P.K. Taak, the statement of accused was recorded vide Ex. PW1/A to the effect that she had concealed the dead body of the deceased and she could get it recovered. PW-3, Smt. Mala Devi told that Varinder had told that his father was killed by two neighbours Basant and Hem Ram. The son had further told to her that the father was killed in the night with the help of Laxmi Devi. However, Laxmi Devi (accused) told that Basant and Hem Raj had killed her husband.

23. PW-4 Tek Singh deposed that the accused had also confessed that she had given *chunni* with which the deceased was killed. Similarly, PW-8 Sh. Rahul Kumar deposed that they had made inquiries from accused. She told that Biru was killed by Basant and Som Raj. She also told that she was present with them.

24. Mr. P.M. Negi, learned Deputy Advocate General has also argued that the accused made extra judicial confession before PW-4, Sh. Tek Singh, PW-8, Sh. Rahul Kumar and PW-13 Sh. Varinder Khatri. FIR was registered by PW-8 Rahul Kumar vide Ex. PW11/G. However, there is no reference to extra judicial confession made in the FIR. When the judicial confession has been made by the accused before PW-8, Sh. Rahul Kumar, he should have necessarily stated it in the FIR. This is an after thought. Similarly, PW-4 was not known to accused. There was no occasion with her (accused) to state before him that she had given *chhuni,* with which the deceased was killed.

25. In **Jagta** Vs. **State of Haryana**, AIR 1974 Supreme Court 1545, their Lordships of the Hon'ble Supreme Court has held that the evidence about an extra judicial confession is in the nature of things a weak piece of evidence. Their Lordships have further held that the circumstantial evidence in order to warrant conviction should be consistent only with the hypothesis of the guilt of the accused. Their Lordships have held as under:

> *"14. So far as the alleged extra judicial confession of the accused is concerned, the prosecution has relied upon the evidence on Ram Singh (PW 4). After having been taken through the evidence of that witness, we find the same to be lacking in credence and devoid of any ring of truth. The police was admittedly present in the office of the co-operative society in village Farmana on the morning of January 15, 1972. We find no reason as to why the accused, instead of surrendering himself before the police, should go to the house of Ram Singh in village Farmana, blurt out a confession before him and ask him to produce the accused before the police. Nothing has been shown*

to us as to why the accused could not himself go and appear before the police. We have mentioned above that an attempt has been made in this case to introduce the story of the recovery of ornaments belonging to Phul Pati deceased from the accused. The attempt of the investigating agency to introduce a false story about the removal of the ornaments of the deceased and their recovery from the accused would in our opinion, also affect the credibility of the evidence regarding the extra judicial confession alleged to have been made to Ram Singh PW. The evidence about an extra judicial confession is in the nature of things a weak piece of evidence. If the same is lacking in probability as it is in the present case, there would be no difficulty in rejecting the same. We are, therefore, not prepared to place any reliance upon the evidence regarding the extra judicial confession of the accused.

17. Lastly, we have the evidence about the injuries which were found on the person of the accused. The explanation of the accused is that those injuries were caused to him by the police. Assuming that the explanation of the accused with regard to those injuries is not trustworthy, this circumstance as well as the circumstance about his being present in his fields at 1 p.m. on the day of occurrence and about his going at sunset time on a pucca road towards his village are hardly sufficient to warrant the conviction of the accused in a serious offence entailing death penalty. It is well established that circumstantial evidence in order to warrant conviction should be consistent only with the hypothesis of the guilt of the accused. The same cannot be said to be true of the circumstantial evidence adduced in this case."

26. Their Lordships of the Hon'ble Supreme Court in **The State of Punjab** Vs. **Bhajan Singh and others** AIR 1975 Supreme Court 258, have held that when the doctor was unable to find the cause of death because the dead bodies were in decomposed state, it could not be said that the death of the persons whose bodies were recovered was homicidal. Their Lordships have held as under:

13. We have heard Mr. Sharma on behalf of the appellant-State and are of the opinion that no case has been made for interference with the Judgment of the High Court. There is no eye witness of the occurrence and the conviction of the accused is sought to be secured on the basis of circumstantial evidence. We, however, find that the evidence which has been adduced in this case is far from satisfactory and that it suffers from a number of infirmities. In the first instance, there is no evidence on record to show that the two dead bodies which are alleged to have been recovered in instance of the disclosure statement of Bhajan Singh were those of Bachan Singh and Harbans Singh deceased. The evidence of Dr. Saluja is clear on the point that the features of the persons on whose dead bodies the doctor performed post-mortem were unrecognisable. Question then arises as to whether the death of the two persons whose dead bodies were recovered was homicidal. So far as this aspect is concerned. we find that Dr. Saluja has deposed that he found no marks of ligature on either of the two dead bodies. According further to the doctor, he could not find the cause of death because the two dead bodies were in a decomposed

state. In the face of the above evidence of the doctor, it is not possible to hold that the death of the two persons, whose bodies were recovered, was homicidal

14. The learned Sessions Judge in the course of his judgment has observed that the doctor who performed post-mortem examination was careless inasmuch as he failed to send the two dead bodies to the Professor of Anatomy who might have been in a position to express opinion after examining the hyoid bone and cervical vertebra as to whether "a death of the two deceased persons was due to strangulation. Although it may be that it would have been more appropriate on the part of the doctor to have sent the dead bodies to an anatomy expert, the fact that the doctor did not de so cannot be a ground for drawing inference adverse to the accused. The accused cannot be made to suffer because of that omission of the doctor. It would indeed be contrary to all accepted principles to give the benefit of that omission to the prosecution. The onus in a criminal trial is upon the prosecution to prove the guilt of the accused. If there be any gap or lacuna in the prosecution evidence the accused and not the prosecution would be entitled to get the benefit of that.

In the instant case, the deceased was allegedly buried and his dead body was taken out after two weeks. There are no findings about the cause of the death of the deceased, except the bald statement of doctor PW-10 that the deceased died due to strangulation.

27. In **Udiya** Vs. **State of Rajasthan** 1997 Cri. L.J. 516, the Division Bench of Rajasthan High Court has held that when the alleged confession was stated to have been made before Geba, who lodged the first information report, however, his version was not in the FIR, the learned Sessions Judge has thus rightly disbelieved the evidence of extra judicial confession. The Division Bench has held as under:

"17. The prosecution had also relied on the extra-judicial confession of the accused which was said to have been made by him in the presence of Jay Ram. Geba and Shanker. This confession was said to have been made before Geba who lodged the first information report. However, this version was not there in the FIR. The Learned Sessions Judge has thus rightly disbelieved the evidence of extra judicial confession."

28. The Court while appreciating the extra-judicial confession, has to take into consideration the following circumstances:

(a) to whom it is made;

(b) the time and place of making it;

(c) the circumstances, in which it was made;

and the Court has to look into any suspicious circumstances.

29. PW-8, Sh. Rahul Kumar deposed that he had gone to the house of the accused alongwith Varinder. PW-13, Sh. Varinder Khatri has stated that on 23.01.2012, Rahul and Varinder came to their house and they inquired about the whereabouts of his father from his mother. Thereafter, his mother disclosed to them that his father was killed by her in connivance with Som Raj and Basant. The prosecution has not examined Varinder

Kumar. Now, as far as Rahul is concerned, he has not made any statement regarding the alleged extra judicial confession made by the accused before him in the FIR.

30. PW-13, Sh. Varinder Khatri has remained silent for two weeks. He deposed that on 23.01.2012, Rahul and Varinder came to their house and they inquired about the whereabouts of his father from his mother. Thereafter, his mother disclosed to them that his father was killed by her in connivance with Som Raj and Basant. He would have been the first person to raise hue and cry and reported the matter to the police if his father had been killed by his mother with the help of co-accused. This statement cannot be relied upon for the simple reason that he remained silent for two weeks.

31. DW-1 Ms. Minakshi has deposed that it was Som Raj and Basant Kanwar, who had given beatings to her father. We have already noticed that conduct of PW-13, Sh. Varinder Khatri was unnatural since he has not raised any alarm at the time when his father was taken out and he has remained silent on 23.01.2012.

32. According to the prosecution, the motive attributed to the accused was that her husband used to ask her not to have any relations with Basant Kanwar and Som Raj. Basant Kanwar and Som Raj were minors at the time of incident and the accused was 33 years old. It has come in the evidence that the deceased used to come drunk to the house and used to urinate and vomit in the room, which used to leak down to the room occupied by Basant Kanwar and Som Raj. This used to lead altercations between the deceased and Basant Kanwar and Som Raj. The possibility of the young boys coming to the house of the deceased cannot be ruled out, since PW-13 was also young boy of 16 years old.

33. PW-10, Dr. Manoj Sharma, deposed that the death of deceased was consistent with ligature strangulation. He issued the post mortem report Ex. PW10/B. However, the final opinion was not given. We have closely perused Ex. PW10/B. There is no final opinion given by PW-10, Dr. Manoj Sharma, though the Investigating Officer has stated that he has given the final opinion after receipt of F.S.L. reports Ex. PW6/A and PW7/B. It was necessary for PW-10 to give definitive opinion whether the strangulation has led to asphyxia, hypoxia or there was any venous congestion or shock due to cardiac arrest. He has merely stated that the death was consistent with ligature strangulation.

34. Accordingly, in view of the observations and discussions made hereinabove, the appeal is allowed. The judgment and order, dated 02.09.2013/05.09.2013, are set aside. The accused is acquitted of the charges framed against her. She be released forthwith, if not required in any other case. The fine amount, if already deposited, be refunded to the accused. The Registry is directed to prepare the release warrant and send the same to the concerned Superintendent of Jail.

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

M/s Competent Automobile Co. Ltd. & others ….Revisionists

Versus

Subhash Chand son of late Shri Parmod Singh & others. ….Non-revisionists

Civil Revision No. 184 of 2006
Order Reserved on 3rd June 2015.
Date of Order 3rd July, 2015

Code of Civil Procedure, 1908- Order 21- Parties settled the matter- an order was passed by the Court that in view of compromise suit stood dismissed as withdrawn- however, parties did not abide by the terms and conditions of the compromise on which an execution petition was filed – Execution petition was dismissed by the trial Court after holding that no executable decree was passed as the suit was dismissed as withdrawn- held, that when the parties enter into a compromise which forms part and parcel of the order, such compromise is executable even if the suit was dismissed as withdrawn in view of compromise- trial Court had erred in not executing the compromise entered between the parties. (Para-4)

Code of Civil Procedure, 1908- Order 23- The compromise was entered between the parties, however, permission of the Court to enter into the compromise was not taken- held, that when Court permitted the parties to place on record the compromise and had also recorded the statement of the parties, implied permission was granted by the Court to compromise the matter. (Para-5)

Case referred:
Kerala State Coir Corporation Limited vs. Delhi Intercontinental (Hotels) Private Limited, 1993(27) Delhi Reported Judgments (Delhi High Court) page 62

For the Revisionists: Mr. K.S.Kanwar, Advocate
For the Non-revisionists: Mr. K.D. Sood Sr. Advocate with Mr.Sanjeev Sood, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present revision petition is filed under Section 115 of Code of Civil Procedure against order dated 29.9.2006 passed by learned Civil Judge (Senior Division) Hamirpur (H.P.) in execution petition No. 1 of 2006 titled M/s Competent Automobile Company Ltd. vs. Subhash Chand and others.

Brief facts of the case

2. Brief facts of the case as pleaded are that Parmod Singh deceased plaintiff filed civil suit No. 11 of 2005 under Specific Relief Act 1963 against defendants namely K.K. Mehta Director M/s Competent Automobile Company Limited VPO Gutkar District Mandi H.P. and against Managing Director M/s Competent Automobile Co. Limited Head Office Competent House F-14 Connaught Place New Delhi for declaration to the effect that agreement dated 27.11.2003 executed between the plaintiff and defendant No.1 for lease of land comprised in Khata No. 87 min, Khatauni No. 90 min Khasra Nos. 602/474/659/476 kita 2 measuring 11 canal 0 marlas as per jamabandi for the year 1997-98 situated in Tika Tikkar Mauza Mahalta Tehsil and District Hamirpur (H.P.) and another agreement dated 10.12.2003 for the lease of aforesaid land are null and void. It is pleaded that both agreements are the result of fraud misrepresentation coercion and undue influence and are null and void. It is pleaded that plaintiff is not bound by aforesaid agreements dated 27.11.2003 and 10.12.2003 in any manner. Consequential relief of permanent prohibitory injunction was also sought by way of restraining the defendants not to raise any further construction in any manner over the land in suit. Additional relief of possession by way of demolition of super structure was also sought. Thereafter on dated 22.3.2005 learned trial Court recorded statement of K.K. Mehta Director of M/s Competent Automobile Co. Ltd. Branch Office Gutkar District Mandi H.P. and also recorded statement of Rajinder Kumar

son of Shri Parmod Singh and Shri Subhash Chand son of Parmod Singh who was General Attorney of Parmod Singh. Thereafter on dated 22.3.2005 learned Civil Judge (Senior Division) Hamirpur passed the order that in view of compromise Ext.CA as well as statements of parties recorded today the suit stands dismissed as withdrawn. Thereafter M/s Competent Automobile Company Limited filed execution petition No. 1 of 2006 titled M/s Competent Automobile Company Limited vs. Subhash Chand and others for execution of order dated 22.3.2005 passed by learned Civil Judge (Senior Division). Revisionists M/s Competent Automobile Company Limited sought the relief against non-revisionists to the effect that non-revisionists be directed to execute the lease deed in favour of M/s Competent Automobile Company Ltd. relating to immovable property comprised in Khata No. 87 min, Khatauni No. 90 min Khasra Nos. 602/474, 659/476 Kita 2 measuring 11 canal 0 marlas as per jamabandi for the year 1998-99 situated in Tika Tikkar mauja Mohalta Tehsil and District Hamirpur (H.P.). M/s Competent Automobile Company Limited also sought further relief in execution petition that in default to execute the lease deed on part of non-revisionists then local commissioner be appointed by Court to execute the lease deed in favour of M/s Competent Automobiles Company Ltd. Learned Executing Court dismissed the execution petition and held that no decree was passed by trial Court and on this ground compromise could not be executed and learned trial Court further held that in view of the fact that Parmod Singh plaintiff filed the suit through his next friend and no permission of Court was sought to compromise the case on behalf of Parmod Singh and on this ground compromise Ext.CA could not be executed.

3. Feeling aggrieved against the order passed by learned trial Court in execution proceedings revisionists filed the present revision petition. Court heard learned Advocate appearing on behalf of the revisionists and learned Advocate appearing on behalf of the non-revisionists and Court has also perused the entire record carefully.

4. Submission of learned Advocate appearing on behalf of revisionists that findings of Executing Court that suit was dismissed as withdrawn and on this ground compromise Ext.CA executed inter se the parties in CS No. 11 of 2005 titled Parmod Singh vs. K.K. Mehta could not be executed is contrary to law is accepted for the reasons hereinafter mentioned. Learned trial Court has dismissed civil suit No. 11 of 2005 titled Parmod Singh vs. K.K. Mehta on dated 22.3.2005 with observations that in view of compromise Ext.CA as well as statements of parties recorded in Court suit stands dismissed as withdrawn. It is held that order of Court for withdrawal of suit could not be read as dehors as per statements of counsel for parties and compromise Ext.CA. It is held that if compromise Ext.CA and statements of parties recorded would take into consideration then it would be clearly proved that parties have amicably settled the matter and amicably determined the rights of parties with regard to the matter in controversy of suit. Learned trial Court had made compromise Ext.CA and statements of parties recorded before the Court as part and parcel of order. It was held in case reported in ***1993(27) Delhi Reported Judgments (Delhi High Court) page 62 titled Kerala State Coir Corporation Limited vs. Delhi Intercontinental (Hotels) Private Limited*** that if suit was dismissed as withdrawn in view of compromise between the parties and undertaking given by learned Advocates in the Court then compromise and undertaking given before the Court would be executable. In view of ruling cited supra it is held that compromise Ext.CA and statements of parties given in CS No. 11 of 2005 are executable.

5. Another submission of learned Advocate appearing on behalf of revisionists that findings of Executing Court that in view of the fact that suit was filed by plaintiff Parmod Singh through his next friend and in view of the fact that no leave of Court was

granted to execute the compromise and on this ground compromise executed inter se parties could not be executed is also contrary to law is also accepted for the reasons hereinafter mentioned. It is proved on record that learned Civil Judge (Senior Division) Hamirpur (H.P.) on dated 22.3.2005 permitted the parties to place on record compromise Ext.CA and it is also proved on record that thereafter learned Civil Judge (Senior Division) Hamirpur also recorded statements of parties. In view of the fact that learned Civil Judge (Senior Division) Hamirpur permitted the parties to place on record compromise Ext.CA and in view of the fact that learned trial Court also recorded statements of parties it is held that learned trial Court had impliedly permitted the parties to compromise the case and it is well settled law that parties cannot be penalized for the fault of the Court. No objection was raised by learned Civil Judge (Senior Division) Hamirpur (H.P.) on dated 22.3.2005 relating to requirement of leave of Court. It is well settled law that Civil Courts are under legal obligation to pass the orders strictly in accordance with law and also to entertain the documents in civil proceedings strictly in accordance with law. In view of the fact that no objection was raised by Court on dated 22.3.2005 when compromise Ext.CA was placed on record and in view of the fact that no objection was raised by Court when statements of parties recorded on dated 22.3.2005 it is held that at the subsequent stage it is not expedient in the ends of justice to nullify the compromise Ext.CA and statements of parties recorded before learned Civil Judge (Senior Division) Hamirpur by the Court itself.

6. Another submission of learned Advocate appearing on behalf of non-revisionists that no decree was passed by Court and on this ground execution petition was not maintainable is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that compromise Ext.CA and statements of parties are part and parcel of order of learned Civil Judge (Senior Division) Hamirpur dated 22.3.2005. It is well settled law that parties cannot be allowed to flout the terms and conditions of agreement executed inter se the parties and placed in civil proceedings. It is held that compromise Ext.CA and statements of parties recorded in Civil Suit No. 11 of 2005 titled Parmod Singh vs. K.K. Mehta are part and parcel of order dated 22.3.2005.

7. In view of above stated facts order of learned Executing Court dated 29.9.2006 announced in Execution Petition No. 1 of 2006 titled M/s Competent Automobile Company Limited vs. Subhash Chand and others is set aside and it is held that order of learned Executing Court dated 29.9.2006 is illegal. Execution petition is remanded back to learned Executing Court with direction to execute compromise Ext.CA executed inter se the parties in CS No. 11 of 2005 titled Parmod Singh vs. K.K. Mehta strictly in accordance with law. Parties are directed to appear before Executing Court on date 31.07.2015. File of learned Executing Court along with certified copy of this order be sent back forthwith. Parties are left to bear their own costs. Revision petition stands disposed of. Pending miscellaneous application(s) if any also stands disposed of.

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

National Insurance Company Limited …Appellant.

Versus

Ram Chander and others …Respondents.

FAO No. 36 of 2008

Decided on: 03.07.2015

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that driver did not have valid driving licence at the time of accident, however, no evidence was led to prove this fact- Driver appeared in the witness box and gave the details of the licence- therefore, insurer was rightly held liable to indemnify the insured. (Para-12 to 14)

For the appellant:	Mr. Sandeep Sharma, Senior Advocate, with Mr. Pankaj Negi, Advocate.
For the respondents:	Mr. Mehar Chand, Advocate, vice Ms. Archana Dutt, Advocate, for respondent No. 1. Mr. Sanjay Dutt Vasudeva, Advocate, vice Mr. C.N. Singh, Advocate, for respondents No. 2 and 3. Nemo for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is judgment and award, dated 09.10.2007, made by the Motor Accident Claims Tribunal-II, Sirmaur District at Nahan, H.P. (for short "the Tribunal") in M.A.C. Petition No. 60-N/2 of 2001, titled as Shri Ram Chander versus The State of Haryana and others, whereby compensation to the tune of Rs.2,94,000/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimant-injured and the insurer came to be saddled with liability (for short "the impugned award").

2. The owner-insured, driver and claimant-injured have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Only the appellant-insurer has questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling it with liability.

4. Thus, the only question to be determined in this appeal is - whether the Tribunal has fallen in an error in saddling the appellant-insurer with liability?

5. In order to determine the issue, it is necessary to give a brief resume of the facts of the case, the womb of which has given birth to the appeal in hand.

6. The claimant-injured filed claim petition before the Tribunal seeking compensation on the ground that he became the victim of a vehicular accident, which was caused by the driver, namely Shri Ram Swaroop, while driving bus, bearing registration No. HR-37-8718, rashly and negligently, on 09.04.2000, at about 2.30 P.M., at place Bhooppur, Tehsil Paonta Sahib.

7. The respondents in the claim petition resisted the claim petition on the grounds taken in the respective memo of objections.

8. Following issues came to be framed by the Tribunal on 17.08.2002:

> *"1. Whether the petitioner sustained injuries in a motor accident caused by rash and negligent driving of a bus (No. HR-37-8718) by the respondent No. 3, Ram Swaroop at*

Bhuppur village in Paonta Sahib tehsil, on April 9, 2000, as alleged? OPP

2. If issue 1 is proved, what amount the petitioner is entitled to receive as compensation and from whom? OPP

3. Whether respondent 3, Ram Swaroop, did not have any valid and effective driving licence at the time of the accident? If so, to what effect? OPR-4

4. Relief."

9. The claimant-injured led evidence in support of his claim. The driver himself appeared in the witness box as RW-1. It is apt to record herein that the appellant-insurer has not led any evidence.

10. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation in favour of the claimant-injured and saddled the appellant-insurer with liability.

11. There is no dispute about the findings returned by the Tribunal on issue No. 1. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

12. Issue No. 2 and 3 are interdependent. The appellant-insurer has taken a ground that Ram Swaroop, the driver of the offending vehicle, was not having a valid and effective driving licence at the relevant point of time. It was for the appellant-insurer to discharge the onus, has not led any evidence to prove the same, thus, has failed to discharge the onus.

13. The driver, namely Shri Ram Swaroop, himself appeared in the witness box and has given the details of his driving licence.

14. It was for the appellant-insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence at the relevant point of time and the owner-insured has committed a willful breach of the terms and conditions of the insurance policy, has not led any evidence, thus, has failed to prove the said factum.

15. In the given circumstances, the Tribunal has rightly made discussions in para 34 of the impugned award. Accordingly, the findings returned by the Tribunal on issues No. 2 and 3 are upheld.

16. Having said so, the Tribunal has rightly directed the appellant-insurer to satisfy the award, which is a meager amount.

17. Viewed thus, the appeal merits to be dismissed and the impugned award is to be upheld. Accordingly, the impugned award is upheld and the appeal is dismissed.

18. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award through payee's account cheque.

19. Send down the record after placing copy of the judgment on Tribunal's file.

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

National Insurance Company Ltd. ...Appellant

VERSUS

Ram Kali and others ...Respondents

FAO No.416 of 2008.
Decided on: 03.07.2015.

Motor Vehicles Act, 1988- Section 166- Claimants specifically pleaded that accident had taken place due to negligence of the driver- FIR also established that the vehicle was being driven in a rash and negligent manner- driver did not appear before the Tribunal and had not filed any reply to the claim petition- therefore, rashness and negligence was duly proved. (Para-11 to 13)

Cases referred:

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121

Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120.

For the Appellant: Mr.Ashwani K. Sharma, Advocate.

For the Respondents: Mr.Dinesh Bhanot, Advocate, for respondents No.1 to 6.
Mr.Dheeraj K. Vashista, Advocate, for respondents No.7 and 8.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.(Oral):

Appellant-insurer has invoked the jurisdiction of this Court in terms of Section 173 of the Motor Vehicles Act, 1988, (for short, the Act), by the medium of the present appeal, and has questioned the award, dated 15th March, 2008, passed by the Motor Accident Claims Tribunal, Solan camp at Nalagarh, (for short, the Tribunal), in Claim Petition No.8-NL/2 of 2005/04, titled Ram Kali and others vs. Pritpal Singh and others, whereby compensation to the tune of Rs.5,60,000/-, with interest at the rate of 9% and the costs quantified at Rs.1,000/-, was awarded in favour of the claimants, and the insurer-appellant was saddled with the liability, (for short, the impugned award).

2. The claimants, the owner and the driver have not questioned the impugned award, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the insurer has challenged the impugned award on two grounds, firstly on the ground that the amount of compensation awarded by the Tribunal is excessive; and secondly that the insurer is not liable to pay compensation since the claimants have failed to prove that the driver, namely, Pritpal Singh, original respondent No.1 (respondent No.7 herein), had driven the offending vehicle rashly and negligently.

4. In order to determine both these issues, it is necessary to give a flash back of the facts of the case, the womb of which gave birth to the instant appeal.

5. The claimants invoked the jurisdiction of the Tribunal under Section 166 of the Act for grant of compensation to the tune of Rs.10.00 lacs, as per the break-ups given in

the claim petition, on the ground that on 17.6.2004, at about 11.00 A.M., near Chungi Post, GT Road, Ludhiana, the driver of the offending vehicle, namely, Pritpal Singh, had driven the offending vehicle i.e. Car bearing registration No.PB-10AU-7572, rashly and negligently and caused the accident, as a result of which the deceased sustained multiple injuries and succumbed to the same. Qua the accident, an FIR bearing No.74/04, under Sections 279, 337 and 304-A, was also registered at Police Station, Salem Tawri, Ludhiana.

6. The driver and the owner of the offending Car opted not to contest the Claim Petition before the Tribunal and, therefore, they were proceeded against ex parte. Thus, the averments contained in the Claim Petition, so far as they relate to the driver and the owner, have gone un-rebutted.

7. The insurer resisted the Claim Petition by filing reply. In its reply to paragraph 24 of the Claim Petition, the insurer has taken evasive stand that no accident had taken place and that the accident in question had not occurred due to sole rash and negligent driving of the driver of the offending vehicle, which is no denial in terms of the mandate of Order VIII Rule 3 of the Code of Civil Procedure, (for short, the CPC).

8. On the pleadings of the parties, the Tribunal settled the following issues:

"1. Whether the deceased Roop Lal had suffered injuries on account of rash/negligent driving of car by respondent No.1 and had died as such? 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 respondent No.1 did not possess a valid and effective driving licence and documents? OPR3

4. Relief."

9. In order to prove the case set out in the Claim Petition, the claimant Ram Kali (widow of deceased Roop Lal) appeared in the witness box as PW-1. The insurer (original respondent No.3) has opted not to lead any evidence.

10. I have examined the statement of Ram Kali PW-1 and the contents of the FIR Ext.PA, which do disclose prima facie that the driver of the offending vehicle had driven the offending vehicle rashly and negligently on the fateful day and had caused the accident. The said statement of the claimant Ram Kali, in the absence of any evidence to the contrary led by the insurer, has remained un-rebutted.

11. Sine qua non for granting compensation in a claim petition under Section 166 of the Act is that the claimants have to plead and prima facie prove that the accident was the outcome of rash and negligent driving on the part of the driver driving the offending vehicle at the relevant point of time. In the instant case, the claimants have specifically averred that the accident had occurred due to the rash and negligent driving of the driver Pritpal Singh. It was for the driver of the offending vehicle to deny the said averment and prove otherwise, if it was so. However, the driver of the offending vehicle did not appear before the Tribunal and file any reply to the claim petition.

12. During the course of hearing, the learned counsel appearing for the driver of the offending vehicle (respondent No.7 herein) has placed on record a copy of the judgment passed by the Judicial Magistrate Ist Class, Ludhiana, in Criminal Case No.327 of 17-9-2004, emanating out of FIR No.74, dated 18.6.2004, Police Station, Salem Tabri, Ludhiana,

whereby the driver of the offending vehicle faced trial for the accident in question and was acquitted.

13. The learned counsel for respondent No.7 (driver of the offending vehicle) has not denied the rash and negligence on the part of the driver of the offending vehicle only for the purpose of grant of compensation in the instant lis.

14. Having said so, the Tribunal has rightly decided issue No.1 in favour of the claimants and against the owner, the driver and the insurer. Accordingly, the findings returned on this issue by the Tribunal are upheld.

15. Coming to the second ground of attack qua adequacy of compensation, the Tribunal, after relying upon the certificate Ext.PW-1/B, has held that the age of the deceased, at the time of accident, was 33 years and applied the multiplier of 15, which is just and proper while keeping in view 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.**

16. The Tribunal, after making detailed discussion in paragraph 12 of the impugned award, has assessed the monthly income of the deceased at Rs.4,500/-, which, by no stretch of imagination, can be said to be on the higher side. After deducting 1/3rd amount, the Tribunal held that the claimants lost source of dependency to the tune of Rs.3,000/- per month. While deducting 1/3rd amount towards the personal expenses of the deceased, the Tribunal has lost sight of the fact that the claimants, in the instant case, are six in number and, therefore, only 1/5th amount ought to have been deducted towards the personal expenses of the deceased. However, the claimants have not challenged the impugned award, therefore, the same is reluctantly upheld.

17. Having glance of the above discussion, there is no merit in the appeal filed by the insurer and the same is dismissed. The Registry is directed to release the amount in favour of the claimants strictly in terms of the impugned award.

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

National Insurance Company Ltd. …Appellant.

Versus

Shayama Verma and another …Respondents.

FAO No. 47 of 2008
Decided on: 03.07.2015

Motor Vehicles Act, 1988- Section 149- Insurer did not lead any evidence to prove that driver did not have a valid and effective driving licence and the owner had committed willful breach of the terms and conditions of the insurance policy - therefore, insurer was rightly held liable to pay compensation. (Para- 9 and 10)

For the appellant: Mr. Deepak Bhasin, Advocate.
For the respondents: Mr. Deepak Kaushal, Advocate, for respondent No. 1.
Nemo for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

There is no representation on behalf of respondent No. 2, despite service. Hence, he is set ex-parte.

2. Challenge in this appeal is to the judgment and award, dated 01.09.2007, made by the Motor Accident Claims Tribunal - II, Sirmaur District at Nahan, H.P. (for short "the Tribunal") in M.A.C. Petition No. 24-N/2 of 2003, titled as Shayama Verma versus Kishan Chand and others, whereby compensation to the tune of Rs.40,000/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimant-injured and the insurer came to be saddled with liability (for short "the impugned award").

3. The owner-insured, driver and claimant-injured have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

4. Only the appellant-insurer has questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling it with liability.

5. It pains me to record herein that only a meager compensation amounting to Rs. 40,000/- has been awarded in favour of the claimant-injured. Even liability of the insurer under 'No Fault Liability' is Rs.25,000/- and for this petty amount, the claimant-injured has been deprived of his rights right from the year 2001 till today, is an eye-opener for the appellant-insurer.

6. However, I have gone through the impugned award and the record. I am of the considered view that the Tribunal has rightly saddled the appellant-insurer with liability for the following reasons:

7. The Tribunal has framed the following issues on 19.05.2006:

> *"1. Whether the petitioner sustained injuries due to the rash and negligently driving of bus No. HP-07-3907 on 7-6-2001 at bus stand Shimla being driven by respondent No. 2 as alleged? OPP*
>
> *2. If issue No.1 is proved, whether the petitioner is entitled for compensation. If so, to what amount and from whom? OPP*
>
> *3. Whether the driver of the offending bus was not possessed of a valid and effective driving licence at the time of accident? OPR-3*
>
> *4. Whether the offending bus was driven in contravention of the terms and conditions of insurance policy? OPR-3*
>
> *5. Relief."*

8. Before I determine issues No. 1 and 2, I deem it proper to decide issues No. 3 and 4.

Issues No. 3 and 4:

9. The Tribunal, after scanning the evidence, oral as well as documentary, has held that the appellant-insurer has failed to prove that the driver of the offending vehicle was not having a valid and effective driving licence and the owner-insured of the offending

vehicle has committed any willful breach of the terms and conditions contained in the insurance policy read with the mandate of Sections 147 and 149 of the Motor Vehicles Act, 1988 (for short "MV Act").

10. The appellant-insurer has not led any evidence, thus has failed to discharge the onus. Having said so, the Tribunal has rightly decided issues No. 3 and 4 in favour of the owner-insured and the driver and against the appellant-insurer, are, accordingly upheld.

Issues No. 1 and 2:

11. These issues are not in dispute. However, I have gone through the record. The claimant-injured has proved that the offending vehicle, i.e. bus, bearing registration No. HP-07-3907 was being driven rashly and negligently on 7.6.2001, at about 10.50 A.M., at local bus stand, Shimla, by its driver, who caused the accident, in which the claimant-injured sustained injuries. Thus, the findings recorded by the Tribunal on issue No. 1 are upheld.

12. An amount of Rs.40,000/- awarded by the Tribunal in favour of the claimant-injured, though, is a meager amount, but the claimant-injured has not questioned the same. Thus, the findings returned by the Tribunal on issue No. 2 are also upheld.

13. Having glance of the above discussions, the appeal merits to be dismissed and the impugned award is to be upheld. Accordingly, the impugned award is upheld and the appeal is dismissed.

14. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award through payee's account cheque.

15. Send down the record after placing copy of the judgment on Tribunal's file.

****

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

FAO No. 638 of 2008
a/w FAO No.639 of 2008
Reserved on: 19.06.2015
Decided on: 03.07.2015

FAO No. 638 of 2008

National Insurance Company ...Appellant.
Versus
Smt. Sundri Devi and another ...Respondents.

FAO No. 639 of 2008

National Insurance Company ...Appellant.
Versus
Master Raja Rana and others ...Respondents.

Motor Vehicles Act, 1988- Section 149- Claimant proved that deceased had hired the truck for loading apples from the orchard- Insurer had not led any evidence to prove that deceased was a gratuitous passenger- hence, the plea that the deceased was travelling as gratuitous passenger cannot be accepted. (Para-14 to 18)

Cases referred:
National Insurance Co. Ltd. versus Kamla and others, 2011 ACJ 1550
National Insurance Co. Ltd. versus Cholleti Bharatamma, 2008 ACJ 268 (SC)
Naresh Verma versus The New India Assurance Company Ltd. & others, ILR (2014) XLIII (V) HP 482
FAO No. 77 of 2010, titled as NHPC versus Smt. Sharda Devi & others, ILR (2014) XLIII (V) HP 844
National Insurance Company Limited versus Swaran Singh & others, AIR 2004 Supreme Court 1531

FAO No. 638 of 2008

For the appellant: Ms. Devyani Sharma, Advocate.
For the respondents: Mr. D.S. Nainta, Advocate, for respondent No. 1.
Mr. Ashok Tyagi, Advocate, for respondent No. 2.

FAO No. 639 of 2008

For the appellant: Ms. Devyani Sharma, Advocate.
For the respondents: Mr. D.S. Nainta, Advocate, for respondents No. 1 to 3.
Mr. Ashok Tyagi, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Both these appeals are outcome of a vehicular accident allegedly caused by the driver, namely Shri Sodhi Singh, while driving truck, bearing registration No. HR-55A-7517, rashly and negligently, on 29.08.2005 at about 3.15 P.M. near place Jaunli, on its way from Summerkot to Bhaloon, in which deceased-Sumin Kumar and Balwant Singh sustained injuries and succumbed to the injuries. Thus, I deem it proper to dispose of both these appeals by this common judgment.

2. By the medium of **FAO No. 638 of 2008,** the appellant-insurer has questioned the judgment and award, dated 13.08.2008, made by the Motor Accident Claims Tribunal (II), Shimla, Camp at Rohru (for short "the Tribunal") in MAC Petition No. 2-R/2 of 2006, titled as Smt. Sundri Devi versus National Insurance Company Ltd. & another, whereby compensation to the tune of Rs.3,96,000/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimant (for short “the impugned award-I").

3. Challenge in **FAO No. 639 of 2008** is to the judgment and award, dated 13.08.2008, made by the Tribunal in MAC Petition No. 10-R/2 of 2006, titled as Master Raja Rana and others versus National Insurance Company Ltd. and another, whereby compensation to the tune of Rs.6,06,000/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimants (for short "the impugned award-II").

4. The claimants and the owner-insured have not questioned the impugned awards on any count, thus, have attained finality so far it relate to them.

5. The appellant-insurer has questioned the impugned awards on the ground that the Tribunal has wrongly saddled it with liability.

6. Thus, the only question to be determined in both these appeals is - whether the Tribunal has rightly saddled the insurer with liability?

7. In order to determine the issue, it is necessary to give a brief resume of the facts of the case, the womb of which has given birth to the appeals in hand.

8. In both the claim petitions, the claimants have averred that the driver, namely Shri Sodhi Singh, had driven the offending vehicle, i.e. truck, bearing registration No. HR-55A-7517, on 29.08.2005 at about 3.15 P.M. near place Jaunli, on its way from Summerkot to Bhaloon, rashly and negligently, in which the deceased were travelling in order to load apples in the offending vehicle, but before that the offending vehicle met with the accident, in which deceased sustained injuries and succumbed to the injuries. The driver of the offending vehicle also died in the said accident.

9. Dependents of deceased-Sumin Kumar and Balwant Singh filed claim petitions, i.e. MAC Petition No. 2-R/2 of 2006, titled as Smt. Sundri Devi versus National Insurance Company Ltd. & another, and MAC Petition No. 10-R/2 of 2006, titled as Master Raja Rana and others versus National Insurance Company Ltd. and another, respectively and claimed compensation, as per the break-ups given in the respective claim petitions.

10. The owner-insured of the offending vehicle did not contest the claim petitions and was proceeded ex-parte. The insurer resisted both the claim petitions on the grounds taken in the respective memo of objections.

11. Identical issues came to be framed in both the claim petitions. I deem it proper to reproduce the issues framed only in MAC Petition No. 2-R/2 of 2006 herein:

> *"1. Whether on 29.08.2005 at about 3:15 PM, the driver of truck No. HR-55A-7517 was driving the vehicle rashly and negligently and as such caused death of Sh. Sumin Kumar? 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 vehicle was being driven in violation of terms and conditions of the insurance policy? OPR*
>
> *4. Whether the driver was not having valid and effective driving licence to drive truck No. HR-55A-7517? OPR*
>
> *5. Whether the truck No. HR-55A-7517 was being driven without valid permit, fitness certificate and other documents? OPR*
>
> *6. Whether the deceased was travelling in the truck as gratuitous passenger? OPR*
>
> *7. Relief."*

12. The claimants in both the claim petitions have led evidence. The insurer has not led any evidence in any of the claim petitions. Thus, the evidence led by the claimants in both the claim petitions has remained unrebutted.

13. The claimants have proved by leading evidence that the deceased had hired the truck for loading apples from the orchard, but before they reached there, the vehicle met

with the accident. The insurer has not led any evidence to discharge the onus or to prove the defence taken by it that the deceased were gratuitous passengers. Thus, the insurer has failed to discharge the onus.

14. It is proved that the offending vehicle was hired for loading apples. Thus, by no stretch of imagination, it can be said that the deceased were gratuitous passengers.

15. This Court in a case titled as **National Insurance Co. Ltd. versus Kamla and others,** reported in **2011 ACJ 1550,** has also discussed the same issue while referring to the judgment of the Apex Court in **National Insurance Co. Ltd. versus Cholleti Bharatamma,** reported in **2008 ACJ 268 (SC)** and held that the person, who had hired the vehicle for transporting goods, was returning in the same vehicle, met with the accident, cannot be said to be an unauthorised/gratuitous passenger.

16. It is apt to reproduce paras 8 to 11 of the judgment rendered in **Kamla's case (supra)** herein:

> *"8. Coming to the second plea taken by the learned counsel for the appellant that the deceased was a gratuitous passenger, a perusal of the reply filed by respondent No. 2, insurance company shows that they had only pleaded that the deceased was admittedly not employee of the insured and was traveling in the truck as a gratuitous passenger. Thus, it was submitted that the Insurance Company was not liable. Reliance was also placed upon the decision in* ***National Insurance Co. Ltd. v. Cholleti Bharatamma, 2008 ACJ 268 (SC)*** *wherein the plea was taken that the owner himself travel in the cabin of the vehicle and not with the goods so as to be covered under Section 147. However, in case the driver permits a passenger to travel in the tool box, he cannot escape from the liability that he was negligent in driving the vehicle and moreover, in a petition under Section 163-A of the Motor Vehicles Act, rash or negligent driving is not to be proved and, therefore, this decision does not help the appellant.*
>
> *9. Learned counsel for the appellant had also relied upon the decision in* ***National Insurance Co. Ltd. v. Maghi Ram****, 2010 ACJ 2096 (HP), wherein a learned Judge of this Court has considered the question and had observed that the Insurance Company is liable in respect of death or bodily injury to any person including the owner of goods or his authorized representative carried in the vehicle. It was observed that it is apparent that the goods must normally be carried in the vehicle at the time of accident.*
>
> *10. The allegations made by the petitioners in the petition as well as in the evidence were that the deceased had gone after hiring the truck with his vegetable and was coming in the same vehicle when the accident took place. The learned counsel for the claimants/respondents*

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

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

17. The same principle has been laid down by this Court in a bunch of two appeals, **FAO No. 9 of 2007**, titled as **National Insurance Company Limited versus Smt. Teji Devi & others,** being the lead case, decided on 22nd August, 2014; **FAO No. 22 of 2007,** titled as **Naresh Verma versus The New India Assurance Company Ltd. & others,** decided on 26th September, 2014, and **FAO No. 77 of 2010,** titled as **NHPC versus Smt. Sharda Devi & others,** decided on 17th October, 2014.

18. Applying the test to the instant case, one comes to an inescapable conclusion that the deceased were not travelling in the offending vehicle as gratuitous passengers.

19. The insurer has also not proved that the driver of the offending vehicle was not having a valid and effective driving licence, thus, has failed to discharge the onus. However, I have gone through the driving licence, is valid and effective one.

20. The insurer had to prove issues No. 3 to 6, has not led any evidence, thus, has failed to discharge the onus.

21. It is beaten law of land that in order to seek exoneration, the insurer has to plead and prove that the owner-insured has committed willful breach.

22. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **National Insurance Company Limited versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. .....

(i) .....

(ii).....

(iii).....

(iv) The insurance company are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings; but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them."

23. Having said so, the Tribunal has rightly saddled the insurer with liability.

24. The insurer has also questioned the adequacy of compensation. It is worthwhile to record herein that the insurer has not sought permission in terms of Section 170 of the Motor Vehicles Act, 1988 (for short "the MV Act") to contest the claim petitions, thus, cannot raise this issue at this stage. However, I have gone through both the impugned awards. The amount awarded is too meager, cannot be said to be excessive in any way.

25. Having glance of the above discussions, the appeals merit to be dismissed and the impugned awards are to be upheld. Accordingly, the impugned awards are upheld and the appeals are dismissed, as indicated hereinabove.

26. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned awards after proper identification.

27. Send down the record after placing copy of the judgment on each of the Tribunal's files.

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

Oriental Insurance Company ...Appellant

VERSUS

Bimla Devi and others ...Respondents.

FAO No.285 of 2008.
Reserved on : 19.06.2015
Pronounced on: 03.07.2015.

Motor Vehicles Act, 1988- Section 166- Claimants had pleaded that driver had driven the goods carrying commercial vehicle rashly and negligently, hit the scooter due to which the rider of the scooter died- it was claimed that accident was the result of contributory negligence- however, contents of the FIR and the statements of the witnesses disclosed that driver of goods vehicle was driving the vehicle in a rash and negligent manner- provisions applicable before Civil Court are not applicable before Claim Tribunal- Tribunal should not succumb to technicalities and should not defeat the claim petition on technical ground. (Para-10 to 17)

Cases referred:

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646
Savita vs. Bindar Singh & others, 2014 AIR SCW 2053
Sohan Lal Passi v. P.Sesh Reddy and others, AIR 1996 Supreme Court 2627

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

For the Appellant:	Mr.G.C. Gupta, Senior Advocate, with Ms.Meera Devi, Advocate.
For the Respondents:	Mr. Ajay Kumar, Senior Advocate, with Mr.R.L. Chaudhary, Advocate, for respondents No.1 and 2. Mr.Neel Kamal Sood, Advocate, for respondent No.3. Mr.B.C. Verma, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Challenge in this appeal is to the award, dated 25th March, 2008, passed by the Motor Accident Claims Tribunal, Bilaspur, (for short, the Tribunal), in Claim Petition No.58 of 2005, titled Bimla Devi and another vs. Dimple Thakur and others, whereby compensation to the tune of Rs.7,08,720/-, with interest at the rate of 6% from the date of filing of the Claim Petition till realization, was awarded in favour of the claimants, and the insurer-appellant was saddled with the liability, (for short, the impugned award).

2. The claimants, the owner and the driver have not questioned the impugned award, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the insurer has challenged the impugned award on the grounds taken in the memo of appeal.

Brief facts:

4. Claimants invoked the jurisdiction of the Tribunal in terms of Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), for grant of compensation to the tune of Rs.20.00 lacs, as per the break-ups given in the Claim Petition, on the ground that driver, namely, Manohar Kumar had driven the goods carrying commercial vehicle bearing No.HP-51-3565, on 13th April, 2005, rashly and negligently, hit the scooter bearing No.HP-24A-0263, on which the deceased namely Roshan Lal was traveling, as a result of which he sustained injuries and succumbed to the same. The driver of the offending vehicle eloped alongwith the offending vehicle from the spot. FIR No.134/05, dated 13.4.2005, was registered about the accident at Police Station, Sadar, Bilaspur. It was further averred that the deceased was 52 years of age at the time of accident, was serving as government employee and was posted as Superintendent in Government Senior Secondary School, Jagatkhanna, District Bilaspur, H.P., was earning Rs.15,487/- per month as salary.

5. The Claim Petition was resisted by the respondents by filing replies.

6. On the pleadings of the parties, the following issues came to be settled by the Tribunal:

"1. Whether deceased Roshan Lal has died in the accident of truck No.HP-51-3565 which was being driven rashly and negligently by respondent No.2, as alleged? OPP

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

3. Whether the claim petition is not maintainable? OPR-1

4. Whether this Tribunal has no jurisdiction to try the present petition? OP-1

5. Whether the claim petition is bad for non-joinder and mis-joinder of necessary parties? OPR-1

6. Whether the driver of the offending vehicle was not having a valid and effective driving licence at the time of the accident as alleged? OPR-3

7. Whether the accident has taken place due to the contributory negligence of the deceased/ scoorterist and the truck driver as alleged, if so, its effect? OP-3

8. Whether both the vehicles were being plied without the requisite documents at the time of the accident as alleged, if so, its effect? OPR-3

9. Relief."

7. In order to prove their respective claims, the parties led their evidence. Claimants examined PW-1 Devi Ram, PW-2 Yash Pal, PW-3 Amarjeet Singh, PW-4 Bimla Devi (claimant), PW-5 HC Pratap Singh and PW-6 Ranjeet Singh. On the other hand, respondents examined RW-1 Khem Chand, RW-2 Hira Lal and RW-3 Manohar Kumar (driver of the offending vehicle).

8. The Tribunal, after scanning the entire evidence, has concluded that the driver of the offending vehicle had driven the vehicle rashly and negligently and hit the scooter and caused the accident, in which the deceased sustained the injuries and succumbed to the same. The said findings of the Tribunal have not been questioned by the driver or the owner of the offending vehicle.

9. However, the insurer has challenged the findings of the Tribunal by the medium of the instant appeal. It may be placed on record here that the insurer has not led any evidence to prove that the accident was the outcome of contributory negligence on the part of the driver of the offending vehicle and the deceased.

10. The argument of Mr.Gupta, learned Senior Advocate appearing for the insurer that the accident was the outcome of contributory negligence since the scooter hit the offending vehicle on its rear portion, while the deceased was trying to overtake the offending vehicle, though attractive, is devoid of any force for the following reasons.

11. Contents of the FIR and the statements of the witnesses examined by the claimants do disclose that the driver of the offending vehicle was driving the vehicle rashly and negligently and has caused the accident. On the contrary, no evidence was led by the insurer to prove that the accident was not the outcome of sole negligence on the part of the driver of the offending vehicle or that the deceased was driving the scooter rashly and negligently and struck with the rear portion of the offending vehicle.

12. Arguments were advanced by Mr.Gupta as if he was arguing a case before a Civil Court. In a Claim Petition, summary procedure is to be adopted and all provisions of Civil Procedure Code are not applicable, rather only some provisions have been made applicable in terms of Section 169 of the Act, read with Rule 232 of the Himachal Pradesh Motor Vehicles Rules, 1999 (for short, the Rules of 1999). It is apt to reproduce Rule 232 of the Rules of 1999, hereunder:

> ***"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."*

13. It is beaten law of the land that the negligence on the part of the driver of the offending vehicle has to be decided on the hallmark of preponderance of probabilities and not on the basis of proof beyond reasonable doubt. Furthermore, the claimants claiming compensation in terms of Section 166 of the Motor Vehicles Act is not to be seen as an adversial litigation, but is to be determined while keeping in view the aim and object of granting compensation. My this view is fortified by the judgment of the Apex Court in ***Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646***.

14. The Apex court in **Savita vs. Bindar Singh & others, 2014 AIR SCW 2053,** has held that at the time of fixing compensation, courts should not succumb to niceties or technicalities of law. It is apt to reproduce paragraph 6 of the said decision hereunder:

> *"6. After considering the decisions of this Court in Santosh Devi (Supra) as well as Rajesh v. Rajbir Singh (supra), we are of the opinion that it is the duty of the Court to fix a just compensation. At the time of fixing such compensation, the court should not succumb to the niceties or technicalities to grant just compensation in favour of the claimant. It is the duty of the court to equate, as far as possible, the misery on account of the accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim. Therefore, it will be the bounden duty of the Tribunal to award just, equitable, fair and reasonable compensation judging the situation prevailing at that point of time with reference to the settled principles on assessment of damages. In doing so, the Tribunal can also ignore the claim made by the claimant in the application for compensation with the prime object to assess the award based on the principle that the award should be just, equitable, fair and reasonable compensation."*

15. A reference may also be made to the decision of the Apex Court in **Sohan Lal Passi v. P.Sesh Reddy and others, AIR 1996 Supreme Court 2627,** in which, in paragraph 12, it was observed that the courts, while deciding claim petitions, must keep in mind that the right of the claimants is not defeated on technical grounds. Relevant portion of paragraph 12 of the said decision is reproduced hereunder:

> *"12. ..... While interpreting the contract of insurance, the Tribunal and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an*

insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."

16. This Court also, in the recent past, in series of judgments, has followed the similar principle and held that granting of compensation is just to ameliorate the sufferings of the victims and is to be taken to its logical end without succumbing to the niceties of law, hyper-technicalities and procedural wrangles and tangles.

17. Having regard to the above discussion, the sine qua non for granting compensation in a Claim Petition is that the claimants have to prove prima facie that the driver of the offending vehicle was driving the vehicle rashly and negligently, which, in the instant case, has been proved by the claimants by leading evidence, and thus, have discharged the onus. Moreover, the insurer has not sought any direction in terms of Section 170 of the Act and has also not led any evidence.

18. I have gone through the evidence led by the claimants. The Tribunal has rightly made discussion in paragraphs 9 to 18 of the impugned award and has rightly arrived at the conclusion that the driver had driven the offending vehicle rashly and negligently and had caused the accident.

19. Having said so, the findings recorded by the Tribunal on issues No.1 and 7 are correct and are accordingly upheld.

20. As far as issues No.3, 4 and 5 are concerned, onus to prove these issues was on the owner/insured, which he has failed to discharge. Moreover, the owner has not questioned the findings recorded by the Tribunal on these issues. Accordingly, the findings of the Tribunal recorded on these issues are upheld.

21. Qua issues No.6 and 8, the onus to prove these issues was on the insurer. It is beaten law of the land that the insurer has to plead and prove that the owner has committed willful breach of the terms and conditions contained in the insurance policy, read with the provisions of Sections 147 and 149 of the Act. However, a perusal of the record shows that there is nothing on the file which could show that the owner has committed any willful breach or the vehicle was being driven in contravention to the terms and conditions contained in the insurance policy or that the driver of the offending vehicle was not having a valid and effective driving licence. Accordingly, findings recorded by the Tribunal on these issues are also upheld.

22. As far as issue No.2 is concerned, the learned Senior Counsel for the appellant has argued that the amount of compensation awarded by the Tribunal is excessive. A perusal of the impugned award shows that the Tribunal has rightly taken the income of the deceased, which, by no stretch of imagination, can be said to be on the higher side.

23. However, I have gone through the record of the case. The deceased was a government employee and was earning Rs.15,487/- per month. The age of the deceased was 52 years at the time of accident. The loss of dependency has been correctly assessed by the Tribunal and multiplier of 10 came to be rightly applied in view of the Second Schedule

attached to the Motor Vehicles Act, read with the judgment 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.**

24**.** In view of the above discussion, no infirmity can be found with the impugned award and the same is accordingly upheld. Consequently, the appeal is dismissed.

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

Oriental Insurance Company Ltd. …Appellant
Versus
Vinod Kumar & others …Respondents

FAO No. 15 of 2008
Date of decision: 03.07.2015

Motor Vehicles Act, 1988- Section 169- Strict pleadings and proof are not required to determine the rash and negligent driving in a claim petition. (Para-11)

Case referred:
Dulcina Fernandes and others versus Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646

For the appellant : Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.
For the respondents: Mr. Vinod Thakur, Advocate, for respondent No. 1.
Nemo for respondent No. 2.
Mr. Sanjay Dutt Vasudeva, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

The appellant-insurer has questioned the award dated 31st October, 2007, made by the Motor Accident Claims Tribunal-II, Kangra at Dharamshala, H.P. (hereinafter referred to as "the Tribunal") in MAC Petition No. 20-D/2005, whereby compensation to the tune of Rs.1,53,012/- with interest at the rate of 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 against the appellant-insurer, herein (for short, the "impugned award"), on the grounds taken in the memo of appeal.

2. The claimant, owner-insured and driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. Only the appellant-insurer has questioned the impugned award on the ground that the Tribunal has fallen in error in saddling it with liability and the Tribunal has wrongly recorded findings on issue No. 1.

4. It is necessary to give a brief summary of the case, the womb of which has given birth to the present appeal.

5. The claimants being victims of the motor vehicular accident, had invoked the jurisdiction of the Tribunal, in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988, for short "the Act", for grant of compensation to the tune of Rs.2,50,000/-, as per the break-ups given in the claim petition. It is averred in the claim petition that driver, namely, Vinay Kapoor, had driven the vehicle-Tempo Trax bearing registration No. HP-37-7893, rashly and negligently, on 16.01.2004, at about 10.30 a.m., in Village Sidhwari near liquor vend, Tehsil Dharamsala, District Kangra, H.P., caused the accident, hit Vinod Kumar, as a result of which, he sustained injuries.

6. The respondents contested the claim petition on the grounds taken in their memo of objections.

7. Following issues came to be framed by the Tribunal:

"1. *Whether the petitioner received injuries in the motor accident on 16.1.2004 at place Sidhbari, caused by rash and negligent driving of the tempo trax bearing No. HP-37-9893 by its driver (Respondent No. 2) as alleged? ....OPP*

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

3. Whether the vehicle in question was being plied in violation of the terms and conditions of the insurance policy at the time of accident? If so, its effect? OPR-3

4. Relief."

8. The claimants have led evidence. Owner-insured and driver have also led evidence. The insurer has not led any evidence.

9. The Tribunal after scanning the entire evidence passed the impugned award, whereby the claimant was held entitled to compensation to the tune of Rs.1,53,012/- with interest @7.5% per annum from the date of the claim petition till its realization and the insurer was saddled with liability.

10. I have examined the record and am of the view that the driver has driven the offending vehicle, rashly and negligently, on 16.01.2004, at about 10.30 a.m., in Village Sidhwari near Liquor Vend, Tehsil Dharamsala, District Kangra, H.P. and caused the accident.

11. It is a beaten law of the land that in order to determine the rash and negligent driving in a claim petition, strict pleadings and proof are not required, as held by the Apex Court in a case titled as **Dulcina Fernandes and others versus Joaquim Xavier Cruz and another,** reported in **(2013) 10 Supreme Court Cases 646.** It is apt to reproduce relevant portion of paras 8 and 9 of the judgment herein:

> *"8. In United India Insurance Co. Ltd. v. Shila Datta, (2011) 10 SCC 509, while considering the nature of a claim petition under the Motor Vehicles Act, 1988 a three-Judge Bench of this Court has culled out certain propositions of which Propositions (ii), (v) and (vi) would be relevant to the facts of the present case and, therefore, may be extracted hereinbelow:*

"10. (ii) The rules of the pleadings do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In fact, there is no pleading where the proceedings are suo motu initiated by the Tribunal.

** * **

(v) Though the Tribunal adjudicates on a claim and determines the compensation, it does not do so as in an adversarial litigation ....

(vi) The Tribunal is required to follow such summary procedure as it thinks fit. It may choose one or more persons possessing special knowledge of and matters relevant to inquiry, to assist it in holding the enquiry."

9. The following further observation available in para 10 of the Report would require specific note:

(Shila Datta case, (2011) 10 SCC 509, SCC p. 519)

"10. ..... We have referred to the aforesaid provisions to show that an award by the Tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute."

12. In view of the ratio laid down by the Apex Court in the judgment, supra, it is held that the Tribunal has rightly recorded the findings on issue No. 1. Accordingly, the findings recorded by the Tribunal on the said issue are upheld.

13. The Tribunal has made assessment, the details of which are given in paras-8 & 9 of the impugned award. The findings recorded by the Tribunal are reasonable. The award amount is just and appropriate, cannot be said to be excessive, in any way.

14. Having said so, it is held that there is no merit in the appeal. Accordingly, the same is dismissed and the impugned award is upheld.

15. The Registry is directed to release the awarded amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' account cheque.

16. 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.

FAOs (MVA) No. 427 and 435 of 2008.
Date of decision: 3rd July, 2015.

1. FAO No.427 of 2008.

Smt.Pushpa Devi and others .....Appellants

Versus

National Insurance Co. and another ...Respondents.

2. FAO No.435 of 2008.

H.P. Forest Corporation .....Appellant

Versus

Smt. Pushpa Devi and others ...Respondents.

Motor Vehicles Act, 1988- Section 166- Deceased was drawing salary of Rs.4,829/-- Tribunal had deducted 1/4th towards the personal income- held, that 1/4th of the amount was to be deducted towards personal income and the loss of the dependency is to be taken as Rs.3,600/- per month- age of the deceased was 39 years - applying multiplier of '14' claimants are entitled to Rs. 6,04,800/- (Rs. 3600x12=Rs. 43200/-x14=Rs. 6,04,800/-).

(Para- 17 to 19)

Cases referred:

Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

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

Munna Lal Jain and another versus Vipin Kumar Sharma and others , JT 2015 (5) SC 1

For the appellant(s):	Mr.B.C. Verma, Advocate, for the appellants in FAO No. 427/2008 and Mr. Pranay Partap Singh, Advocate, for the appellant in FAO No. 435 of 2008.
For the respondent(s):	Ms.Seema Sood, Advocate, for respondent No.1 in FAO No. 427/2008 and for respondent No.5 in FAO No. 435/2008. Mr. Pranay Partap Singh, Advocate, for respondent No. 2 in FAO No. 427/2008 and Mr. B.C. Verma, Advocate, for respondents No. 1 to 4 in FAO No. 435 of 2008.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice,*(Oral)*

These two appeals are outcome of a common judgment and award dated 3.3.2008, passed by the Motor Accident Claims Tribunal (III), Shimla, H.P., hereinafter referred to as "the Tribunal" in MACT No.43-S/2 of 2006/05, whereby compensation to the tune of Rs.5,30,000/- alongwith 7.5% interest per annum came to be awarded in favour of the claimants and against the Himachal Pradesh Forest Corporation-owner of the vehicle with command to the insurer to satisfy the award at the first instance with right of recovery from the Forest Corporation-owner, for short "the impugned award".

2. Both these appeals are being taken up together for disposal in the given circumstances.

3. The insurer has not questioned the impugned award on any aground, thus, it has attained finality so far as it relates to it.

4. The claimants, by the medium of FAO No. 427 of 2008 have questioned the impugned award on the ground that the amount awarded is inadequate.

5. The H.P. Forest Corporation-owner, by the medium of FAO No. 435 of 2008, has questioned the impugned award on the ground that the Tribunal has fallen in an error in granting the right of recovery to the insurer.

6. In order to determine both these questions, it is necessary to give a flash-back of the relevant facts, the womb of which has given birth to both these appeals.

7. Claimant Pushpa Devi being the victim of a vehicular accident invoked the jurisdiction of the Tribunal, by the medium of claim petition, on the ground that their bread-earner Bhim Singh has lost life being the victim of an accident which was caused by the driver, who has driven the vehicle bearing registration No. HP-18-4802 owned by respondent No.1-Forest Corporation rashly and negligently on 29.11.2004, who sustained the injuries and succumbed to the injuries. It is further averred that the deceased was a conductor by profession and his gross salary was Rs.7000/- per month. The claimants have claimed compensation to the tune of Rs.10 lacs, as per the break-ups given in the claim petition.

8. The respondents in the claim petition have resisted and contested the averments contained in the claim petition by filing replies and following issues came to be framed:

(i) *Whether Bhim Singh died in the accident of truck bearing No.HP-18-4802, which took place on 29.11.2004 because it was being driven in a rash and negligent manner by its driver? OPP.*

(ii) *Whether the vehicle in question was being driven in violation of the terms and conditions of the Insurance Policy and the vehicle was not having a valid route permit? OPR-2.*

(iii) *Whether this petition has been filed by the petitioner in collusion with respondent No.1 ?OPR.*

(iv) *If the above issues are proved in affirmative, to what amount of compensation and from whom the petitioners are entitled to receive? OPP.*

(v) *Relief.*

9. Claimants examined as many as five witnesses, namely, Smt. Pushpa Devi, claimant No.1 (PW1), Sh. Deepak Sood, (PW2), Sh.Ramesh Chand (PW3), H.C. Laiq Ram (PW4) and Sh. Davinder Singh (PW5).

10. The respondents have examined two witnesses, namely, Sh. Ramesh Chand and Sh. S.S. Jasrotia.

11. The claimants have also placed on record copies of postmortem report Ext. PW1/A, FIR Ext. PW1/B, Pariwar Register Ext. PW1/C, death certificate Ext. PW1/D, and salary certificate Ext. PW3/A, respectively.

12. Respondents have also placed on record copies of RC Ext. RW1/A, Insurance policy Ext. RW1/B, route permit Ext. RW1/C, permission for renewal of route permit Ext. RW1/D, order Ext. RW1/E, driving license Ext.RW1/F, terms and conditions of insurance policy Ext. RW2/A and repudiation letter Ext. RW2/B.

13. The Tribunal, after scanning the evidence, held that the claimants have proved that the offending vehicle was being driven rashly and negligently on the said date in which the deceased sustained injuries and succumbed to the injuries. There is no dispute on the said findings returned by the Tribunal on issue No.1, thus are accordingly upheld.

14. Issues No. 2 and 4 are interlinked, thus I deem it proper to deal with issue No. 3 at the first instance. It was for the owner to discharge the onus on this issue, has not

led any evidence as to how there is collusion between respondent No. 1 and the claimants. Thus, the findings returned on this issue are upheld.

15. Now coming to issue No.4. The learned counsel for the Forest Corporation has argued that the route permit was renewed after cancellation, after the date of accident. There is nothing on the record to show that the route permit was renewed or it was issued fresh, after it was cancelled. The cancellation order was made on and w.e.f. 4.4.2007. Thus, on the date of accident, the Forest Corporation had allowed the vehicle to ply without route permit. Plying the vehicle without route permit is breach in terms of Sections 147 and 149 of the Motor Vehicles Act read with the terms and conditions contained in the insurance policy Ext. RW1/B.

16. Having said so, the Tribunal has rightly held that the owner has committed willful breach and exonerated the insurer from its liability. Accordingly, findings returned on this issue are upheld.

17. The next question is whether the amount awarded is adequate or otherwise? On the face of it, the Tribunal has fallen in an error in deducting 1/3rd from the income of the deceased. As per salary certificate Ext. PW3/A, last pay drawn was Rs.4829/-. Keeping in view the ratio laid down in ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120,***. 1/4th was to be deducted and not 1/3rd.

18. Thus, the claimants have lost source of dependency to the tune of Rs.3600/- per month. The age of the deceased was 39 years at the time of accident and the Tribunal has wrongly applied the multiplier of 13. The just and appropriate multiplier to be applied was "14" in view of ***Sarla Verma,*** supra read with ***Munna Lal Jain and another versus Vipin Kumar Sharma and others*** reported in ***JT 2015 (5) SC 1***. It is apt to reproduce paras 12 and 14 of the said judgment herein:

> *"12. The remaining question is only on multiplier. The High Court following Santosh Devi (supra), has taken 13 as the multiplier. Whether the multiplier should depend on the age of the dependants or that of the deceased, has been hanging fire for sometime; but that has been given a quietus by another three-Judge Bench decision in Reshma Kumari (supra). It was held that the multiplier is to be used with reference to the age of the deceased. One reason appears to be that there is certainty with regard to the age of the deceased but as far as that of dependants is concerned, there will always be room for dispute as to whether the age of the eldest or youngest or even the average, etc., is to be taken. To quote:*
>
> > *"36. In Sarla Verma, this Court has endeavoured to simplify the otherwise complex exercise of assessment of loss of dependency and determination of compensation in a claim made under Section 166. It has been rightly stated in Sarla Verma that the claimants in case of death claim for the purposes of compensation must establish (a) age of the deceased;*

(b) income of the deceased; and (c) the number of dependants. To arrive at the loss of dependency, the Tribunal must consider (i) additions/deductions to be made for arriving at the income; (ii) the deductions to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference to the age of the deceased. We do not think it is necessary for us to revisit the law on the point as we are in full agreement with the view in Sarla Verma."

13. xxxxxxx xxxxxxxx xxxxxxxxxx

14. The multiplier, in the case of the age of the deceased between 26 to 30 years is 17. There is no dispute or grievance on fixation of monthly income as Rs.12,000.00 by the High Court."

19. Thus, the claimants are held entitled to Rs.3600x12=Rs.43200/- x14=Rs.6,04,800/-.

20. The Tribunal has also not granted compensation under the four heads. I hold the claimants entitled to compensation under the four heads as under:

(i)	loss of love and affection:	Rs.10,000/-
(ii)	Loss of estate :	Rs.10,000/-
(iii)	Funeral expenses :	Rs.10,000/-
(iv)	Loss of future expenses:	Rs.10,000/-
	Total	***Rs.40,000/-***

21. Accordingly, the amount awarded is enhanced to Rs.6,04,800/- + Rs.40,000/- =Rs.6,44,800/-. The rate of interest awarded by the Tribunal is upheld.

22. Having said so, the impugned award is modified as indicated hereinabove. The H.P. Forest Corporation is directed to deposit the enhanced amount within eight weeks from today. The Registry is directed to release the amount already deposited in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees' cheque account and enhanced amount on its deposition.

23. Accordingly, the appeal filed by the H.P. Forest Corporation is dismissed and the appeal filed the claimants is allowed as indicated hereinabove.

24. Send down the record forthwith, after placing a copy of this judgment.

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

Rajesh Kumar son of Shri Siri Chand ….Revisionist

Versus

State of H.P. through Collector Sirmaur at Nahan H.P.& another ….Non-Revisionists

Civil Revision No. 53 of 2015
Order Reserved on 5th June 2015
Date of Order 3rd July, 2015

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a civil suit for seeking direction to the defendants to install a new drinking water connection in the premises pleading that he had approached the defendants for supplying a new water connection but the connection was not released- defendants pleaded that no objection certificate was not taken from the landlord and water connection could not be released in absence of no objection certificate – held that plaintiff is tenant and landlord is under obligation to supply essential amenities to the tenant- tenant has an effective remedy to approach the Rent Controller under Section 11 of H.P. Urban Rent Control Act- plaintiff is in litigation with the landlord – landlord is a necessary party in the present litigation - therefore, the injunction was rightly declined by the trial Court.

For the Revisionist: Mr. George, Advocate
For the Non-Revisionist: Mr. J.S. Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present revision petition is filed under Section 115 of Code of Civil Procedure against order dated 29.12.2014 announced by learned District Judge Sirmaur at Nahan in Civil Miscellaneous Appeal No. 18-CMA/14 of 2014 titled Rajesh Kumar vs. State of H.P. wherein learned District Judge affirmed the order of learned Civil Judge (Junior Division) Nahan District Sirmaur announced in CMA No. 156/6 of 2014 titled Rajesh Kumar vs. Collector District Sirmaur at Nahan H.P.

Brief facts of the case

2. Brief facts of the case as pleaded are that revisionist filed the civil suit before learned trial Court for grant of decree of mandatory injunction in favour of revisionist and against the non-revisionists directing non-revisionists to install the new drinking water connection in premises of revisionist known as “Durga Chhat Bhandar” (Durga Snacks Stall) new market Nahan pleaded therein that revisionist is running a petty shop and restaurant in new market Nahan. It is pleaded that revisionist is the tenant of shop and plaintiff used to take the water from his neighbour. It is further pleaded that dispute occurred between revisionist and landlord and landlord created pressure on neighbourer of revisionist and water supply of revisionist was stopped. It is also pleaded that thereafter revisionist approached the office of non-revisionist No. 2 to provide new water connection to the revisionist. It is pleaded that non-revisionist No. 2 did not pay any heed to request of revisionist and ultimately revisionist issued notice dated 25.6.2014. It is pleaded that water is basic necessity of life and non-revisionists be directed to install new drinking water connection in the tenanted premises of plaintiff.

3. Per contra written statement filed on behalf of non-revisionists pleaded therein that suit of revisionist is not maintainable because revisionist did not obtain NOC from landlord. It is pleaded that revisionist has no cause of action and due to scarcity of water there was complete ban for providing new private water connection.

4. Revisionist also filed application under Order 39 Rules 1 and 2 CPC for grant of ad-interim injunction pleaded therein that non-revisionists be directed by way of ad-interim injunction to provide new water connection in the premises situated in Khata/Khatuni No. 110 min/273 Khasra No. 764/1 measuring 10.50 Sq. metres situated in

Mohall Amarpur New Market Nahan as per jamabandi for the year 2011-12. Learned trial Court dismissed the application filed under Order 39 Rules 1 and 2 CPC on the ground that revisionist did not obtain no objection certificate from his landlord. Thereafter revisionist filed Civil Miscellaneous Appeal No. 18-CMA/14 of 2014 titled Rajesh Kumar vs. State of H.P. and learned District Judge Sirmaur at Nahan affirmed the order passed by learned trial Court.

5. Feeling aggrieved against the order of learned District Judge Sirmaur at Nahan revisionist has filed present revision petition.

6. Court heard learned Advocate appearing on behalf of the revisionist and learned Assistant Advocate General appearing on behalf of the non-revisionists and also perused the record carefully.

7. Submission of learned Advocate appearing on behalf of revisionist that order of learned District Judge Sirmaur at Nahan dated 29.12.2014 is illegal arbitrary and capricious and liable to be quashed is rejected being devoid of any force for the reasons hereinafter mentioned. It is prima facie proved on record that revisionist is tenant in the premises and it is also prima facie proved on record that premises is used for commercial purpose. It is also prima facie proved on record that initially the tenancy was created in favour of revisionist by late Smt. Raj Kaur mother-in-law of Arvinder Kaur. It is also prima facie proved on record that after the death of Raj Kaur Arvinder Kaur became landlord of premises. It is also prima facie proved on record that rent deeds dated 10.11.2006 and 6.11.2007 were executed inter se the landlord and tenant. It is also prima facie proved on record that in special Act i.e. H.P. Urban Rent Control Act 1987 interest of landlord and tenants are protected. It is also prima facie proved on record that as per Section 11 of H.P. Urban Rent Control Act 1987 landlord is under legal obligation to provide essential supply of services which includes supply of water, electricity, light in passage and on stair cases, conservancy and sanitary services. As per Section 11 of H.P. Urban Rent Control Act 1987 if the landlord does not provide essential supply of services to the tenants as mentioned in this Section then tenant has liberty to file application before Rent Controller under H.P. Urban Rent Control Act 1987 and Rent Controller is under legal obligation to pass order under Section 11 of H.P. Urban Rent Control Act 1987 to provide essential supply of services to the tenant. Court is of the opinion that revisionist has alternative efficacious remedy under H.P. Urban Rent Control Act 1987. As per Section 41 of Specific Relief Act 1963 Civil Court can refuse the injunction when alternative equal efficacious remedy is available. It is held that in present case alternative equal efficacious remedy is available to the revisionist under Section 11 of H.P. Urban Rent Control Act 1987. It is also prima facie proved on record that there is litigation between the landlord and revisionist which is pending before Rent Controller. Court is of the opinion that tenant can file counter application before Rent Controller under Section 11 of H.P. Urban Rent Control Act 1987 for providing essential water service in the tenanted premises.

8. Another submission of learned Advocate appearing on behalf of revisionist that as per National Water Policy 2012 supply of water is essential for life, livelihood, food security and sustainable development and on this ground revision petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that revisionist has alternative efficacious remedy under Section 11 of H.P. Urban Rent Control Act 1987.

9. Another submission of learned Advocate appearing on behalf of revisionist that as per H.P. State Water Policy 2013 revision petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that revisionist has alternative efficacious remedy before Rent Controller as per Section 11 of H.P. Urban Rent Control Act 1987 for supply of water.

10. Another submission of learned Advocate appearing on behalf of revisionist that order of learned District Judge is based on surmises and conjectures and every individual has fundamental right to get the drinking water and on this ground revision petition be accepted is rejected in view of availability of alternative efficacious remedy to the revisionist as per Section 11 of H.P. Urban Rent Control Act 1987.

11. Another submission of learned Advocate appearing on behalf of revisionist that findings of learned District Judge that in absence of NOC from landlord who is in litigation with revisionist ad-interim relief could not be granted to revisionist is also contrary to law is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that prima facie revisionist is the tenant and it is also proved on record that prima facie Arvinder Kaur is the landlord of premises. Court is of the opinion that Arvinder Kaur landlord is the necessary party in present case being owner of premises. It is well settled law that no person should be condemned unheard on the concept of *audi-alterm-partem*. It is also prima facie proved on record that rent deed also executed between the landlord and revisionist and it is held that because of availability of alternative efficacious remedy under Section 11 of H.P. Urban Rent Control Act 1987 it is not expedient in the ends of justice to grant ad-interim injunction in favour of revisionist as per Clause 41 of Specific Relief Act 1963.

12. Another submission of learned Advocate appearing on behalf of revisionist that learned District Judge has committed serious error by way of holding that revisionist should implead landlord as party or should obtain NOC from landlord and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that landlord is owner of premises and owner of premises in dispute is necessary party in present case because tenant has sought the relief to install new private water connection inside the fore walls of shop owned by landlord. It is held that landlord has direct and substantial interest in shop in dispute being owner of shop.

13. Another submission of learned Advocate appearing on behalf of revisionist that order of learned District Judge is in violation of H.P. Water Supply Rules 1989 and is in violation of National and State Water Policies and on this ground revision petition be accepted is rejected being devoid of any force keeping in view the fact that alternative efficacious remedy is available to the tenant before Rent Controller under Section 11 of H.P. Urban Rent Control Act 1987. There is no dispute inter se the parties that H.P. Urban Rent Control Act 1987 is operative upon premises in dispute.

14. In view of above stated facts it is held that revisionist has alternative efficacious remedy under Section 11 of H.P. Urban Rent Control Act 1987 and it is held that learned trial Court and learned District Judge Sirmaur at Nahan did not commit any illegality and material irregularity. Orders of learned trial Court and learned first Appellate Court are affirmed with liberty to revisionist to approach Rent Controller under Section 11 of H.P. Urban Rent Control Act 1987. Parties are left to bear their own costs. Revision petition stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Ram Saran (Dead through LRs Savitri Devi & ors). .....Appellants.

Versus

Gorakh Ram (Dead through LRs Shrawan Ram & ors) & another.....Respondents.

RSA No. 17 of 2003.
Reserved on: 1.7.2015.
Decided on: 3.7.2015.

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that defendant was interfering with the suit land without any right, title or interest- defendant filed a counter claim pleading that he was owner in possession of the suit land and plaintiff was wrongly interfering with the same- a Local Commissioner was appointed to visit the spot and to verify whether construction was being raised or not – he visited the spot and found that construction was being raised – subsequently, another Local Commissioner was appointed to demarcate the suit land- he demarcated the suit land- parties admitted the same to be correct- he found encroachment on the suit land- held, that suit was rightly decreed by the trial Court. (Para-12 to 15)

For the appellant(s): Mr. Ajay Sharma, Advocate,
For the respondents: Mr. Anand Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Hamirpur, H.P., dated 20.11.2002, passed in Civil Appeal No.02 of 1996.

2. Key facts, necessary for the adjudication of this regular second appeal are that the predecessor-in-interest of Sh. Gorakh Ram and Khembo Ram, respondents-plaintiffs (hereinafter referred to as the plaintiffs) instituted a suit for permanent prohibitory injunction against the predecessor-in-interest of appellants-defendants namely, Sh. Ram Saran (hereinafter referred to as the defendant). According to the plaintiffs, they along with other co-sharers were owners-in-possession of the land comprised in Khata No. 34 min, Khatoni No. 67 min, Kh. No. 239, measuring 2 kanals 6 marlas, situate in Tika Doli Sujanpur, Tappa Bhaleth, Sub Tehsil Sujanpur, Distt. Hamirpur, H.P. (hereinafter referred to as the suit land). The defendant has no right, title or interest over the suit land. The defendant being a head-strong and quarrelsome person, has started giving illegal and unwarranted threats by forcibly raising construction over the suit land.

3. The suit was contested by the defendant. According to the defendant, his land adjoins the land of the plaintiffs. The plaintiffs were threatening to dispossess the defendant by raising construction.

4. The replication was filed by the plaintiffs. The defendant also filed counter claim under Order 8 Rule 6-A CPC. He was owner-in-possession of the land comprised in Khata No. 35 min, Khatoni No. 68 min, Kh. No. 241, measuring 8 kanals 16 marlas, situate

adjacent to the suit land and the plaintiffs were threatening to dispossess him under the garb of stay order. The written statement was also filed to the counter claim by the plaintiffs. According to them, the defendant has constructed the house over a part of Kh. No. 239, despite the stay orders granted by the trial Court. The learned Senior Sub Judge, Hamirpur, H.P. framed the issues on 6.1.1993. The learned Senior Sub Judge, Hamirpur, H.P, decreed the suit on 13.11.1995. The defendant, feeling aggrieved, preferred an appeal before the learned District Judge, Hamirpur. The learned District Judge, Hamirpur, dismissed the same on 20.11.2002. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 22.9.2003:

> "1. Whether report of the Local Commissioner Ext. LC/1 being contrary to the instructions of the Financial Commissioner and against the High Court Rules and orders could not have been read in evidence and impugned judgments and decrees solely passed upon the same, thus, stand vitiated and liable to be quashed and set aside?"

6. Mr. Ajay Sharma, Advocate, for the appellants, on the basis of the substantial question of law framed, has vehemently argued that the report of the Local Commissioner Ext. LC/1, is contrary to the instructions of the Financial Commissioner and also against the High Court Rules and Orders. He also argued that the cross-objections preferred by his client have not been decided in accordance with law. On the other hand, Mr. Anand Sharma, Advocate, for the respondents has supported the judgments and decrees passed by both the Courts below.

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

8. Sh. Sarwan Ram, general power of attorney of the plaintiffs, has appeared as PW-1. According to him, the ad-interim injunction was granted on 25.9.1992. The defendant, though stopped the construction for 4-5 days, however, has again started the same. The defendant has started digging foundations over the suit land for the purpose of construction of house. The plaintiffs requested the defendant not to do so, but the defendant did not stop the work. The Local Commissioner was appointed, but the defendant did not stop the construction work. He denied the suggestion that defendant has constructed the house on his own land, though he has stated that about 3-4 marlas of the suit land has been covered by the defendant under the house.

9. The defendant has appeared as DW-1. According to him, he has constructed his house over Kh. No. 241, owned and possessed by him. He got the land demarcated in the year 1991 and thereafter he dug the foundations for his house and completed the house in the month of February, 1992. Thereafter, there was ad-interim injunction from the Court. According to him, the plaintiffs wanted to encroach upon his land comprising in Kh. No. 241. In his cross-examination, he admitted that his brother Anant Ram has also filed a civil suit against the plaintiffs. According to him, no Local Commissioner went on the spot.

10. DW-2 Sh. Girdhari Lal testified that the defendant has constructed his house over Kh. No. 241. He was resident of Village Doli whereas the suit land is situated in Tikka Sujanpur.

11. DW-3 Sant Ram also belongs to Village Doli. According to him, the demarcation of the land was not got conducted. According to the defendant, he had completed the construction of the house in the month of February, 1992, however, DW-3 Sant Ram mason has admitted that he has in fact started raising the construction of the house of the defendant in the year 1992.

12. Sh. Kuldeep Kumar, Advocate was appointed as Local Commissioner in an application filed under Order 26 Rule 9, read with Section 151 CPC, which was registered as CMA No. 536 of 1994. He was directed to visit the spot and report whether some construction was being raised on the spot and the nature and extent thereof. Sh. Kuldeep Kumar, Advocate, visited the spot and found the construction being raised on the spot. He recorded the statements of the plaintiffs and also the brother of the defendant.

13. Sh. Sohan Lal, Naib Tehsildar, Sujanpur, was appointed as Local Commissioner to demarcate the suit land as well as Kh. No. 241 on the spot and to find out whether any encroachment over the suit land has been made by the defendant or not. The Local Commissioner, visited the spot on 31.1.1993. He submitted the report Ext. LC/1.

14. It is evident from the perusal of the report that the plaintiffs and the defendant were present on the spot. The defendant has agreed with the Local Commissioner's report. The objections filed with the Local Commissioner's report were also dismissed. The Local Commissioner has demarcated the land strictly as per the instructions issued by the Financial Commissioner. Both the parties had agreed to the measurement and mode of demarcation. The parties have admitted the demarcation to be true and correct. No objection was raised by any of the parties on the spot. The statements of the parties are on record i.e. Ext. LC/2. The Local Commissioner has found encroachment of one marla by the defendant as per '*Sajra Latha*' Ext. LC/3 on Kh. No. 239/1. The demarcation was carried out strictly as per the instructions issued by the Financial Commissioner as well as by this Court.

15. Now, as far as the counter claim raised by the defendant is concerned, issue No. 2 was specifically framed by the trial Court on 6.1.1993. Issues No. 1 & 2 were tried together. Issue No. 1 was decided in favour of the plaintiffs and issue No. 2 was decided against the defendant. The findings of the learned trial Court are based on correct appreciation of oral as well as documentary evidence and it cannot be said that the counter claim preferred by the defendant was not at all adjudicated upon. The defendant has not even raised this question while preferring an appeal before the learned first appellate Court. Moreover, no substantial question of law as to whether the counter claim was not adjudicated upon was framed at the time of admission of this Regular Second Appeal. This Court has still gone into the merits of this issue, raised by the defendant for the first time before this Court, in order to do complete justice between the parties.

16. Consequently, there is no merit in this appeal and the same is dismissed.

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

Shyam Lal ...Appellant.
Versus
Kewal Singh and others ...Respondents.

FAO No. 27 of 2008
Decided on: 03.07.2015

Motor Vehicles Act, 1988- Section 149- Claimant pleaded that he had boarded the vehicle- it was nowhere pleaded that he was travelling in the vehicle as driver or conductor- therefore, tribunal had rightly held that claimant was travelling in the vehicle as a gratuitous passenger- owner had committed the breach of the terms and conditions of the insurance policy- held that insurance company was rightly absolved of its liability.

For the appellant: Mr. Onkar Jairath, Advocate.
For the respondents: Nemo for respondents No. 1 and 2.
Mr. Ratish Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

There is no representation on behalf of respondents No. 1 and 2, despite service. Hence, they are set ex-parte.

2. Challenge in this appeal is to the judgment and award, dated 28.09.2007, made by the Motor Accident Claims Tribunal-II, Una, District Una (H.P.) (for short "the Tribunal") in M.A.C. Petition No. 46 of 2003, titled as Kewal Singh versus Surjit Kumar and others, whereby compensation to the tune of Rs.67,800/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimant-injured and the owner-insured and the driver of the offending vehicle came to be saddled with liability (for short "the impugned award").

3. The driver, the insurer and the claimant-injured has not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

4. Only the appellant-owner-insured, namely Shri Shyam Lal, has questioned the impugned award on the ground that the Tribunal has fallen in an error while exonerating the insurer and saddling him with liability.

5. Thus, the only question to be determined in this appeal is - whether the Tribunal has fallen in an error in exonerating the insurer and saddling the owner-insured with liability? The answer is in the negative for the following reasons:

6. The claimant-injured is the victim of a vehicular accident, which was caused by the driver, namely Shri Surjit Kumar, while driving tanker, bearing registration No. PB-12 C-1205, rashly and negligently, on 15.10.1998 near place Kala Kund at Gwal Thai, in which four persons died and five persons sustained injuries.

7. I have gone through the impugned award and the record. The offending vehicle, i.e. tanker, is a goods vehicle and as per the insurance policy, Ext. RW-1/A, risk of '2+1' is covered, i.e. the risk of two drivers and one cleaner is covered.

8. It is admitted by the appellant-owner-insured that the insurer has satisfied the claim of at least two persons and as per the insurance policy, Ext. RW-1/A, the liability of the insurer is '2+1'.

9. The claimant-injured in para 22 of the claim petition has himself averred that he has boarded the offending vehicle, i.e. the tanker, at the relevant point of time. It is nowhere pleaded that he was travelling in the vehicle as driver or conductor. It is apt to reproduce relevant portion of para 22 of the claim petition herein:

> *"That on the fateful day the applicant boarded the tanker at Bhakra and was coming towards Nangal. The driver of the vehicle was no rash and negligent that he lost the control of the vehicle on the down steep near Gwal Thai at a place near Kala Kund and the vehicle fell down deep causing death of two persons and serious injuries to some persons including present applicant. The accident is directly attributed to the rash and negligent driving of driver of the tanker."*

10. In the given circumstances, one comes to an inescapable conclusion that the claimant-injured was travelling in the offending vehicle, at the relevant point of time, neither in the capacity of the driver nor the cleaner, thus, was a gratuitous passenger.

11. The Tribunal has rightly made discussions in paras 21 to 23 of the impugned award and has came to the conclusion that the claimant-injured was travelling in the offending vehicle as a gratuitous passenger and the owner-insured has committed the breach of the terms and conditions of the insurance policy.

12. Having said so, the impugned award needs no interference.

13. Viewed thus, the appeal merits to be dismissed and the impugned award is to be upheld. Accordingly, the impugned award is upheld and the appeal is dismissed.

14. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award through payee's account cheque.

15. Send down the record after placing copy of the judgment on Tribunal's file.

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

Denzong Nang-Ten Sung –Kyob Tsogpa ...Petitioner.

VERSUS

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

Cr.Revision No.161 of 2012.
Reserved on: 01.06.2015.
Decided on: July 06, 2015.

Code of Criminal Procedure, 1973- Section 321- Currency of Rupees one crore recovered from a vehicle during search-fake documents showing fake identity of the person carrying the currency and the sale and purchase of land also collected during the investigation-case under sections 419, 420, 467 I.P.C etc. registered-respondent No. 3 shown to have conspired with the co-accused—withdrawal of the prosecution sought against him on the ground of paucity of evidence and on the ground that the Respondent No. 3 was a Dharam Guru and the withdrawal was in the interest of maintaining the law and order- application was allowed- held that there is sufficient material on record to incriminate the accused-permission for withdrawal from prosecution was unjustified and result of the non application of mind-Revision allowed and application for withdrawal dismissed. (Para- 15 & 16)

Code of Criminal Procedure, 1973- Section 321- Prosecution applied under section 321 Cr.P.C for withdrawal from the prosecution -Intervener application by a stranger to the prosecution case to oppose the prayer for withdrawal from the prosecution of the case-Intervener petitioner being stranger to the prosecution case has no locus standi to oppose the application under section 321 Cr.P.C. (Para 11)

Code of Criminal Procedure, 1973- Section 397- Revision in a criminal case- even if the intervener petitioner/ Revisionist had no locus standi to file the Revision, still the court can suo moto examine the order to judge the correctness or otherwise of the findings rendered by the inferior court. (Para-11)

Cases referred:

Sheonandan Paswan versus State of Bihar & Ors., 1983(1) SCC 438
Sheonandan Paswan versus State of Bihar and others, (1987)1 SCC 288
A.R. Antulay versus Ramdas Sriniwas Nayak and another, (1984)2 SCC 500
P.D. Dinakaran (2) versus Judges Inquiry Committee and another, (2011)8 SCC 474
Commissioner of Wealth Tax versus Dr. Karan Singh and others, 1993 Suppl.(4) SCC 500
V.S. Achuthanandan versus R. Balakrishna Pillai and others (1994)4 SCC 299
Abdul Karim and others versus State of Karnataka and others, (2000)8 SCC 710
Janata Dal versus H.S. Chowdhary and others, (1992)4 SCC 305

For the petitioners:	Mr.K.K.Rai, Sr.Advocate with Mr.S.K.Pandey, Advocate and Mr. R.S. Jaswal, Advocate, for the petitioner.
For respondents No.1 and 2:	Mr.Shrawan Dogra, Advocate General with Mr.Vivek Singh Attri, Deputy Advocate General.
For Respondent No.3:	Mr.Vikas Pahwa, Senior Advocate with Mr.Narender Pal Singh, Advocate with Mr.C.N. Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant criminal revision petition is directed against the impugned orders rendered on 21.05.2012 by the learned Judicial Magistrate 1st Class, Una, District Una, H.P., whereby, the latter Court allowed/accepted the application preferred before it, by the State of Himachal Pradesh under Section 321 of the Cr.P.C., seeking its permission for withdrawal from prosecution against respondent No.3 herein. The petitioner herein claims the relief of quashing of the aforesaid order rendered by the learned Judicial Magistrate 1st

Class, Una, besides, seeks a direction from this Court for reinvestigation of the case by an independent agency, on conclusion whereof, it be directed to file a supplementary charge sheet before the Criminal Court of competent jurisdiction.

2. The facts necessary for adjudication of this revision petition are that on 26.01.2011, the police party headed by ASI Manoj Kumar was present at Mehatpur Barrier. At about 3.35 P.M., a Scorpio vehicle bearing No. HP36A-0444 came from Una to Nangal side. On a checking of the vehicle, its driver disclosed his name as Sanjog Dutt son of Ravinder Nath and the person sitting on the front seat disclosed his name as Ashutosh Sharma son of Ravinder Nath. Both of them exhibited their identity cards issued by Divya Himachal. The word "Press" was displayed on the front and back mirrors of the vehicle. On suspicion, when the police proceeded to search the vehicle in the presence of Sh.Chanchal Bali and Sh.Vivek Kumar, then Sh.Sanjog Dutt displayed a Certificate bearing No.OR/DKD/AMB/14/2011 of 25.01.2011, issued by Corporation Bank, Ambala. As per the certificate, cash amounting to Rupees one crore was displayed therein to be carried in the vehicle in the name of Shri K.P. Bhardwaj. On a checking of the vehicle, a plastic gunny bag branded EZY COOK was found concealed on the back side of the driver's seat of the vehicle and on checking of the same, one more plastic gunny bag within the gunny bag was found and it was found containing eight bundles (80 lakhs) of 1000 currency, four bundles (20 lacs) of 500 currency and in total currency of Rupees one crore was recovered. Five bundles having the notes of denomination of Rs.1000/- and three bundles having the notes of denomination of Rs.500/-, were having the strip of HDFC Bank, Delhi and three bundles having the notes of denomination of Rs.1000/- and one bundle having the notes of denomination of Rs.500/- were having the strip of ICICI Bank, Delhi. In opposition to the certificate, the aforesaid seized currency was not found to be issued from Corporation Bank, Ambala and the identity of both the persons sitting in the vehicle was found suspicious, inasmuch as theirs being not though revealed by them to be correspondents with Divya Himachal. It transpired that the currency recovered was earned from anti-social activities or illegal sources and it was to be utilized for illegal business. The recovered currency, vehicle in question along with other articles were taken into possession by the police. Thereafter, an FIR under Sections 419, 420, 467, 468, 471 and 120-B, IPC was registered in the police station. The investigation into the offences was conducted by ASI Manoj Kumar and thereafter the investigation was conducted by Shri K.G. Kapoor, Additional Superintendent of Police, Una, Sh. Rakesh Singh, SDPO, Jawali, Sh. Dinesh Kumar, SDPO, Kangra, SHO/SI Yashpal, Investigating Officers, Police Station, Una, SI/SHO Negi Ram, Police Station Chintpurni, ASI Kaur Chand and H.C. Satish Kumar No.94. During Investigation spot map was prepared by visiting the spot. The currency amounting to Rupees one crore, two press identity cards and one certificate of Corporation Bank, Ambala were taken into possession. The statements of the witnesses under Section 161 of the Cr.P.C. were recorded on the spot. The accused Sanjog Dutt and Ashutosh were interrogated and arrested for offences as per law. Shri Ragvay Chhosang, Cashier of the Karma Garchin Trust was associated in the investigation and he produced the documents relating to the purchase of land in the name of Karma Garchin Trust to the police but he could not produce the permission letter of the government for the sale of land. It was found during the course of the investigation that on 25.01.2011, Ragvay Chhosang has handed over Rupees one Crore to Sanjog Dutt at Majnu Ka Tilla, Delhi and thereafter, in the intervening night, he himself carried a sum of Rs.21 lacs to Karma Garchin Trust, Sidhwari. On 27.01.2011, the investigation of the case was carried out at Gyto Monastery, Sidhwari and during course thereof, currency of different countries along with registers and three pen drives were taken into possession vide separate recovery memos. On 28.01.2011, accused Devinder Kumar, Bank Manager of Corporation

Bank, Ambala was also associated in the investigation with respect to issuance of certificate aforesaid. On 29.01.2011, Kul Prakash Bhardwaj was also associated in the investigation at Vankhandi and interrogated. On 29.01.2011, at the instance of accused Ragvay Chhosang, the police recovered foreign currency from the tenanted premises occupied by Gompo Tisring in the house of Shakuntla and prepared memos in this regard. The police also prepared the spot map in this regard. Thereafter, accused Ragvay Chhosang gave identification of his room and office of Gayato Monastery Complex at Sidhwari to the police and the police prepared the memo in this regard. On 29.1.2011, the police conducted the search of Hotel Central Point, Dharamshala and took into possession three general power of attorneys as also recorded the statements of witnesses under Section 161 of the Cr.P.C. On 30.01.2011, during a search operation in the guest house of Rinjin Wagmo at Majnu Ka Tilla, Delhi, a CPU, certificate, attorney charges and Bulk Sale Register were taken into possession. On 31.1.2011, while counting the recovered Indian currency, two notes of the denomination of 500/500 were found bogus and the same were taken into possession by the police vide separate memo. In this regard, a case under Section 489 of the IPC was registered. On 01.02.2011, the police took into possession vehicle bearing No. HR-3H-6194 along with its documents, a video cassette and one laptop millennium marka along with its charger/lead vide separate memos. On 3.2.2011, a memo regarding production and taking into possession, a diary for the year 2008 on which "Executive Diary" was written has been prepared. On the same day, statement of Mali Ram Dogra was recorded under Section 164 of the Cr.P.C., before the learned Judicial Magistrate 1st Class, Court No.II. On 03.02.2011, Rinjin Wagmo and Karma Kukehapa were associated in the investigation and interrogated accordingly. They were arrested and information with respect to their arrest was given as per law to their relatives. On 5.2.2011, a memo regarding production and taking into possession, the records pertaining to account No.11329127388 was prepared. On 05.03.2011, a memo regarding production and taking into possession, the hard disk of computer and the documents relating to land of Karma Garchen Trust, Sidhwari were taken into possession by the police. The specimens of handwriting and signatures of accused, namely, Devinder Kumar Dhar, Rinjin Wagmo, Ragway Chhosang and Kul Praksh Bhardwaj were taken before the Court and the same were sent to RFSL, Dharamshala for comparison and report whereof has been received. According to the report of RFSL Dharmshala, it was found that the specimens of handwriting and signatures resemble with the supplied documents. During the investigation of the case, search qua the strips and slips appended on the currency notes was under taken in Delhi at ICICI and HDFC Bank and it was found that a sum of Rs.1 Crore was not withdrawn from these banks and a certificate to this effect has also been received from the concerned Branch Managers. The hard disc was taken into possession from Gompo Tisiring and when the print out was taken from the hard disc, it was found that the sale of 52 canals of land was made for Rs.5 Crores instead of 2 and half Crores. The hard disc along with print out was sent to FSL, Junga for comparison and report whereof has been received. During the course of investigation, cash book and other registers from Karma Garchen Trust, Sidhwari were taken into possession by the police and audit whereof was conducted by the Chartered Accountant. Gompo Tisiring, Tenzin Namgayal, Dr. Swatanter Mahajan and Sher Singh, during the course of investigation unraveled the fact that they have put their signatures on the sale deed. During the course of investigation, Tehsildar Dharamshala, TCP Dharamshala and Karma Garchan Sidhwari were asked questions regarding registration of Karma Garchan Trust, issuance of NOC for purchase and sale of land, they gave divergent replies in writing which were not found satisfactory. In this regard opinion was sought from prosecution agency, Una which was of the opinion that the Trust and sale deed were illegal. In the investigation conducted until

now, it was found that accused Ragway Chhosang along with Karma Kukhempa took foreign currency from Gayato Monastery, Sidhwari to Manju Tilla, Delhi and there on 25.01.2011, accused Rinjin Wangmo after converting this foreign currency into Indian currency gave Rs.1 crore and 21 lacs to Ragway Chhosang whereas according to accused Rinjin Wangmo this amount of Rs.1 Crore and 21 lacs was given by him to Ragway Chhosang as a donation and Ragway Chhosang himself, after taking 21 lacs, went to Karma Garchan Trust, Sidhwari, Dharamshala. Accused Ragway Chhosang and Rinjin Wagmo gave Rs.1 crore to Sanjog Dutt, the driver of K.P. Bhardwaj for its transmission by him to accused K.P. Bhardwaj. Devinder Kumar Dhar, the Bank Manager in a well planned manner has already at his own instance prepared a fictitious certificate and has given the same to Sanjog Dutt. Then Sanjog Dutt along with Malli Ram Dogra brought the aforesaid amount of Rs.1 crore from Delhi to Chandigarh in K.P. Bhardwaj's vehicle i.e. Alto Car No. HR-03 H-6194 in a well planned manner. On 26.01.2011, Sanjog Dutt after wrapping Rs.1 crore in a plastic bag and hiding it, inside other luggage put it in K.P. Bhardwaj's vehicle No. HP-36B-0444, and took his brother also with him from Chandigarh to Dharamshala. Accused Sanjog Dutt has already apprised his brother Ashutosh about the sum of Rs.1 crore. Both of them, showed their identity cards of "Press" issued by Divya Himachal. Investigations, revealed that Sanjog Dutt was not the employee of Divya Himachal and his identify card was found to have been forged. It was also found that the word "Press" written on the front and back mirrors of the vehicle of accused K.P. Bhardwaj was fictitious. During the course of investigation, it was found that accused K.P. Bhardwaj, who was the owner of the vehicle in question, was neither an employee of the Press nor the aforesaid vehicle was related to the Press. It was found that the aforesaid persons conspired to deceive the law by mentioning the word "Press" on the front and rear mirrors of the vehicle bearing No. HP-36B-0444 and accused Sanjog Dutt possessed an invalid press card. The recovered amount of Rs. One Crore was deposited with the government treasury as per the orders of the Court. Further, when foreign currency and Indian Currency amounting to Rs.53,65,265/-, which was recovered from Dharamshala, was checked at SBP Branch, Una as per the orders of the Court, it was found that two notes of the denomination of 500 were bogus. The same were sent for analysis and as per the report of Analyst, these two notes of five hundred each were also found fake. Indian currency notes of Rs.53,64,265/- and two fake notes of rupees five hundred each are lying deposited in the Malkhana of police station and the certificate issued by accused D. K. Dhar in which it is found mentioned that K.P. Bhardwaj has deposited rupees one crore earned by selling land at Delhi, in his account at Ambala Bank, were also found false because it has come in the investigation that neither K.P. Bhardwaj had sold any land in Delhi nor he has any account in Corporation Bank at Ambala. It has also come in the investigation that the sale deed qua fifty two kanals of land executed between accused Ragvey Chhosang, member of Karma Garhin Trust Sidhwari and owners Kul Praksh etc., was shown for rupees two and half crore yet according to the record of computer hard disk, the sale deed was executed for rupees five crore. Foreign currency received in Karma Garchen Trust, Sidhwari, Dharamshala could not be exchanged in Indian currency at Dharamshala and Sidhwari for which Trust had sought permission for exchange of money from FERA which was refused and the Trust was facing hindrances in carrying out the functions of the Trust. Whenever money was required for sale-purchase of land, construction of buildings, Ragvey Chhosang, Cashier of Trust stealthily used to go to Rinjhin Wangmo and Karma Kukey Khampa, who have one guest house and business of foreign exchange in Majnu Tilla, Delhi and brought money to Sidhwari Trust after exchange, which was illegal. It was also revealed in the investigation that Rs. one core aforesaid was neither lawfully exchanged in Delhi nor any donation from outside was received by Rinjhin Wangmo

because as per branches of ICICI and HDFC Bank, Delhi, this money was not withdrawn from their banks. The entire money is "Hawala" and the Chairman of the Trust, 17th Gyalwang Karmapa Ogyen Trinley Dorge was also interrogated who told that accounts of Karma Garchen Trust were operated by its employees and work of sale and purchase of land was used to be done by a committee and he has no knowledge about it. However, as per the report of Tehsildar, Dharamshala, 17th Gyalwang Karmapa Ogyen Tirinley Dorge is Chairman of the said Trust. In this context, it is proved that sale-purchase of land for the Trust and whatever amount was paid by them to K.P. Bhardwaj, 17th Gyalwang Karmpa Ogyen Trinley Dorge was having knowledge. He has not obtained permission under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act from the Himachal Government to purchase land though he is a non Himachali/non agriculturist and in Himachal sale-purchase of land is done with the permission of the government. Full and final payment has been made to K.P. Bhardwaj before the registration of the sale deed. The whole process of purchase of land was within the knowledge of 17th Gyalwang Karmapa Ogyen Trinley Dorge being the Chairman of the Trust and he was having full knowledge. Hence, the offence under Section 120 B IPC has been proved against him. The registers and cash books of Karma Garchen Trust, Sidhwari have been taken into possession by the police and got audited from Hari Narayan Chittu, C.A., Una and the report to this effect has been procured. As per the report, tax evasion worth Rs.3 crore has been found in the Trust. The sale deed executed inter se the Trust and accused K.P. Bhardwaj, Dr. Swatanter Mahajan and Sher Singh was with a purpose to earn the benami property because, if they had revealed the entire money, in that event they would have to pay more tax. According to hard disk recovered by the police, the deal was for Rs.5 crores but the sale deed was executed for Rs.2.5 crores. During the course of the investigation, the police took into possession the records relating to the payments made in connection with the sale and purchase of the land by the members of the Trust to Mr. K.P. Bhardwaj, Dr. Swatanter Mahajan and Sher Singh. According to the record, the total value of the land of K.P. Bhardwaj measuring 27 kanal, 11-1/4 marla was about 1 crore 37 lakh i.e. 5 lakh per kanal but as per record K.P. Bhardwaj received Rs. one crore and eight lakhs by means of cheque and cash. Similarly, Swatanter Mahajan has received Rs.19 lakh and 85 thousand in lieu of land measuring 18 kanal 6 marla, while Sher Singh received Rs.11 lakhs and 47 thousand and five hundred in lieu of land measuring 4 kanal 7 marla. Rupees one crore recovered by the police were being claimed by him to be his money and he has filed an application before the Court for its release. Before this, all the money involved in this transaction was received differently by K.P. Bhardwaj, Swatanter Mahajan and Sher Singh. Dr.Swatanter Mahajan and Sher Singh have not given power of attorney to K.P.Bhardwaj to receive the money. As per sale deed, balance amount of K.P.Bhardwaj is about 28 lakh 25 thousand rupees whereas he has claimed that he himself had already received rupees one crore. Thus, it appears that the deal was finalized for 5 crore and not for 2.5 crore. As per specimen of handwritings and signatures and statements of the witnesses a challan for the offences under Sections 419,420, 467, 468, 471 and 120-B of the IPC has been prepared against accused entered in Column No.11. Hence, a case under Sections 419,420, 467, 468, 471 and 120-B of the IPC has been prepared against accused Sanjog Dutt, Ashutosh, Ragvay Chhosang, Kul Prakash Bhardwaj, Devender Kumar Dhar, Karma Kukempa, Rinzin Wagmo, Tenzin Namgayal, Gompo Tisring and 17th Gyalwang Karmapa Ogyen Trinley Dorge.

3. The petitioner herein had moved an application before the learned Judicial Magistrate 1st Class, Una opposing the move of the government to withdraw from prosecution against respondent No.3 herein. On 21.5.2012 the learned Judicial Magistrate 1st Class, Una, District Una, H.P., under the orders impugned before this Court rather

allowed the application of the public prosecutor for permission to withdraw from prosecution against respondent No.3 herein.

4. The petitioner herein before the learned Judicial Magistrate 1st Class, Una, had filed an intervener application, with a disclosure therein of his opposition as well as remonstrance, to the prayer made by the State of Himachal Pradesh in its application under Section 321 of the Cr.P.C., for the according of necessary permission by the Court, for withdrawal from prosecution against respondent No.3 herein. In trite, the portrayal in the application instituted at the instance of the petitioner herein before the learned Judicial Magistrate 1st Class, Una against the prayer of the Government of Himachal Pradesh being accepted, by the Judicial Magistrate concerned, was embedded in the fact that, with the Investigating Officer during course of his carrying/conducting investigations, having concluded that the respondent No.3 herein being head of the Trust in whose favour a sale deed qua 52 kanals of land without the statutory permission as envisaged under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act of the Government concerned, was executed by the vendors and the sum of money unearthed from the vehicle intercepted by the police on 26.01.2011 as also the money unearthed from the premises of respondent No.3 herein at Gyuto Monastery, Dharamshala, both constituted the consideration for the acquisition of property for and on behalf of the Trust of which respondent No.3 herein was Chairman, as such, the unearthing of the aforesaid money per se in entwinement with its user for the acquisition of property for the benefit or use of the Trust, manifested the knowledge of the Chairman of the Trust, the respondent No.3 herein, qua the unaccounted money recovered, both from the vehicle intercepted by the police as also recovered from the premises of respondent No.3 at Gyuto Monastery, Dharamshala and qua its user for a shady land transaction. Consequently, the offence under Section 120-B of the IPC as portrayed in the report under Section 173 of the Cr.P.C., was made out against respondent No.3 herein. In sequel, it was manifested in the apposite application preferred by the petitioner herein/intervener, that the application under Section 321 of the Cr.P.C., instituted by respondents No.1 and 2 before the learned Judicial Magistrate 1st Class, Una, seeking its permission for withdrawal from prosecution against respondent No.3 herein, suffered from lack of objective appraisal of the material on record, besides obvious non application of mind. Moreover, the impugned orders rendered thereon by the learned Judicial Magistrate 1st Class, Una, too are now portrayed to be also suffering from a similar taint.

5. The learned counsel appearing for the respondent No.3 before making any submission qua the tenacity of the reasoning afforded by the learned Judicial Magistrate concerned, in allowing the application preferred before it by the Government of Himachal Pradesh under Section 321 of the Cr.P.C., for permission to withdraw from prosecution against respondent No.3 herein, has with much vigour contended before this Court that the intervener, before the learned Judicial Magistrate 1st Class concerned, the petitioner herein, had no locus standi either to contest the application preferred before the learned Judicial Magistrate 1st Class concerned by the State of Himachal Pradesh under Section 321 of the Cr.P.C. for permission to withdraw from prosecution against respondent No.3 herein nor also the intervener therein, has the necessary locus standi to institute the instant criminal revision petition before this Court, for assailing or setting aside the orders rendered by the learned Judicial Magistrate 1st Class concerned, whereby it accorded permission to the State of Himachal Pradesh, on its application preferred before it, to withdraw from prosecution against respondent No.3 herein. He has besides contended on the strength of the pronouncement of the Hon'ble Apex Court in ***Sheonandan Paswan versus State of Bihar & Ors., 1983(1) SCC 438*** that even otherwise the factors or parameters necessitating

satisfaction for validating the impugned orders, as enshrined in paragraph No.120, which paragraph stands extracted hereinafter, had both met accomplishment and satiation, inasmuch as the portrayals in the record of the government seized with, processing the matter for rendering a direction to the Public Prosecutor concerned, to institute an application under Section 321 of the Cr.P.C., before the Judicial Magistrate concerned for seeking the latter's permission for withdrawal from prosecution, depict its having applied its mind incisively as well as thoroughly qua the factum of not only there being paucity or scanty evidence existing against respondent No.3 herein, besides its having also applied its mind to the factum that with the respondent No.3 herein, being a "Dharam Guru", who has an immense following and has been afforded political asylum by the Government of India, besides is the successor of His Holiness Dalai Lama, hence, in the event of withdrawal from prosecution against respondent No.3 herein, being not permitted, it shall entail a law and order problem and would lead to strained relations between the Indian Government and the Tibetan Government in exile. In sequel, he contends with vehemence before this Court that in light thereof, the impugned order suffers from no taint and necessitates vindication. Paragraph No. 120 of the aforesaid citation reads as under:-

> "120. The last in the series is the case of R. K. Jain v. State. After review of the various cases of this court, the court laid down the following propositions :
>
> 1. Under the scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the executive.
>
> 2. The withdrawal from the prosecution is an executive function of the Public Prosecutor.
>
> 3. The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.
>
> 4. The government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.
>
> 5. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, we add, political purposes sans Tammany Hall enterprises.
>
> 6. The Public Prosecutor is an officer of the court and responsible to the court.
>
> 7. The court performs a supervisory function in granting its consent to the withdrawal.
>
> 8. The court's duty is not to re-appreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or

> withholding its consent to withdrawal from the prosecution."

The citation aforesaid as relied upon by the learned senior counsel appearing for respondent No.3 herein, delineates the salient or fundamental principles which are to be borne in mind by a Criminal Court of competent jurisdiction while granting permission to the Public Prosecutor for withdrawal from prosecution against an accused. There is no whisper or any pronouncement therein qua the fact whether the intervener therein, who had opposed the prayer of the learned Public Prosecutor for his being permitted by the Court concerned on his application under Section 321 of the Cr.P.C., to withdraw from prosecution against the accused therein, had while his being a private individual any locus standi to contest the application of the learned Public Prosecutor. Obviously with silence having been maintained by the Hon'ble Apex Court in the citation aforesaid qua the locus of a private individual therein to as an intervener oppose and contest the prayer of the learned Public Prosecutor as canvassed in an application under Section 321 of the Cr.P.C., for permission to withdraw from prosecution against the accused therein, no obvious guidance there-from emanates qua the fact whether the petitioner herein while being a private individual has the necessary locus to assail or challenge the impugned order rendered by the learned Judicial Magistrate 1st Class, Una. However, in the subsequent decision rendered by the Hon'ble Apex Court reported in **Sheonandan Paswan versus State of Bihar and others, (1987)1 SCC 288**, the minority view explicitly foisted locus upon a private individual/citizen to contest an application instituted by the Public Prosecutor for permission of the Court concerned for withdrawal from prosecution against an accused. The relevant paragraph No.14 stands extracted hereinafter:-

> The learned counsel on behalf of Dr. Jagannath Mishra also raised another contention of a preliminary nature with a view to displacing the locus standi of Sheonandan Paswan to prefer the present appeal. It was urged that when Shri Lallan Prasad Sinha applied for permission to withdraw the prosecution against Dr. Jagannath Mishra and others, Sheonandan Paswan had no locus to oppose the withdrawal since it was a matter entirely between the Public Prosecutor and the Chief Judicial Magistrate and no other person had a right to intervene and oppose the withdrawal and since Sheonandan Paswan had no standing to oppose the withdrawal, he was not entitled to prefer an appeal against the order of the learned Chief Judicial Magistrate and the High court granting permission for withdrawal. We do not think there is any force in this contention. It is now settled law that a criminal proceeding is not a proceeding for vindication of a private grievance but it is a proceeding initiated for the purpose of punishment to the offender in the interest of the society. It is for maintaining stability and orderliness in the society that certain acts are constituted offences and the right is given to any citizen to set the machinery of the criminal law in motion for the purpose of bringing the offender to book. It is for this reason that in A. R. Antulay v. R. S. Nayak (1984)2 SCC 500 this court

> pointed out that (SCC p.509, para 6) "punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society, right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a strait jacket formula of locus standi. . ". This court observed that locus standi of the complainant is a concept foreign to criminal jurisprudence. Now if any citizen can lodge a first information report or file a complaint and set the machinery of the criminal law in motion and his locus standi to do so cannot be questioned, we do not see why a citizen who finds that a prosecution for an offence against the society is being wrongly withdrawn, cannot oppose such withdrawal. If he can be a complainant or initiator of criminal prosecution, he should equally be entitled to oppose withdrawal of the criminal prosecution which has already been initiated at his instance. If the offence for which a prosecution is being launched is an offence against the society and not merely an individual wrong, any member of the society must have locus to initiate a prosecution as also to resist withdrawal of such prosecution, if initiated. Here in the present case, the offences charged against Dr. Jagannath Mishra and others are offences of corruption, criminal breach of trust etc. and therefore any person who is interested in cleanliness of public administration and public morality would be entitled to file a complaint, as held by this court in A. R. Antulay v. R. S. Nayak and equally he would be entitled to oppose the withdrawal of such prosecution if it is already instituted. We must therefore reject the contention urged on behalf of Dr. Jagannath Mishra that Sheonandan Paswan had no locus standi to oppose the withdrawal of the prosecution. If he was entitled to oppose the withdrawal of the prosecution, it must follow a fortiorari that on the turning down of his opposition by the learned Chief Judicial Magistrate he was entitled to prefer a revision application to the High court and on the High court rejecting his revision application he had standing to prefer an appeal to this court. We must therefore reject this contention of the learned counsel appearing on behalf of Dr. Jagannath Mishra."

The aforesaid portion of the judgment delineating the minority view of the Bench voices the tenet that an intervener before the learned Court concerned before whom an application under Section 321 of the Cr.P.C., is preferred for permission to withdraw from prosecution against the accused therein, even when he is not the complainant or the Investigating Agency, has the necessary locus standi to oppose as an intervener, an application preferred by the Public Prosecutor concerned before the Criminal Court of competent jurisdiction wherein a prayer is made for permission to withdraw from prosecution against the accused

therein. The minority view obviously does not hold good. Its effect having come to be muted as well as silenced by the majority view which rather has held, that the view expressed by the minority whereby the locus was held to inhere in an intervener even while his donning the capacity of a private individual to oppose the application preferred by the Public Prosecutor for permission to withdraw from the prosecution against an accused, postulates an incorrect proposition of law.

6. The learned Senior Counsel appearing for the intervener/petitioner herein has with much vigour contended before this Court that with a loud expression existing in paragraph 14 which stands extracted hereinabove, even if by a minority, yet the view therein being embedded or entrenched upon a decision of the Hon'ble Apex Court in **A.R. Antulay versus Ramdas Sriniwas Nayak and another, (1984)2 SCC 500** which decision comprises a decision by a five Judge Bench of the Hon'ble Apex Court, its effect cannot face subsidence or dilution by a mere expression of dissent by the majority, without supplemental ad nauseam reasoning vis-à-vis each of the expositions by the minority. However, the above contention is unacceptable to this Court, inasmuch as even if the said argument may stand to garner sustenance, yet the factum that in ***A.R. Antulay's case supra***, the Hon'ble Apex Court was seized of the locus of a private individual to institute a private complaint for commission of an offence under the Prevention of Corruption Act and the concomitant empowerment and jurisdiction vested in the Special Judge concerned under the Act aforesaid to take cognizance thereupon. The factual matrix therein being in dire contradiction to the factual matrix of the instant case wherein the intervener/petitioner has rather taken to contest the application of the State of Himachal Pradesh preferred before the Court concerned for permission to withdraw from prosecution against respondent No.3 herein enfeebles its legal vigour and renders frail its applicability. The Hon'ble Apex Court in the afore referred case had held that a private individual has legal competence to institute a private complaint and on the institution of a private complaint, under the Prevention of Corruption Act, the Special Judge concerned is empowered to take cognizance thereupon. However, for reiteration, distinctively in the instant case, the intervener/the petitioner herein, even when has not instituted a private complaint before the Special Judge under the provisions of the Prevention of Corruption Act, yet has opposed the prayer made in the application under Section 321 of the Cr.P.C., instituted by the Assistant Public Prosecutor before the Court concerned for the according of permission to withdraw from prosecution against respondent No.3 herein. Obviously, the transparent salient fact of distinctivity inter se the status of a private complainant therein as well as his legal competence to invoke the jurisdiction of the Special Judge appointed under the Prevention of Corruption Act, through a complaint instituted before it, vis-à-vis an intervener, who opposes the prayer of the learned Public Prosecutor seeking permission of the Court concerned to withdraw from prosecution against the accused besides, with the mandate enshrined in ***A.R. Antulay's case supra***, investing legal competence in a private individual to institute a private complaint before the Special Judge under the Prevention of corruption Act and its not vesting or clothing any right in a private individual to, as an intervener oppose an application preferred by the learned Public Prosecutor before the Court concerned under Section 321 of the Cr.P.C., for permission to withdraw from prosecution against the accused. Consequently, the reliance, if any, by the counsel for the petitioner herein upon the decision of the Hon'ble Apex Court in ***A.R. Antulay's case supra*** carries no force or vigour. In other words, when a private individual/citizen is clothed with a firm legal right to institute a complaint under the Prevention of Corruption Act before the Special Judge concerned for hence warranting cognizance by the Court concerned, now when the petitioner herein has contradistinctly instituted an application opposing the prayer made by the Assistant Public

Prosecutor in the latter's application preferred under Section 321 of the Cr.P.C., before the learned Judicial Magistrate 1st Class concerned for permission to withdraw from prosecution against respondent No.3, the minority view of the Hon'ble Apex Court anchored upon ***A.R. Antulay's case supra***, is an inapt reliance by the counsel for the petitioner for concluding that an intervener opposing an application of the State moved through the learned Public Prosecutor before the Criminal Court of competent jurisdiction for permission to withdraw from prosecution against the accused, too has the locus standi to manifest a protest or objection to the application aforesaid, besides does not rejuvenate his contention, especially with the minority view losing its vigour and strength in the face of the majority having not accepted it.

7. The learned Senior Counsel appearing for the petitioner has proceeded to also rely upon a judgment of the Hon'ble Apex Court reported in ***P.D. Dinakaran (2) versus Judges Inquiry Committee and another, (2011)8 SCC 474*** , the relevant paragraph No.13 whereof stands extracted hereinafter, to contend before this Court that with the majority having not explicitly dealt with ad nauseam with each of the expostulations of the minority view, hence, the majority view declining locus to the intervener in an application under Section 321 of the Cr.P.C., ought not to hold sway or command. Paragraph No.13 of the aforesaid judgment reads as under:-

> "13. Shri Patil then argued that by making investigation prior to the framing of charges, the Committee has acted in violation of the scheme of the Act and the petitioner has a bona fide apprehension that the investigation to be made hereinafter will be an empty formality. Shri Patil relied upon the judgments of this Court in Sub-Committee on Judicial Accountability v. Union of India, 1991 4 SCC 699, Sarojini Ramaswami v. Union of India, 1992 4 SCC 506 and Krishna Swami v. Union of India and others, 1992 4 SCC 605 as also the judgments of the Kerala, Bombay and Allahabad High Courts in V. Padmanabha Ravi Varma Raja v. Deputy Tehsildar, Chittur, 1963 AIR(Ker) 155, Mahendra Bhawanji Thakar v. S.P. Pande, 1964 AIR(Bom) 170 and Prem Prakash Gupta v. Union of India, 1977 AIR(All) 482 and argued that the minority view expressed by K. Ramaswamy, J. in Krishna Swami's case on the interpretation of Sections 3 and 4 of the Act should be treated as law declared under Article 141 of the Constitution because the majority did not express any view on the questions framed by the three-Judge Bench. Learned senior counsel further argued that in the absence of any contrary view by the majority, the minority opinion is binding on all including this Court unless the same is overruled by a larger Bench. Shri Patil finally argued that violation of the mandate of Section 3 has the effect of vitiating the proceedings of the Committee and, therefore, the charges framed against the petitioner are liable to be quashed."

However, in the hereinabove extracted paragraph of the aforesaid judgment, the majority view was held to be not holding the field qua the questions formulated by the Hon'ble Three Judge's Bench, inasmuch as the majority had omitted to express any view contrary to the one expressed by the minority. Nonetheless, the aforesaid extracted portion of the judgment of the Hon'ble Apex Court cannot be read to befittingly apply to the facts at hand especially when the majority view has explicitly and expressly pronounced its disconcurrence or dissent with the minority view, hence, when has not omitted to express/communicate its divergence/difference with minority, which fact of divergence of opinion being omitted to be communicated by the majority in the afore referred judgment relied upon by the learned senior counsel for the petitioner herein hence left open space for the minority view to hold sway. In sequel, with the expression of open dissent by the majority with the minority view, in ***Sheonandan Pawan's case (1987)1 SCC 288 supra***, hence, the majority view holds sway, command and legal clout.

8. The learned Senior Counsel appearing for the petitioner herein has besides, relied upon a judgment of the Hon'ble apex Court reported in ***Commissioner of Wealth Tax versus Dr. Karan Singh and others, 1993 Suppl.(4) SCC 500***, the relevant paragraph No.11 whereof is extracted hereinafter, in canvassing the view that with the majority having not openly differed with the minority view, in sequel, the majority is to be construed to have acquiesced with the minority view. Paragraph No.11 reads as under:-

> "11. Mr. Sorabjee further contended that whatever has been said in the judgment of Mitter, J. , must be treated to be the majority view. In support of this proposition, Mr Sorabjee relied upon the observations in Guardians of Poor v. Guardians of Poor and Overseers of Manchester v. Guardians of Ormskrik Union. Describing the views expressed by D. D. Basu on Article 141 in his Commentary on the Constitution of India (6th edn. , Volume H, at pages 14 and 15 as the correct approach of interpreting a judgment where the Judges holding the majority give independent judgments, Mr Sorabjee contended that when one of the judges expounds the law on a particular point, but others do not openly dissent from it, it must be taken that all the judges concurring in the majority decision agreed to that exposition. He relied on the following observations from the case of Guardians of Poor v. Guardians of Poor:
>
> "We know that each of them considers the matter separately, and then they consider the matter jointly, interchanging their judgment, so that every one of them has seen the judgments of others. If they mean to differ in their view, they say so openly when they come to deliver their judgments and if they do not do this, it must be taken that each of them agrees with the judgments of the others. "the learned counsel also recommended adoption of the practice followed in England for considering the judgments of the House of

> Lords indicated in case of Overseers of Manchester v. Guardians of Ormskrik Union in the following terms:
>
> "Where in the House of Lords one of the learned Lords gives an elaborate explanation of the meaning of a statute, and some of the other learned Lords present concur in the explanation, and none express their dissent from it, it must be taken that all of them agreed in it. "by way of further elaboration Mr Sorabjee contended that this principle is applicable even to the views of dissenting judges, unless the majority opinion expressly disagrees with the same. He referred to the decision in Rustom Cavasjee Cooper v. Union of India as an illustration of this proposition where the observations in the judgment of Ray, J. cannot be treated to be the majority view for the reason that at page 561-G reservation was expressed by Shah, J. in express terms. The argument, therefore, is that since in the judgment of Sikri, C. J. we do not find any dissent or reservation from the views of Mitter, J. on the non-applicability of Entry 86 of the Wealth Tax Act, the said view must be treated to be that of all the four judges forming the majority. Reliance was also placed on paragraph 20 of the judgment in Ramesh Birch v. Union of India."

However, the said pronouncement by the Hon'ble Apex Court is inappositely and feebly concerted to be applicable to the facts at hand especially when the majority view in the citation relied upon by the senior counsel for the respondent No.3 while ousting the locus of an intervener to oppose or contest an application under Section 321 of the Cr.P.C., has loudly and with formidability in the opening paragraph of the judgment, rendered by the Hon'ble Judge, who authored it, for the Bench which constituted the majority, expressed his dissent with the view of locus inhering in an intervener as expressed by the minority. Consequently, with an open dissent by the majority with the minority view, there is no room for the learned senior counsel for the petitioner herein to contend on the strength of the citation aforesaid, applicable only in the event of lack of open dissent by the majority with the minority view, hence, conveying its acquiescence with the minority view, that his submissions anchored upon the citation aforesaid marshal any strength or vigour to oust the vigour of the majority view especially when it has expressed its loud and open divergence with the minority view. The learned Senior Counsel appearing for the petitioner has been unable to place before this Court any judgment of the Hon'ble Apex Court portraying the fact that a single line of dissent as found existing in the dis-concurrent view of the majority with the minority is inabundant as well as insufficient to be construable to be an expression of dissent from the minority view. Consequently, with the inability of the learned Senior Counsel for the petitioner herein to, hence, cite before this Court any pronouncement of the Hon'ble Apex Court that the explicit single line of dissent existing in the opening paragraph of the judgment of the Hon'ble Judge of the Hon'ble Apex Court, who authoured it for the majority is insufficient to constitute it to be a proclamation of an open dissent with the minority view, dehors the ad nauseam expostulation by the majority on each of the pronouncements existing in the minority view, as a corollary it has to be concluded that the single line of dissent manifested in the opening line of the judgment of the Hon'ble Judge,

who authoured the majority view, is sufficient and abundant to countervail the effect of the minority view.

9. The learned Senior Counsel appearing for the petitioner has proceeded to rely upon a judgment of the Hon'ble Apex Court reported in ***V.S. Achuthanandan versus R. Balakrishna Pillai and others (1994)4 SCC 299*** wherein the Hon'ble Apex Court had permitted the petitioner therein to question the validity of the order passed by the High Court, whereby, it set aside the order passed by the learned Special Judge declining to give permission to the Public Prosecutor to withdraw from prosecution against the accused therein, as such, too vesting in the petitioner herein the necessary locus standi, to also question the validity and tenacity of the order rendered by the learned Judicial Magistrate 1st Class, Una in permitting the Government of Himachal Pradesh to withdraw from prosecution against respondent No.3 herein. However, the reliance as placed by the learned Senior Counsel for the petitioner in canvassing that hence the petitioner herein too, has the locus to assail the validity of the impugned orders passed by the learned Judicial Magistrate 1st Class, Una whereby it permitted the Government of Himachal Pradesh to withdraw from prosecution against respondent No.3, is misplaced, inasmuch as in the case cited/relied upon, it is manifestly elucidated in paragraph 8, that the Apex Court had not embarked upon or entered into the facet of testing the locus of the petitioner therein, especially when the locus of the appellant/petitioner therein was not disputed before the Hon'ble Apex Court, constituted in the fact of his being an acknowledged public figure of the State concerned, which equipped him with the necessary locus to institute an appeal before the Hon'ble Apex court for setting aside the order rendered by the High Court whereby it had set aside the orders rendered by the learned Special Judge, whereby the latter Court had declined to give consent to the Public Prosecutor for withdrawal from prosecution against the accused therein. Ensuably, then the said decision which had permitted the appellant therein, who was a private individual to assail by way of an appeal the decision rendered by the High Court only on the score of his locus having come to be not contested by the parties to the lis, obviously, then with the acquiescence of the parties to the lis therein qua his having the necessary locus to institute an appeal before the Hon'ble Apex Court had constrained the Hon'ble Apex Court to not delve into or embark upon the factum of his having the necessary locus to institute an appeal before the Hon'ble Apex Court, would not facilitate the espousal by the learned Senior Counsel appearing for the petitioner herein that the petitioner herein, too when unlike the decision as relied upon by the learned Senior Counsel has a contentious or disputed locus, has too the legal competence to institute a revision before this Court for contesting the validity of the orders rendered by the learned Judicial Magistrate 1st Class.

10. Moreover, the learned counsel appearing for the petitioner herein has also proceeded to rely upon a judgment of the Hon'ble Apex Court reported in ***Abdul Karim and others versus State of Karnataka and others, (2000)8 SCC 710*** wherein too, the Hon'ble Apex Court had permitted a private individual to institute an appeal before it against the order permitting the withdrawal from prosecution against the accused therein. Nonetheless, the relevant paragraph No.33 of the judgment aforesaid as relied upon by the learned Senior Counsel appearing for the petitioner underlines the fact that the appellant in the case aforesaid was permitted to, even as a private individual, when otherwise he may not have any locus to institute an appeal to assail the orders rendered by the competent Court, permitting the government concerned to, on an application preferred before it by the Public Prosecutor, withdraw from prosecution against the accused therein, contest it, merely for non existence of any contest on the part of the parties to the lis qua the fact of his having the necessary locus standi to institute the said appeal before the Hon'ble Apex Court.

Obviously then when in the aforesaid case too, there was no contest qua the locus standi of the appellant before the Hon'ble Apex Court, his locus to institute an appeal before the Hon'ble apex Court was neither embarked upon nor delved into by the Hon'ble apex Court. However, in the instant case, when the parties to the lis before this court have portrayed an acerbic contest qua the locus of the petitioner herein to institute the instant revision petition before this Court assailing the impugned orders rendered by the learned Judicial Magistrate 1st Class, Una, as a corollary, the reliance, if any, by the learned Senior Counsel appearing for the petitioner upon the aforesaid decision of the Hon'ble Apex Court with a salient loud postulation therein of a private individual therein being permitted to institute an appeal before it only on, his locus having remained unassailed or un-contested, is of no avail nor does it provide any legally sinewed weapon to the learned Senior Counsel appearing for the petitioner, especially when unlike the case as relied upon, for reiteration, the locus of the petitioner herein is under a volatile contest, hence ousting the foisting of locus upon the petitioner herein. In the judgment reported in ***Sheonandan Paswan versus State of Bihar and others, (1987)1 SCC 288*** wherein the majority view held that a private individual /citizen had no locus standi to assail the orders rendered by the Court of the Chief Judicial Magistrate whereby it had accorded permission to the Public Prosecutor on an apposite application instituted before it, to withdraw from prosecution against the accused therein. However, even the Hon'ble Judges, who propounded the majority view had not abstained from testing the validity of the orders rendered by the learned Chief Judicial Magistrate concerned permitting the withdrawal from prosecution to the Public Prosecutor against the accused therein, on his apposite application, instituted before the Court concerned. It had embarked upon, an incisive analysis of the grounds meted out in the application, instituted under Section 321 of the Cr.P.C., before the Court concerned and had ad nauseam dwelt upon, besides enunciated whether they, in entwinement with the material as existed before the Court concerned justified the according of permission for withdrawal from prosecution against the accused therein by the Court concerned to the Public Prosecutor, on his apposite application instituted before it. The embarking upon by the majority view in ***Sheonandan Paswan's case supra*** qua the facet of satiation by the Public Prosecutor with the legal prescriptions propounded in the apt authoritative pronouncements for facilitating the success of his application under Section 321 of the Cr.P.C., as instituted for the according of permission by the Court concerned to withdraw from prosecution against the accused therein, does also give latitude to this Court to, dehors the fact that the petitioner herein has no locus standi to assail the impugned orders rendered by the learned Judicial Magistrate 1st Class, Una, proceed to, in the exercise of its revisional jurisdiction which is a plenary jurisdiction, the width and scope whereof has been construed by the Hon'ble Apex Court in a judgment reported in ***Janata Dal versus H.S. Chowdhary and others, (1992)4 SCC 305,*** *the relevant paragraphs No. 128, 129, 130 and 134* are extracted hereinafter, to be vesting jurisdiction in this Court to, even on its own motion on examination of records unearthing patent illegalities and irregularities in the orders rendered by the Courts below, reverse them. Paragraphs No.128 to 130 and 134 reads as under:-

> "128. Sections 397,401 and 482 of the new Code are analogous to Ss.435, 439 and 561(A) of the old Code of 1898 except for certain substitutions, omissions and modifications. Under S. 397, the High Court possesses the general power of superintendence over the actions of Courts subordinate to it which the discretionary power when administered on administration side is

known as the power of superintendence and on the judicial side as the power of revision. In exercise of the discretionary powers conferred on the High Court under the provisions of this Section, the High Court can, at any stage, on its own motion, if it so desires and certainly when illegalities and irregularities resulting in injustice are brought to its notice, call for the records and examine them. The words in Section 435 are, however, very general and they empower the High Court to call for the record of a case not only when it intends to satisfy itself about the correctness of any finding, sentence or order but also as to the regularity of any proceeding of any subordinate Court.

129. By virtue of the power under S. 401, the High Court can examine the proceedings of inferior Courts if the necessity for doing so is brought to its notice in any manner, namely, (1) when the records have been called for by itself, or (2) when the proceedings otherwise come to its knowledge.

130. The object of the revisional jurisdiction under S. 401 is to confer power upon superior criminal Courts - a kind of paternal or supervisory jurisdiction - in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment which has resulted, on the one hand, or on the other hand in some undeserved hardship to individuals. The controlling power of the High Court is discretionary and it must be exercised in the interest of justice with regard to all facts and circumstances of each particular case, anxious attention being given to the said facts and circumstances which vary greatly from case to case.

134. This Court in Dr. Raghubir Sharan v. State of Bihar, (1964) 2 SCR 336 : (AIR 1964 SC 1) had an occasion to examine the extent of inherent power of the High Court and its jurisdiction when to be exercised. Mudholkar, J. speaking for himself and Raghubar Dayal, J. after referring a series of decisions of the Privy Council and of the various High Courts held thus:

".....every High Court as the highest Court exercising criminal jurisdiction in a State has inherent power to make any order for the purpose of securing the ends of Justice .....Being an extraordinary power it will, however, not be pressed in aid except for remedying a flagrant abuse by a subordinate Court of its powers ....."

Obviously, then when the records of the entire case are before this Court, as a natural corollary even dehors the fact that the petitioner has no locus standi, this Court, with Section 397 of the Cr.P.C., whereunder the instant petition is laid, empowering it to gauge or fathom the legality or otherwise of the impugned orders passed by the learned Judicial Magistrate 1st Class, Una, by a circumspect and keen discernment of the record can, hence, proceed to determine ad nauseam whether the impugned order permitting respondents No.1 and 2 to withdraw from prosecution against respondent No.3 herein, has begotten satiation of the salient principles or of the legal prescription enshrined in various judgments of the Hon'ble Apex Court for its, hence, being construable to be a legally sustainable order.

11. The application under Section 321 of the Cr.P.C., was instituted by the learned Assistant Public Prosecutor before the learned Judicial Magistrate 1st Class, Una. The grounds portrayed therein for constraining the latter Court to accord permission to withdraw from prosecution against respondent No.3 herein were harboured upon the factum of there being paucity of evidence against respondent No.3 herein. Besides, the factum of his being a "Dharam Guru", hence, his having an immense following, moreover, his being the likely the successor to His Holiness Dalai Lama, as such, to hence not vitiate relations inter se the Indian Government and the Tibetan Government in exile, are the mainstay of the grounds meted out in the application preferred under Section 321 of the Cr.P.C., by the learned Assistant Public Prosecutor for the permission of the Court concerned to withdraw from prosecution against respondent No.3 herein being sought. The grounds meted in the application instituted under Section 321 of the Cr.P.C., before the learned Judicial Magistrate 1st Class, Una have to withstand the test of theirs owing their existence therein to an objective appraisal of the material on record by the authority concerned besides, their has to be a manifest unfoldment therein, of the authority concerned, having dispassionately applied its mind to the fact whether the material on record denoted the existence or not of a role of criminal conspiracy, as attributed to the respondent No.3 herein, by the Investigating Officer. In case, short shift was made to the exhaustive and detailed report furnished by the Investigating Officer, naturally then, the application instituted by the learned Assistant Public Prosecutor before the Court concerned for according permission to withdraw from prosecution against the respondent No.3 herein would stand vitiated, it being ridden with the vice of its being hinged upon extraneous considerations, besides it having excluded the relevant and germane material from consideration, obviously would rendering it to be suffering from the taint of thorough non application of mind.

12. In case, the attribution of a role of criminal conspiracy to respondent No.3 herein by the Investigating Officer in his report filed under Section 173 of the Cr.P.C., before the Criminal Court of competent jurisdiction is not hinged upon or anchored upon any adequate material on record, as a sequel, the formation of an opinion by the authority concerned that there is paucity and scanty evidence against respondent No.3 herein would be foisted with soundness of reasoning. On the other hand, if the material on record does display that the Investigating Officer in his report under Section 173 of the Cr.P.C., had a sound legal basis in connoting a role of conspirator to respondent No.3 herein, constituted by the fact of his being the Chairman of the Karma Garchen Trust, Sidhwari, in whose favour, the land was transferred by Shri K.P. Bhardwaj, Swatantar Singh and Sher Singh for a consideration of Rs.5 crores, concomitantly his having the knowledge of the shady the land transaction, naturally then the inevitable inference which would ensue, is that the role as ascribed by the Investigating Officer of his being a conspirator would gain a strong legal foothold. In aftermath, for the reasons aforesaid and hereinafter, given the fact that the attribution of a role of a conspirator to respondent No.3 herein stands loudly manifested on

an incisive discernment of a well reasoned exhaustive report of the Investigating Officer, in sequel, the ground as agitated/meted by the learned Assistant Public Prosecutor in his application for according permission to withdraw from prosecution against respondent No.3 herein of there being scarce or in-abundant evidence against respondent No.3 herein, is rendered rudderless.

13. The role as ascribed to respondent No.3 herein is that of a conspirator. For determining, whether he had conspired with the other accused in begetting the illegal land deal struck with tainted consideration of Rs.5 crores, the factum of his being a Chairman of the Karma Garchan Trust, Sidhwari, in whose favour the land was purchased, cannot be slighted. The prime position of his occupying the Chairmanship of the Karma Garchan Trust, Sidhwari, cannot absolve him from the attribution of an inculpatory role to him, merely on the ground that he was not a signatory to the relevant documents nor the tainted money comprising the sale consideration, for the land transaction having flowed out from his hands to the vendors. The role of a criminal conspirator as imputed to respondent No.3 herein is a discreet role, it gains a legal foothold not by direct evidence but by existence of indirect evidence. The indirect evidence which was concluded by the Investigating Officer to be portraying a legitimized attribution of a role of a criminal conspirator to him, was embedded in the factum of his being the Chairman of the Karma Garchan Trust, Sidhwari, in whose favour the property was purchased. His occupying the position of Chairman of the Trust per se is magnificatory of his having knowledge qua acquisitions or additions to the estate of the Trust. The aforesaid indirect evidence or material on record, cannot forestall the invincible inference, that the role as attributed by the Investigating Officer to respondent No.3, of his while being the Chairman of the Karma Garchan Trust, Sidhwari, having knowledge of the land transaction as also having knowledge qua the flow of tainted money to the vendors for acquiring land from the latter, besides concomitantly his being an obscure or hidden back player, as such, a conspirator was a tenable as well as a sound conclusion in law.

14. The learned Judicial Magistrate 1st Class, Una, while accepting the prayer made in the application preferred before it under Section 321 of the Cr.P.C., by the Assistant Public Prosecutor for permission to withdraw from the prosecution against respondent No.3 herein appears to have in a rough shod and in a short shift manner overlooked and abandoned the aforesaid material on record pronouncing the tenable foisting of a role of criminal conspiracy upon respondent No.3 herein by the Investigating Officer. The learned Judicial Magistrate 1st Class, Una, has also in her impugned order proceeded to exclude the germane apposite material conveying or communicating a role of conspirator to respondent No.3 herein, as such, the impugned order as well as the application under Section 321 of the Cr.P.C., on which it was hinged, are both rendered to be suffering from lack of objective appraisal of the material on record, thorough non application of mind, as also, beget the taint of excluding from consideration the germane material constituted by exclusion from consideration the preeminent fact divulged by the Investigating Officer in his report on an incisive investigation carried out by him into the entire case, qua fulfillment of a role of a criminal conspirator by respondent No.3 herein. Consequently, the learned trial Court while rendering the impugned order has overlooked the factum of there being abundant as well as sufficient material on record to impute an inculpatory role to respondent No.3 herein. The grounds as meted out in the application of the Assistant Public Prosecutor of respondent No.3 being a “Dharam Guru”, hence, his having an immense following and his being the successor of His Holiness Dalai Lama, as such, to not bring discord in the relation inter se the Indian Government and the Tibetan Government in exile, the permission to withdraw

from prosecution against respondent No.3 was accordable do not fall within the domain of the legal principles enshrined hereinabove for permission being granted to withdraw from prosecution against respondent No.3 herein. Moreso, the said ground meted in the application under Section 321 of the Cr.P.C., was untenably countenanced by the learned Judicial Magistrate 1st Class, Una, even when the said ground stands overwhelmed and subsumed by the existence of abundant, potent and sufficient material on record portraying an incriminatory role of conspirator to respondent No.3 herein. Obviously, then the ground aforesaid cannot stand on a firmly grooved legal pedestal. The said ground is legally unworthwhile as well as legally insignificant and its being accorded inappropriate/ unwarranted potency by the learned Judicial Magistrate 1st Class, Una, in allowing the application of respondents No.1 and 2, under Section 321 of the Cr.P.C., has caused immense jolt to the administration of criminal justice.

15. What disturbs this Court is that the money which was a sum of Rs.one crore and nabbed from the vehicle on 26.1.2011 was dishonestly divulged by the occupants of the vehicles to be emanating from Corporation Bank, Ambala. However, the said fact, on investigation having been carried out by the Investigating Officer, was concluded to be false. Rather it was concluded by the Investigating Officer that the foreign currency from the premises of Gayato Monestary, Sidhwari was carried by accused Ragway Chosang along with Karma Kukhempa to Majnu Ka Tilla, Delhi and illegally converted there into Indian currency and thereafter a sum of Rs.One crore was handed over by the aforesaid to accused Sanjog Dutt. The nabbing of a huge amount of Rs.One crore illegally converted from foreign currency carried from the premises of Gayato Monastery, Sidhwari by accused Ragway Chosang along with accused Karma Kukhempa surrounds the sale consideration qua the land transaction, with the taint of its being smeared with unaccounted foreign money accumulated in the premises of Gayato Monastery, Sidhwari . The unaccounted foreign money, in transgression of the norms of its legal conversion into Indian currency, was utilized for settlement/finalization of the shady land transaction inter se K.P. Bhardwaj, Dr. Swatantar Mahajan and Sher Singh and the authorized signatories of the Karma Garchan Trust, Sidhwari of which respondent No.3 was the Chairman. The further fact that the Investigating Officer has concluded that the land transaction inter se K.P. Bhardwaj, Dr. Swatantar Mahajan and Sher Singh and the authorized signatories of the Karma Garchan Trust, Sidhwari was finalized for a sum of Rs.5 crores and which sale transaction smacks of the taint of, its being reared with unaccounted foreign money illegally converted into Indian money, as such, the entire episode reeks of the taint of money laundering, ignorance qua which cannot be feigned by respondent No.3 being the Chairman of the Karma Garchan Trust, Sidhwari to whose trust donations in foreign money were made and qua whose additions in estate were settled by persons nominated by him, which knowledge appears to have been lightly overlooked even when it manifestly and patently portrays an inculpatory role of a conspirator to respondent No.3

16. For the foregoing reasons, the present petition is allowed. Consequently, the impugned order rendered on 21.05.2012 by the learned Judicial Magistrate 1st Class, Una is quashed and set aside, in sequel, the application preferred before it by the Assistant Public Prosecutor for permission to withdraw from prosecution against the respondent No.3 herein is dismissed. Respondents No.1 and 2 shall proceed in accordance with law against respondent No.3 herein. However, it is made clear that the findings recorded hereinabove shall have no bearing on the merits of the case. All the pending applications also stand disposed of.

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

Kavita Pant and others .....Petitioners.

Versus

Union of India and another .....Respondents.

CWP No.3097 of 2015.
Order reserved on: 01.07.2015.
Date of decision: July 6th , 2015.

Public Premises Act, 1971- Section 5- The petitioners were in possession of the land recorded in the ownership of central government - proceedings of their eviction were initiated- petitioners pleaded that they had filed the suit which was decreed- they had constructed their house by investing huge amount - the Estate Officer found the possession of the petitioners to be unauthorized and ordered their eviction- petitioners had acknowledged the title of the respondents – respondents were restrained from forcibly evicting the petitioners – long possession is not equivalent to adverse possession- the findings recorded by the authorities are pure findings of fact which are not open in the judicial review- petition dismissed. (Para-6 to 22)

Cases referred:

Ashoka Marketing Ltd. and another versus Punjab National Bank and others (1990) 4 SCC 406

Suhas H. Pophale versus Oriental Insurance Company Limited and its Estate Officer (2014) 4 SCC 657

State of U.P. and another versus Zia Khan (1998) 8 SCC 483

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

Jagpal Singh & Ors. versus State of Punjab & Ors. AIR 2011 SC 1123

For the Petitioners : Mr.G.D.Verma, Senior Advocate with Mr.B.C.Verma, Advocate.

For the Respondents: Mr.Adarsh Sharma, Advocate vice Mr. Ashok Sharma, Assistant Solicitor General of India.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This writ petition has been filed with the following prayer:-

"That the eviction proceedings as started by the Respondents pursuant to notice Annexure P-2, may kindly be ordered to be set aside and quashed and since orders under challenge vide Annexure P-4 and Annexure P-8 passed by the Respondent No.2 and Additional District Judge, Sirmour, in appeal, respectively, may kindly be set aside and quashed."

2. The brief facts giving rise to the present case are that eviction proceedings under the Public Premises Act were initiated against the petitioners which culminated into an eviction order. This order was further assailed before the learned Appellate Authority, who too dismissed the same vide judgment dated 22.06.2015.

3. The subject-matter of dispute is the land comprised in Khasra Nos. 665 to 670, measuring 0-02-06 hectares, situated in revenue estate Chhawani, Nahan, District Sirmaur. The land in dispute was recorded in the ownership of the Central Government, who instituted proceedings for eviction as it was the petitioners, who were in possession of the same.

4. The petitioners contested these proceedings by claiming that the notice served upon them was malafide and without jurisdiction because in the Civil Suit No.45/1 of 2012 instituted by them, their possession for more than 60 years over the suit land had been established and the suit had been partly decreed. It was further averred that the suit land had been given to the predecessor of the petitioners by the erstwhile ruler of Sirmaur State and their possession over the suit land was from three generations. It was also averred that they had constructed their houses by investing huge amount.

5. The Estate Officer found the possession of the petitioners to be unauthorized and accordingly ordered their eviction which order, as observed earlier, was affirmed by the Appellate Authority.

We have heard Shri G.D.Verma, Senior Advocate assisted by Shri B.C.Verma, Advocate and have gone through the records of the case.

6. At the outset, it may be observed that the Public Premises Act has been enacted with a view to provide for eviction of unauthorized occupants from public premises. In the Statement of Objects and Reasons for this enactment, reference has been made to the judicial decisions whereby the 1958 Act was declared as unconstitutional and it has been mentioned:-

> *"63.....The court decisions, referred to above, have created serious difficulties for the Government inasmuch as the proceedings taken by the various Estate Officers appointed under the Act either for the eviction of persons who are in unauthorised occupation of public premises or for the recovery of rent or damages from such persons stand null and void..... It has become impossible for Government to take expeditious action even in flagrant cases of unauthorised occupation of public premises and recovery of rent or damages for such unauthorised occupation. It is, therefore, considered imperative to restore a speedy machinery for the eviction of persons who are in unauthorised occupation of public premises keeping in view at the same time the necessity of complying with the provision of the Constitution and the judicial pronouncements, referred to above."*

7. The Constitution Bench of the Hon'ble Supreme Court after considering the aforesaid Statement of Objects and Reasons in ***Ashoka Marketing Ltd. and another*** *versus* ***Punjab National Bank and others (1990) 4 SCC 406*** held that the Public Premises Act had been enacted to deal with the mischief of rampant unauthorised occupation of public premises by providing a speedy machinery for the eviction of persons in unauthorised occupation. It was held:-

> *"This shows that the Public Premises Act has been enacted to deal with the mischief of rampant unauthorised occupation of public premises by providing a speedy machinery for the eviction of persons in unauthorised occupation. In order to secure this object the said Act prescribes the time period for the various steps which are required to be taken for securing eviction of the persons in unauthorised occupation. The object underlying the enactment is to*

safeguard public interest by making available for public use premises belonging to Central Government, Companies in which the Central Government has substantial interest, Corporations owned or controlled by the Central Government and certain autonomous bodies and to prevent misuse of such premises."

8. Earlier to this, the Hon'ble Supreme Court compared the Public Premises Act with the general law and in para 55 held:-

"55.....The Public premises Act makes provision for a speedy machinery to secure eviction of unauthorised occupants from public premises. As opposed to the general law which provides for filing of a regular suit for recovery of possession of property in a competent Court and for trial of such a suit in accordance with the procedure laid down in the Code of Civil procedure, the Public Premises Act confers the power to pass an order or eviction of an unauthorised occupant in a public premises on a designated officer and prescribes the procedure to be followed by the said officer before passing such an order. Therefore, the Public Premises Act is also a special statute relating to eviction of unauthorised occupants from public premises...."

9. These observations of the Hon'ble Supreme Court were reiterated by the Hon'ble Supreme Court in recent decision in ***Suhas H. Pophale*** *versus* ***Oriental Insurance Company Limited and its Estate Officer (2014) 4 SCC 657.***

10. Shri G.D.Verma, learned counsel for the petitioners has vehemently argued that even if it is assumed that the petitioners are in unauthorized possession, even then, there is nothing on record to prove or even remotely suggest that it is the respondents, who are owners of the land. He further contends that once the Civil Court had found the petitioners to be in possession of the suit land for over a period of 60 years, they could not have been ordered to be evicted.

11. Indisputably, the decree passed by the Civil Court in the civil suit interse the parties has attained finality and reads thus:-

"It is held that, although, the plaintiffs are in settled possession of the suit land, but their possession has not matured into title. The plaintiffs are held not entitled to the declaration to the effect that they have become owners of the suit land by way of adverse possession. By way of injunction, the defendants are permanently restrained from dispossessing the plaintiffs from the suit land comprised in old Khasra No.861, 862, 863, 864 and 865 and new Khasra Nos.665, 666, 667, 668, 669 and 670, measuring 0-2-06 Hectares, situated in revenue Estate Chhawani Shamsherpur, Ward No.12, Nahan, District Sirmaur, H.P. forcefully and without following the process of law."

12. It is evident from the bare perusal of the decree that the petitioners themselves attorned and acknowledged the title of the respondents and the only plea raised by them was that they were in settled possession of the land for 60 years.

13. It is not in dispute that the decree passed by the Civil Court has attained finality and the only protection afforded to the petitioners was that they would not be dispossessed forcibly and without following the process of law.

14. The decree passed by the Civil Court was binding not only on the parties, but also the authorities constituted under the Public Premises Act. (Refer: ***State of U.P. and another*** *versus* ***Zia Khan (1998) 8 SCC 483***).

15. It has to be remembered that whenever an encroacher, illegal occupant or land grabber of the public property raises the plea that he has perfected title by adverse possession, the Court is bound to act with greatest seriousness, care and circumspection. Any laxity in this regard may result in destruction of right/title of the State to immovable property and give upper hand to the encroacher, unauthorized occupant or land grabber.

16. State is ordinarily rated as virtuous litigant and it goes without saying that the property recorded in government khata is the property of the public at large and, therefore, cannot be jeopardized by an individual or handful of people. The Court while dealing with a dispute involving public property should be at guard against any fraud, collusion and concoction militating against the fair play of justice jeopardizing the interest of the State.

17. Coming down heavily on the land grabbers, the Hon'ble Supreme Court in ***Mandal Revenue Officer*** *versus* ***Goundla Venkaiah and another (2010) 2 SCC 461*** held as under:-

> "47. In this context, it is necessary to remember that it is well-nigh impossible for the State and its instrumentalities including the local authorities to keep every day vigilance/watch over vast tracts of open land owned by them or of which they are the public trustees. No amount of vigil can stop encroachments and unauthorised occupation of public land by unscrupulous elements, who act like vultures to grab such land, raise illegal constructions and, at times, succeeded in manipulating the State apparatus for getting their occupation/possession and construction regularized. It is our considered view that where an encroacher, illegal occupant or land grabber of public property raises a plea that he has perfected title by adverse possession, the Court is duty bound to act with greater seriousness, care and circumspection. Any laxity in this regard may result in destruction of right/title of the State to immovable property and give upper hand to the encroachers, unauthorised occupants or land grabbers.
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> 48. In State of Rajasthan v. Harphool Singh (2000) 5 SCC 652, this Court considered the question whether the respondents had acquired title by adverse possession over the suit land situated at Nohar-Bhadra Road at Nohar within the State of Rajasthan. The suit filed by the respondent against his threatened dispossession was decreed by the trial Court with the finding that he had acquired title by adverse possession. The first and second appeals preferred by the State Government were dismissed by the lower appellate Court and the High Court respectively. This Court reversed the judgments and decrees of the courts below as also of the High Court and held that the plaintiff-respondent could not substantiate his claim of perfection of title by adverse possession. Some of the observations made on the issue of acquisition of title by adverse possession which have bearing on this case are extracted below: (SCC p.660, para 12)
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> > "12. So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned,

> the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/title of the State to immovable property and conferring upon a third-party encroacher title where he had none. The decision in P. Lakshmi Reddy v. L. Lakshmi Reddy AIR 1957 SC 314 adverted to the ordinary classical requirement -- that it should be nec vi, nec clam, nec precario -- that is the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. It was also observed therein that whatever may be the animus or intention of a person wanting to acquire title by adverse possession, his adverse possession cannot commence until he obtains actual possession with the required animus."
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> 49. A somewhat similar view was expressed in A.A. Gopalakrishnan v. Cochin Devaswom Board (2007) 7 SCC 482. While adverting to the need for protecting the properties of deities, temples and Devaswom Boards, the Court observed as under: (SCC p.486, para 10)
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> > "10.The properties of deities, temples and Devaswom Boards, require to be protected and safeguarded by their trustees/archakas/shebaits/ employees. Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples, deities and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This is possible only with the passive or active collusion of the authorities concerned. Such acts of 'fences eating the crops' should be dealt with sternly. The Government, members or trustees of boards/trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. It is also the duty of courts to protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation."

18. To similar effect is the judgment passed by the Hon'ble Supreme Court in ***Jagpal Singh & Ors.*** *versus* ***State of Punjab & Ors. AIR 2011 SC 1123*** wherein after coming down heavily on the unauthorized occupants, the Hon'ble Supreme Court made the following observations:-

> "13. We find no merit in this appeal. The appellants herein were trespassers who illegally encroached on to the Gram Panchayat land by using muscle power/money power and in collusion with the officials and even with the Gram Panchayat. We are of the opinion that such kind of blatant illegalities must not be condoned. Even if the appellants have built houses on the land in question they must be ordered to remove their constructions, and possession of the land in question must be handed back to the Gram Panchayat. Regularizing such illegalities must not be permitted because it is Gram Sabha land which must be kept for the common use of villagers of the village. The letter dated 26.9.2007 of the Government of Punjab permitting regularization of possession of these unauthorized occupants is not valid. We are of the opinion that such letters are wholly illegal and without jurisdiction. In our opinion such illegalities cannot be regularized. We cannot

allow the common interest of the villagers to suffer merely because the unauthorized occupation has subsisted for many years."

19. Insofar as the contention of the petitioners that even the Civil Court has found the petitioners to be in possession of the suit land for over a period of 60 years is concerned, suffice it to say that it is more than settled that long and continuous possession in law is not necessarily adverse and this question has already been dealt with in detail by this Bench in ***CWP No.4087 of 2014*** titled ***Manoj Singh*** *versus* ***Union of India and others,*** decided on 27.05.2015.

20. The findings recorded by the learned authorities are pure finding of fact which are ordinarily not open to judicial review unless the same are manifestly perverse or are unsupportable from the evidence on record which is not the position in the instant case.

21. It may be reiterated that it was the petitioners themselves who had sought declaration of title from the Civil Court which was denied to them and the said findings admittedly have attained finality. No doubt, the Civil Court protected the possession of the petitioners but only to the extent that they will not be dispossessed, save and except, in accordance with law.

22. The proceedings under the Public Premises Act cannot be said to be the proceedings which are not in accordance with law and the petitioners having been found in unauthorized occupation have, therefore, been rightly ordered to be evicted.

23. In view of the aforesaid discussion, we find no merit in this petition and the same is dismissed in limine. All pending applications also stand disposed of.

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

Rajeev Sood .....Petitioner.

Versus

Devinder Sain Chopra and others .....Respondents.

CMPMO No.529 of 2009.
Judgment reserved on : 02.07.2015.
Date of decision: July 06, 2015.

Code of Civil Procedure, 1908- Order 6 Rule 17- Trial Court dismissed the application on the ground that parties could not prove that in spite of due diligence the facts could not be pleaded prior to the commencement of the trial- suit was filed in the year 1982- the proviso to Order 6 Rule 17 came into force in 2002 – provision was retrospective and therefore, application could not have been dismissed on the ground that the party had failed to show due diligence. (Para-5 to 7)

Constitution of India, 1950- Article 227- Power under Article 227 is administrative as well as judicial which can be exercised at the instance of the aggrieved person as well as suo moto- however, it cannot be exercised to correct mere error of fact or law, unless error is based on clear ignorance or utter disregard of the provisions of law or error resulted in grave injustice- amendment is necessary to determine the real controversy between the parties, therefore, application allowed. (Para-16 to 23)

Cases referred:
State Bank of Hyderabad versus Town Municipal Council (2007) 1 SCC 765
Surya Dev Rai versus Ram Chander Rai and others (2003) 6 SCC 675
Radhey Shyam and another versus Chhabi Nath and others (2009) 5 SCC 616
Radhey Shyam and another versus Chhabi Nath and others (2015) 5 SCC 423
Shail versus Manoj Kumar and others (2004) 4 SCC 785
Pirgonda Hongonda Patil versus Kalgonda Shidgonda Patil and others AIR 1957 SC 363
M/s. Modi Spinning & Weaving Mills Co. Ltd. and another versus M/s. Ladha Ram & Co. (1976) 4 SCC 320
B.K.Narayana Pillai versus Parameswaran Pillai and another (2000) 1 SCC 712
Pankaja and another versus Yellappa(D) by L.R.s and others AIR 2004 SC 4102
Sajjan Kumar versus Ram Kishan (2005) 13 SCC 89
Rajesh Kumar Aggarwal & Ors. versus K.K.Modi & Ors. AIR 2006 SC 1647
Usha Balashaheb Swami and others versus Kiran Appaso Swami and others (2007) 5 SCC 602
North Eastern Railway Administration, Gorakhpur versus Bhagwan Das (dead) by LRS. (2008) 8 SCC 511
Peethani Suryanarayana and others versus Repaka Venkata Ramana Kishore and others (2009) 11 SCC 308
Abdul Rehman and another versus Mohd. Ruldu and others (2012) 11 SCC 341

For the Petitioner	:	Mr.Vinay Kuthiala, Senior Advocate with Mr.Diwan Singh Negi, Advocate.
For the Respondents	:	Mr.Sandeep Sharma, Advocate, for respondent No.1. Mr.G.C.Gupta, Senior Advocate with Mr.Subhash Sharma and Ms.Meera Devi, Advocates, for respondents No.5 to 11.

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 22.08.2009 passed by the learned District Judge (Forest), Shimla, whereby the application for amendment of the written statement preferred by the petitioner came to be dismissed.

2. The dispute relates to building No.8, Middle Bazar, Shimla, over which the respondents claim ownership, whereas, petitioner claims to have become owner by way of adverse possession.

3. As per the petitioner, the necessity for amendment arose because of the fact that the case of the plaintiffs was based upon mutation attested in their favour vide order dated 12.07.1977 on the strength of alleged sale certificate issued under the provisions of Displaced Persons (Compensation and Rehabilitation) Act, 1954. However, the said mutation was not only reviewed, but was cancelled by the competent authority which fact came to the knowledge of the petitioner only on 24.07.2009 when he applied for the copy of the revenue record (jamabandi).

4. This application was opposed by the plaintiffs/respondents on the ground that no such subsequent event has taken place with regard to suit property which had been acquired by them on the basis of the sale certificate. It was further contended that the revenue authorities had no jurisdiction or authority to cancel the sale made by the Rehabilitation Department.

5. The learned appellate Court dismissed the application only on the ground that after amendment of Rule 17 of Order 6 CPC, the parties were required to prove that inspite of due diligence, the party could not raise the matter before the commencement of the trial and accordingly dismissed the application.

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

6. At the outset, it may be observed that even the learned counsel for the respondents has fairly conceded that the order passed by the Court below dismissing the application only on the ground of due diligence cannot be supported in law. He has fairly submitted that the amendment brought about the Code of Civil Procedure by Amendment Act 22 of 2002 with effect from 01.07.2002, more particularly, provisions of Rule 17 of Order 6 CPC would only operate prospectively and not to the proceedings already instituted.

7. It is also not in dispute that this legal position has already been set at rest by the judgment of the Hon'ble Supreme Court in ***State Bank of Hyderabad*** *versus* ***Town Municipal Council (2007) 1 SCC 765*** wherein it was categorically held that by reason of Section 16(2) (b) of the Code of Civil Procedure (Amendment) Act, 2002, the amendments carried out therein would only apply in respect of the suits which were filed after 01.07.2002. As the suit in the present case has admittedly been filed in the year 1982, the proviso appended to Order 6 Rule 17 CPC as applied by the learned District Judge does not apply to the present proceedings.

8. Having conceded to a part of the impugned order, the learned Senior Counsel for the respondents has raised preliminary objection regarding the maintainability of this petition which has been filed under Article 227 of the Constitution of India. It is contended that once the specific remedy of Revision under the provision of 115 CPC has been provided for, then recourse to Article 227 of the Constitution of India cannot be permitted.

9. This objection according to the learned Senior Counsel for the petitioner will now have to be decided bearing in mind the recent judgment of three Judges of the Hon'ble Supreme Court on this issue.

10. The earlier view of the Hon'ble Supreme Court in ***Surya Dev Rai*** *versus* ***Ram Chander Rai and others (2003) 6 SCC 675*** that an order of the Civil Court was amenable to writ jurisdiction under Article 226 of the Constitution of India was doubted in ***Radhey Shyam and another*** *versus* ***Chhabi Nath and others (2009) 5 SCC 616*** and this is how the matter came up before the Bench of Hon'ble three Judges in ***Radhey Shyam and another*** *versus* ***Chhabi Nath and others (2015) 5 SCC 423*** and it was held:-

> "25. It is true that this Court has laid down that technicalities associated with the prerogative writs in England have no role to play under our constitutional scheme. There is no parallel system of King's Court in India and of all other courts having limited jurisdiction subject to supervision of King's Court. Courts are set up under the Constitution or the laws. All courts

in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of Tribunals or authorities or courts other than judicial courts. There are no precedents in India for High Courts to issue writs to subordinate courts. Control of working of subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of civil court stand on different footing from the orders of authorities or Tribunals or courts other than judicial/civil courts. While appellate or revisional jurisdiction is regulated by statutes, power of superintendence under Article 227 is constitutional. The expression "inferior court" is not referable to judicial courts, as rightly observed in the referring order in paras 26 and 27 quoted above.

26. The Bench in Surya Dev Rai also observed in para 25 of its judgment that distinction between Articles 226 and 227stood almost obliterated. In para 24 of the said judgment distinction in the two articles has been noted. In view thereof, observation that scope of Article 226 and 227 was obliterated was not correct as rightly observed by the referring Bench in Para 32 quoted above. We make it clear that though despite the curtailment of revisional jurisdiction under Section 115 CPC by Act 46 of 1999, jurisdiction of the High Court under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of Article 227 has been explained in several decisions including Waryam Singh vs. Amarnath AIR 1954 SC 215, Ouseph Mathai vs. M. Abdul Khadir (2002) 1 SCC 319, Shalini Shyam Shetty vs. Rajendra Shankar Patil (2010) 8 SCC 329 and Sameer Suresh Gupta vs. Rahul Kumar Agarwal (2013) 9 SCC 374. In Shalini Shyam Shetty, this Court observed : (SCC p.352, paras 64-67)

> "64. However, this Court unfortunately discerns that of late there is a growing trend amongst several High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases the High Courts, in a routine manner, entertain petitions under Article 227 over such disputes and such petitions are treated as writ petitions.
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> 65. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown that a private individual is acting in collusion with a statutory authority.
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> 66. We may also observe that in some High Courts there is a tendency of entertaining petitions under Article 227 of the Constitution by terming them as writ petitions. This is sought to be

> justified on an erroneous appreciation of the ratio in Surya Dev and in view of the recent amendment to Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999. It is urged that as a result of the amendment, scope of Section 115 CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed that has not resulted in expanding the High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.
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> 67. As a result of frequent interference by the Hon'ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice. This Court hopes and trusts that in exercising its power either under Article 226 or 227, the Hon'ble High Court will follow the time honoured principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest courts of justice within their jurisdiction will adhere to them strictly." (emphasis added)
>
> 27. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.
>
> 28. We may also deal with the submission made on behalf of the respondent that the view in Surya Dev Rai stands approved by larger Benches in Shail v. Manoj Kumar (2004) 4 SCC 785, Mahendra Saree Emporium(2) v.G.V.Srinivasa Murthy (2005) 1 SCC 481 and Salem Advocate Bar Assn.(2) v. Union of India (2005) 6 SCC 344 and on that ground correctness of the said view cannot be gone into by this Bench. In Shail, though reference has been made to Surya Dev Rai, the same is only for the purpose of scope of power under Article 227 as is clear from para 3 of the said judgment. There is no discussion on the issue of maintainability of a petition under Article 226. In Mahendra Saree Emporium, reference to Surya Dev Rai is made in para 9 of the judgment only for the proposition that no subordinate legislation can whittle down the jurisdiction conferred by the Constitution. Similarly, in Salem Bar Assn. in para 40, reference to Surya Dev Rai is for the same purpose. We are, thus, unable to accept the submission of learned counsel for the respondent."

11. It would be seen that in ***Radhey Shyam's case*** (supra), the Court was primarily concerned with the scope of power under Article 226 of the Constitution of India.

12. Insofar as the scope of power under Article 227 of Constitution of India is concerned, the Court has not doubted the correctness of the view taken by another Bench of Hon'ble three Judges in ***Shail*** *versus* ***Manoj Kumar and others (2004) 4 SCC 785***. The Hon'ble Supreme Court therein held that the High Court in exercise of the powers under Article 227 of the Constitution of India not only has the powers to make directions by way of guiding inferior Court or Tribunal as to the manner in which it would proceed hence, but

also has jurisdiction itself to pass such a decision or direction as the inferior Court or Tribunal should have made. But, then it was held that the powers under Article 227 of the Constitution of India are to be exercised sparingly and with care and caution. The Hon'ble Supreme Court observed as follows:-

> "3. In Surya Dev Rai V. Ram Chander Rai (2003) 6 SCC 675 this Court has held that in exercise of power of superintendence conferred under Article 227 of the Constitution of India on the High Court, the High Court does have power to make such directions as the facts and circumstances of the case may warrant, may be, by way of guiding the inferior Court or Tribunal as to the manner in which it would proceed hence and the High Court has the jurisdiction also to pass itself such a decision or direction as the inferior Court or Tribunal should have made. The jurisdiction under Article 227 of the Constitution is to be exercised sparingly and with care and caution, but is certainly one vesting in the High Court and meant to be exercised in appropriate cases. If convinced of the genuineness of the averments made by the petitioner and if convinced that a deserted woman, repeatedly knocking at its doors, is on the verge of destitution the High Court itself has jurisdiction to direct suitable amount of maintenance being awarded and to secure compliance with its directions, if the same relief the subordinate Court has failed to grant or to enforce. May be that the High Court could have passed such order on the next date of hearing. But the petitioner has approached this Court probably impelled by impatience."

13. Therefore, even in ***Shail's case*** (supra), the Hon'ble Supreme Court for deciding the scope of Article 227 only followed what had been laid down in ***Surya Dev Rai's case*** (supra).

14. Insofar as the power of superintendence conferred on the High Court under Article 227 is concerned, the same is administrative as well as judicial and is capable of being invoked at the instance of any person aggrieved or may even be exercised suo motu. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein.

15. The supervisory jurisdiction under Article 227 of the Constitution of India is exercised for keeping the subordinate Courts within the bounds of their jurisdiction. When a subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does not have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction. But then the exercise of supervisory jurisdiction is not available to correct mere error of fact or law unless the following requirements are satisfied:-

i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and

ii) a grave injustice or gross failure of justice has occasioned thereby.

16. Supervisory jurisdiction may be refused to be exercised wherein an alternative efficacious remedy by way of appeal or revision is available to the person. But, supervisory jurisdiction is to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest gross failure of justice or grave

injustice should occasion. Under Article 227 of the Constitution of India orders of both Civil and Criminal Court can be examined only in very exceptional case when manifest miscarriage of justice has been occasioned. Such power, however, is not to be exercised to correct a mistake of fact and law.

17. Reverting to the facts of the case, it would be noticed that the main ground for refusing the amendment was the erroneous interpretation and thereafter the applicability of the amended provisions of Rule 17 of Order 6 which concededly were not applicable to the facts of the case. Therefore, in such circumstances, it cannot probably be disputed that this petition under Article 227 of the Constitution of India is definitely maintainable.

The preliminary objection raised by the respondents is, therefore, rejected.

18. Now coming to the merits of the petition, it can be safely concluded that the legal position regarding amendment of written statement is somewhat settled. The principles culled out from various judicial decisions regarding amendment of written statement are enumerated herein under:-

I. The object of Order VI Rule 17 CPC is that the court should try the merits of the case that come before them and should consequently allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to either side.

II. The rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in larger interest of doing full and complete justice to the parties before the court. Thus, the court should always give leave to amend pleadings of a party unless it is satisfied that the party applying was acting malafide. The amendment to pleading should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice.

III. Amendment sought after substantial delay could be allowed even if barred by limitation if that sub-serves the cause of justice and avoids further litigation.

IV. While dealing with amendment applications the Courts should not adopt a hyper technical approach. Liberal approach should be general rule particularly in cases where the other party can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties.

V. Amendments should be refused only where the other party cannot be placed in the same position before the amendment but the amendment would cause him an injury which could not be compensated in costs.

VI. A prayer for amendment of the plaint and a prayer of written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. The aforesaid principle does not apply to the amendment of the written statement.

VII. In case of amendment of a written statement, the courts are more liberal in allowing an amendment than that of a plaint as the question of prejudice is far less in the former than in the latter. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent

pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.

VIII. Inconsistent and alternative pleas can be allowed to be taken in a written statement provided they are not destructive of each other.

IX. Mere delay in making an amendment application itself is not enough to refuse amendment particularly when the delay does not cause serious prejudice to the other party and can be compensated in terms of money.

X. It would not be open to a party to wriggle out of an admission made by him by seeking amendment of the written statement as admission is a material piece of evidence which would be in favor of a person who would be entitled to take advantage of that admission. However, the admission can be explained and it would be permissible to add rider and/or proviso thereto while keeping the admission intact.

(The afore-noted principles have been culled out by this Court from the decisions of the Hon'ble Supreme Court reported in **Pirgonda Hongonda Patil** versus **Kalgonda Shidgonda Patil and others AIR 1957 SC 363, M/s. Modi Spinning & Weaving Mills Co. Ltd. and another** versus **M/s. Ladha Ram & Co. (1976) 4 SCC 320, B.K.Narayana Pillai** versus **Parameswaran Pillai and another (2000) 1 SCC 712, Pankaja and another** versus **Yellappa(D) by L.R.s and others AIR 2004 SC 4102, Sajjan Kumar** versus **Ram Kishan (2005) 13 SCC 89, Rajesh Kumar Aggarwal & Ors.** versus **K.K.Modi & Ors. AIR 2006 SC 1647, Usha Balashaheb Swami and others** versus **Kiran Appaso Swami and others (2007) 5 SCC 602, North Eastern Railway Administration, Gorakhpur** versus **Bhagwan Das (dead) by LRS. (2008) 8 SCC 511, Peethani Suryanarayana and others** versus **Repaka Venkata Ramana Kishore and others (2009) 11 SCC 308** and **Abdul Rehman and another** versus **Mohd. Ruldu and others (2012) 11 SCC 341).**

19. In the application filed for amendment, the petitioner had sought to add Para 8 and 9 in the originally existing Para 7 of the preliminary objections to the following effect:-

"8. That the suit of the plaintiffs is neither maintainable nor competent in its present form.

9. The plaintiffs are guilty of suppressio veris in much as they have not disclosed the true fact about replacement of its name from the ownership of suit property in the name of the Department of Custodian, and have thus tried to play fraud on the Hon'ble Court by suppressing the said fact."

And similarly in Para 2 of the written statement on merits, the following paragraph was intended to be incorporated.

"That it is worthwhile to submit here that during the pendency of the present suit, the mutation allegedly sanctioned in favour of the plaintiffs on 12-7-1977, has been reviewed and rejected by the competent revenue officer vide order dated 29-12-1986. (Copy of Register Intakal is filed herewith). It is further submitted that vide order dated 22-3-2001, in case No.53/2001 passed by the Assistant Collector, Settlement, during the settlement operation, the name of the plaintiff has been ordered to be replaced in the revenue records by the name of Department of Custodian, in the column of

ownership. To the knowledge of the replying defendant, the said orders have been passed by the revenue authorities, due to illegality/infirmity in the sale allegedly made in favour of the plaintiffs. The suit property is now recorded in the name of the Department of Custodian, and the possession has been shown to be that of the tenants. The said fact is evident from the Latest Jamabandi for the year 2004-2005, a copy of which is filed with the written statement. Thus, the plaintiffs are not the owners of the suit property and thus have no locus to file and maintain the present suit."

20. In reply to this application, the respondents filed the following reply:-

"5. That no subsequent development has taken place, due to which amendment in the written statement has become necessary or which goes to the root of the matter or which may have vital bearing, on the final out come of the present lis. No amendment deserves to be allowed. That it is denied that the plaintiffs are not the owner of the suit property."

21. Now, in case the proposed amendment is seen, the petitioner has clearly stated that the mutation that had allegedly been sanctioned earlier in favour of the plaintiffs (respondents herein) on 12.07.1977 had been reviewed and rejected by the competent Revenue Officer vide order dated 29.12.1986. It was further submitted that vide order dated 22.03.2001 in Case No.53/2001 the Assistant Collector, Settlement, had ordered the name of the plaintiff to be replaced by the name of Department of Custodian in the column of ownership in the revenue record.

22. The denial to such averments is too general and not even specific and, therefore, I see no reason why the amendment should have been refused. It may also be noticed that in the suit filed by the plaintiffs/respondents, the Department of Custodian is not even a party. Though, as per the proposed amendment, it is the department, who after review of the mutation is the owner of the property. These are all matters which are required to be proved by leading clear, cogent and convincing evidence. But, then in absence of the real owner, the plaintiffs/respondents cannot be permitted to oppose the application only because the petitioner has now questioned their title, because in case the plaintiffs themselves do not possess or lack the title, then even the suit itself is not maintainable.

23. The contents of the proposed amendment which have not been categorically and specifically denied have cast a cloud upon the title of the plaintiffs. Therefore, the proposed amendment is necessary for determining the real controversy between the parties as this would be in larger interest of doing full and complete justice to the parties before the Court.

24. As a consequence to the aforesaid findings, there is merit in this petition and the same is accordingly allowed. The impugned order dated 22.08.2009 is set aside and the amendment as proposed is allowed. The pending application, if any, also stands disposed of.

25. As the suit has been instituted in the year 1982, the learned appellate Court shall make all endeavours to decide the appeal as expeditiously as possible and in no event later than **31st December, 2015.** The parties through their counsel are directed to appear before the appellate Court on **15.07.2015.**

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

State of H.P. and others ….. Appellants

Vs.

Dechan Palmo …. Respondent

LPA No. 179 of 2014
Reserved on: 23.6.2015
Date of decision: July 06, 2015

Constitution of India, 1950- Article 226- Petitioner was selected as an O.T. teacher by duly constituted DPC on 30.7.1987 – she was adjusted in Govt. Primary School, Cheling and was shown to be working as C & V Teacher on tenure basis- she claimed regularization – petitioner was regularized during the pendency of the petition before Writ Court- held, that her entire length of service is to be counted at the time of regularization- petitioner was qualified O.T. who was appointed as JBT on tenure basis – respondents cannot be permitted to take advantage of their own wrong by posting the writ petitioner as JBT when she was admittedly an O.T. – therefore, Writ Court had rightly ordered her regularization with the benefit of past service.

Case referred:
Paras Ram vs. State of Himachal Pradesh and another Latest HLJ 2009 (HP) 887

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

For the Respondent : Mr. Sanjeev Bhushan, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This Letters Patent Appeal is directed against the judgment passed by learned writ Court on 9.8.2011 in CWP (T) No. 12072 of 2008 whereby the services of the writ petitioner (respondent herein) were ordered to be regularized by taking into account the entire service rendered by her w.e.f. 30.7.1987.

2. The facts, in brief, may be noticed. The writ petitioner was selected as an O.T. teacher by duly constituted DPC on 30.7.1987 and after being appointed joined services on 13.10.1987. The writ petitioner vide order dated 15.10.1992 was adjusted in Govt. Primary School, Cheling and vide order dated 4.5.1994 the writ petitioner was shown to be working as Classical and Vernacular Teacher (C & V Teacher) on tenure basis in Govt. High School, Keylong.

3. Aggrieved by the non-regularisation of her services, the writ petitioner approached the erstwhile Tribunal by filing Original Application No. 1741 of 2005 wherein it was averred that she had been discriminated by non-regularisation of her services whereas all the teachers, who were working on tenure basis, had been regularized on completion of 10 years of services.

4. In the Original Application, the writ petitioner claimed the following reliefs:

(i) Respondents may be directed to regularise the services of the applicant as LT teacher from 1997 with all consequential benefits of pay, seniority, etc. etc.

(ii) That respondents may be directed to count the services rendered by the applicant on tenure basis accept the option exercised by the applicant and further respondent may be directed to continue the applicant in existing pay scale of TGT uptil 1.7.97 and thereafter only to fix him in the pay scale to the post of Lecturer, with all consequential benefits of pay, arrears and further the accruing benefits in pension may be granted to the applicant.

5. The respondents contested the petition by filing a short reply, and paras 3 and 4 thereof, reads as follows:

"3. That the replying respondent No.2 had issued instructions during the year 1998 to all the Distt. Education Officer in Himachal Pradesh (copy attached as Annexure R-1) that all such S.V. posts were to be converted into O.T./L.T./Home Science teacher depending upon the qualification of each such S.V. Teacher. Her case also falls in this category and is to be decided as per instructions from time to time as regard her for regularisation.

4. That the replying respondent after considering the case of the applicant has directed the Dy. Director of Elementary Education, L&S at Keylong vide letter No. EDN-H(III)E(I)OA No. 1741/2005 dated 22.11.2007 to consider/process the case of the applicant as per the instructions for the purpose of regularisation if otherwise she is found eligible. It is further submitted that the competent authority to consider such cases is the Dy. Director of Elementary Education of the Distt. who has now been directed to process and finalise her case."

6. On abolition of the Tribunal, the case was transferred to this Court and during the pendency of the case the services of the writ petitioner were ordered to be regularized as L.T. w.e.f. 18.5.2004 vide office order dated 22/23.4.2008.

7. The learned writ Court came to the conclusion that the respondents while considering the case of the writ petitioner for regularisation had not taken into consideration the various orders placed on record by the writ petitioner as Annexures A-1 to A-3, therefore, her case was required to be considered by taking into account her entire length of service rendered w.e.f. 30.7.1987 for the purpose of regularisation.

8. The State has preferred this appeal on the ground that the learned writ Court had over-looked the fact that the writ petitioner was though a qualified O.T. but was initially appointed as JBT on tenure basis on 30.7.1987 and working as such till 17.5.1994. She joined the post of Senior Vernacular Teacher on tenure basis only on 18.5.1994, which was subsequently designated as O.T. and therefore, the services of the petitioner on completion of 10 years w.e.f. 18.5.1994 were rightly regularized on 18.5.2004. It is further contended that the period of services rendered as JBT at best could count for the purpose of pension in accordance with Rule 13 of the Pension Rules read with the judgment passed by this Court on 19.5.2009 in CWP(T) No. 7712 of 2008 titled Paras Ram vs. State of H.P. and another.

9. We have heard learned counsel for the parties and have gone through the record of the case carefully.

10. The appellants have vehemently argued that the issue in hand is squarely covered by the judgment rendered by learned Single Judge of this Court in ***Paras Ram*** vs. ***State of Himachal Pradesh and another Latest HLJ 2009 (HP)*** 887 wherein it was held that the benefit of ad hoc service rendered by an employee prior to his regular service on the same post would be counted only for the purpose of increments and pension.

11. The appellants also relied upon a Division Bench judgment of this Court in LPA No. 36 of 2010 titled Sita Ram vs. State of H.P. and others decided on 15th July, 2010 which affirmed the view taken by the learned Single Judge in ***Paras Ram's*** case (supra).

12. In addition to this, the appellants would submit that the issue in the instant appeal is otherwise no longer *res-integra* in view of a Division Bench judgment of this Court in CWP No. 10529 of 2011 titled Youdhisther Kumar Sharma vs. State of H.P. and another, decided on 7.12.2011 wherein it was held that where a person had worked in dual capacity i.e. some period as JBT and some period as Shastri, then as far as the period of service rendered in the capacity of JBT is concerned, the same would count only for the purpose of pension as per Rule 13 of the Pension Rules, whereas the ad hoc/tenure period in the post of Shastri would count for the purpose of increments as also pension.

13. The judgments relied upon by the appellants are clearly distinguishable. In ***Paras Ram's*** case (supra), the petitioner therein had passed diploma of Drawing Teacher and in the year 1997 came to be appointed on ad hoc basis against the post of Junior Basic Trained Teacher (JBT) on 31.8.1995. The State Government took a conscious decision to regularize those C & V teacher, who had put in 10 years of service as JBT. The grievance of the petitioner therein was that the services rendered by him before his regularisation against the post of JBT should be counted towards the annual increments and this Court on the basis of the letter dated 27.9.1977 allowed the petition and directed the respondents to count the ad hoc services rendered by the petitioner before his regularisation for the purpose of annual increments.

14. In ***Sita Ram's*** case, the view taken in ***Paras Ram's*** case was affirmed and it was held that if ad hoc service is followed by regular service in the same post, the said service could be counted for the purpose of increments and it was further held that any service that is counted for the purpose of increment, will also count for pension.

15. In ***Youdhishther Kumar case*** (supra) the petitioner had worked for some time as JBT and for some time as Shastri. This Court after placing reliance on ***Sita Ram's*** case (supra) held that as per the service rendered in JBT is concerned, this period would count only for the purpose of pension as per Rule 13 of the Pension Rules, whereas the period of ad hoc /tenure rendered in the post of Shastri is concerned, the same if followed by regular appointment would count towards increments and pension.

16. It is not in dispute that the writ petitioner was a qualified O.T., who was initially posted as a JBT on tenure basis on 30.7.1987 and worked as such till 17.5.1994. She came to be posted as Senior Vernacular Teacher on 18.5.1994. It is not even the case of the appellants that the writ petitioner was not qualified for being appointed or has been wrongly appointed as O.T. Therefore, none of the judgments as relied upon by the appellants are applicable to the facts of the present case.

17. It is the specific case of the writ petitioner that similarly situated persons have been regularized in the year 1997 after completion of 10 years of services and it was only the writ petitioner, who had been left out. The respondents have not controverted this allegation and, therefore, the same having gone un-rebutted is deemed to be correct. At this stage, we may also observe that even the further allegations of the writ petitioner that even during the period w.e.f. 30.7.1987 to 17.5.1994 she had been continuously performing the duties of Language Teacher have not been controverted.

18. Even otherwise, the appellants cannot be permitted to take advantage of their own wrong by posting the writ petitioner as JBT when she was admittedly an O.T. It is more than settled that in matters of postings and transfers, an employee has no say and the mere fact that writ petitioner had been posted as a JBT would not take away either the qualification or the post to which the writ petitioner had otherwise been appointed.

19. In view of the aforesaid discussion, we find no merit in this appeal and the same is accordingly dismissed, so also the pending application(s) if any.

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

Anurag Sharma and another ...Petitioners.

Versus

State of H.P. and others ...Respondents.

CWP No. 2775 of 2015-H
Reserved on: 01.07.2015
Decided on: 07.07.2015

Constitution of India, 1950- Article 226- Petitioners filed a Writ Petition claiming themselves to be holding the district cadre posts of Indian National Congress in District Kangra- they also stated that they are public spirited persons- the person against whom allegations were made were not arrayed before the Court as parties- petition appears to be politically motivated, which could not be called to be public interest litigation- hence the same is dismissed. (Para-5 to 19)

Cases referred:

Ashok Kumar Pandey versus State of West Bengal and others, AIR 2004 Supreme Court 280
M.C. Mehta versus Union of India & Ors., 2007 AIR SCW 6459
Neetu versus State of Punjab & Ors., 2007 AIR SCW448
A. Abdul Farook versus Municipal Council, Perambalur & Ors., 2009 AIR SCW 5292
M/s. Holicow Pictures Pvt. Ltd. versus Prem Chandra Mishra and Ors., 2008 AIR SCW 343
State of Uttaranchal versus Balwant Singh Chaufal and others, 2010 AIR SCW 1029
Girish Vyas & Anr. v. State of Maharashtra & Ors., 2012 AIR SCW 3088
Ayaaubkhan Noorkhan Pathan v. State of Maharashtra and Ors., 2012 AIR SCW 6177
Institute of Law and others versus Neeraj Sharma and others, 2014 AIR SCW 6357
Devinder Chauhan Jaita versus State of Himachal Pradesh and others, 2014 ILR (HP) VI 709

Vijay Kumar Gupta versus State of Himachal Pradesh & others, 2015 ILR(HP) I, 351

For the petitioners: Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 to 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

The writ petitioners have invoked the jurisdiction of this Court by the medium of this writ petition for issuing the following writs on the grounds taken in the memo of the writ petition:

> *"(i) That the impugned acts of respondents No. 1 to 5 above stated which amounts to executive inaction on their part and most irresponsible behaviour of respondent No. 6 and its leaders while making statement of the situation above stated may kindly be quashed and set aside with directions to respondents No. 1 to 5 to appoint committee of experts from the office of respondent No. 2 to frame guidelines to be followed in its letter and spirit in future with respect to issuing statements in print and social media and further directions may kindly be issued to respondents 1 to 5 to immediately and promptly book the persons who violate said guidelines.*
>
> *Respondent No. 6 may kindly be directed to evolve its own guidelines so that restraints can be put on its leaders not to encash the sentiments of the innocent citizens of the State of HP in a situation like present one and further not to issue statements without verifying true and correct aspect of a situation and further more to put restraints on its leaders not to aggravate the false situation like present one in future.*
>
> *(ii) Directions may kindly be issued to the respondents to act immediately and promptly to book the wrong doers in the case in hand and the said persons may kindly be prosecuted in accordance with law for violating the particular provisions of law and the said prosecution may be taken to its logical end so that the same can act eye-opener for others in coming times.*
>
> *(iii) That directions may kindly be issued to the political leaders in the State of HP to be more cautious and careful in making statements and be more responsible, particularly in a situation like above stated so that peace of the State can be maintained as in the present case, the statements made by leaders of respondent No. 6 were contrary to the public peace and tranquility thereby creating need to issue*

appropriate directions as are deemed fit by this Hon'ble Court.

(iv) That respondent No. 7 and 8 who took very active part in time and again displaying the false messages and posting the same to other people also without confirming the news, SHO, Police Station, Kangra may kindly be directed to investigate into the matter with respect to the part played by respondents No. 7 and 8 in giving air to the false news and the said respondents may kindly be ordered to be booked, dealt with and prosecution in accordance with law.

(v) Records of the case may kindly be summoned.

(vi) Any other relief as may be deemed just and proper keeping in view the facts and circumstances of the case may also be granted in favour of the petitioners"

2. In fact, the writ petitioners have pleaded that this writ petition be treated as public interest litigation, is not permissible for the following reasons:

3. The writ petitioners have to carve out a cause that the litigation is in the interest of public at large, they have no interest in the litigation and it is not a publicity interest litigation or private interest litigation or politics interest litigation or paisa making interest or for any other oblique purpose.

4. The writ petitioners in para 3 of the writ petition have specifically averred that they are wedded to Indian National Congress and holding the district cadre posts in District Kangra , but, in the same breath, they have stated that they are public spirited persons.

5. The perusal of the writ petition does disclose that it is not in the public interest, appears to be for some other reasons, which, prima facie, have been disclosed in paras 3, 3 (a) and 4 of the writ petition. Virtually, the writ petitioners are trying to draw some action against the opponent political leaders or the persons who have allegedly made the false statements against the sitting MLA/Cabinet Minister and his relatives in order to gain political edge.

6. It is apt to reproduce paras 3, 3 (a) and 4 of the writ petition herein:

"3. The facts, as necessary for the adjudication of the present writ petition, are that the petitioners apart from being wedded to Indian National Congress and are holding the posts in the said party in District Kangra, are also public spirited persons and have been pursuing public causes at given intervals. With respect to this aspect of the matter, no other and further details are being given; however, in case contradicted by any of the parties, said details will be mentioned. This fact is being stated, more particularly in view of the fact that very very burning issue is sought to be brought to the notice of this Hon'ble Court by way of present writ petition, as the particular respondents arrayed as respondents have failed to abide by the dictate of law while handling the situation qua which details are being given here

in below and further being office bearers of the opposite party in the State of HP, it failed to check in the public cause in its right perspective, being professed by its leaders and members. The situation owing to said aspect so aggravated that there were agitations and dharnas and respondents will not deny this aspect of the matter that just owing to the hoax created by giving totally false statements in the press and social media, situation boiled down to such an extent that had it not been checked particularly on the requests having been made by the petitioners and like minded persons that there ought to have been constitutional break down in the State of HP.

In view of this only, the present writ petition is being filed to invoke the extra ordinary jurisdiction as is vested in this Hon'ble Court solely for the sake of justice/substantial justice so that in future such like happening may not be there at least in the State of HP which is particularly a clam loving State.

3(a) That present is not an adversary litigation but the writ petition is being filed solely in the public interest and petitioners humbly submit that there may not be any other glaring situation as was arose in District Kangra at Dharamshala and to control such situation in public interest. Therefore, respondents are liable to evolve procedure, to follow and get the same followed.

4. That there is yet another aspect owing to which the petitioners are invoking the extra ordinary jurisdiction of this Hon'ble Court as a few miscreants, with the help of leaders of opposite parties, took advantage of the situation and left no stone unturned to malign the image of sitting MLA from Dharamshala and a Cabinet Minister. this is not expected at all from the leaders who have remained themselves as Ministers. In this view of the matter only, respondent No. 6 is added as party respondent. This Hon'ble Court is humbly requested to issue suitable directions to all the political parties, particularly respondent No. 6 to guide its members and leaders not to react unnecessarily and without confirming the news. The leaders may be having political rivalry, but that cannot be allowed to be used for personal cause and in any manner which amounts to hitting another person below the belt. This is what has been done by the leaders of respondent No. 6 while issuing statements in the press with respect to the incident in question."

7. The police authorities are seized of the matter and it is for the police to carry out investigation and if case is made out or if false statement has been made, the provisions of the Code of Criminal Procedure (for short "CrPC") can be invoked.

8. The persons, against whom allegations have been made, are not before the Court and it appears that under the disguise of public interest, they are trying to invoke the jurisdiction of this Court in order to meet the political ends on behalf of the Cabinet Minister/MLA, mention of which has been made in para 6 of the writ petition. We wonder why the said Minister/MLA and so called the nephew of the Minister have not invoked the appropriate remedy, if any, in order to seek the redressal of their grievances.

9. The origin of the public interest litigation has been discussed by the Apex Court right from inception, particularly from the year 1976. The Apex Court in a case titled as **Ashok Kumar Pandey versus State of West Bengal and others,** reported in **AIR 2004 Supreme Court 280,** has given details as to how a petition can be treated as public interest litigation and held that it is a weapon to be used with great care, with all circumspection and in the rarest of rare cases and it is the duty of the Court to lift the veil and see what is behind it. It is apt to reproduce paras 12, 14, 15, 16 and 18 to 28 of the judgment herein:

> *"12. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the Court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs .*
>
> *13. .....*
>
> *14. The Court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motive, justifiable executive actions. In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public*

grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing with imposters and busy bodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect.

15. Courts must do justice by promotion of good faith, and prevent law from crafty invasions. Courts must maintain the social balance by interfering where necessary for the sake of justice and refuse to interfere where it is against the social interest and public good. (See State of Maharashtra v. Prabhu, (1994 (2) SCC 481), and Andhra Pradesh State Financial Corporation v. M/s. GAR-Re-Rolling Mills and another (AIR 1994 SC 2151). No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions. (See Dr. B. K. Subbarao v. Mr. K. Parasaran, (1996) 7 JT 265). Today people rush to Courts to file cases in profusion under this attractive name of public interest. They must inspire confidence in Courts and among the public.

16. As noted supra, a time has come to weed out the petitions, which though titled as public interest litigations are in essence something else. It is shocking to note that Courts are flooded with large number of so called public interest litigations where even a minuscule percentage can legitimately be called as public interest litigations. Though the parameters of public interest litigation have been indicated by this Court in large number of cases, yet unmindful of the real intentions and objectives, Courts are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases. Though in Dr. Duryodhan Sahu v. Jitendra Kumar Mishra and others (AIR 1999 SC 114), this Court held that in service matters PILs should not be entertained, the inflow of so-called PILs involving service matters continues unabated in the Courts and strangely are entertained. The least the High Courts could do is to throw them out on the basis of the said decision. The other interesting aspect is that in the PILs, official documents are being annexed without even indicating as to how the petitioner came to possess them. In one case, it was noticed that an interesting answer was given as to its possession. It was stated that a packet was lying on the road and when out of curiosity the petitioner opened it, he found copies of the official documents. Whenever such frivolous pleas are taken

to explain possession, the Court should do well not only to dismiss the petitioners but also to impose exemplary costs. It would be desirable for the Courts to filter out the frivolous petitions and dismiss them with costs as afore-stated so that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the Courts.

17. .....

18. In Gupta's case (supra) it was emphatically pointed out that the relaxation of the rule of locus standi in the field of PIL does not give any right to a busybody or meddlesome interloper to approach the Court under the guise of a public interest litigant. He has also left the following note of caution : (SCC p. 219, para 24)

> *"But we must be careful to see that the member of the public, who approaches the Court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The Court must not allow its process to be abused by politicians and others to delay legitimate administrative action or to gain a political objective."*

19. In State of H. P. v. A. Parent of a Student of Medical College, Simla and others (1985 (3) SCC 169), it has been said that public interest litigation is a weapon which has to be used with great care and circumspection.

20. Khalid, J. in his separate supplementing judgment in Sachidanand Pandey v. State of W. B. (1987 (2) SCC 295, 331) said :

> *"Today public spirited litigants rush to Courts to file cases in profusion under this attractive name. They must inspire confidence in Courts and among the public. They must be above suspicion. (SCC p. 331, para 46)*
>
> *xx xx xx*
>
> *Public interest litigation has now come to stay. But one is led to think that it poses a threat to Courts and public alike.*
>
> *Such cases are now filed without any rhyme or reason. It is, therefore, necessary to lay down clear guidelines and to outline the correct parameters for entertainment of such petitions. If Courts do not restrict the free flow of such cases in the name of public interest litigations, the traditional litigation will suffer and the Courts of law, instead of dispensing justice, will have to take upon themselves administrative and executive functions, (SCC p. 334, para 59)*

xx xx xx

I will be second to none in extending help when such help is required. But this does not mean that the doors of this Court are always open for anyone to walk in. It is necessary to have some self-imposed restraint on public interest litigants."

21. Sabyasachi Mukharji, J. (as he then was) speaking for the Bench in Ramsharan Autyanuprasi v. Union of India (1989 Supp (1) SCC 251), was in full agreement with the view expressed by Khalid, J. in Sachidanand Pandey's case (supra) and added that 'public interest litigation' is an instrument of the administration of justice to be used properly in proper cases.

22. See also separate judgment by Pathak, J. (as he then was) in Bandhua Mukti Morcha v. Union of India (1984 (3) SCC 161).

23. Sarkaria, J. in Jasbhai Motibhai Desai v. Roshan Kumar Haji Bashir Ahmed and others (1976 (1) SCC 671) expressed his view that the application of the busybody should be rejected at the threshold in the following terms (SCC p. 683, para 37) :

"It will be seen that in the context of locus standi to apply for a writ of certiorari, an applicant may ordinarily fall in any of these categories : (i) 'person aggrieved'; (ii) 'stranger'; (iii) busybody or meddlesome interloper. Persons in the last category are easily distinguishable from those coming under the first two categories. Such persons interfere in things which do not concern them. They masquerade as crusaders for justice. They pretend to act in the name of pro bono publico, though they have no interest of the public or even of their own to protect. They indulge in the pastime of meddling with the judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity; while the ulterior intent of some applicants in this category, may be no more than spoking the wheels of administration. The High Court should do well to reject the applications of such busybodies at the threshold."

24. Krishna Iyer, J. in Fertilizer Corporation Kamgar Union (Regd.) Sundri and others v. Union of India, (1981 (1) SCC 568) in stronger terms stated (SC p. 589, para 48) :

"If a citizen is no more than a wayfarer or officious intervener without any interest or concern beyond what belongs to any one of the 660 million people of

this country, the door of the Court will not be ajar for him."

25. In Chhetriya Pardushan Mukti Sangharsh Samiti v. State of U. P. (1990 (4) SCC 449), Sabyasachi Mukharji, C. J. observed : (SCC p. 457, para 8)

"While it is the duty of this Court to enforce fundamental rights, it is also the duty of this Court to ensure that this weapon under Article 32 should not be misused or permitted to be misused creating a bottleneck in the superior Court preventing other genuine violation of fundamental rights being considered by the Court."

26. In Union Carbide Corporation v. Union of India, (1991 (4) SCC 584, 610), Ranganath Mishra, C. J. in his separate judgment while concurring with the conclusions of the majority judgment has said thus (SCC p. 610, para 21):

"I am prepared to assume, nay, concede, that public activists should also be permitted to espouse the cause of the poor citizens but there must be a limit set to such activity and nothing perhaps should be done which would affect the dignity of the Court and bring down the serviceability of the institution to the people at large. Those who are acquainted with jurisprudence and enjoy social privilege as men educated in law owe an obligation to the community of educating it properly and allowing the judicial process to continue unsoiled."

27. In Subhash Kumar v. State of Bihar, (1991 (1) SCC 598) it was observed as follows :

"public interest litigation cannot be invoked by a person or body of persons to satisfy his or its personal grudge and enmity. If such petitions under Article 32, are entertained it would amount to abuse of process of the Court, preventing speedy remedy to other genuine petitioners from this Court. Personal interest cannot be enforced through the process of this Court under Article 32 of the Constitution in the garb of a public interest litigation. Public interest litigation contemplates legal proceeding for vindication or enforcement of fundamental rights of a group of persons or community which are not able to enforce their fundamental rights on account of their incapacity, poverty or ignorance of law. A person invoking the jurisdiction of this Court under Article 32 must approach this Court for the vindication of the fundamental rights of affected person and not for the purpose of vindication of his personal grudge or enmity. It is the duty of this Court to discourage such petitions and to ensure that the course of justice is not obstructed or polluted by

> *unscrupulous litigants by invoking the extraordinary jurisdiction of this Court for personal matters under the garb of the public interest litigation".*
>
> *28. In the words of Bhagwati, J. (as he then was) "the Courts must be careful in entertaining public interest litigations" or in the words of Sarkaria, J. "the applications of the busybodies should be rejected at the threshold itself" and as Krishna Iyer, J. has pointed out, "the doors of the Courts should not be ajar for such vexatious litigants"."*

10. The Apex Court also in a case titled as **M.C. Mehta versus Union of India & Ors.,** reported in **2007 AIR SCW 6459,** laid down the tests how jurisdiction of the Court can be invoked and which petition can be treated as a public interest litigation. It is apt to reproduce paras 8, 10 and 11 herein:

> *"8. We have no doubt in our mind that judiciary may step in where it finds the actions on the part of the Legislature or the Executive are illegal or unconstitutional but the same by itself would not mean that public interest litigation, in a case of this nature, should be converted into an adversarial litigation. The jurisdiction of the court to issue a writ of continuous mandamus is only to see that proper investigation is carried out. Once the court satisfies itself that a proper investigation has been carried out, it would not venture to take over the functions of the Magistrate or pass any order which would interfere with its judicial functions. Constitutional scheme of this country envisages dispute resolution mechanism by an independent and impartial tribunal. No authority, save and except a superior court in the hierarchy of judiciary, can issue any direction which otherwise take away the discretionary jurisdiction of any court of law. Once a final report has been filed in terms of sub-section (1) of Section 173 of the Code of Criminal Procedure, it is the Magistrate and Magistrate alone who can take appropriate decision in the matter one way or the other. If it errs while passing a judicial order, the same may be a subject matter of appeal or judicial review. There may a possibility of the prosecuting agencies not approaching the higher forum against an order passed by the learned Magistrate, but the same by itself would not confer a jurisdiction on this Court to step in. We should not entertain the application of the learned Amicus Curiae on such presupposition. A judicial order passed by a Magistrate may be right or wrong, but having regard to the hierarchy of the courts, the matter which would fall for consideration before the higher court should not be a subject matter of a decision of this bench. In an unlikely event of the interested parties in not questioning such orders before the higher forum, an independent public interest litigation may be filed. Instances are not unknown where this Court has entertained public*

interest litigation in cases involving similar question under Article 32 of the Constitution of India. [See Rajiv Ranjan Singh Lalan VIII v. Union of India [(2006) 6 SCC 613].

9. .....

10. The parameters within which this Court should function in such matters are, therefore, well-defined.

11. It is one thing to say that this Court will not refrain from exercising its jurisdiction from issuing any direction for protection of cultural heritage and the ecology and environment; but then in discharge of the said duty, this Court should not take upon itself the task of determining the guilt or otherwise of an individual involved in the criminal proceeding. It should not embark upon an enquiry in regard to the allegations of criminal misconduct so as to form an opinion one way or the other so as to prima facie determine guilt of a person or

otherwise. Any direction which could be issued, in our opinion, has already been issued by us on 27.11.2006, stating :

> *"34. We, accordingly, direct CBI to place the evidence/material collected by the investigating team along with the report of the SP as required under Section 173(2) CrPC before the court/Special Judge concerned who will decide the matter in accordance with law. It is necessary to add that, in this case, we were concerned with ensuring proper and honest performance of duty by CBI and our above observations and reasons are confined only to that aspect of the case and they should not be understood as our opinion on the merits of accusation being investigated. We do not wish to express any opinion on the recommendations of the SP. It is made clear that none of the other opinions/recommendations including that of the Attorney General for India, CVC shall be forwarded to the court/Special Judge concerned."*

11. The Apex Court in the cases titled as **Neetu versus State of Punjab & Ors.,** reported in **2007 AIR SCW448,** and **A. Abdul Farook versus Municipal Council, Perambalur & Ors.,** reported in **2009 AIR SCW 5292,** has laid down the same principle.

12. In another case titled as **M/s. Holicow Pictures Pvt. Ltd. versus Prem Chandra Mishra and Ors.,** reported in **2008 AIR SCW 343,** the Apex Court has held that the Courts should filter out the frivolous petitions. It is apt to reproduce paras 18 and 22 as under:

> *"18. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest*

and / or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the Court is acting bona fide and not for personal gain or private motive or political motivation or other oblique considerations. The Court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives, and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

19. .....

20. .....

21. .....

22. As noted supra, a time has come to weed out the petitions, which though titled as public interest litigations are in essence something else. It is shocking to note that Courts are flooded with large number of so called public interest litigations where even a minuscule percentage can legitimately be called as public interest litigations. Though the parameters of public interest litigation have been indicated by this Court in large number of cases, yet unmindful of the real intentions and objectives, Courts are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases. It is also noticed that petitions are based on newspaper reports without any attempt to verify their authenticity. As observed by this Court in several cases newspaper reports do not constitute evidence. A petition based on unconfirmed news reports, without verifying their authenticity should not normally be entertained. As noted above, such petitions do not provide any basis for verifying the correctness of statements made and information given in the petition. It would be desirable for the Courts to filter out the frivolous petitions and dismiss them with costs as afore-stated so that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the Courts."

13. It would also be profitable to reproduce para 10 of the judgment in **M/s. Holicow Pictures's case (supra)** herein:

> *"10. When there is material to show that a petition styled as a public interest litigation is nothing but a camouflage to foster personal disputes, the said petition is to be thrown out. Before we grapple with the issue involved in the present case, we feel it necessary to consider the issue regarding public interest aspect. Public Interest Litigation which has now come to occupy an important field in the administration of law should not be "publicity interest litigation" or "private interest litigation" or "politics interest litigation" or the latest trend "paise income litigation". If not properly regulated and abuse averted, it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well. There must be real and genuine public interest involved in the litigation and not merely an adventure of knight errant borne out of wishful thinking. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have a locus standi and can approach the Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration. These aspects were highlighted by this Court in The Janta Dal v. H. S. Chowdhary (1992 (4) SCC 305) and Kazi Lhendup Dorji v. Central Bureau of Investigation, (1994 Supp (2) SCC 116). A writ petitioner who comes to the Court for relief in public interest must come not only with clean hands like any other writ petitioner but also with a clean heart, clean mind and clean objective. {See Ramjas Foundation v. Union of India, (AIR 1993 SC 852) and K. R. Srinivas v. R. M. Premchand, (1994 (6) SCC 620)."*

14. The Apex Court in the case titled as **State of Uttaranchal versus Balwant Singh Chaufal and others,** reported in **2010 AIR SCW 1029** and has dealt with the origin and development of public interest litigation and has also summarized the basic principles which can be made foundation for preserving the purity and sanctity of public interest litigation. It is apt to reproduce paras 45 and 198 of the judgment herein:

> *"45. In this judgment, we would like to deal with the origin and development of public interest litigation. We deem it appropriate to broadly divide the public interest litigation in three phases.*
>
> *Phase-I: It deals with cases of this Court where directions and orders were passed*

primarily to protect fundamental rights under Article 21 of the marginalized groups and sections of the society who because of extreme poverty, illiteracy and ignorance cannot approach this court or the High Courts.

Phase-II: It deals with the cases relating to protection, preservation of ecology, environment, forests, marine life, wildlife, mountains, rivers, historical monuments etc. etc.

Phase-III: It deals with the directions issued by the Courts in maintaining the probity, transparency and integrity in governance.

xxx xxx xxx

198. In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:

(1) The courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.

(2) Instead of every individual Judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this court immediately thereafter.

(3) The courts should prima facie verify the credentials of the petitioner before entertaining a P.I.L.

(4) The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.

(5) The court should be fully satisfied that substantial public interest is involved before entertaining the petition.

(6) The court should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.

(7) The courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.

(8) The court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting

similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations."

15. The Apex Court has also discussed the issue in the cases titled as **Girish Vyas & Anr. v. State of Maharashtra & Ors.,** reported in **2012 AIR SCW 3088,** and **Ayaaubkhan Noorkhan Pathan v. State of Maharashtra and Ors.,** reported in **2012 AIR SCW 6177.** It is apt to reproduce para 132 of the judgment in **Girish Vyas's case (supra)** herein:

"132. Public Interest Litigation is not in the nature of adversarial litigation, but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful as observed by this Court in paragraph 9 of Bandhua Mukti Morcha Vs. Union of India, [AIR 1984 SC 802. By its very nature the PIL is inquisitorial in character. Access to justice being a Fundamental Right and citizen's participatory role in the democratic process itself being a constitutional value, accessing the Court will not be readily discouraged. Consequently, when the cause or issue, relates to matters of good governance in the Constitutional sense, and there are no particular individuals or class of persons who can be said to be injured persons, groups of persons who may be drawn from different walks of life, may be granted standing for canvassing the PIL. A Civil Court acts only when the dispute is of a civil nature, and the action is adversarial. The Civil Court is bound by its rules of procedure. As against that the position of a Writ Court when called upon to act in protection of the rights of the citizens can be stated to be distinct."

16. It would also be profitable to reproduce para 22 of the judgment in **Ayaaubkhan Noorkhan Pathan's case (supra)** herein:

"22. Thus, from the above it is evident that under ordinary circumstances, a third person, having no concern with the case at hand, cannot claim to have any locus-standi to raise any grievance whatsoever. However, in the exceptional circumstances as referred to above, if the actual persons aggrieved, because of ignorance, illiteracy, inarticulation or poverty, are unable to approach the court, and a person, who has no personal agenda, or object, in relation to which, he can grind his own axe, approaches the court, then the court may examine the issue and in exceptional circumstances, even if his bonafides are doubted, but the issue raised by him, in the opinion of the court, requires consideration, the court may proceed suo-motu, in such respect."

17. The same principle has been laid down by the Apex Court in the case titled as **Institute of Law and others versus Neeraj Sharma and others,** reported in **2014 AIR SCW 6357.**

18. This Court has also laid down the same principle in a batch of writ petitions, **CWP No. 7249 of 2010,** titled as **Devinder Chauhan Jaita versus State of Himachal Pradesh and others,** being the lead case, decided on 03.12.2014 and another batch of writ petitions, **CWP No. 9480 of 2014,** titled as **Vijay Kumar Gupta versus State of Himachal Pradesh & others,** being the lead case, decided on 09.01.2015.

19. Keeping in view the averments contained in the writ petition read with the origin of public interest litigation, development of law and the test laid down by the Apex Court, it can be safely held that the writ petition merits to be dismissed in limine for the reason that entire litigation appears to be politically motivated, which is admitted by the writ petitioners in the writ petition, as discussed hereinabove.

20. Having glance of the above discussions, this writ petition is misconceived and is dismissed in limine.

****

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

CWP No. 6978 of 2012 along with
CWP No.7852 of 2012.
Date of Decision : 7th July, 2015.

1.	**CWP No. 6978 of 2012.**	
	Progressive Farmer Society Kharapather	.....Petitioner.
	Versus	
	H.P. APM Board, Khalini and others	.....Respondents.
2.	**CWP No. 7852 of 2012**.	
	Giri Ganga Co-operative Society and others	.....Petitioners.
	Versus	
	State of H.P., through Managing Director, H.P. State Agriculture Produce Marketing Board, Khalini, Shimla-2 and another	.....Respondents.

Constitution of India, 1950- Article 226- Respondent had constructed a Sub Marketing Yard - booths and shops were allotted to the various categories as per prescribed quota- petitioner being co-operative society was entitled to 10% of the quota- petitioner challenged the quota of 50% for the local dealers- held, that no material was brought on record to show that 50% quota prescribed for the local dealers was discriminatory or it was not based upon any intelligible differentia having any nexus with the object sought to be achieved- rather, experience of local dealers was recognized by the respondent by prescribing the quota of 50%- petition dismissed. (Para-2 to 4)

For the Petitioner(s): Mr. Davinder Chauhan Jaita, Advocate for the petitioner in CWP No. 6978 of 2012 and Ms. Neelam Kaplas, Advocate for the petitioners in CWP No.7852 of 2012.

For respondents : Mr. Sanjeev Sharma, Advocate for respondent No. 1 both the petitions.

Mr. S.C. Sharma, Advocate for respondent No.2 in both the petitions.

Ms. Uma Manta, Advocate, for respondents No. 3,4,5,8,10 and 12 in CWP No.6978 of 2012.

Ms. Kamlesh Shandil, Advocate, for respondents No.9 and 11 in CWP No.6978 of 2012.

Mr. Rohit Chauhan, Advocate vice Mr. Suneet Goel, Advocate for respondent No.7 in CWP No.6978 of 2012.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

Both these petitions pertain to a common subject matter, hence, they are disposed of by a common order.

2. The petitioners are Co-operative Societies. Respondents No.1 and 2 constructed/raised Sub Marketing Yard at Kharapathar. The booths and shops raised therein were meant for allotment to the categories as enshrined in Annexure R-1. The prescription of a quota for the categories enumerated in Annexure R-1, is in the manner as extracted hereinafter:-

"1. Local Fruits & Vegetables growers	15%
2. Local Dealers, Traders in Agricultural Produce	50%
3. Co-operative and allied Institutions	10%
4. Scheduled castes	10%
5. Scheduled Tribes	5%
6. Backward castes	10%"

The quota fixed or determined therein for allotment of shops/booths constructed in the Sub Marketing Yard, Kharapathar, to the Co-operative and allied Institutions is 10%. The respondents-board issued an advertisement comprised in Annexure R-2 for eliciting from the eligible/desirous aspirants their respective quotations. On the respondents having received quotations from the aspirants/entities concerned falling in the aforesaid delineated categories qua whom an earmarked quota aforesaid was prescribed, proceeded to in consonance thereto make allotments of booths/shops situated within Sub Marketing Yard, Kharapathar, respectively in their favour. The petitioners through these writ petitions have challenged the prescription of a quota of 50% for the category of Local Dealers, Traders in Agricultural Produce. Even though, the learned counsel appearing for the petitioners with much fervour have canvassed before this Court that the aforesaid quota of 50% prescribed in Annexure R-1 for the aforesaid category inconsonance whereof an advertisement was issued by the respondents and allotments of shops/booths existing in Sub Marketing Yard, Kharapathar were made, is constitutionally bad, inasmuch as it is arbitrary and discriminatory. Nonetheless, there exist no apposite averment in the pleadings portraying the fact that the quota of 50% earmarked for local dealers, traders in agricultural produce as the respondents No.3 to 12 are, is per se discriminatory and arbitrary, inasmuch as the fixation or earmarking of a quota of 50% for the local dealers, traders in agricultural produce, is in derogation to or militative of the spirit of the Himachal Pradesh Agricultural Produce Market Act, 1969 and the Himachal Pradesh Agricultural and Horticultural Produce Marketing (Development) Act, or that the creation of the category of local dealers, traders in

Agricultural Produce qua whom a 50% quota has been fixed or determined under Annexure R-1 for allotment of shops/booths situated within Sub Marketing Yard, Kharapathar demonstrably constitutes an unreasonable classified category not anvilled upon any intelligible differentia having any nexus with the object to be achieved by the statutes aforesaid. Rather, it appears that the earmarking of a quota of 50% to the local dealers, traders in agricultural produce by the respondents-board is grooved in and motivated by the fact that the said category while possessing experience in dealing with/selling horticultural and agricultural produce would ensure that the produce of the local farmers, as brought to the Sub Marketing yard wherein the booths/shops stand allotted to them, fetch a remunerative or handsome price. In case, the experience of the local dealers, traders in agricultural produce, hence, is the implicit ground revered by the competent authority while fixing a quota of 50% for them for allotment of booths/shops within the Sub Marketing Yard, Kharapathar, consequently, the said factum cannot at all be construed to render the fixation or earmarking or determination of a quota of 50% for local dealers, traders in agricultural produce, for allotment of shops/booths therein, to be ridden with the vice or taint of discrimination or arbitrariness, hence, warranting its being quashed and set aside. Rather it has to be held that the classification of or categorization of local dealers, traders in agricultural produce as a specific entity in Annexure R-1 besides determination of a quota of 50% in its favour for allotment of shops/booths in Sub Marketing Yard, Kharapathar, hence, is a reasonable classification anvilled or anchored upon an intelligible differentia having a nexus with the salutary object referred to hereinabove. Consequently, the learned counsel appearing for the petitioners is interdicted to contend before this Court that the quota of 50% as earmarked or determined by Annexure R-1 in favour of local dealers, traders in agricultural produce for theirs hence being entitled to inconsonance thereto claim allotment of shops/booths within Sub Marketing Yard, Kharapathar, is ridden with any vice or taint necessitating any interference by this Court.

3. The learned counsel appearing for the petitioner with much fervour argued before this Court that the respondents Nos. 3 to 12, who belong to the category of local dealers, traders in agricultural produce qua whom 50% quota has been determined under Annexure R-1 for allotment of shops/booths within Sub Marking Yard, Kharapathar did not fulfill the necessary criteria for construing them to be falling within the ambit of the said category inasmuch as some of them do not belong to either Kotkhai and Jubbal, besides shops/booths to some of them stand already allotted elsewhere which operates as a proscription against their being allotted shops/booths in Sub Marketing Yard, Kharapathar. Consequently, he urges that when respondents No.3 to 12 do not fall in the category of local dealers, traders in agricultural produce, hence, allotment of shops or booths to them in Sub Marketing Yard, Kharapathar necessitates interference, inasmuch as allotment of booths/shops made in their favour being liable to be quashed and set aside. The learned counsel appearing for the petitioner while addressing the said arguments has remained wholly oblivious to the factum of the definition of local dealers, traders in agricultural produce as stand defined in Clause -2 of Annexure R-2, which stand extracted hereinafter:-

> "2. **Category: Local dealers, traders in fruits and vegetables**:-
>
> (i) the applicant shall be registered with the Agricultural Produce Market Society, Shimla and Kinnaur as dealer/trader in fruits and vegetables or dealing in the pursuit of sale of fruits and vegetables within Jubbal and Kotkhai Tehsil."

With a portrayal therein of a person being construable to be falling in the category of local dealers, traders in agricultural produce in the event of his having come to be registered with the Agricultural Produce Market Society , Shimla or Kinnaur as a dealer, trader in agricultural produce or his undertaking or being engaged in the pursuit of sale of vegetables and fruits within the limits of Jubbal and Kotkhai Tehsil, as such, it was incumbent upon the petitioners to portray in the writ petitions the trite fact of the allottees, who have been arrayed as respondents No.3 to 12 being neither registered with the Agricultrual Produce Market Society, Shimla or Kinnaur as dealers, traders in agricultural produce nor theirs being engaged in the business/pursuit of sale of fruits and vegetables within Jubbal or Kotkhai, Tehsil. In the face of the learned counsel appearing for the petitioners having omitted to disclose or divulge in the writ petition the fact that in the face of the allottees, who have been arrayed as respondents No.3 to 12, hence, having not acquired the necessary eligibility criteria to render hence unvindicable the allotments of shops/booths, in their favour by the respondents No.1 and 2, existing in the Sub Marketing Yard, Kharapathar. In sequel, the learned counsel appearing for the petitioners cannot contend before this Court that respondents No.3 to 12 while not having achieved or satiated the essential eligibility criteria as enshrined in Clause-2 of Annexure R-2 appended with CWP No.6978 of 2012, were rendered ineligible to participate in the process of allotment of shops/booths within the Sub Marketing Yard, Kharapathar, nor also the learned counsel appearing for the petitioner can contend that hence the allotment of shops/booths in their favour is liable to be quashed and set aside. Rather, it has to be held that the respondents had made allotments of shops/booths existing in Sub Marketing Yard, Kharapathar in favour of the allottees only on their having drawn satisfaction qua their entitlement to it/them in all respects. Moreover, the eligibility criteria omitting to oust or debar the allottees arrayed as respondents No.3 to 12 from participating in the process of allotments of shops/booths in Sub Marketing Yard, Kharapathar, in the event of theirs having come to be previously allotted shops/booths elsewhere, does obviously strip the vigour of the contention of the learned counsel appearing for the petitioners that given the factum of some of the allottees having been allotted shops/booths elsewhere, theirs being hence interdicted to claim allotment of shops/booths in Sub Marketing Yard, Kharapathar.

4. The petitioners belong to the category of Co-operative Societies, qua whom a 10% quota has been earmarked. The respondent No.2 proceeded to allot shops/booths in Sub Marketing Yard, Kharapathar inconsonance with the prescription of a quota in their favour as displayed in Annexure R-1, to “Himkiran Cooperative Society Kiana, Tehsil Jubbal, District Shimla” and “The Hill Queen Fruit Growing-cum-Marketing Cooperative Society, Praunthi, Tehsil Jubbal, District Shimla, H.P.” Even though, the allotment of shops/booths to the aforesaid Cooperative Societies was assailable on all available grounds at the instance of the petitioners, rather lamentably the petitioners have omitted to challenge the allotment of shops to the aforesaid Cooperative Societies in the Sub Marketing Yard, Kharapathar. Consequently, with no claim having been staked by the petitioners to the shops/booths allotted to the aforesaid co-operative societies in Sub Marketing Yard, Kharapathar, as such, the allotment of shops/booths to the aforesaid cooperative societies cannot be interfered with by this Court.

5. For the foregoing reasons, there is no merit in these writ petitions, as such, both the writ petitions are dismissed. Stay orders, if any, granted in favour of the petitioners, are also vacated. All pending applications also stand disposed of.

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

Raman Thakur. …Appellant.

Versus

Raksha Kumari. …Respondents.

RSA No. 224 of 2015
Reserved on: 2.7.2015
Decided on: 7.7.2015

Transfer of Property Act, 1882- Section 122- Plaintiff claimed that gift deed executed by 'M', father of the plaintiff in favour of defendant was wrong and applicant had no right in the property and property was ancestral in nature- record showed that 'S' was owner in possession of the suit land – he had gifted the suit land to his son 'C' who had executed the will of the property in favour of his sons 'M' and 'O' in equal share- plaintiff had failed to prove any custom amongst the Rajput of Hamirpur- plaintiff had also failed to prove the ancestral nature of the suit land- property acquired by way of gift does not fall within the definition of ancestral property- therefore, suit was rightly dismissed by the trial Court.

(Para-13 to 15)

Case referred:

C.N. Arunachala Mudaliar vs. C.A. Muruganatha Mudailiar and another, AIR 1953 SC 495

For the Appellant : Mr. Arvind Sharma, 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, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 5.9.2014 rendered by the District Judge, Hamirpur in Civil Appeal No. 66 of 2011.

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 possession of land comprised in Khata No.1 min, Khatauni No.1 min, Khasra No. 267 measuring 4 kanal and 5 marlas situated in Tikka Anu Kalan, Tappa Bajuri, Tehsil and District Hamirpur, H.P. and also that the gift deed dated 28.11.2003 executed by one Mohinder Paul Singh in favour of respondent-defendant (hereinafter referred to as the "defendant" for convenience sake) is illegal and null and void. Plaintiff is son of Mohinder Paul Singh. Defendant taking advantage of her relationship with Mohinder Paul Singh got executed the gift deed dated 28.11.2003 in her favour. Mohinder Paul Singh had no right to gift the property in favour of defendant as the property was ancestral and could not be alienated in any manner.

3. The suit was contested by the defendant. It is denied that the suit land is ancestral and the plaintiff and Mohinder Paul Singh were governed by agricultural customs of Kangra and Hamirpur Districts. It is also denied that Mohinder Pal Singh was not competent to gift the land in suit and the gift was legal and valid.

4. Replication was filed by the plaintiff. Issues were framed by the Civil Judge (Junior Division) on 12.3.2008 and thereafter additional issues were framed on 20.2.2009 and 10.3.2010. Learned Civil Judge (Junior Division) dismissed the suit on 10.6.2011. Plaintiff preferred an appeal before the District Judge, Hamirpur. He dismissed the same on 5.9.2014. Hence, the present appeal.

5. Mr. Arvind Sharma, learned counsel for the appellant, on the basis of the substantial questions of law framed, has vehemently argued that both the courts below has misread and misinterpreted Ex.DW-1/A gift deed. He has also contended that the gift deed was executed in violation of custom prevailing in the area and both the courts below have misconstrued the oral as well as documentary evidence.

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

9. PW-1 Raman Thakur has deposed that his father had received the suit land from his ancestors and there was no necessity to gift the suit land to the defendant. However, in his cross-examination, he has admitted that the suit land was received by his father from his grandfather Chattar Singh by way of "will". The suit land was gifted to the defendant by his father as they were in good terms. However, due to differences between them, his father had moved an application mark-A for cancellation of gift deed dated 28.11.2003. He had accompanied his father on 5.5.2005 to the office of Tehsildar.

10. PW-2 Kishori Lal has deposed that the parties are Rajput by caste. They are governed by Jamindari customs. Mohinder Paul Singh had received the land from his ancestors. He has cultivated the land for Mohinder Paul Singh for the last 10-12 years.

11. Defendant Raksha Devi has appeared as DW-1. She has deposed that her father had two sons and his property developed upon his two sons, i.e. brothers of the defendant through "will". The suit land was gifted to her by Mohinder Paul Singh and after the gift deed; she was in possession of the suit land.

12. DW-2 Amar Singh has attested the gift deed. DW-4 Gurdev Singh was another attesting witness. According to them, Mohinder Paul Singh has made gift deed in favour of the defendant. The contents of the gift deed were read over to him and he voluntarily and in sound disposition of mind signed the gift deed Ex.DW-1/A. The gift deed was scribed by DW-3 Mukhtayar Singh.

13. The document mark 'A' has not been duly proved. According to Jamabandi Ex.P-5 for the year 1910-11, Surat Singh was recorded as owner in possession of the suit land. He has gifted the suit land to his son Chattar Singh vide mutation No.49. Chatter Singh executed "will" of his property in favour of his sons Mohinder Paul Singh and Ominder Singh in equal shares vide mutation No. 1280 ExP-12. Mohinder Paul Singh has gifted the land to defendant by way of registered gift deed Ex.DW-1/A. DW-1 Raksha Devi, DW-2 Amar Singh, DW-4 Gurdev Singh and DW-5 Sanjay Kumar have not spoken about the existence of any custom prevailing in the area. The plaintiff has failed to prove existence of any custom amongst the Rajputs of Hamirpur. The plaintiff has also placed reliance on question Nos. 86

and 92 in Middleton Collection of Customary Law of Kangra District. Since the plaintiff has failed to prove that the land was ancestral, these questions have no bearing. The plaintiff has miserably failed to prove ancestral nature of the property or any custom, which bars the gift of self acquired property in favour of other person. The gift deed dated 28.11.2003 Ex.DW-1/A is legal and valid.

14. Their Lordships of the Hon'ble Supreme Court in ***C.N. Arunachala Mudaliar*** vs. ***C.A. Muruganatha Mudailiar and another***, AIR 1953 SC 495 have held that when the father obtains the grandfather's property by way of gift, he receives it not because he is a son or has any legal right to such property but because his father chose to bestow a favour on him which he could have bestowed on any other person as well. Their Lordships have further held that there is no warrant for saying that according to the Mitakshara, an affectionate gift by the father to the son constitutes ipso facto ancestral property in the hands of the donee. In other words, a property gifted or bequeathed by a father to his son cannot become ancestral property in the hands of the donee or legatee simply by reason of the fact that the donee or legatee got it from his father or ancestor. Their Lordships have held as under:

> **"[12] So far as the first ground is concerned, the foundation of the doctrine of equal ownership of father and son in ancestral property is the well known text of Yagnavalkya: vide Yagnavalkya Book 2, 129 which says:**
>
> **"The ownership of father and son is co-equal in the acquisitions of the grandfather, whether land, corody or chattel."**
>
> **It is to be noted that Vijnaneswar invokes this passage in Chap. I, Sec. 5 of his work, where he deals with the division of grandfather's wealth amongst his grandsons. The grandsons, it is said, have a right by birth in the grandfather's estate equally with the sons and consequently are entitled to shares on partition, though their shares would be determined 'per stirpes' and not 'per capita'.**
>
> **This discussion has absolutely no bearing on the present question. It is undoubtedly true that according to Mitakshara, the son has a right by birth both in his father's and grandfather's estate, but as has been pointed out before, a distinction is made in this respect by Mitakshara, itself. In the ancestral or grandfather's property in the hands of the father, the son has equal rights with his father. While in the self-acquired property of the father his rights are unequal by reason of the father having an independent power over or predominant interest in the same: vide Mayne's Hindu Law, 11th Edition, page 336. It is obvious however, that the son can assert this equal right with the father only when the grandfather's property has devolved upon his father and has become ancestral property in his hands. The property of the grandfather can normal vest in the father. as ancestral property it and when the father inherits such property on the death of the grandfather or receives it, by partition, made by the grandfather himself during his life-time. On both these occasions the grandfather's property comes to the father by virtue of the latter's legal right as a son or descendant of the former and consequently it becomes ancestral property in his hands.**

But when the father obtains the grandfather's property by way of gift, he receives it not because he is a son or has any legal right to such property but because his father chose to bestow a favour on him which he could have bestowed on any other person as well. The interest which he takes in such property must depend upon the will of the grantor. A good deal of confusion, we think, has arisen by not keeping this distinction in mind. To find out whether a property is or is not ancestral in the hands of a particular person, not merely the relationship between the original and the present holder but the made of transmission also must be looked to; and the property can ordinarily be reckoned as ancestral only if the present holder has got it by virtue of his being a son or descendant of the original owner. The Mitakshara, we think, is fairly clear on this point. It has placed the father's gifts under a separate category altogether and in more places than one has declared them exempt from partition. Thus, in Chap. I, Sec. 1. placitum 19 Mitakshara refers to a text of Narada which says:

"Excepting what is gained by valour, the wealth of a wife and what is acquired by science which are three sorts of property exempt from partition; and any 'favour conferred by a father'."

Chapter 1, sec. 4 of Mitakshara deals with effects not liable to partition and property "obtained through the father's favour" finds a place in the list of things of which no partition can be directed: vide section 4, placitum 28 of Mitakshara. This is emphasised in Sec. 6 of chapter I which discusses the rights of posthumous sons or sons born after partition. In placitum 13 of the section it is stated that though a son born after partition takes the whole of his father's and mother's property, yet if the father and mother has affectionately bestowed some property upon a separated son, that must remain with him. A text, of Yagnavalkya is then quoted that "the effects which have been given by the father and by the mother belong to him on whom they are bestowed": vide Yagnavalkya 2, 124.

[13] It may be noted that the expression 'obtained through favour of the father' which occurs in placitum 28, Sec. 4 of Mitakshara is very significant. A Mitakshara father can make a partition of both the ancestral and self-acquired property in his hands any time he likes even without the concurrence of his sons: but if he chooses to make a partition, he has got to make it in accordance with the directions laid down in the law. Even the extent of inequality, which is permissible as between the eldest and the younger sons, is indicated in the text: vide Mit. chapter I. Section 2. Nothing depends upon his own favour or discretion. When, however, he makes a gift which is only an act of bounty, he is unfettered in the exercise of his discretion by any rule or dictate of law. It is in these gifts obtained through the favour of the father that Vijnaneswar, following the earlier sages, declares the exclusive right of the sons. We hold, therefore, that there is no warrant for saying that according to the Mitakshara, an affectionate gift by the father to the son constitutes 'ipso facto' ancestral property in the hands of the done."

15. Both the courts below have correctly appreciated the oral as well as documentary evidence and there is no need to interfere with the well reasoned judgments and decrees passed by both the courts below.

16. In view of the analysis and discussion made hereinabove, there is no merit in the present appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

****

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

H.P.State Cooperative Bank Ltd. and another. .....Plaintiffs.

Vs.

Utter Pradesh State Financial Corporation and another. ...Defendants.

Civil Suit No. 26 of 2009.
Judgment reserved on: 27.5.2015
Date of Judgment: July 8, 2015.

Code of Civil Procedure, 1908- Section 20- Plaintiffs had purchased SLR- the interest was remitted to plaintiffs at Shimla- held, that part of cause of action had accrued in favour of plaintiffs at Shimla- therefore, Court at Shimla had jurisdiction to hear and entertain the suit. (Para-13)

Interest Act, 1978- Section 3(3)(c)- Plaintiffs claimed the interest to the extent of Rs. 76 lacs from the defendant- plaintiffs thereafter sold the SLR to CKP Cooperative Bank Limited Mumbai- held, that plaintiffs are not entitled to interest upon interest- therefore, plaintiffs are only entitled for amount of Rs.76 lacs from the defendant. (Para-10)

Recovery of Debt due to Banks and Financial Institutions Act, 1993- Section 18- Plaintiffs' bank was constituted under the provision of H.P. Co-operative Societies Act- held, that provision of recovery of debt due to Bank and Financial Institutions Act is not applicable to the Co-operative Bank. (Para-16)

For the plaintiffs: Mr. Raman Sethi, Advocate.
For defendants: Mr.Ashwani K. Sharma, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present civil suit is filed for the recovery of Rs.90,67,466/- (Ninety lacs sixty seven thousand four hundred sixty six) on account of principal amount and interest.

BRIEF FACTS OF THE CASE:

2. It is pleaded that plaintiff bank is constituted under the provision of HP Cooperative Societies Act. It is further pleaded that Managing Director of plaintiff bank is competent to represent plaintiff bank and has authority to sign, verify plaint and swear in affidavit, file application and engage Advocate. It is further pleaded that Sh Rajinder Singh son of Sh Kehar Singh is the Managing Director of plaintiff bank and is competent to file present suit. It is further pleaded that defendant No.1 is a body of Corporate established under the provisions of State Financial Corporations Act 1951. It is further pleaded that defendant No.1 floated a scheme in the year 2005 regarding SLR bonds. It is further pleaded that plaintiff bank had purchased bonds under the scheme worth Rs.6 crores on 14th

December 2005. It is further pleaded that maturity date of bond was 12.2.2011. It is further pleaded that plaintiff bank thereafter on dated 15.12.2005 also purchased bonds to the tune of Rs.3,50,00,000/- (Three crores fifty lacs). It is further pleaded that purchased bond was to mature in the month of February 2011. It is further pleaded that bond to the tune of Rs.9,50,00,000/-(Nine crores fifty lacs) was to bear interest at the rate of 8% per annum. It is further pleaded by plaintiffs that defendant No.1 did not pay interest on the bonds as scheduled. It is further pleaded that total interest accrued on the principal amount of bonds comes to Rs.76 lacs. It is further pleaded that defendant No.2 is a State Government of Utter Pradesh and is the guarantor of payment of principal amount invested in the bonds. It is further pleaded that scheme was floated by defendant No.1 with the approval of defendant No.2. It is further pleaded that on account of non payment of interest by defendants, plaintiffs have suffered great financial loss. It is further pleaded that defendant No.1 through communication dated 12.11.2006 requested plaintiffs to accept only principal amount and waive the interest. It is further pleaded that thereafter plaintiffs repeatedly requested defendants to pay interest to the tune of Rs. 76 lacs but despite repeated requests defendants did not pay interest amount. It is further pleaded that thereafter legal notice under Section 80 CPC was served. It is further pleaded that despite legal notice defendants failed to liquidate the liability. It is further pleaded that cause of action has accrued to plaintiffs on dated 14.12.2005 and 15.12.2005 and further arose on dated 12.8.2006, 12.2.2007, 31.8.2006 and 28.2.2007. It is further pleaded that cause of action further accrued to the plaintiffs on dated 28.6.2008. Prayer for decree of suit as mentioned in relief clause of plaint sought.

3. Per contra written statement filed on behalf of defendant No.1 pleaded therein that no cause of action accrued to the plaintiffs in Himachal Pradesh. It is further pleaded that contract of payment of interest entered into with bond holders has frustrated and same could not be enforced. It is further pleaded that plaintiffs have no locus standi to file present suit through authorized person. It is further pleaded that U.P. Financial Corporation is a statutory body established under the provisions of State Financial Corporations Act 1951. It is further pleaded that bonds were purchased by plaintiff No.1 through open market subject to all credit risk. It is further pleaded that plaintiff bank has no legal right to enforce the liability of interest against co-defendant No.1 in view of poor financial status of co-defendant No.1. It is further pleaded that Small Industrial Development Bank of India has also totally stopped refinancing of loans in respect of defendant No.1. It is further pleaded that defendant No.1 has approached various bond holders for one time settlement and for waiver of interest but plaintiff bank did not agree. It is further pleaded that suit is barred by limitation as same was filed beyond three years. Prayer for dismissal of suit sought.

4. Per contra separate written statement filed on behalf of co-defendant No.2 pleaded therein that Hon'ble High Court of HP has no jurisdiction to try the suit. It is further pleaded that none of the defendants reside at Shimla or in Himachal Pradesh nor carry any business at Shimla. It is further pleaded that in fact plaintiffs have entered into contract for purchase of bonds from open market at Kanpur U.P. It is further pleaded that suit is barred by limitation. It is further pleaded that contract between plaintiffs and defendant No.1 has frustrated as per provision of Section 56 of Contract Act. It is further pleaded that suit ought to have been filed before Debt Recovery Tribunal Allahabad. It is further pleaded that present suit is not filed through competent person. It is further pleaded that bonds purchased by plaintiffs from open market subject to credit risk. It is further pleaded that plaintiff bank has no legal right to enforce the liability of interest. It is denied that co-

defendant No.1 is the guarantor relating to payment of interest and principal amount. It is further pleaded that co-defendant No.2 has no link with co-defendant No.1. It is pleaded that one time settlement was offered to various bond holders. Prayer for dismissal of suit sought.

5. On dated 13.12.2010 following issues were framed by Court:

1.Whether plaintiffs are entitled to the suit amount if so at what rate of interest? ...OPP.

2.Whether suit is not maintainable as alleged? ...OPD

3.Whether plaintiffs have no locus standi to file and maintain the present suit?. ...OPD

4. Whether this Court has no jurisdiction to try the present suit if so its effect?.OPD.

5. Whether contract has become frustrated on account of subsequent events if so its effect? ...OPD-2.

6. Whether suit has not been filed through a competent and authorized person if so its effect?. ...OPD.

7. Whether suit is barred under the provisions of Recovery of Debt due to Banks and Financial Institutions Act 1993?. ...OPD-2.

8. Whether suit is not within time? ..OPD.

9. Relief.

6. Parties produced following witnesses in support of their case.

Sr.No.	Name of Witness
PW1	Vijay Sharma
DW1	R.K.Bharti
DW2	S.K.Singh
PW2	Abhishek Chauhan in rebuttal

7. Parties also produced the following pieces of documentary evidence in support of their case.

Sr.No.	Description:
Ext. PW1/A	Legal notice under Section 80 CPC
Ext PW1/B	Letter dated 29.3.2006
Ext PW1/C	Letter dated 1.11.2006
Ext. PW1/D	Letter dated 12.11.2006 regarding settlement of SLR bonds issued by UPFC
Ext.PW1/E	Letter dated 15.12.2006 issued by plaintiffs to UPFC
Ext PW1/F	Letter dated 25.8.2007 issued by plaintiffs to UPFC
Ext.PW1/G	Letter dated 12.2.2008 issued by plaintiffs to UPFC.
Ext. PW2/A	Letter dated 25.3.2015 issued by Axis Bank.

Ext. PW2/B	Certificate under Bankers Book Evidence Act 1891 issued by Axis Bank.
Ext. DW1/A	SLR Bonds issued by UPFC
Ext.DW1/B	SLR Bonds issued by UPFC
Ext.DW1/C	Authority letter issued by UPFC

8. Court heard learned Advocate appearing on behalf of the parties at length and also perused the entire record carefully.

9.Testimony of Oral Witnesses.

9.1 PW1 Sh Vijay Sharma Manager Investment HP State Co-operative Bank Ltd. The Mall Shimla has stated that he had joined service in the plaintiff bank in the year 1988. He has stated that he is working as Manager investment in the plaintiff bank since the year 2008. He has stated that plaintiff bank had purchased UPSFC SLR bonds from co-defendant No.1 worth Rs.6 crores on 14.12.2005 and had purchased bonds worth Rs.3.50 crores on 15.12.2005 from co-defendant No.1. He has stated that co-defendant No.1 is liable to pay interest at the rate of 8% per annum. He has stated that co-defendant No.1 paid interest to plaintiff bank upto February 2006 and thereafter co-defendant No.1 did not pay any interest on the bonds due in August 2006 and February 2007. He has stated that bonds were purchased by plaintiff bank from secondary market. He has stated that plaintiff bank was entitled to recover a sum of Rs.76 lacs from co-defendant No.1 on account of accrued interest on the bonds. He has stated that notice Ext PW1/A was issued. He has stated that despite notice co-defendant No.1 did not pay interest. He has stated that plaintiff bank is a Co-operative Society registered under the H.P. Co-operative Societies Act 1968. He has stated that plaintiff bank has to suffer financial loss due to non-payment of amount of interest. He has stated that co-defendant No.1 did not pay any amount after filing the suit. PW1 also tender in evidence documents Ext PW1/B to Ext PW1/G. He has admitted that head office of co-defendant No.1 is at Kanpur U.P. He has admitted that head office of co-defendant No.2 is at Lucknow U.P. He has admitted that bonds were issued by co-defendant No.1 at Kanpur U.P. He has stated that bonds were not sold by co-defendant No.1 to plaintiff bank directly. He has denied suggestion that bonds were purchased by plaintiff bank subject to market risk. He has admitted that last instalment of interest was received by plaintiff bank in February 2006. He has admitted that co-defendant No.1 had written to plaintiff bank to accept principal amount of the bonds and waives interest. He has denied suggestion that contract between the parties stood frustrated owing to bad financial condition of co-defendant No.1. He has denied suggestion that co-defendant No.2 State of U.P. had not guaranteed repayment of principal amount of bonds and interest. He has denied suggestion that co-defendant No.1 is not jointly and severally liable to pay the amount. He has denied suggestion that High Court of HP has no jurisdiction to entertain and try the present suit. He has denied suggestion that no part of cause of action accrued to plaintiff bank within territorial jurisdiction of Courts at Kanpur.

9.2. DW1 R.K.Bharti has stated that he is presently posted as Assistant Grade-I in UPFC since 1989. He has stated that UPFC had floated SLR bonds in the year 1991 for a period of 20 years which were purchased by Punjab National Bank. He has stated that plaintiff bank had purchased bonds on dated 14.12.2005 for an amount of Rs 6 crores. He has stated that thereafter plaintiff bank had purchased bonds on dated 15.12.2005 for an amount of Rs.3.5 crores from open market. He has stated that rate of interest was 8% per annum. He has stated that interest on the bonds was payable at Kanpur. He has stated that

plaintiff bank did not purchase bonds within the State of Himachal Pradesh. He has stated that no transaction took place within the territory of Himachal Pradesh. He has stated that UPFC had paid interest in the sum of Rs.24 lacs on the bonds of Rs.6 crores and interest of Rs.14 lacs on the bond of Rs.3.5 crores. He has stated that co-defendant No.1 could not pay interest on the bond amount after March 2006 on account of its deteriorating financial status. He has stated that co-defendant No.1 had made proposal to plaintiffs for one time settlement. He has stated that dispute between plaintiff bank and co-defendant No.1 was to be settled only at Kanpur. He has stated that co-defendant No.1 had already paid excess amount of interest to plaintiff bank. He has admitted that plaintiff bank had purchased SLR bonds from secondary market. He has admitted that SLR bonds floated by U.P. State Financial Corporation could be purchased from secondary market. He has admitted that SLR bonds worth Rs.9.5 crores purchased by plaintiff bank from secondary market were fetching interest at the rate of 8% per annum. He has admitted that letter Ext PW1/B was sent by co-defendant No.1 to plaintiff bank. He has admitted that document Ext PW1/B along with cheque to plaintiff bank was sent to Shimla address. He has admitted that another cheque amounting to Rs.18,61,440/- vide cheque No. 149344 dated 18.3.2006 was sent to plaintiff bank at Shimla address. He has stated that aforesaid amount was paid towards interest payable to plaintiff bank on SLR bonds till February 2006. He has admitted that no interest was sent on SLR bonds which were due to plaintiff bank after March 2006. He has stated that communication was also sent to head office at Shimla. He has admitted that SLR bonds floated by U.P. State Financial Corporation were guaranteed by the Government of Utter Pradesh. He has admitted that legal notice Ext PW1/A was sent to U.P. State Financial Corporation by plaintiff bank.

9.3. DW2 Sh S.K.Singh Chief Manager Law U.P. State Financial Corporation Kanpur has stated that SLR bonds were purchased by plaintiff bank from open market. He has stated that bonds purchased by plaintiff bank from open market were subject to market risk. He has stated that bonds were issued from head office of U.P State Financial Corporation situated at Kanpur. He has stated that interest on the bond amount was payable at Kanpur. He has stated that financial position of UP State Financial Corporation is deteriorating day by day. He has stated that Corporation is not in a position to pay amount more than principal amount admissible on the SLR bonds. He has stated that contract conditions has frustrated. He has stated that he has no personal knowledge that cheque bearing No. 149360 dated 28.3.2006 and cheque No. 149344 dated 18.3.2006 was sent by co-defendant No.1 to plaintiff bank at Shimla towards payment of interest on the SLR bonds worth Rs. 9.5 crores purchased by plaintiffs. He has stated that he could not state that aforesaid cheques were credited in the plaintiff bank account No. 050010200001205 at Axis bank Kasumpti Shimla. He has admitted that interest was payable on SLR bonds twice in a year i.e. during the month of August and February. He has stated that he could not state that amount of interest which was due to plaintiff bank was Rs. 24 lacs payable on 12.8.2006 and further interest Rs.24 lacs was payable on 12.2.2007 and further Rs.14 lacs was payable on 31.8.2006 and further Rs.14 lacs was payable on 28.2.2007. He has admitted that legal notice Ext PW1/A was issued. He has admitted that document Ext PW1/D was sent by co-defendant No.1 to plaintiff bank at head office Shimla. He has admitted that documents Ext PW1/E,F & G were also sent from head office Shimla. He has stated that he could not produce any document in order to prove that U.P. State Financial Corporation is facing financial crisis. He has admitted that till filing of suit principal amount towards interest which was outstanding against U.P. State Financial Corporation was Rs. 76 lacs. He has stated that cheques were sent by co-defendant No.1 to plaintiff bank to Shimla.

9.4 PW2 Sh Abhishek Chauhan in rebuttal has stated that current account No. 050010200001205 is in the name of H.P. State Co-operative Bank The Mall Shimla. He has stated that earlier Axis bank was known as UTI bank. He has stated that on dated 24.4.2008 UTI bank has changed its designation as Axis bank. He has stated that statement of account is Ext PW2/B. He has stated that transaction relating to cheque No. 149344 amounting to Rs.1861440/- is marked as mark 'x'. He has stated that similarly entry in respect of transaction of cheque No.149360 amounting to Rs.1085840/- is encircled in red and marked as mark 'Y' in Ext PW2/B. He has stated that he has not incorporated the entries in the ledger account of plaintiff bank.

Findings upon Issue No.1.

10. Submission of learned Advocate appearing behalf of plaintiffs that plaintiffs are legally entitled for recovery of Rs.90,67,466/- is partly answered in yes and partly in no for the reasons hereinafter mentioned. It is proved on record that on dated 14.12.2005 plaintiff bank purchased SLR bonds to the tune of Rs.6 crores. It is proved on record that plaintiff bank had purchased SLR bonds to the tune of Rs. 3.5 crores on dated 15.12.2005. It is proved on record that plaintiff bank purchased SLR bonds to the tune of Rs.9500000/- (Nine crores fifty lacs). It is proved on record that SLR bonds were issued by U.P Financial Corporation and was guaranteed by the Government of Utter Pradesh. It is also proved on record that as per bonds the interest was to be payable by way of equal half yearly payments in the month of August and February every year. It is proved on record that SLR bonds were transferable. It is proved on record that rate of interest was 11.5% which was reduced to 8% per annum. It is proved on record that vide document Ext PW1/G dated 12.2.2008 plaintiffs bank issued notice to co-defendant No.1 to pay interest due to the tune of Rs.76 lacs. DW1 R.K.Bharti Assistant Grade-I UPFC Kanpur has admitted in cross examination that sum of Rs. 76 lacs was due to plaintiffs bank against co-defendant No.1 as interest amount. Even DW2 S.K.Singh Chief Manager Law UP State Financial Corporation Kanpur has admitted that initially the rate of interest was 11.5% per annum which was reduced to 8% per annum. DW2 S.K.Singh Chief Manager Law UP State Financial Corporation has admitted that at the time of filing of suit the principal amount towards interest which was outstanding against UP State Financial Corporation was Rs. 76 lacs. It is well settled law that facts admitted not to be proved under Section 58 of the Indian Evidence Act. In the present case DW1 R.K.Bharti and DW2 S.K.Singh have admitted the liability of Rs.76 lacs relating to interest at the time of filing of the suit. Even plaintiffs in para 4 of the plaint has specifically mentioned in positive manner that interest to the tune of Rs.76 lacs is due to plaintiffs bank from defendants jointly and severally. DW1 R.K. Bharti has specifically stated when he appeared in witness box that plaintiffs have sold the bonds to CKP Cooperative bank Limited Mumbai to the tune of Rs.6 crores. DW1 R.K. Bharti has specifically stated when he appeared in witness box that plaintiffs bank has sold bonds to the tune of Rs.3.5 crores to Ajmer Urban Cooperative Bank Limited Ajmer. Plaintiffs bank did not adduce any rebuttal evidence on record in order to prove that plaintiffs bank did not sale bonds to CKF co-operative bank Bombay and to Ajmer Urban Co-operatives Bank Ltd Ajmer. In the present case no specific date has been mentioned that on which date SLR bonds were sold by plaintiffs bank to CKP Co-operative Bank Limited Mumbai and to Ajmer Urban Cooperative Bank Limited Ajmer. Court is of the opinion that after the sale of SLR bonds to CKP Cooperative Bank Mumbai and to Ajmer Urban Cooperative Bank Limited Ajmer plaintiffs bank is not legally entitled for claim of interest after the sale of bonds. DW1 R.K.Bharti Assistant Grade-I UPFC Kanpur has specifically stated in positive manner when he appeared in witness box that one time settlement has been executed by co-defendant No.1 with CKP Cooperative Bank Limited Mumbai and with Ajmer Urban Cooperative Bank

Limited Ajmer relating to Rs.6 crores SLR bonds and relating to Rs.3.5 crores SLR bonds which are in dispute. Plaintiffs did not adduce any rebuttal evidence on record. In view of the fact that plaintiff bank already sold SLR bonds to CKP Cooperative Bank Limited Mumbai to the tune of Rs.6 crores and in view of the fact that plaintiff bank also sold SLR bonds to Ajmer Cooperative Bank Limited Ajmer to the tune of Rs.3.5 crores and in view of fact that as per Section 3(3)(c) of Interest Act 1978 Court is not empowered to award interest upon interest it is held that plaintiffs are not entitled for interest upon interest. It was held in case reported in 2015 (1) Shim.LC 168 titled V.Kala Bharathi and others Vs. The Oriental Insurance Company Ltd. that Section 3(3)(c) of Interest Act 1978 prohibit to award interest on interest. It is held that plaintiffs bank is legally entitled for recovery of Rs.76 lacs only from defendants jointly and severally. Hence issue No.1 is partly decided in favour of the plaintiffs.

Findings upon issue No.2.

11. Submission of learned Advocate appearing on behalf of defendants that suit is not maintainable on purchase of bond is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that plaintiffs have purchased SLR bonds. It is proved on record that as per condition mentioned in SLR bonds same were transferable by endorsement. It is held that plaintiffs being purchaser of SLR bonds issued by co-defendant No.1 are legally entitled to file suit for recovery of interest due. Hence issue No.2 is decided against defendants.

Findings upon issue No.3.

12. Submission of learned Advocate appearing on behalf of defendants that plaintiffs have no locus standi to file and maintain the present suit is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that plaintiffs bank had purchased SLR bonds to the tune of Rs.9.5 crores. It is proved on record that SLR bonds were transferable. It is proved on record as per testimony of DW1 R.K.Bharti that co-defendant No.1 had sent interest amount to the plaintiffs. In view of the fact that defendants have given undertaking in SLR bonds that they would pay interest at the rate of 11.5% per annum which was later reduced to 8% per annum and in view of the fact that SLR bonds are transferable bonds as per recital mentioned in SLR bonds it is held that plaintiffs bank who had purchased SLR bonds is legally entitled to claim interest from defendants jointly and severally because co-defendant No.2 had stood guarantor of U.P State Financial Corporation who had issued SLR bonds. Hence it is held that plaintiffs have locus standi to file and maintain present suit. Issue No.3 is decided against defendants.

Findings upon issue No.4.

13. Submission of learned Advocate appearing on behalf of defendants that Hon'ble High Court of HP has no territorial jurisdiction to try present suit in view of condition in SLR bonds that interest would be payable at U.P Financial Corporation Kanpur is also rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that territorial jurisdiction of Court is granted by statute. It is well settled law that territorial jurisdiction of Court cannot be snatched by parties by way of self agreement. It is well settled law that any agreement which is contrary to statutory law cannot be enforced in Court of law. In the present case it is proved on record that co-defendant No.1 has sent amount of interest to plaintiffs bank to Shimla and the amount mentioned in the cheque was deposited in payee account of plaintiffs bank. It is proved on record by way of testimony of PW2 Abhishek Chauhan who is posted in Axis bank S.D. Complex Kasumpati Shimla HP that co-defendant No.1 had sent cheque No. 149344 amounting to Rs.1861440/- in favour of plaintiffs bank. It is proved on record that co-

defendant No.1 had also sent interest amount vide cheque No. 149360 amounting to Rs.1085840/- in favour of plaintiffs bank to Shimla which was credited in the payee account of plaintiffs bank by Axis Bank S.D Complex Kasumpati Shimla HP. It is well settled law that suit can be filed where the defendants resides or where part of cause of action accrued. In view of the fact that co-defendant No.1 had sent two cheques relating to interest to Shimla and in view of fact that amount of the cheque was credited in the payee account of plaintiffs bank at Shimla HP it is held that part of cause of action accrued in favour of plaintiffs at Shimla which is within territorial jurisdiction of High Court of HP. It is well settled law that civil suit can be filed where part of cause action accrued in favour of plaintiffs as per Section 20(c) of Code of Civil Procedure 1908. It is held that in the present case part of cause of action accrued in favour of plaintiffs at Shimla H.P. It is held that plaintiffs bank is legally competent to file present suit in High Court of HP. Hence issue No.4 is decided against defendants.

Findings upon issue No.5.

14. Submission of learned Advocate appearing on behalf of defendants that contract has become frustrated on account of financial crisis of co-defendant No.1 and on this ground suit filed by plaintiffs be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that co-defendant No.1 did not file balance sheet of financial status of co-defendant No.1. There is no evidence on record that co-defendant No.1 was declared bankrupted by competent Court of law. Court is of the opinion that simply on the testimony of DW1 and DW2 that co-defendant No.1 is suffering from financial crisis it is not expedient in the ends of justice to decline relief to the plaintiffs. Hence it is held that present contract has not become frustrated on account of subsequent events. Issue No.5 is decided against defendants.

Findings upon issue No.6.

15. Another submission of learned Advocate appearing on behalf of defendants that present suit has not been filed through a competent and authorized person is also rejected being devoid of any force for the reasons hereinafter mentioned. Defendants did not adduce any positive, cogent and reliable evidence on record in order to prove that present suit was not filed by competent person. Defendants did not examine any official of plaintiffs in order to prove that Sh Rajinder Singh Managing Director of plaintiff bank was not authorized to file present suit. Hence issue No.6 is decided against defendants on the concept of ipse dixit (Assertion made by person without proof). Issue No.6 is decided against defendants.

Findings upon issue No.7.

16. Another submission of learned Advocate appearing on behalf of defendants that present suit barred under the provision of Recovery of Debt due to Banks and Financial Institutions Act 1993 is also rejected being devoid of any force for the reasons hereinafter mentioned. Plaintiffs have specifically mentioned in para No.1 of the plaint that plaintiff bank is constituted under the provision of HP co-operative societies act. It was held in case reported in AIR 1998 Rajasthan 100 titled M/s Phoneix Impex Vs. State of Rajasthan and others that Section 18 of recovery debts due to banks and financial institutions Act 1993 is not applicable to co-operative bank registered under co-operative societies act. It was held that provision of recovery of debts due to banks and financial institution act 1993 will not over ride provision of societies act. It is held that co-operative societies act is special act and it is held that one special act cannot over ride another special act. Under the HP co-operative societies act financial bank means cooperative societies object of which includes creation of

funds to be lent to other cooperative societies. Hence it is held that bar of Section 18 of recovery of debts due to banks and financial institution act 1993 will not apply in the present case because plaintiffs bank is not a company registered under Companies Act but it is a society registered under HP co-operative societies act. Issue No.7 is decided against defendants.

Findings upon issue No.8.

17. Submission of learned Advocate appearing on behalf of defendants that suit is not within time is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that document Ext PW1/G dated 12.2.2008 issued by HPSC Bank Ltd. to General Manager UPFC head office 14/88 Civil Lines Kanpur UP. Plaintiffs bank issued demand notice to co-defendant No.1 for payments of Rs.76 lacs but despite demand notice Ext PW1/G issued on dated 12.2.2008, defendants did not pay amount of interest due to the tune of Rs.76 lacs. Present suit was filed by plaintiffs on 7th April, 2009. Hence it is held that present suit is within limitation from accrual of cause of action. It is proved on record that vide letter Ext PW1/D dated 12th November 2006 co-defendant No.1 proposed plaintiffs for settlement to accept full principal amount without interest which was worked out to Rs.9.5 crores. On 12th November 2006 UPFC had agreed to release entire principal amount in twelve equal monthly installment commencing from April 2007. It is proved on record that vide letter Ext PW1/D dated 12th November 2006 co-defendant No.1 acknowledged the liability to pay an amount to the tune of Rs.9.5 crores. It is well settled law that by way of written acknowledgement limitation could be extended under Section 18 of Limitation Act 1963. Present suit was filed on 7th April, 2009 within three years w.e.f.12th November 2006. It is held that present suit was filed within limitation. Issue No.8 is decided against defendants.

Relief:

18. In view of above stated findings suit is partly decreed in favour of plaintiffs and against defendants jointly and severally for recovery of Rs.76,00,000/- (Seventy six lacs) with costs. Interest upon interest is declined. Registrar Judicial will prepare decree sheet forthwith in accordance with law. Civil suit is disposed of. All pending application(s) if any are also disposed of.

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

Kaushalya Devi .....Non-applicant/ appellant.

Vs.

Kaushalya Devi and others ..... Applicants- respondents.

CMP No. 5798 of 2015 in RSA No. 110 of 2007.
Order reserved on : 25.6.2015.
Date of decision: 8.7.2015.

Indian Evidence Act, 1872- Sections 43 and 45- Non-applicant had filed an application under Order 39 Rules 1 and 2 in the second appeal - application was taken for consideration and the order of status quo was passed- an application was filed again leveling serious allegations against the Advocate- it was prayed that signatures of the applicants on the caveat petition and Power of Attorney given to the Advocate be got examined- the purpose of the application is to establish that the applicants had never engaged A as their counsel and were not aware of the order passed by the Court- applicants were present in the

Court but had not levelled any allegation against the counsel- they only sought time to engage counsel as original counsel had expressed his inability to continue with the case- record showed that A had in fact been engaged by the applicants- practice of frequently changing the Advocates and filing applications casting aspersion and assassinating the person and character of the earlier counsel have to be deprecated - a litigant cannot be permitted to drag the court and force it to decide the case in a particular manner- therefore, there is no necessity of examining the signatures – application dismissed with cost of Rs.10,000/-. (Para-6 and 7)

For the appellant : Mr. K.D.Sood, Senior Advocate with Mr. Rajnish K. Lall, Advocate, for the non-applicant- appellant.

For the respondents: Mr. T.R. Jain, Advocate, for the applicants- respondents.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The respondents have moved this application, under sections 73 and 45 of the Indian Evidence Act, 1872, for comparison and examination of their signatures and handwritings on the power of attorney, caveat petition and affidavit etc.

2. It is averred that appellant- non-applicant had filed regular second appeal and alongwith it an application under order 39 Rules 1 and 2 CPC read with section 151 CPC bearing CMP No. 169 of 2007 had also been preferred for restraining the respondents from interfering in the suit land. The appeal and the miscellaneous applications were taken up for disposal on 3.5.2007. The appeal was admitted and whereas in the application the order for maintaining the status quo existing on the date was passed. Thereafter in paras 3 to 5 of the application certain serious allegations have been made against the Advocate (who represented the applicants- respondents and shall hereinafter be referred to as Shri "A") in the following terms:-

> "3. That in this context, it is submitted that the learned counsel Sh. "A" contested the matter on behalf of the respondents. Not only this, the learned counsel filed a Caveat Petition vide No. (P)-55/2007 dated 22.01.2007 under Section 148-A of Code of Civil Procedure read with Section 151 alongwith Affidavit and Power of Attorney on behalf of the respondents.
>
> 4. That the respondents were surprised when they received the letter dated 07.03.2012 from the learned counsel Sh. "A" that an application under Order 39 Rule 2-A read with Section 151 of Code of Civil Procedure was filed by the learned counsel of the appellant for willful disobedience of the order of this Hon'ble High Court.
>
> 5. That the humble respondents submit that Sh. "A" Counsel appeared and contested the case/ matter was neither given any Power of Attorney nor instructed by any of the respondent to file the above stated Caveat Petition, which clearly shows that the false/ fake documents were prepared, which were filed before this Hon'ble Copurt. Certified copy of the Power of Attorney/ Vakalatnama is annexed as Annexure A-1 and certified copy of caveat petition alongwith affidavit is annexed as Annexure A-2."

3. It is then averred that the applicants with the permission of this court engaged new counsel to contest the matter and also gave power of attorney in their favour. However, the applicants were not satisfied even with these counsels and after obtaining NOC engaged the present counsel. Lastly, it is contended that the appeal and the application were taken up for disposal by this court and was dismissed on 5.6.2014. Therefore, it has become necessary to examine the signatures of the applicants- respondents on the caveat petition and power of attorney given to their earlier Advocates.

4. The appellant- non-applicant has filed reply to the application, wherein preliminary objection has been taken to the effect that no case was made out for invoking sections 45 or 73 of the Evidence Act or for leading expert evidence when the facts of the case are clear and despite knowledge the respondents-applicants had disobeyed and flouted the orders of the court. It is further contended that the application has been filed with a view to delay the decision of the case and is malafide and therefore, deserves to be dismissed. Even on merits, the application has been opposed and it is specifically averred that power of attorney and the caveat petition had been filed in this case under the instructions of the applicants.

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

6. The application filed by the applicants makes no head or tail and it appears that because the applicants are facing proceedings under order 39 Rule 2-A CPC, therefore, they now want to prove the aforesaid signatures and establish that they had never engaged Sh. "A" as their counsel and were therefore not aware of the orders of status quo passed by this court on 3.5.2007.

7. To understand the background of the case one has to delve into the records. A caveat petition allegedly on behalf of the applicants was filed in the Registry of this court under the signatures of Sh. "A" on 22.1.2007, whereas the appeal was filed two months later to this on 20.3.2007. When the appeal came up for consideration before this court on 26.3.2007, the following order came to be passed:-

> **"Caveat Petition No. 55 of 2007**
>
> This caveat petition is allowed. Copies of the grounds of appeal and application have been supplied to the learned counsel appearing for the Caveators.
>
> At the request of learned vice counsel appearing for the appellant, list the appeal alongwith stay application after three weeks."

8. On 11.4.2007, Sh. "A" addressed a letter to the petitioners, contents whereof read as under:-

> *"Madam,*
>
> *That you had engaged me on 22.1.2007 as a counsel for filing a Caveat Petition under Section 148-A of CPC on your behalf in the Hon'ble High Court of Himachal Pradesh at Shimla in a matter i.e. Kaushalya Devi & Ors. Vs. Kaushalya Devi for defending the Regular Second Appeal which would be expected to be filed by non-caveator/plaintiff Kaushalya Devi W/o Bishan Dass R/o Village Balehan, Up-Muhal Narwan, Tehsil Dharamshala, Distt. Kangra (HP). The said caveat was filed by me on your behalf in the Hon'ble*

High Court of Himachal Pradesh and the same was registered as Caveat Petition No. 55/2007. You have paid Rs.2,000/ only.

2. That in the second week of March, 2007 Smt. Kaushalya Devi W/o Bishan Dass appellant/plaintiff had filed RSA bearing No. 110/07 alongwith CMP bearing No. 169/07 under Order 39 Rule 1 & 2 read with Section 151 CPC praying therein injunction against you till the pendency of appeal. The said appeal was listed before the Hon'ble High Court of Himachal Pradesh for admission on 26.3.2007. Since I had filed Caveat Petition on your behalf alongwith Power of Attorney duly signed by all of you authorizing me to appear and defend the said Regular Second Appeal which would be filed by the plaintiff. Therefore, no notices were required to be issued to you. I appeared in the Hon'ble High Court on that day.

3. That I have duly intimated you about the filing of the RSA in the Hon'ble High Court of Himachal Pradesh. I have also intimated you about the filing of reply to the CMP, I have drafted the reply at your instance and again requested you for putting your initials on the said reply and affidavit annexed with the application. Despite several intimations you did not respond nor came to my office for doing the needful.

4. That the Caveat Petition was filed at your instance and Power of Attorney was also duly signed by all of you. Thereafter, I appeared on your behalf before the Hon'ble High Court of Himachal Pradesh for defending the RSA which has been filed by the appellant.

5. That all of you did not respond nor visited my office for taking further course of action in the matter which clearly amounts to negligence on your part. Any order passed against you on the said CMP No. 169/07 annexed with RSA No. 110/07 would be entirely at your risk and cost and I will not be responsible for the same.

6. That for defending RSA you had not paid the counsel fee to me till date. Therefore, you are also called upon to pay a sum of Rs. 11,000(Rs. Eleven Thousand) only being the counsel fee for defending RSA No. 110/07 with CMP No. 169/07 within a period of 15 days from the receipt of this notice/intimation.

Yours faithfully,
Sd/-
(Sh. "A")
Advocate.

9. On 3.5.2007 the court passed the following order:-

"Heard learned counsel for the parties. Admit on the substantial questions of law as filed with the appeal.

CMP No. 169/2007.

This application has been filed by the appellant with the prayer that the respondents may be restrained from raising any construction. I have heard the learned counsel for the parties. It is directed that the parties to this appeal shall maintain status quo as existing today qua the nature and possession of the land as described in the application

during the pendency of the appeal. The application is disposed of. **Dasti** copy on usual terms."

10. On 7.3.2012, the appellant handed over a copy of application under Order 39 Rule 2-A CPC to Sh. "A", Advocate who was then representing the applicants. Upon receipt of the copy, Sh. "A" wrote a registered letter to the applicants informing them about this fact.

11. On 22.3.2012 this court passed the following order:-

"Learned counsel appearing for the respondents seek permission to withdraw his power of attorney on behalf of the respondents. Permission granted. Kaushalya Devi and Sudesh Kumari respondents are present in Court. They pray for and are granted three weeks time to engage a counsel on their behalf. Order has been communicated to the respondents in the Court today. List after three weeks."

12. The original order sheet of the even date shows that this order has been duly acknowledged and in token thereof all the three applicants have appended their signatures. It is thereafter that the applicants engaged new Advocates. However, even those Advocates were superseded by the present Advocate.

13. The applicants have now made allegations to the effect that Sh. "A" had though appeared and contested the matter on their behalf, but he had neither been instructed nor given power of attorney and therefore the signatures on these documents should be compared and examined by an expert.

14. In order to test the veracity of such submission, it would be seen that on 22.3.2012 though the applicants were present in person before this court, yet they never choose to level any allegation against Sh. "A" that he had not been authorized to put in appearance on their behalf nor had they executed any power of attorney or signed the caveat petition. They only sought time to engage a counsel because Sh. "A" expressed his inability to continue with the case.

15. Not only this Sh. "A" had in fact earlier to this on 16.3.2012 filed an application under order 3 Rule 4, sub-rule(2) CPC for withdrawal of power of attorney filed on behalf of the applicants. This application was registered as CMP No. 200 of 2012 and contains the following averments:-

"An application under Order 3 Rule 4 Sub Rule 2 for the withdrawal of Power of Attorney filed on behalf of Respondents No. 1 to 3.

MAY IT PLEASE YOUR LORDSHIPS:-

1. That the applicant has been representing Respondents No. 1 to 3 in the above noted Regular Second Appeal pending before this Hon'ble Court. He has been duly authorized to defend the said Regular Second Appeal on behalf of respondents No. 1 to 3. The applicant had been informing the respondents from time to time about the case through registered post.

2. That an application under Order 39 Rule 2A read with Section 151 CPC had been received through the counsel for the appellant. This fact was duly brought to the notice of Respondents No. 1 to 3 through registered letter on 9/3/2012 which was duly received.

3. That on 13/3/2012 the Respondent No.3 alongwith her husband visited the office of the applicant and had taken one set of record of the case.

4. That the respondents did not impart any instructions for defending the case nor thereafter visited the office of the applicant, hence the applicant has no other option except to withdraw of Power of Attorney and seek the leave of this Hon'ble Court for the withdrawal from the aforesaid case.

It is, therefore, prayed that this application may kindly be allowed and leave may be granted for the withdrawal of the Power of Attorney on behalf of Respondents No. 1 to 3 in the interest of justice."

16. No doubt, the applicants while filing the reply to the application, under order 39 Rule 2-A CPC had submitted that they were unaware of the restraint order passed by this court as the same was never conveyed to them, but then while filing an application for early hearing being CMP No. 1127 of 2012, it has been specifically stated as follows:-

> ""… The applicants have been restrained from raising the construction. It is submitted that the applicants are raising the construction on their own land but under the garb of interim order, the non-applicant is not allowing the applicants to proceed with the construction. It is submitted that the construction material is lying waste and the cement bags have already become useless. The cost of the construction is going high day by day and as such, the applicants are suffering both financially and mentally."

17. Nowhere in the aforesaid application had the applicants mentioned about the fact that they were not in the knowledge of the orders passed by this court and significantly this application has been verified on 2.10.2012, but has been actually filed on 15.10.2012.

18. In this background, the first and foremost question required to be determined is as to whether Sh. "A" had in fact been engaged by the applicants. A perusal of the caveat petition and thereafter the letter sent by Sh. "A" on 11.4.2007 and 7.3.2012 coupled with the application for withdrawal from the proceedings on behalf of Sh. "A" (CMP No. 202 of 2012), which was filed on 16.3.2012 and the presence of all the applicants before this court on 22.3.2012 alongwith Sh. "A" establishes beyond reasonable doubt that Sh. "A" had in fact been engaged by the applicants.

19. It is otherwise difficult to believe as to why Sh. "A" without instructions from the applicants would of his own put in appearance on their behalf and oppose the passing of any interim order when the case was for the first time listed before this court on 26.3.2007. In case Sh. "A" had not been engaged by the applicants as is now being alleged then what prevented them from pointing out this fact to this court when they themselves were present in the court alongwith Sh. "A" on 22.3.2012. If Sh. "A" had not been engaged as counsel then how was he in possession of the records of the case and on what basis did he file a detailed caveat petition and also put in appearance on behalf of the applicants. This aspect assumes significance because it is not at all the case of the applicants that they were totally unaware of the appeal having been preferred by the non-applicant.

20. The practice of frequently changing the Advocates and then filing applications which in some manner casts aspersion and assassinate the person and character of the earlier counsel have to be deprecated with a heavy hand for the purity of administration of law and salutary and healthy practice.

21. It is not fair to the court to change counsels frequently and file petitions because the counsel engaged subsequently may not be aware of what had transpired in the court at the earlier occasions. It may also amount to embarrassment to the court to hear the grievances of the party which has no basis and more particularly where a party does not furnish any material to substantiate the grounds taken in the subsequent applications.

22. The conduct of such a party is reprehensible and deserves not only to be deprecated but censured. A litigant cannot be permitted to drag the court in such a manner and force it to decide the case in a particular manner he wants.

23. This court expresses its grave concern over the procedure adopted by the applicants for the redressal of their grievances. It is salutary to note that the court spends valuable time in deciding the cases and this practice of changing the Advocates frequently and thereafter filing the petitions only wastes the valuable time of the courts and has therefore to be deprecated and dealt with sternly.

24. The practice of filing applications and making uncharitable remarks against the Advocate, who was previously conducting the matter is all the more reprehensible. To my mind, even a lawyer must be very reluctant to take up a brief of this nature. In case for some reasons a change of lawyer is unavoidable, the newly engaged lawyer would owe it to himself and to the profession to have the statement of facts duly verified from the lawyer earlier conducting the case and only thereafter file application of the present kind.

25. Another fact, which cannot be ignored is that in case Sh. "A" was a total stranger to the applicants, then why on his asking did they come to Shimla, then stand with him in the court on 22.3.2012 and still did not chose to make any complaint before this court at that time or within some reasonable time thereafter and why it is only when the third counsel was engaged that these allegations have been made that too after a period of three years, is not forthcoming. It was incumbent upon the applicants to satisfy this court that Sh. "A" had not been engaged as counsel by them. The applicants by moving the present application to say the least have abused the process of law and that apart, I even find the contents of the application to be absolutely false.

26. Since this court has not agreed with the contention of the applicants that they had not engaged Sh. "A" as their counsel, who had not only appeared on their behalf but also filed a caveat petition, therefore, necessity or requirement of examining the signatures and handwritings on the documents or sending them for comparison to the expert does not at all arise.

27. In view of the aforesaid discussion, I find no merit in this application and the same is accordingly dismissed with costs of Rs.10,000/-. Before parting, it only needs to be clarified that the dismissal of this application shall not come in the way of the applicants in proving and establishing the contents of this application by leading clear, cogent and convincing evidence, which needless to say, if led, shall be considered on its own merit.

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

Lachhman Dass ...Petitioner
Versus
Babu Ram & others ...Respondents

CMPMO No. 103 of 2015
Date of Decision: 08.07.2015

Code of Civil Procedure, 1908- Section 151- Judgment and decree were passed for restraining the defendants from raising construction- the defendant did not stop the construction work despite the judgment and decree- Local Commissioner was appointed who reported that construction was being raised- an application for police help was filed, which was dismissed- held that the Court has inherent power to grant the police help - where the circumstances justify granting of police help, the Court should provide such help to enforce its order- petition allowed and S.P. directed to provide police help for the execution of the judgment and the decree. (Para 3 to 13)

Cases referred:
The State of Bihar Vs. Usha Devi and another, AIR 1956 Patna 455
M/s. Ram Chand and Sons Sugar Mills Private Ltd., Barabanki (U.P.) Vs. Kanhayalal Bhargava and others, AIR 1966 Supreme Court 1899
Rayapati Audemma Vs. Pothineni Narasimham, AIR 1971 Andhra Pradesh 53
Jaishi Ram and others Vs. Salig Ram, 1981 Sim. L.C. 156
Sunil Kumar Halder and others Vs. Nishikanta Bhandari and others, AIR 1983 Calcutta 266
Charubala Dev Nath Vs. Shri Niranjan Pathak, AIR 1993 Calcutta 288
Matha Gavarayya and others Vs. The District Collector, E.G. Distt. and others, AIR 1993 Andhra Pradesh 103
Papanna Vs. Nagachari, 1996 ILR (Kar) 1271
Shipping Corporation of India Ltd. Vs. Machado Brothers and others, AIR 2004 Supreme Court 2093

For the petitioner : Mr. Ajay Sharma, Advocate.
For the respondent : Mr. Jitender P. Ranote, Advocate vice Mr. B.S. Thakur, Advocate, for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge (oral):

The judgment and decree dated 12.1.2012 was rendered in Civil Suit No. 72 of 2004. However, the fact of the matter is that despite the judgment and decree dated 12.1.2012, respondents though restrained, but did not stop raising construction, which led to the appointment of the Local Commissioners thrice. All the Local Commissioners have pointed out that the construction was still being raised by the respondents despite the judgment and decree dated 12.1.2012. In these circumstances, the petitioner approached the trial Court for seeking police assistance. The application was rejected vide order dated 21.3.2015.

2. The Court is of the considered view that in view of the peculiar facts and circumstances, more particularly when the respondents were raising construction despite the judgment and decree dated 12.1.2012, the police assistance ought to have been provided. There may not be any specific provision to provide police assistance, but the Court in order to maintain Rule of law, could provide the police assistance to the parties towards execution of the judgment and decree or any order exercising its inherent power.

3. All Courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their Constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle *quando lex aliquid alique, concedit, conceditur et id sine quo res ipsa esse non potest* (when the law gives a person anything, it gives him that also without which the thing itself cannot exist).

4. The learned Single Judge in AIR 1956 Patna 455 titled as **The State of Bihar** Vs. **Usha Devi and another** has held that if a Court comes to the conclusion that an order passed under Order 39 Rules 1 or 2 has been disobeyed and by a contravention of that order the other party in the suit has done something for its own advantage to the prejudice of the other party, it is open to the Court under inherent jurisdiction to bring back the party to a position where it originally stood as if the order passed by the Court has not been contravened. The learned Single Judge has held as under:

> *"3. Mr. Shahi, appearing for the State of Bihar, has contended that the order is without jurisdiction. According to his contention, the State of Bihar had already taken possession of the land in dispute long before the institution of the suit on 6-3-1954, and, therefore, the overt act, if any, which had been committed by the State of Bihar had not been committed after the passing of the interim injunction. In that view of the matter, the learned Munsif, it has been argued, was not justified to pass the order to re-deliver possession. Whatever may be the allegations or counter-allegations of the parties in respect to the present position of the parties relating to the land, this much, however, is obviously clear that the State of Bihar had not come in possession of that land till 26-10-1953, when a notice was issued by the Revenue Sub-divisional Officer, Giridih, calling upon the Raja of Jharia to give possession of the Bhandar to the State of Bihar. The dispute, therefore, if any, as to possession of the land, between the parties must have begun sometime thereafter. And in the course of that, it is not denied that the contractor of the State of Bihar had either forcibly or in some other way succeeded in dismantling some portion of the eastern room of that Bhandar. It was at this stage that the suit giving rise to this application was instituted on 6-3-1954, and also an order of interim injunction was passed against the State of Bihar restraining them from dismantling it any further and from dispossessing the plaintiff from that Bhandar. It, therefore, cannot be said with certainty that at the time when the order for injunction was passed, the State of Bihar had in fact completely taken possession of the land in dispute, though they might have succeeded in dismantling some portion of it here and there. This is to some extent clear also from the concession made by the Govt. Pleader in the court below in the course of the hearing of the application for interim injunction. The learned Munsif in his order has stated:"the learned pleader for the*

defendants submitted that the defendants have made alterations during the pendency of the suit but if the defendants have done so they have done so at their own risk knowing full well that the plaintiff had already prayed for an order of injunction and the matter was subjudice". This statement of fact by the learned Munsif shows that the entire position of the parties in respect of the land in dispute at that point of time was in a fluid condition. On one side the State of Bihar was trying to dismantle the whole thing and on the other the plaintiff was trying to save the property from their possession as far as possible. That being so, it cannot be said that the State of Bihar had in fact come into complete possession of the property at about point of time. Subsequent thereto, it is not denied that the State of Bihar, had been restrained from further demolishing that house and thereby interfering with the possession of the plaintiff. The order of interim injunction as to possession passed by the learned Munsif has been finally confirmed by the Court of appeal, and on the face of that order it is not open now to the State of Bihar either to demolish the Bhandar any further or to interfere with the possession of the plaintiff in any other form or manner. The allegation of the plaintiff at the time when the order under revision was passed was that her possession over the Bhandar was interfered with subsequent to the passing of the interim injunction against the State of Bihar. That contention, as it appears from the order of the learned Munsif, was accepted and on the footing of that finding the learned Munsif passed an order on 5-5-1955, for redelivery of the possession of the property to her. I am informed that a separate proceeding for disobeying the interim order is also pending against the State of Bihar. It is, therefore, not advisable to give findings on facts which are connected with that proceeding for that may prejudice the position of the parties in that proceeding. Prima facie, it appears to me that the order passed by the learned Munsif on the facts of this case cannot be said to be one without jurisdiction. If a court comes to the conclusion that an order passed under Order 39 Rule 1 or 2 have been disobeyed and by a contravention of (supra) order the other party in the suit has done (supra) ing for its own advantage to the prejudice (supra) other party, it is open to the Court under inherent jurisdiction to bring back the party to a position where it originally stood as if the order passed by the court has not been contravened. The exercise of this inherent power vested in the court is based on the principle that no party can be allowed to take advantage of his own wrong in spite of the order to the contrary passed by the Court."

5. Their Lordships of the Hon'ble Supreme Court in AIR 1966 Supreme Court 1899 titled as **M/s. Ram Chand and Sons Sugar Mills Private Ltd., Barabanki (U.P.)** Vs. **Kanhayalal Bhargava and others** have held that whatever limitations are imposed by construction on the provisions of S. 151 of the Code, they do not control the undoubted power of the Court conferred under Section 151 of the Code to make a suitable order to prevent the abuse of the process of the Court. Their Lordships have held as under:

"5.] Section 151 of the Code reads:

"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."

The words of the section appear to be rather wide. But the decisions of this Court, by construction, limited the scope of the said section. In Padam Sen v. State of Uttar Pradesh (1961) 1 SCR 884 at p. 887: (AIR 1961 SC 218 at p. 219), the question raised was whether a Munsif had inherent powers under S. 151 of the Code to appoint a commissioner to seize account books. This Court held that he had no such power. Raghubar Dayal, J., speaking for the Court, observed:

"The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and, therefore, it must be held that the Court is free to exercise them for the purposes mentioned in S. 151 of the Code when the exercise of these powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. It is also well recognised that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code."

This Court again in Manohar Lal Chopra v. Raja Seth Hiralal (1962) Supp 1 SCR 450 at p. 461: (AIR 1962 SC 527 at p. 533), considered the question whether a Court had inherent power under S. 151 of the Code to issue a temporary injunction restraining a party from proceeding with a suit in another State. In that context, Raghubar Dayal, J., after quoting the passage cited above from his earlier judgment, interpreted the said observations thus:

"These observations clearly mean that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in S. 151 itself. But those powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the Legislature. This restriction, for practical purposes, on the exercise of these powers is not because these powers are controlled by the provisions of the Code but because it should be presumed that the procedure specifically provided by the Legislature for orders in certain circumstances is dictated by the interests of justice.

This Court again in Arjun Singh v. Mohindra Kumar, 1964-5 SCR 946 at p. 968: (AIR 1964 SC 993 at p. 1003), considered the scope of S. 151 of the Code. One of the questions raised was whether an order made by a Court under a situation to which O. IX, R. 7 of the Code did not apply, could be treated as one made under S. 151 of the Code. Rajagopala Ayyangar, J., made the following observations:

"It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words, if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of

the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which relates."

Having regard to the said decisions, the scope of the inherent power of a Court under S. 151 of the Code may be defined thus: The inherent power of a Court is in addition to and complementary to the powers expressly conferred under the Code. But that power will not be exercised if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code. If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by the said provisions. Whatever limitation are imposed by construction on the provisions of S. 151 of the Code, they do not control the undoubted power of the Court conferred under Section 151 of the Code to make a suitable order to prevent the abuse of the process of the Court."

6. In AIR 1971 Andhra Pradesh 53 titled as **Rayapati Audemma** Vs. **Pothineni Narasimham,** the Division Bench has held that though there being no express provision in the Code for the purpose, Court can grant police aid under its inherent powers. The Division Bench has held as under:

"6. In the Allahabad case also, the learned Judges merely observed that the civil court had no jurisdiction to order the police to interfere in the matter of execution of a decree. The inherent powers execrable by the civil court under Section 151, Civil P. C. were not referred to. Their Lordships also proceeded on the footing that because the disobedience of the order of the court was punishable with penalties mentioned in Order XXI, Rule 32, Civil P. C. the Court could not give any direction to the police with respect to the execution of the decree. The provision for penalty is entirely different from the enforcement of the order itself as we have mentioned earlier. Such a provision would not and cannot preclude the court from exercising its inherent power under Section 151, Civil P. C. in order to do justice or to prevent abuse of the process of court. But the actual decision given therein with respect to the direction given to the Superintendent of Police may be correct inasmuch as the form in which the direction was given to the police authorities, does not appear to be proper or correct.

9. If the police authorities are under a legal duty to enforce the law and the Public or the citizens are entitled to seek directions under Article 226 of the Constitution for discharge of such duties by the Police Authorities we feel that the civil courts can also give appropriate directions under Section 151 Civil P. C. to render aid to the aggrieved parties for the due and proper implementation of the orders of Court. It cannot be said that in such a case the exercise of the inherent power under Section 151, Civil P. C. is devoid of jurisdiction.

There is no express provision in the Code prohibiting the exercise of such a power and the Court can give appropriate directions at the instance of the aggrieved parties to the police authorities to render its aid for enforcement of the Court's order in a lawful manner.

7. In 1981 Sim. L.C. 156 titled as **Jaishi Ram and other**s Vs. **Salig Ram**, the learned Single Judge has held that if the circumstances of a case are such that assistance of police for the enforcement of an order is necessary, an order to this effect can be passed. The learned Single Judge has held as under:

"3. I have perused the order passed by the Sub-Judge. He has based his judgment on a decision in Ravapati Audemma V. Pothineni Narasimham, AIR 1971 A.P. 53. This is a Division Bench judgment of that High Court. In the said judgment the point involved was the same as in the presence case. The learned Judges have discussed the case-law on the point. They have not agreed with certain prior decisions. The relevant observations may be reproduced:

"The observations in the aforesaid decision no doubt support the contention of the learned counsel for the petitioner. The learned Judge Bhima Sankaram, J., referred to Section 151, C.P.C. but took the view that because an order of injunction is capable of enforcement by punishing its disobedience in the manner provided by Order 39 Rule 2(3), C.P.C., it is not open to the Civil Courts to enforce the same with the aid of the police. With great respect we are unable to agree with this reasoning. It has to be noticed that Order 30, Rule 2(3), CPC., provides only for punishment by attachment of the property or by detention in civil prison of the person who committed breach. But it does not further provide for implementation of the order of injunction itself. Order 39, Rule 2(3) cannot be said to be an express provision with respect to implementation of the order of injunction, but is only a provision which provides penalty for disobedience of the order. In such a case there being no other express provisions in the Code for enforcement of the order, it is not only proper but also necessary that the courts should render all aid to the aggrieved party to derive full benefits of the order. Though the order of injunction under Order 39, C.P.C. is only interim in nature, still it clothes the person who obtained the order with certain rights and he is entitled to enforce the aforesaid right against the party who is bound by the order. No doubt in such a case, the aggrieved party himself could approach the police authorities to prevent obstruction to the enforcement of the order or to the exercise of the right which he derives under the order or to the exercise of such right which he derives under the order of Court. But we do not see why when the same person brings to the notice of the Court that enforcement of the order is sought to be prevented or obstructed, the Court should not exercise its inherent power under Section 151, C.P.C. and direct the police authorities to render all aid to the aggrieved party in the implementation of the Court's order.

In our opinion the exercise of such power is necessary for the ends of justice or to prevent abuse of the process and the civil court

has ample jurisdiction to pass such order under Section 151, C.P.C. The learned Judge's observation "that the police are not bound to obey and directions of the court in the absence of any statutory obligation to do so and a civil court would be stultifying itself by giving directions which may not be complied with", with great respect, cannot be said to be correct. Inasmuch as we are of the opinion that such a direction to be police authorities could be given under the inherent powers of the Court under Section 151, C.P.C. the police are bound to obey such directions."

The learned Judges have also referred to some decisions on the point, including the observations in Padam Sen Vs. State of U.P. (AIR 1961 SC 218). It is desirable to reproduce the same:

"The following observations in AIR 1961 e also apposite in this context:

> *"The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purpose mentioned in Sec. 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature.'*

In view of these clear observations of their Lordships with regard to the scope and ambit of the inherent powers of the Court under Section 151, C.P.C., we are clearly of the opinion that in order to do justice between the parties or to prevent the abuse of process of the Court, the Civil courts have ample jurisdiction to give directions to the police authorities to render aid to the aggrieved parties with regard to the implementation of the orders of Court or the exercise of the rights created under orders of Court. That the police authorities owe a legal duty to the public to enforce the law is clear from a decision of the Court of Appeal, reported in R.V. Metropolitan Police Commr., (1968) 1 All DR 763, where Lord Denning, M.R. observed at page 769 as follows:

"I hold it to be the duty of the Commissioner of Police, as it is of every chief constable to enforce the law of the land.....but in all these things he is not the servant of anyone, save of the law itself. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."

The same view was expressed by the other learned Judges. We may also refer to the judgment of the Madras High Court, in Varadachariar V. Commr. Of Police (1969) 2 Mad. LJ 1, where the learned Judge, Kailasam, J., after referring to the English case cited above held that the Commissioner of Police should proceed and act in accordance with the directions indicated in the aforesaid judgment."

8. In AIR 1983 Calcutta 266 titled as **Sunil Kumar Halder and others** Vs. **Nishikanta Bhandari and others**, the learned Single Judge has held that the Court can

order police protection under Section 151 C.P.C. towards the implementation of order for injunction. The learned Single Judge has held as under:

> *"4. In the result, the application is allowed. The order passed by the learned Munsif is set aside. The learned Munsif is directed to give appropriate directions upon the police as prayed for in the application Pled by the petitioners under Section 151 of the Civil P. C. within two weeks from the receipt of the order from his Court. There will be no order for costs in this application. The order may be communicated by a spl. messenger at the cost of the petitioners."*

9. In AIR 1993 Calcutta 288 titled as **Smt. Charubala Dev Nath** Vs**. Shri Niranjan Pathak**, the learned Single Judge has held that the Court has power and jurisdiction under Section 151 to grant police help to implement its order. The learned Single Judge has held as under:

> *"16. In the cases of Saudamini Roy Chowdhury (supra) and Sunil Kumar Haldar (supra) this court has taken the view that the Court has the power under Section 151, Code of Civil Procedure to direct the police to render help for implementation of its order."*

10. In AIR 1993 Andhra Pradesh 103 titled as **Matha Gavarayya and others** Vs. **The District Collector, E.G. Distt. and others**, the learned Single Judge has held that injunction decree can be implemented by seeking police aid or by seeking necessary directions from either Civil Court under Section 151 or High Court under Article 226 of the Constitution of India. The learned Single Judge has held as under:

> *"4. Coming to two CRPs, filed by the 3rd respondent-society, i.e., CRP Nos. 2382 and 2383 of 1991, they have been preferred against the orders passed by the court of the District Munsif, Kothapeta, seeking execution of the decree of injunction, the lower court had rightly rejected the said application as having no jurisdiction. It is pertinent to mention that a decree of injunction is inexecutable but measures can be taken to make it ettective. For implementation of the injunction order, it is always open to the decree-holder to seek police aid and for that purpose seek necessary directions from either the civil court invoking its inherent .power under Section 151, CPC, or invoke extraordinary jurisdiction of this court under Article 226 of Constitution of India, and as such, these two CRPs, are devoid of merits as there is no error or jurisdiction committed by the court below."*

11. In 1996 ILR (Kar) 1271 titled as **Papanna** Vs. **Nagachari**, the learned Single Judge has held as under:

> *"5. The defendant filed objections, contending that the police help cannot be ordered to implement the orders of injunction and if there is any violation, the proper remedy of the plaintiff is to move the Court under O. 39, R. 2A and Court has no jurisdiction to order police protection. The defendant's objection was overruled and the trial Court passed an order directing the P.S.I. Anekal to assist the plaintiff in implementing and enforcing the orders passed by that Court on I.A.I. application for temporary injunction. The defendant has challenged the same.*

> *6. The counsel for the revision-petitioner contended that though there is an order of temporary injunction against him, in fact, he is in possession of the same and even if there is any violation of order of temporary injunction, the proper remedy of the plaintiff is to move the Court under Order 39, Rule 2A and that the Court has no jurisdiction to order police protection in such circumstances. I am not inclined to accept both the contentions.*
>
> *7. It is to be noted that the order of temporary injunction was confirmed by, the trial Court after hearing the defendant and considering his objections by its order dated 3-7-1992. Defendant, dissatisfied with the above order, filed an appeal before the Addl. Civil Judge, which was also dismissed on 20- 11-1993 on a consideration of the entire matter. It does not lie in the mouth of the defendant to contend that he is still in possession of the property and that the order of injunction cannot be given effect to. When the Court has prima facie considered the matter and has granted a temporary injunction in favour of the plaintiff after hearing the defendant, the Court has to enforce the same and the contention of the defendant that he is in possession, cannot be accepted at this stage.*
>
> *8. The second ground raised by the counsel for the revision-petitioner is also equally untenable. The mere fact that there is provision under Order 39, Rule 2 A for taking action for disobedience of an order of temporary injunction, does not prevent the Court from taking steps to see that its orders are implemented. If the Court had no power to implement its own orders, then there is no purpose in the Courts passing orders in matters coming before them. The remedy under. Order 39, Rule 2A is not exhaustive and Court can pass appropriate orders to see that its orders are enforced. In necessary cases, even the police can be directed to enforce the orders of the Court. In this case that alone has been done by the trial Court and I do not find any error of jurisdiction warranting interference under Section 115 of C.P.C."-*

12. In AIR 2004 Supreme Court 2093 titled as **Shipping Corporation of India Ltd**. Vs. **Machado Brothers and others,** their Lordships have held that if there is no specific provision which prohibits the grant of relief sought in an application filed under Section 151, the Courts have all the necessary powers under Section 151 to make a suitable order to prevent the abuse of the process of Court. The Division Bench has held as under:

> *"20. From the above, it is clear that if there is no specific provision which prohibits the grant of relief sought in an application filed under Section 151 of the Code, the Courts have all the necessary powers under Section 151, CPC to make a suitable order to prevent the abuse of the process of Court. Therefore, the Court exercising the power under Section 151, CPC first has to consider whether exercise of such power is expressly prohibited by any other provisions of the Code and if there is no such prohibition then the Court will consider whether such power should be exercised or not on the basis of facts mentioned in the application."*

13. Accordingly, the order dated 12.1.2012 is set aside. The Superintendent of Police, Kangra at Dharamshala is directed to render the police assistance to the petitioner/plaintiff towards the execution of the judgment and decree dated 12.1.2012, rendered in Civil Suit No. 72 of 2004 within a period of one week from today.

14. In view of this, the present petition is disposed of, so also the pending application(s), if any. No costs.

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

M/s Priyanka Enterprises through its proprietor Shri Ranbir Chaudhary
.....Plaintiff

Versus

M/s Tirupati Food Processing through its proprietor Shri Manoj Aggarwal
.....Defendant.

Civil Suit No. 4078 of 2013
Judgment reserved on 29th May 2015
Date of Judgment 8th July 2015

Specific Relief Act, 1963- Section 20- Plaintiff had placed an order with the defendant for supply of machinery for Rs. 57 lacs- defendant delayed the supply of machinery and instead of supplying the new machinery, supplied the old and rusted machinery- plaintiff could not start the project due to the old machine- defendant did not file any written statement nor appeared in the witness box- the version of the plaintiff was proved by PW-3- held, that plaintiff is entitled for the recovery of the amount paid by him along with compensation and the interest paid by the plaintiff to the bank for purchasing machinery. (Para-9 to 11)

Cases referred:

Vidyadhar vs. Mankikrao and another, AIR 1999 SC 1441
Iswar Bhai C. Patel @ Bachu Bhai Patel vs. Harihar Behera and another, 1999(1) S.L.J. 724

For the Plaintiff: Ms. Bhawana Dutta, Advocate.
For the Defendant: Ex-parte.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Plaintiff filed present suit for recovery of Rs.71,88,356/- (Rupees seventy one lacs eighty eight thousand three hundred fifty six only) by way of damages with interest at the rate of 8% per annum from the date of institution of suit till realization.

Brief facts of the case:-

2. It is pleaded that plaintiff is proprietor of M/s Priyanka Enterprises Phase-II Industrial area Gagret District Una H.P. and is competent to file the present civil suit. It is pleaded that plaintiff purchased a plot measuring about 1000 sq. metres at G.M. District

Industries Centre Una having Plot No. 10, Phase-II Industrial Area Gagret District Una H.P. for the purpose of establishing the business by constructing a factory for the manufacturing of Expended Extruded Snacks Food Kurkure and Potato Wafer etc. and also sought permission for establishment of factory by the competent authority i.e. District Industries Centre Una H.P. It is pleaded that plaintiff prepared complete project summary and took loan from the Nationalized Bank and defendant approached the plaintiff for supply of machinery required for the manufacture of Expended Extruded Snacks Food Kurkure and Potato Wafer etc. and further for supply of machinery for processing of food items. It is further pleaded that defendant had given the quotation to the plaintiff for the supply of machinery and total estimate to the tune of Rs. 57 lacs (Rupees fifty seven lacs only) was given by defendant to the plaintiff. It is further pleaded that defendant also undertook to install machinery for the said project. It is also pleaded that plaintiff made all arrangements to facilitate the defendant for establishing the machinery required for the said project and further got loan sanctioned from the Nationalized Bank. It is pleaded that after the receipt of payment of Rs.61,50,000/- i.e. Rs.47,05,000/- vide demand draft No. 907811 on dated 29.3.2012 and sum of Rs.14,45,000/- by cash the defendant was under legal obligation to supply the machinery at the earliest to the plaintiff as the plaintiff was willing to start the manufacturing of Expended Extruded Snacks Food Kurkure and Potato Wafer etc.. It is pleaded that defendant deliberately after receipt of payment delayed the machinery for the project and in place of supplying the new machinery defendant supplied old and rusted machinery, the details of which is as under:-

Sr.No.	Name of Part	Value	Old/Rusted
1	Esprator(1)	2,25,000/-	Old
2.	Emry Rule machine (1)	90,000/-	Old
3	Elemator(1)	60,000/-	Old
4	Brum(1)	40,000/-	Old
5	Grinding Suj Machine(2)	6,50,000/-	Old
6	Jaali Swizerland, Namda, Tape, Air Lock Rubber etc. (Set)	5,00,000/-	Old
7.	Motors & Electricals Good (set) started not supplied	5,00,000/-	Old

It is pleaded that defendant failed to supply the complete machinery to the plaintiff with malafide intention and also failed to supply the following items such as Reel Machine, Wibro Purifier, Finisher Machine, Ekoter Machine Mixer Masala and Pneumatic Packing Machine to the plaintiff. It is further pleaded that plaintiff was in state of shock and after receiving the old rusted and incomplete machinery supplied by the defendant the plaintiff immediately informed the defendant about the same. It is pleaded that when this fact of supply of old rusted and incomplete machinery was brought to the notice of defendant thereafter defendant promised to replace the said machinery with immediate effect but in spite of repeated requests defendant had failed to replace the old machinery and hence the plaintiff after making huge investment in the project could not start the said project. It is pleaded that plaintiff placed the order for supply of requisite machinery for manufacturing of Expended Extruded Snacks Food Kurkure and Potato Wafer etc. and plaintiff was under belief that defendant would provide best quality of machinery. It is pleaded that due to supply of old incomplete machinery by defendant the plaintiff has suffered huge funds and

loss. It is pleaded that plaintiff is suffering the losses of Rs.1 crore (Rupees one crore only) on account of deficiency in service to the plaintiff by the defendant. It is further pleaded that plaintiff and defendant entered into a written agreement dated 28.10.2012 whereby defendant agreed for eplacement of old machinery. It is pleaded that defendant agreed to refund a sum of Rs.17,65,000/- (Rupees seventeen lacs sixty five thousand only). It is pleaded that defendant also issued post dated cheque amounting to Rs.17,65,000/- (Rupees seventeen lacs sixty five thousand only) out of which amount of Rs.10 lacs (Rupees ten lacs only) stood cleared. It is pleaded that defendant did not comply the promise of agreement dated 28.10.2012 and failed to replace the old machinery. It is pleaded that one post dated cheque to the tune of Rs.2,50,000/- (Rupees two lacs fifty thousand only) was also dishonoured and separate proceedings under Section 138 of Negotiable Instrument Act are pending before competent Court of law. It is pleaded that despite repeated requests the defendant did not replace the old machinery and plaintiff was forced to purchase new machinery from other authorized dealer. It is pleaded that plaintiff suffered great financial loss due to illegal act and conduct of defendant. It is also pleaded that plaintiff also served a legal notice upon the defendant dated 12.2.2013 and further pleaded that plaintiff also filed FIR against the defendant. It is pleaded that plaintiff by act and conduct of defendant suffered following damages:-

a) Breach of agreement and for non-supply of the new machinery: Rs.51,50,000/-
b) Interest paid on loan obtained for the purchase of machinery from the bank of plaintiff w.e.f. 29.3.2012 till 30.9.2013 Rs.10,38,356/-
c) Mental harassment Rs.10,00,000/-

Total Rs.71,88,356/-

Prayer for decree the suit as mentioned in relief clause of plaint sought.

3. Defendant did not appear despite service and defendant was proceeded ex-parte on dated 5.3.2014.

4. Oral evidence examined by plaintiff:-

Sr.No.	Name of witness
PW1	Vijay Kumar
PW2	HHC Vijay Kumar
PW3	Ranbir Chaudhary
PW4	Swaraj Kapoor

5. Documentary evidence produced by plaintiff:-

Exhibit	Description of document
Ext.PW3/1	Letter issued by GM District Industries Centre to the plaintiff regarding extension of validity in period of provisional allotment of plot No. 11 Phase II Industrial Area Gagret.
Ext.PW3/2	Project report of Food Processing Unit.

Ext.PW1/A	Letter issued by defendant to plaintiff regarding offer for machinery and equipment for manufacturing of Kurkure.
Ext.PW1/A-2	Commitments of the buyer letter.
Ext.PW1/A-3	Quotation for manufacturing and erection of Kurkure Plant.
Ext.PW1/A-4	Quotation for manufacturing and erection of Kurkure plant.
Ext.PW1/E	Copy of demand draft of Rs.7,05,000/- (Rupees seven lacs five thousand only) in favour of M/s Tirupati Food Processing.
Ext.PW3/3	Agreement between the parties dated 28.10.2012.
Ext.PW3/4	Legal notice given by plaintiff.
Ext.PW3/5	Reply to legal notice by defendant.
Ext.PW3/6 to Ext.PW3/12	Invoice dated 27.11.2012 of Kapur Mill Gin Store
Ext.PW3/13 to Ext.PW3/16	Invoice dated 2.4.2012 of Sharma Electricals.
Ext.PW3/17	Invoice dated 13.4.2012 of Usha Sales Corporation
Ext.PW3/18	Invoice dated 10.7.2012 of Mahesh Trading Company.
Ext.PW3/19	Retail invoice dated 24.11.2012 of Mahadev Trading Company
Ext.PW3/20	Invoice dated 24.11.2012 of Kartar Machine Tools
Ext.PW3/21	Invoice dated 24.12.2012 of Pankaj Steel Industries.
Ext.PW3/22	Invoice dated 5.1.2013 of Ludhiana Krishi Udyog
Ext.PW3/23	Invoice dated 7.1.2013 of M/s Aman Food Industries.
Ext.PW2/A	Copy of FIR
Ext.PW1/F	Certificate issued by PNB Gagret.
Ext.PW1/G	Account ledger inquiry.

6. Following points arise for determination in this case:-

1. Whether plaintiff is entitled for amount of Rs.71,88,356/- (Rupees seventy one lacs eighty eight thousand three hundred fifty six only) by way of damage along with interest at the rate of 18% per annum from the date of institution of suit till realization of amount?
2. Relief.

7. Court heard learned counsel appearing on behalf of the plaintiff and perused the entire record carefully.

8. Testimonies of oral witnesses examined by plaintiff:-

8.1 PW1 Vijay Kumar Deputy Manager PNB Gagret has stated that he has brought the original record of M/s Priyanka Enterprises regarding loan Account No. IB5512. He has stated that an amount of Rs.42,78,740/- (Rupees forty two lacs seventy eight thousand seven hundred forty only) was given as loan to M/s Priyanka Enterprises by way of demand draft No. UEO907811 payable to Kankhal Haridwar Branch. He has stated that record of offer-cum-quotation for quoting rates given by M/s Tirupati Food Processing are Ext.PW1/A to Ext.PW1/D. He has stated that copy of demand draft No. UEO907811 is exhibited as Ext.PW1/E and interest certificate dated 28.10.2013 issued by the bank bears his signature and is Ext.PW1/F. He has stated that interest to the tune of Rs.14,24,275/- (Rupees fourteen lacs twenty four thousand two hundred seventy five only) was paid till 30.4.2014 by M/s Priyanka Enterprises in the said loan account, copy of statement of account is exhibited as Ext.PW1/G.

8.2. PW2 HHC Vijay Kumar P.S. Gagret has stated that he has brought the original record of FIR No. 93/2013 dated 25.7.2013 P.S. Gagret District Una. He has stated that copy is Ext.PW2/A and FIR was lodged by Ranbir Chaudhary against Manoj Aggarwal proprietor M/s Tirupati Food Processing.

8.3 PW3 Ranbir Chaudhary has stated that his affidavit Ext.PW3/A be read as his evidence. He has stated that he is having manufacturing unit of Food Processing (Kurkure). He has stated that quotation given by the defendant pertaining to the supply of machinery is exhibited as Ext.PW1/A-3 and payment of Rs.47,05,000/- (Rupees forty seven lacs five thousand only) was paid to the defendant by way of demand draft which is exhibited as Ext.PW1/E. He has stated that defendant has supplied the old machinery and defendant had given the undertaking that he would replace the old machinery and supply the new machinery. He has stated that undertaking given by defendant is Ext.PW3/3. He has stated that defendant took away the old machinery from his plant and did not supply the new machinery. He has stated that defendant had issued cheque of Rs.2,50,000/- (Rupees two lacs fifty thousand only) and same was dishonoured due to insufficient funds. He has stated that notice given to defendant is mark Z. He has stated that he has filed the complaint against the defendant under Section 138 of Negotiable Instrument Act. He has stated that legal notice Ext.PW3/4 was also given. He has stated that reply to this legal notice is Ext.PW3/5. He has stated that defendant did not supply the new machinery and he was forced to purchase the new machinery for functioning of his unit at Una. He has stated that detail invoices of the material purchased for his unit are Ext.PW3/6 to Ext.PW3/23. He has stated that FIR registered against the defendant in P.S. Gagret District Una dated 25.7.2013 is exhibited as Ext.PW2/A. He has stated that certificate issued by PNB pertaining to charging of interest to the tune of Rs.10,38,356/- (Rupees ten lacs thirty eight thousand three hundred fifty six only) is exhibited as Ext.PW1/F.

8.4 PW4 Swaraj Kapoor has stated that he has brought the record pertaining to retail invoice of Kapoor Mil Gin Store Ludhiana. He has stated that machinery was sold to M/s Priyanka Enterprises. He has stated that retail invoices are Ext.PW3/6 to Ext.PW3/12. He has stated that payment pertaining to the purchase of said machinery was cleared by the plaintiff.

Findings upon Point No.1

9. Submission of learned Advocate appearing on behalf of the plaintiff that plaintiff is entitled to recover the amount of Rs.51,50,000/- (Rupees fifty one lacs fifty

thousand only) on account of breach of agreement and for non-supply of new machinery is accepted for reasons hereinafter mentioned. PW3 Shri Ranbir Chaudhary has stated in positive manner that after undertaking given by defendant in writing Ext.PW3/3 defendant took away old machinery from his plant and did not supply new machinery despite repeated request. Testimony of PW3 remained unrebutted on record. Defendant did not appear in the witness box to rebut testimony of PW3. Hence adverse inference is drawn against defendant under Section 114(g) of Indian Evidence Act. It is held that plaintiff is entitled for recovery of Rs.51,50,000/- (Rupees fifty one lacs fifty thousand only) on account of non-supply of new machinery to plaintiff.

10. Another submission of learned Advocate appearing on behalf of the plaintiff that plaintiff is also legally entitled for damages relating to mental harassment to the tune of Rs.10 lacs (Rupees ten lacs only) is partly answered in yes and partly answered in no. Court is of the opinion that plaintiff is legally entitled for sum of Rs.50,000/- (Rupees fifty thousand only) as mental harassment because it is proved on record that plaintiff had sustained mental harassment on account of supply of old machinery by defendant and on account of supply of defective machinery.

11. Submission of learned Advocate appearing on behalf of the plaintiff that plaintiff is also legally entitled for recovery of Rs.10,38,356/- (Rupees ten lacs thirty eight thousand three hundred fifty six only) on account of interest paid on loan obtained for purchase of machinery from the bank is accepted for the reasons hereinafter mentioned. PW1 Vijay Kumar Deputy Manager PNB Gagret District Una (H.P.) has stated that loan to the tune of Rs. 42,78,740/- (Rupees forty two lacs seventy eight thousand seven hundred forty only) was given to plaintiff and plaintiff had paid interest to the tune of Rs.14,24,275/- (Rupees fourteen lacs twenty four thousand two hundred seventy five only). Testimony of PW1 Vijay Kumar remained unrebutted on record. It is held that plaintiff is entitled to recover Rs.10,38,356/- (Rupees ten lacs thirty eight thousand three hundred fifty six only) from defendant on account of interest paid by plaintiff to PNB.

12. Evidence adduced by plaintiff remains unrebutted. Defendant neither filed written statement nor appeared in witness box despite service. Hence adverse inference is drawn against the defendant under Section 114(g) of Indian Evidence Act. Oral as well as documentary evidence adduced by plaintiff remained unrebutted on record. It was held in case reported in ***AIR 1999 SC 1441 titled Vidyadhar vs. Mankikrao and another*** that if party does not enter into the witness box then adverse inference should be drawn against that party. ***(Also see 1999(1) S.L.J. 724 titled Iswar Bhai C. Patel @ Bachu Bhai Patel vs. Harihar Behera and another)*** Point No.1 is decided partly in favour of plaintiff.

Relief (Point No.2).

13. In view of findings upon point No.1 suit filed by plaintiff is partly decreed. Decree for recovery of Rs.6238356/- (Rupees sixty two lacs thirty eight thousand three hundred fifty six only) is passed in favour of plaintiff and against the defendant. Interest at the rate of 6% per annum qua decreetal amount is also granted in favour of plaintiff and against the defendant from institution of suit till realization of decreetal amount. Plaintiff will also be entitled for costs of suit. The Registrar (Judicial) will prepare the decree sheet strictly in accordance with law forthwith. Civil suit is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Manmohan Sharma ….Appellant.

Versus

State of H.P. …..Respondent.

Cr. Appeal No. 303 of 2014
Reserved on: 2.7.2015
Decided on : 8th July,2015

N.D.P.S. Act, 1985- Section 21(C)- Accused was found riding a motorcycle having bags on both handles, which were found to be containing medicines/injections- inquiry was made from the Drug Inspector who revealed that except for one or two medicines, the others were psychotropic substances– the accused made a disclosure statement on which huge quantity of N.D.P.S. Drugs was recovered- it was not stated by P.P. while seeking permission from the Court to open the parcels that they were received from an official who had brought them from Malkhana- no entry was recorded regarding the taking out of the case property from the Malkhana, therefore, the case property produced in the Court cannot not be linked to the substance recovered at the spot- accused acquitted. (Para 9-14)

For the Appellant: Mr. Vikas Rathore and Mr. Ajay Kochhar, Advocate.
For the Respondent: Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgment of 13.8.2014, rendered by the learned Special Judge(1) Una, District Una, H.P., in Sessions Case No. 17/2013, whereby, the learned trial Court convicted and sentenced the accused/appellant to undergo rigorous imprisonment for a period of 12 years and to pay a fine in a sum of Rs.1,00,000/- (One Lac) and in default of payment of fine to further undergo simple imprisonment for a period of two years for commission of offence under Section 21(c) of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act").

2. The facts, in brief are that, on 10.8.2013, SI Krishan Lal Beri alongwith other police officials were present at Una-Mehatpur Road near Railwany Bridge, Shani Mandir at about 8.15 a.m. and laid a Nakka for conducting traffic checking. At about 10.30 a.m. one motorcycle, black in colour, having registration No. HP-20D-8788 came from Mehatpur side having bags on both handles of the motorcycle. SI Sanjay stopped the motorcycle and asked about the antecedents of the motorcyclist, who disclosed his name to be Manmohan Sharma. The police checked the bags aforesaid and found medicines/drugs/injections in the bags. SI Sanjay then asked the motorcyclist about the documents/licence relating to those medicines/drugs/injections. However, the accused could not produce any documents. Thereafter, rukka was prepared by SI Krishan Lal Beri and handed over the same to C Rajat Kumar with direction to take the same to police Station. The police also prepared spot map. The IO called drug inspector on his mobile phone and narrated him the description of medicines and drugs recovered from the motorcyclist. The Drug Inspector told I.O that

except for one or two medicines, rest of them are psychotropic substances and asked the IO to prepare separate samples of those drugs/psychotropic substance. Thereafter, the Investigating Officer prepared three parcels from the drugs recovered from the accused and sealed all three parcels with seal impression B. He also prepared sample of seals on pieces of clothes. NCB-1 form in triplicate was filled in by the IO. The I.O also took in to possession the motorcycle alongwith keys, drugs parcels and prepared seizure memo. He deposited all these articles in Malkhana. The IO moved an application to Drug Inspector on 13.8.2013 for verifying the facts as to whether the accused was having the licence to keep all these drugs and psychotropic substances or not and the drug inspector replied to all the queries of IO through a separate letter. Prior to that, the accused was arrested on 10.8.2013 and intimation of his arrest was given to his brother. The IO also sent special report to S.P Una. On 12.8.2013 the medical store of the accused was searched in the presence of Drug Inspector, Pradhan and up-Pradhan of Gram Pachayat, Arniala, however, no incriminating drug or psychotropic substance was found in the shop of the accused. The accused made a disclosure statement regarding a room/store taken on rent by him from one kasturi lal of village Bhadolian khurd, Una. Thereafter, police went to the house of Kasturi Lal alognwith the accused. On searching the room taken on rent by the accused, a huge quantity of Narcotic and Psychotropic drugs were recovered. All the drugs were put in one white plastic sack and four parcels. All the parcels were duly sealed with seal impression A. The parcels were taken in possession by the Police vide separate seizure memo. NCB-1 form was filled in by the IO. Spot map was also prepared. Statements of witnesses were also recorded. The police has also obtained certificate from the owner of the room. The photographs of the rented room were also clicked with the help of one Rajat Kumar, photographer. The rented room was also video graphed by one police official with the help of his mobile. The compact disc of that video was also obtained. The drugs and psychotropic substances kept in parcel were sent to FSL, Junga for chemical analysis. On conclusion of the investigation, into the offence, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and presented in the Court.

3. The accused person was charged, for, his having committed offence punishable under Section 21(c) & 22 of the NDPS Act, by the learned trial Court, to, which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 16 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. He chose to lead evidence in defence.

5. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant.

6. The accused/appellant 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 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 the findings of acquittal.

7. On the other hand, the learned Assistant Advocate General, 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, hence, do not necessitate interference, and 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. PW-15 Krishan Lal Beri, the Investigating Officer deposes that on 10.8.2013 he alongwith SI Sanjay Kumar, HHC Raj Kumar, HHG Gurdeep Singh, was on patrol duty. He further deposes that at about 8.15 a.m. the police party reached Shani Mandir near railway bridge and checked about 30 vehicles. At about 10.30 a.m. one motorcycle black in colour having registration No. HP-20D-8788 came from Mehatpur side having bags on both the handles was stopped and on checking the bags aforesaid, the same were found to be containing five types of medicines/drugs and injections kept in small boxes, syrup bottles, two types of injections and two types of drugs. SI Sanjay asked the accused about the documents for transporting the drugs. The accused could not produce any document. He continues to depose that thereafter he prepared rukka Ex. PW-10/A and handed over the same to C Rajat Kumar with a direction to take the same to the police station. Spot map comprised in Ex. PW-15/A has been deposed by this witness to have been prepared by him. He deposes that thereafter he prepared three different parcels from the drugs recovered from the accused, out of which one was the representative sample of the drugs/psychotropic substances. Thereafter all the parcels aforesaid were sealed with three seals of seal impression B. He further deposes that he also prepared the sample seals on pieces of cloths. NCB forms were filled in by him. The motor cycle alongwith key and the contraband bags i.e. parcels Ex. P-2 & Ex. P-3 and representative parcels Ex. P-10 were taken into possession vide seizure memo Ex. PW-8/B and then handed over to MHC for depositing the same in the Malkhana. Thereafter, on permission having been accorded by the Court, the learned PP opened the parcels Ex. P-2, P-3 and P-10. He continues to depose that on opening the parcels, injections of Kavil Ex. PG-1 to PG 95, 25 injections of Avil Ext. PH-1 to Ex. PH 25, 18 bottles of Rexcof syrup Ex. PJ-1 to PJ-18, 9 Corex Syrup Ex. PK-1 to PK-9, 20 tablets of Nitrazepam Ex. Pl-1 to Ex. PL-20, 290 tablets of Alzolom Ex. PM-1 to PM-290, 780 tablets of spas Parvon Ex. PA-1 to Ex. PA-780, 1560 tablets Spasmo Proxyvon Plus Ex. PB-1 to PB-1560, 120 tablets of Spasmo Proxyvon Ex. PC-1 to Ex. PC-120, 120 tablets of Proxyvon Ex. PD-1 to Ex. PD-120, 190 tablets of Pantosec Ex. PE-1 to PW-190 and 360 injection of Norgesic Ex. PF-1 to PF-360, one strip each of Parvon Spas, Proxyvon, Spasmo Proxyvon Plus capsules and 10 injections of Norgesic, 10 tablets Pantosec, 5 injections of Kavil, 5 injection Avil, 2 bottles of Rexcof syrup, one bottle corex and 10 tablets of Alprazolam were found**.** All the drugs/injections found in Ex. P-2, P-3 and P-10 were identified by this witness to be the same, which were found in the conscious and exclusive possession of the accused. He continues to depose that on 12.8.2013 the medical store of the accused was searched in the presence of Drug Inspector, Pradhan and Up-Pradhan of Gram Pachayat, Arniala, however no incriminating drug or psychotropic substance was found in the shop of the accused. The accused made a disclosure statement regarding a room/store taken on rent by him from one kasturi lal of village Bhadolian kurad, Una. Thereafter, police went to the house of Kasturi Lal alognwith the accused. He further deposes that on searching the room taken on rent by the accused, a huge quantity of Narcotic and Psychotropic drugs were found. All the drugs were put in one white plastic sack and four parcels. All the parcels were duly sealed with seal impression A. The parcels were taken in to possession by the Police vide separate seizure memo. He continuous to depose that the learned PP on permission having been accorded by the Court opened Ex. P-6, P-7 to P-9, in which Spasmoproxyvon capsules Ex. PA-1 to Ex. PA-15408 and 5000

capsules of Parvon spas Ex. PB-1 to Ex. PB-5000, 2784 capsules of Proxyvon Ex. PC-1 to PC-2784, 2370 tablets of Anxinil Ex. PS-1 to Ex. PS-2370, 800 tablets of Momolit Ex. PK-1 to Ex. PK-800, 400 tablets of Micromlit Ex. PL-1 to Ex. PL-400, 540 injections of Norgesic Ex. PH-1 to Ex. PH-540 and 984 injections of Fortwin Ex. PG-1 to Ex. PG-984 were kept. He continuous to depose that another parcel in which 32 bottles of Rexcof and 64 bottles of Exiplon were sealed has not been shown to him. He continues to depose that a rapat regarding loss of that parcel has been entered on 16.2.2014. He also deposes that NCB-1 form was filled in and spot map was also prepared by him. He further deposes that statement of witnesses were also recorded by him. In his cross-examination he stated it to be incorrect that the police party with the help of Drug Inspector tried to place those Narcotic Medicines in the shop of accused and when they failed to keep the alleged medicines in the shop of the accused, then they prepared a fake disclosure statement of accused and placed the drugs in the rented accommodation of the accused.

10. The other prosecution witnesses, in their depositions have deposed a version in square tandem to the prosecution story, as referred to hereinabove by the Investigating Officer of the case.

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

12. The prosecution was required to prove the fact that the case property, as shown to PW-8 and identified by him on its production in court by the learned P.P, was linkable to the case property as recovered from the site of occurrence in the manner as alleged by the prosecution. However, at the time of recording of his deposition, Ex. P-3 bore thirteen seals of Forensic Science Laboratory, nonetheless, the impression of other seals though existing on Ex.P-3 yet were not decipherable except one. With the permission of the Court, the learned PP opened the parcels for its being shown to PW-8. However, there is omission in the statement of the learned PP while his seeking permission of the Court to open it in court for its being shown to PW-8, it was received from an official who had on its retrieval from the Malkhana concerned transmitted it to the learned PP. Moreover, there is no evidence comprised in apposite entries recorded in the Malkhana concerned contemporaneous to its production in Court at the instance of the learned PP for its being shown to PW-8. Consequently, for omission on the part of learned PP while seeking the permission of the Court to open it for its being shown to PW-8 to state that it was received by him from the Malkhana concerned through a named official after its retrieval therefrom with an apposite contemporaneous entry therein, an apt conclusion which is to be formed is that the case property as shown to PW-8 is rendered vulnerable to skepticism, in as much, as, it being not the case property as was recovered at the site of occurrence from the conscious and exclusive possession of the accused.

13. Besides the case property was also subsequently shown to PW-14 and PW-15. During the course of the recording of depositions of PW-14, Drug Inspector and PW-15, the Investigating Officer, the learned PP again sought the permission of the Court to open

the sealed parcels for theirs being shown to PWs aforesaid for eliciting from them a testimony qua the fact whether it constituted the case property even during the stage of its production in the Court at the instance of learned PP. There is no communication to the Court by the learned PP that the case property as concerted to be shown to PWs aforesaid was received by him in Court from an official who had received it from the Malkhana Incharge after its retrieval by the latter from the Malkhana concerned nor also there is any communication by the learned PP at the time of his seeking the permission to open it, that an apposite entry was recorded in the Malkhana to portray that hence, it was retrieved from the Malkhana contemporaneous to its production in Court for its being shown to PWs aforesaid at the instance of the learned PP. Consequently, omission on the part of the learned PP while producing the case property in Court to articulate the fact that it was received through an authorized official who had received it from the Malkhana Incharge after its retrieval from the police Malkhana, concerned with a contemporaneous entry in the Malkhana register, renders the factum of its constituting the case property to be vulnerable to skepticism. Obviously then, it cannot be construed to be the case property as was recovered at the site of occurrence from the purported, alleged, conscious and exclusive possession of the accused.

14. The summum bonum of the above discussion is that the prosecution has not been able to adduce cogent and emphatic evidence in proving the guilt of the accused. The appreciation of the evidence as done by the learned trial Court suffers from an infirmity as well as perversity. Consequently reinforcingly, it can be formidably concluded, that, the findings of the learned trial Court merit interference.

15. In view of above discussion, the appeal is allowed and the impugned judgment of 13.8.2014, rendered by the learned Special Judge(I), Una, District Una, H.P, is set aside. The appellant/accused is acquitted of the offence charged. The fine amount, if any, 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.

16. The registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of the jail concerned, in conformity with this judgment forthwith. Records be sent down forthwith.

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

Cr. Appeal No.: 119 of 2013 and other connected matters.
Reserved on: 19.06.2015.
Date of Decision : 08.07.2015

Cr. Appeal No. 119 of 2013.

Ravi Kumar and others .....Appellants.

Versus

State of Himachal Pradesh ...Respondent.

Cr. Appeal No. 91 of 2013.

Vivek Kumar .....Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Cr. Appeal No. 178 of 2013.

Sukhwinder Singh .....Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Cr. Appeal No. 216 of 2013.

Santokh Ram .....Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Indian Penal Code, 1860- Sections 302 and 120-B- A dead body was found which was identified on the basis of documents as belonging to 'D'- complainant made a statement that 'D' had taken his Innova Car from Rahimpur- deceased 'D' had received 4-5 calls from a mobile number which was sold by 'N' to some unknown person- complainant suspected that calling person might have committed the murder of 'D'- investigation was conducted and it was found that accused 'R' accompanied the person who had talked to the deceased- accused were arrested- accused 'R' made a disclosure statement on which clothes of the deceased were recovered- accused 'B' made a disclosure statement on which T.V. screen and stereo were recovered- accused also showed the place where deceased was murdered and his dead body was thrown- prosecution claimed that deceased was strangulated- Medical Officer stated that cause of death could not be ascertained because of advanced stage of decomposition of the dead body- therefore, cause of death was not established by the post mortem examination- post mortem was again conducted by PW-21 who also stated that no definite opinion could be given regarding the cause of death- therefore, prosecution version that deceased was strangulated by the accused cannot be accepted- articles could not be proved to be belonging to the deceased especially when they could be purchased from the market- in view of these circumstances, accused acquitted. (Para-13 to 19)

For the Appellants: Mr. N.K Thakur, Sr. Advocate with Mr. Rohit Bharol, Advocate for the appellant in Cr. Appeal No. 119 of 2013.
Mr. Anup Chitkara, Advocate for appellant in Cr. Appeal No. 91 of 2013.
Mr. Dinesh Thakur, Advocate, for appellant in Cr. Appeal No. 216 of 2013.
None for appellant in Cr. Appeal No. 178 of 2013.

For the respondent: Mr. M.A Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, *Judge*

These appeals are directed against the judgement rendered on 4.3.2013 by the learned Sessions Judge, Una, H.P. in Sessions Case No. 1 of 2009, whereby the appellants/convicts Ravi Kumar, Rohit Dhingra, Santokh Ram alias Sokha, Narinder alias Sodhi, Dharminder alias Sonu and Brij Mohan alias Billa have been sentenced to imprisonment for life for theirs having committed offences under Section 302 read with Section 120-B of the Indian Penal Code alongwith fine of Rs.20,000/- each. In default of payment of fine the convicts have been sentenced to further undergo simple imprisonment for two years. The above said convicts have been sentenced to undergo imprisonment for life

for theirs having committed offence under Section 396 read with Section 120-B of the IPC and fine of Rs.10,000/- each. In default of payment of fine, they have been sentenced to further undergo simple imprisonment for two years. Convicts Sukhwinder @ Kala and Vivek Kumar Tandon were sentenced to rigorous imprisonment for three years and to pay fine of Rs.10,000/- each for offence under Section 411 IPC. In default of payment of fine they have been sentenced to further undergo simple imprisonment for three months. However, all the sentences imposed upon the accused aforesaid were ordered to run concurrently.

2. The prosecution story, in brief, is that on 13.09.2008 Balbir Singh while returning after collecting grass, noticed a dead body in "Nullah" of Harda Jungle District Una (H.P.) and he reported the matter to the police at Police Post Pandoga. On receipt of said information ASI Atul Kumar entered rapat No.11 of 13.9.2008 comprised in Ext.PW-28/A and visited the spot. He got clicked photographs of dead body and place of occurrence. Dead body of deceased was searched and a driving licence and voter's ID-Card during the search of the dead body were recovered. On the basis of aforesaid documents, police came to know that dead body was of Dilbagh Singh son of Nand Singh, resident of Srai Khas, District Jalandhar, Punjab. After preparing the inquest report Exts. PW-17/A and Ext.PW-17/B the dead body was sent for autopsy to the Regional Hospital, Una. Dr. Y.R.Rabi, Medical Officer, Regional Hospital, Una on 14.9.2009 conducted post mortem examination of the body of deceased Dilbagh Singh and issued PMR Ext.PW-20/A. The viscera of the deceased was preserved by the doctors and after sealing it handed over to the police. As per prosecution, dead body of deceased Dilbag Singh was further sent to Tanda Medical College for further examination from Forensic Expert for ascertaining the cause of death. Forensic Expert of Tanda Medical College Dr. D.P.Swami conducted further post mortem examination of deceased Dilbag Singh and issued PMR NO. 77R/08 of 15.9.2008 Ext.PW-21/A. Dr. Swami also handed clothes, sandals and yellow cloth of deceased in sealed cover to the police.

3. The further story of the prosecution is that on 15.9.2009 Jarnail Singh PW-15 recorded his statement under Section 154 Cr.P.C. Ext.PW-15/E to the police disclosing that Dilbag Singh deceased was his cousin brother. On 11.9.2008 at about 3.30 p.m. said Dilbag Singh had taken Jarnail Singh's Innova car bearing No. PB-08-BC-4042 from Rahimpur. On 13.9.2008 he received information from police post Pandoga about the recovery of dead body of Dilbag Singh. Thereafter Jarnail Singh made local inquiries and he came to know that on 11.9.2008 the deceased had received 4-5 telephone calls on his mobile from mobile No. 99884-94105 w.e.f. 5 p.m. to 10.30 p.m. On further inquiry by Jarnail Singh he came to know that the said mobile connection sim was sold by one Munish son of Jagdish, Seth Telecommunication, Kartarpur on 11.9.2008 to an unknown person without any I.D.Proof. He also disclosed that the deceased was last seen on 11.9.2008 at 5.30 p.m at Kartarpur and raised his apprehension that the calling number person might have committed the murder of deceased with the help of his companions and taken away the Innova Car. On the basis of the aforesaid statement of Jarnail Singh, F.I.R. No. 219/08 of 15.9.2008 comprised in Ext.PW-1/B under Sections 302, 364 and 392 IPC was registered at Police Station, Haroli, District Una, H.P.

4. During investigation ASI Atul Kumar on 16.9.2008 visited the spot and prepared site plan Ext.PW-28/C. The viscera of the deceased was sent for examination to FSL, Junga. During investigation, it was found that on 11.9.2008 accused Ravi Kumar was also accompanying the person who had talked to the deceased at Bus Stand, Kartarpur. On

25.9.2008 accused Ravi Kumar, Rohit Dhingra, Brij Mohan @ Billa and one Deepak Rai @ Bhatt were arrested. On 27.09.2008 accused Ravi Kumar made a disclosure statement under Section 27 of the Indian Evidence Act Ext.PW-5/B, pursuant to which he got recovered clothes i.e. shirt Ext.P-2, Pant Ext.P-3, Lower Ext.P-4, Chappal Ext.P-5 and Bag Ext.P1 of deceased Dilbag Singh from the house of Ashok Kumar and the same were taken into possession by the police vide memo Ext.PW-5/A. Site plan Ext.PW-34/A was also prepared on the spot. On 27.9.2008 pursuant to disclosure statement Ext.PW-9/A under Section 27 of the Indian Evidence Act, made by accused Brij Mohan @ Billa, one amplifier Ext.P-6, T.V.screen Ext.P-7 and stereo Ext.P-8 of the aforesaid Innova vehicle were recovered from the house of accused Sukhwinder Singh @ Kala at Paharganj, Delhi and the same were taken into possession by the police vide memo Ext.PW-9/C. The site plan Ext.PW-29/A was also prepared by the Investigating Officer. On 28.09.2008 accused Sukhwinder Singh @ Kala was also arrested for offence under Section 411 IPC. Thereafter, on 27.9.2008 accused Rohit Dhingra identified the place of occurrence where he alongwith Sukha, Sodhi, Sonu and Ravi Kumar had allegedly murdered Dilbagh Singh on the intervening night of 11/12.9.2008 and thrown his dead body and to this effect memo Ext.PW-16/A as well as site plan were prepared.

5. During the Course of investigation, on 30.9.2008 statement of Sohan Singh owner of Tea stall at Pir Nigah was recorded. He disclosed that the accused persons had taken tea in his stall at Mid night on 11.9.2008. He identified co-accused Ravi Kumar and Rohit Dhingra, who were accompanied by 3-4 other boys on the aforesaid night. On 30.9.2008 the police proceeded to the house of Vivek Kumar Tandon to whom the said Innova vehicle was allegedly sold. During investigation the police came to know that the said Innova vehicle was found abandoned by the police of Punjab at Lalroo. As per prosecution on 23.10.2008 at the instance of accused Narinder @ Sodhi and Darminder @ Sonu the place of occurrence was demarcated and to this effect demarcation memo Ext.PW10/D as well as spot map Ext.PW-28/G were prepared. During investigation police obtained the call details of mobile in the name of accused Ravi Kumar and of the deceased and call details Ext.PW-25/A of mobile No.99884-94105 bearing same IMEI No. of hand set used by accused Ravi kumar. As per call details of mobile No. 99884-94105, a call was made on the mobile number of the deceased whereafter the deceased was found to have left for Kartarpur. The original number of accused Ravi Kumar was not found in use on 11.9.2008 from 3.37 p.m. and the said phone number was used by him only on 12.9.2008 at 1.23 p.m. The mobile phone of the deceased was found not in use w.e.f. 10.43 onwards on 11.9.2008 and at that time its location was in Chintpurni area (Himachal circle).

6. Further as per the statements of the witnesses and call details it came in the investigation that on 10.09.2008 accused Santokh Ram @ Sokha, Narinder @ Sodhi, Dharminder @ Sonu, Ravi Kumar and Rohit Dhingra gathered on the terrace of the house of accused Brij Mohan @ Billa and hatched conspiracy to commit theft of Innova vehicle and accused Brij Mohan @ Billa paid them Rs.3000/- to accomplish the aforesaid task. Thereafter, accused Santokh Ram @ Sokha, Narinder @ Sodhi, Dharminder @ Sonu, Ravi Kumar and Rohit Dhingra had gone to Kartarpur from Phillaur. At Kartarpur Santokh Singh sent Narinder, Dharminder and Rohit Dhingra to Sheetla Mata Mandir at Kartarpur and he alongwith Ravi Kumar had gone to the shop of Seth Enterprises, Kartarpur and purchased Vodafone connection No. 99884-94105. Thereafter, while calling on his mobile phone they called deceased Dilbag Singh to Sheetla Mata Mandir. Thereafter, all the five aforesaid accused persons boarded the vehicle to Baba Bad Bhag Singh via Gagret. On the same night from Baba Bad Bhag Singh they went to Pir Nigaha. At Pir Nigaha they took

Coke and as per prosecution case accused Dharminder Singh added six sleeping pills in the coke served to the deceased but it yielded no effect. During the intervening night of 11th and 12th September, 2008 at about 2. a.m., they went from Pir Nigaha towards Hoshiarpur. On the way when they came across Hirda jungle ahead of Pandoga, accused Santokh Singh got stopped the vehicle on the pretext of vomiting and alighted from the vehicle. Deceased Dilbag Singh after checking the air pressure of the tyres again sat on the driver seat. At that time Dharmender accused was sitting on the rear seat, with the help of yellow colour scarf choked the throat of the deceased and pulled it back. Since Dilbagh Singh was powerful, when Sonu could not pull him, Rohit Dhingra helped Sonu to pull the Scarf backward. Both hands of Dilbagh Singh were caught hold by accused Santokh Ram and his co-accused Ravi Kumar. Narinder had closed the mouth and pressed the neck of the deceased. After some time Dilbag Singh lost the senses and fell on the left side of his seat. He was dragged out by accused Santokh Ram, Rohit Dhingra, Narinder and Ravi Kumar and was thrown into the gorge. Thereafter, accused Santokh Ram took charge of driving and fled away alongwith his co-accused from the spot. On the way, accused Santokh Ram @ Sokha destroyed the sim card of the deceased driver. On 12.9.2008 in morning all of them went to co-accused Brij Mohan at Phillaur and from there they alongwith Brij Mohan went to Yamunnagar in the robbed vehicle. They took out the clothes and slippers of deceased from the dickey of Innova vehicle and kept the same with Ashok Kumar brother of Brij Mohan. On 14.09.2008 accused Santokh Singh, Narinder, Dharminder, Brij Mohan and Rohit Dhingra went to the house of Sukhwinder Singh in Paharganj at Delhi via Yamunnagar, U.P. in the aforesaid Innova vehicle. As per prosecution when accused aforesaid could not sell the vehicle, it was left with said Sukhwinder Singh accused and returned back to village Nurmahal. Accused Sukhwinder Singh removed stereo, amplifier alongwith T.V Screen from the Innova vehicle and kept the aforesaid articles in his possession. On 17.9.2008 accused persons Brij Mohan, Santokh Ram, Narinder, Dharmender with one Deepak Rai again went to Delhi in Innova No.PB-08-BB-7878. In Paharganj at Delhi they contacted through Deepak Rai his sister's husband namely Sanjeev Kumar. They sold the robbed Innova vehicle through Sanjeev Rai in East Patel Nagar, Delhi to one Vivek Kumar Tandon only for Rs.13,500/-. When accused Vivek Kumar Tandon came to know about the arrest of his co-accused person, he removed the vehicle from Delhi and abandoned the same in Lalroo area of Punjab. Thereafter challan under Section 173 of the Cr.P.C. was prepared and filed in the Court

7. The trial Court charged the accused Ravi Kumar, Rohit Dhingra, Santokh Ram @ Sokha, Narinder @ Sodhi, Dharminder @ Sonu, Brij Mohan @ Billa under Sections 396 and 302 read with Section 120-B of the Indian Penal Code, accused Sukhwinder Singh @ Kala under Section 411 of the IPC and accused Vivek Kumar Tandon under Sections 411 and 201 IPC, to which they pleaded not guilty and claimed trial.

8. In order to prove its case, the prosecution examined as many as 36 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 Cr.P.C. were recorded, in which they pleaded innocence. In defence, accused Ravi Kumar , Brij Mohan and Rohit Dhingra have tendered certified copy of challan Ex. D-1. Accused Sukhwinder Singh tendered in his defence copy of judgment Ex. D-Z. The other accused did not choose to lead evidence in defence. Supplementary statements of the accused under Section 313 Cr.P.C were recorded to which they did not choose to lead evidence in defence.

9. On appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused/appellants.

10. The appellants are aggrieved by the judgement of conviction, recorded by the learned trial Court. The learned counsel for the appellants, have 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, they contend that the findings of conviction be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

11. On the other hand, the learned Additional Advocate General, 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.

12. 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.

13. The prosecution attributes to the accused an inculpatory role of theirs having strangulated the deceased, hence, begotten his demise. For the aforesaid cause of the demise of the deceased to attain success, it necessitates its being grooved in the apt and germane evidence, comprised in the testimonies of PWs 20 and 21 and theirs displaying the factum of the demise of the deceased having ensued on account of the deceased having come to be strangulated. In case, the evidence of PWs 20 and 21 forthrightly brings to the fore the factum of theirs having, while conducting the post mortem on the body of the deceased, observed symptoms thereon in synchronization with the prescriptive edicts enunciated in Modi's Medical Jurisprudence and Toxicology for succoring, a conclusion that as such, the prosecution version of the accused having begotten the demise of the deceased by strangulating him, which when construed in entwinement with or in conjunction with the other links formidably proved by the adduction of cogent evidence, would stand firmly establish and clinch the guilt of the accused. However, in the event of, the testimonies of PWs 20 and 21 refraining to portray a disclosure of theirs noticing any symptom on the body of the deceased as subjected to post mortem by them, communicative of the deceased having come to be strangulated, as a corollary then the attribution of an inculpatory role to the accused by the prosecution, of theirs having begotten the demise of the deceased by strangulating him would falter. In the eventuality of the prosecution case, hence coming to stagger and falter the factum of proof at the instance of the prosecution of other links in the chain of circumstances, though may be a pointer to the factum of theirs pronouncing the guilt of the accused nonetheless proof thereof would stand dislodged as well as overwhelmed by the factum of the prosecution having not proved the prime or the anchor link in the entire chain of circumstances comprised in its lending invincible and forthright proof qua the cause of demise of the deceased. In other words, absence of evidence both cogent and worthy conveying the factum of the deceased having been strangulated by the accused would hence subsume the effect of proof at the instance of the prosecution of other links in the chain of circumstances, besides would also render the proof qua substantiation of other links in the chain of circumstances, to wane. Moreover, proof of other links in the chain of circumstances would also be concomitantly construed to be a concoction or well an engineered contrivance at the instance of the investigating officer to falsely implicate the accused.

14. Now for determining whether the prosecution has been able to adduce potent proof qua the canvassed fact of the accused having strangulated the deceased, an advertence to the testimonies of PWs 20 and 21, is imperative. PW-20, who conducted the postmortem on the body of the deceased on 14.09.2008 and has proved the postmortem report comprised in Ext.PW-20/A, has therein recorded the following observations:-

> "..... on receipt of the report of Chemical Examiner my opinion was traces of ethyl alcohol detected in Exts. P-1, P-2, and P-3 but the cause of death could not be ascertained because of advance stage of decomposition of the dead body."

15. In his examination in chief he has pronounced the fact, that on receipt of the report of the chemical examiner wherein the latter had opined qua the existence of traces of ethyl alcohol in exhibits sent to him for examination the cause of death of the deceased, arising from the advanced stage of decomposition of the dead body, was unascertainable. The opinion of PW-20 is comprised in Ext.PW-20/B. The sequelling effect of the deposition of PW-20 comprised in his examination-in-chief wherein he has explicitly voiced the factum of his being on account of the advanced stage of decomposition of the body of the deceased disabled to pronounce with definitiveness or conclusiveness upon the cause of demise of the deceased, is that, hence as a natural corollary, it fosters the deduction that in the first instance on 14.09.2008 the cause of the demise of the deceased remained unascertained or unpronounced by the doctor who subjected the body of the deceased, to post mortem. The further obvious inference which is ensuable is that hence on the strength of deposition of PW-20 the prosecution cannot gain any succor or sinew in propagating before this Court that the accused had strangulated the deceased, rather the converse inference which sprouts is that espousal by the prosecution of an inculpatory role being attributable to the accused arising from theirs having strangulated the deceased, faces enfeeblement besides stands negated. However, the prosecution subsequently on 15.9.2008 solicited the services of PW-21 for his carrying out a post mortem examination on the body of the deceased. He in his examination in chief has candidly and bluntly voiced the factum of his noticing no evidence or symptoms of strangulation existing thereon for hence conveying that the demise of the deceased was sequelled by strangulation or hanging. He too in his final opinion in conformity with the final opinion rendered by PW-20 has concluded that no definitive opinion with aplomb could be rendered about the demise of the deceased especially in the face of the advanced decomposition of the dead body and its acting as a deterrent to the according of a conclusive opinion qua the demise of the deceased. Even though, in his examination in chief he has pronounced the fact that if the ligature material is removed immediately the mark of strangulation would not appear on the dead body, especially when it is in an advanced stage of decomposition. He has also recorded in his examination in chief the factum that he noticed blood on the shirt and Pajama of the deceased which constrained him to voice the fact that as such there was possibility of the death of the deceased arising from smothering and strangulation. However, he has admitted the factum that he did not observe any bone of the relevant and apt portion purportedly subjected to strangulation or smothering by the accused having suffered any fracture. Even when the emanation in the examination in chief of PW-21 qua the fact of his having noticed blood on the front side of shirt and Pajama of the deceased as also his having divulged in his examination in chief, the fact that the absence of ligature marks on the portion subjected to strangulation may not appear, to connote the factum of the victim having come to be strangulated, especially when the ligature material stands removed immediately after performing the act of strangulation by the accused, as also when the body of the deceased is

in an advanced stage of decomposition, arouses the possible inference that the demise of the deceased was occasioned by smothering and strangulation, yet it, for the reasons assigned hereinafter, stands obfuscated or waned.

(a) his having in consonance with the deposition of PW-20 underscored the fact of an inability on his part to form a conclusive and definitive opinion qua the cause of demise of the deceased, arising from the fact of the advanced stage of decomposition of the body of the deceased. Further more, when the emanation in his examination-in-chief portraying the possible fact of the deceased having been subjected to strangulation or smothering stands not reflected in his final opinion, existence thereof in his examination in chief can be attributed to have sprouted only on account of his being prodded by the learned PP to engineer or concoct a deposition in tandem with the espousal by the prosecution of the deceased having been put to death by the accused by strangulating or smothering him. Obviously an invented or conjured opinion existing in the examination-in-chief of PW-21, cannot especially when it has remained un-recorded in his final opinion, foment any inference from this Court that hence the propagation by the prosecution of the deceased having been put to death by strangulation or smothering attains any probative vigor and sinew.

(b). Even otherwise, it appears that when PW-20 had omitted to assign any definite opinion qua the demise of the deceased which fact came to be concurred in the opinion rendered by PW-21, the prosecution to somehow sustain its version qua the deceased having been strangulated or smothered by the accused, by tutoring PW-21 concerted to elicit from him an opinion in consonance with its espousal, of the accused having strangulated or smothered the deceased. Naturally, a prodded or tutored version by PW-21 vainly attributing therein the cause of demise arising from smothering and strangulation, is both infirm as well as legally frail.

16. Modi's Medical Jurisprudence and Toxicology 23rd Edition at Page 584 explicitly communicates the symptoms indicative of strangulation. The preeminent symptoms connoting strangulation are:

(a) bleeding from the nose, mouth and ears.

(b) Injury to the muscles of the neck.

(c) Subcutaneous tissues under the mark-Ecchymosed.

(d) Occurrence of fracture of the larynx and trachea besides hyoid bone.

17. Post mortem reports, furnished by both PW-20 and 21 as also their concurrent opinions articulative of no conclusive and definitive opinion emanable qua the cause of the demise of the deceased which aforesaid lack of conclusivity of opinion has been expressed to be arising from the advanced decomposition of the body, besides portray non existence of the hereinabove characteristic symptomatic features on the body of the deceased subjected to post mortem by each of them for tellingly, patently, candidly and forthrightly bespeaking of the demise of the deceased having stood begotten by strangulation. Naturally then the apt inference, is that it can be formidably concluded by this Court, that the features, enunciated in Modi's Medical Jurisprudence and Toxicology 23rd Edition extracted hereinabove, for connoting the factum of the deceased having come to be put to death by strangulation by the accused, when not found existing on the body of the deceased, as such, as a natural corollary an invincible conclusion is that the espousal by

the prosecution of the deceased having been put to death by his being strangulated by the accused is not sustainable.

18. The further links in the chain of circumstances which had been concluded by the learned trial Court to be leading to the inference of the prosecution having proved the guilt of the accused are:-

1. "On 11.9.2008 at about 4.30 p.m. at Taxi Stand, Kartarpur accused Ravi Kumar and Santokh Singh spoke to Dilbag Singh for 10 minutes for hiring vehicle and took him alognwith them where after deceased was not seen alive by anybody.
2. On 11.9.2008 deceased Dilbagh Singh was contacted on his mobile No. 9872591771 several times between 5:43 to 10:43 from phone No. 9988494105 with IMEI No. 356269014835920 of hand set of Ravi Kumar accused.
3. A day earlier to taking the deceased to Himachal Pradesh accused persons Santokh Ram @ Sokha, Narinder @ Sodhi, Ravi Kumar, Rohit Dhingra and Dharminder @ Sonu gathered on the terrace of the house of accused Brij Mohan @ Billa and showed their intention to have a new vehicle.
4. Recovery of dead body of deceased Dilbagh Singh in a decomposed state on 13.9.2008 with abrasions on both elbows and blood stained froth in mouth showing that death of deceased was not natural but homicidal.
5. Recovery of clothes and slippers of deceased from Yamunanagar at the instance of accused Ravi Kumar.
6. Recovery of amplifier, stereo and TV Screen of robbed vehicle at the instance of Brij Mohan @ Billa accused from the house of Sukhwinder Singh @ Kala at Delhi.
7. On 18.9.2008 accused Brij Mohan @ Billa, Santokh Singh @ Sukha, Dharminder @ Sonu , Narinder @ Sodhi alongwith Sukhwinder Singh @ Kala Sold robbed Innove vehicle to V.K Tondon.
8. That on 27.9.2008 robbed Innova vehicle No. PB-08-BC-4042 was found in abandoned state by the side of Ambala-Chandigarh highway in the jurisdiction of Police Station, Lalru."

19. With this Court having formed an opinion that the espousal by the prosecution of the deceased having been subjected to death by the purported inculpatory act of the accused having strangulated him, stands faltered as well as staggered, obviously then, when the primadonna and preeminent link in the chain of circumstances constituted in the fact of cause of the demise of the deceased necessitating or warranting invincible proof, for reasons hereinabove rather stands disproved, the effect of disproof of the primadonna and preeminent link in the chain of circumstances is that it subsumes as well as overwhelms the effect of proof, if any, of other links by the prosecution in the chain of circumstances, besides rendering them to be contrived or engineered by the investigating officer to falsely implicate the accused.

20. Moreover, the aforesaid links in the chain of circumstances get severed in the face of the findings recorded herein above communicating the factum of the Investigating Officer having contrived and engineered a false story to falsely implicate the accused. As

such, a calculated machination on the part of the Investigating Officer to falsely implicate the accused stands established. The articles mentioned at Sr. No. 5, for the reasons hereinabove, can hence be concluded to be not belonging to the deceased especially when they are easily procurable from the market, resultantly causing the prosecution case to stagger. Further more, the recovery of Innova car found in an abandoned state by the side of Ambala-Chandigarh highway, noway helps the prosecution story to propagate the guilt of the accused. Moreover, the evidence of the accused being last seen with the deceased, also suffers effacement.

21. The summum bonum of the above discussion is that the prosecution has not been able to adduce cogent and emphatic evidence in proving the guilt of the accused. The appreciation of the evidence as done by the learned trial Court suffers from an infirmity as well as perversity. Consequently, reinforcingly, it can be formidably concluded, that, the findings of the learned trial Court merit interference.

22. In view of above discussion, the appeals are allowed and the impugned judgment of 4.3.2013, rendered by the learned Sessions Judge, Una, is set aside. The appellants/accused are acquitted of the offence charged. The fine amount, if any, 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 the jail concerned, in conformity with the judgment forthwith. Records be sent forthwith.

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

Siddharth Thakur son of Shri Pradeep Singh ....Petitioner

Versus

Smt. Deva wife of Sh. Siddharth Thakur and another ....Non-petitioners

Cr.MMO No. 83 of 2014
Order Reserved on 29th May 2015
Date of Order 8th July, 2015

Code of Criminal Procedure, 1973- Section 482- Petitioner sought quashing of the petition filed under Section 12 of Protection of Women from Domestic Violence Act or for transferring the same to another District- record showed that material preposition of facts were alleged by one party and denied by another party- merits of the case would be seen by the Court after leading the evidence- merely because father of the wife was in the police is not sufficient to infer that justice would not be done –petition dismissed. (Para-7 and 8)

For the Petitioner: Mr. S.D. Gill, Advocate.

For Non-petitioner No.1: Mr. Sunil Mohan Goel, Advocate.

For Non-petitioner No.2: Mr. J.S. Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed for quashing complaint No. 127/1 of 2013 filed by non-petitioner No. 1 under Section 12 of Protection of Women from Domestic Violence Act 2005 against the petitioner which is pending before learned Chief Judicial Magistrate Kullu or relief for transferring the trial of complaint No. 127/1of 2013 filed by non-petitioner against the petitioner to another District sought.

Brief facts of the case

2. Smt. Deva non-petitioner No.1 wife of petitioner filed application under Section 12 of Protection of Women from Domestic Violence Act 2005 before learned Chief Judicial Magistrate Kullu against petitioner pleaded therein that non-petitioner No.1 is legally wedded wife of petitioner and their marriage was solemnized on dated 12.3.2012 as per customs prevailing between the parties. It is pleaded that marriage was solemnized on dated 12.3.2012 at J.J. Resorts Shamshi as per customs prevailing between the parties. It is pleaded that after marriage petitioner requested the father of non-petitioner No.1 that he wishes to stay at J.J. Resort for some days and thereafter father of non-petitioner No.1 had arranged for stay at J.J. Resort Shamshi. It is pleaded that thereafter marriage was registered in the office of SDM Kullu. It is further pleaded that thereafter petitioner Siddharth Singh went to Canada and again came back on dated 12.1.2013. It is pleaded that thereafter petitioner and non-petitioner No.1 travelled to Delhi, Jalandhar, Jammu and Chamba. It is pleaded that during the whole period petitioner namely Siddharth Singh kept torturing non-petitioner No.1 after consuming liquor. It is pleaded that petitioner also demanded finger ring and also demanded a car. It is pleaded that when father of non-petitioner No.1 showed his inability to provide ring and vehicle then petitioner started torturing and maltreating non-petitioner No.1. It is further pleaded that when non-petitioner No.1 was at Goa with petitioner then petitioner locked non-petitioner No.1 in a room. It is pleaded that when non-petitioner No.1 was at Goa with petitioner and when one foreigner was looking at non-petitioner No.1 then petitioner told non-petitioner No.1 that if foreigner would say that his wife is beautiful then he would say to the foreigner to keep Smt. Deva. Non-petitioner No.1 further pleaded in application filed under Section 12 of Protection of Women from Domestic Violence Act 2005 that one day at about 2½ AM in the night petitioner was drinking heavily and when non-petitioner No.1 resisted then petitioner became furious and started beating the non-petitioner. It is pleaded that petitioner namely Siddharth laid non-petitioner No.1 Smt. Deva on the floor and thereafter sat on the stomach of non-petitioner No.1 and threatened non-petitioner No.1 that non-petitioner No.1 would be killed. It is pleaded that thereafter petitioner namely Siddharth Singh crossed all limits of brutality and put his fist on the vagina of Smt. Deva. It is pleaded in application filed under Section 12 of Protection of Women from Domestic Violence Act 2005 that Shri Siddharth Singh also humiliated Smt. Deva by uttering the words that Smt. Deva is of black complexion. It is pleaded that petitioner Shri Siddharth had also sent SMS to Smt. Deva with filthy and abusive language. It is pleaded that Shri Siddharth did not provide any maintenance allowance. It is pleaded that Smt. Deva is apprehending danger to her life at the hands of petitioner Shri Siddharth. It is pleaded in application under Section 12 of Protection of Women from Domestic Violence Act 2005 that Shri Siddharth and his family members used to abuse Smt. Deva. It is pleaded in application under Section 12 of Protection of Women from Domestic Violence Act 2005 that Siddharth and his family members always demanded dowry from Smt. Deva.

3. Per contra reply filed on behalf of Siddharth pleaded therein that father of Smt. Deva is senior police officer and he had created a false and hear-say evidence with mala fide motive. It is pleaded that Siddharth did not demand any dowry at any point of time and did not commit physical and mental torture.

4. Smt. Deva filed rejoinder and re-asserted the allegations made in application filed under Section 12 of Protection of Women from Domestic Violence Act 2005. It is proved on record that when application was filed under Section 12 of Protection of Women from Domestic Violence Act 2005 thereafter learned Chief Judicial Magistrate sought report from Protection Officer namely Ms. Phulwanti Negi. It is also proved on record that thereafter Ms. Phulwanti Negi filed domestic incident report and thereafter learned Chief Judicial Magistrate summoned the petitioner namely Siddharth Singh. Protection Officer requested learned Chief Judicial Magistrate Kullu to pass a protection order under Section 18, residence order under Section 19, maintenance order under Section 20 and compensation order under Section 22 of Protection of Women from Domestic Violence Act 2005 against Siddharth.

5. Court heard learned counsel appearing for the petitioner and non-petitioner No.1 and also heard learned Assistant Advocate General appearing on behalf of non-petitioner No.2 and also perused the entire record carefully.

6. Following points arise for determination in present case:-

1. Whether petition filed by the petitioner for quashing complaint No. 127/1 of 2013 and in alternative for transferring complaint No. 127/1 of 2013 to some other District from Kullu is liable to be accepted as mentioned in memorandum of grounds of petition?
2. Final Order.

Reasons for findings on Point No.1.

7. Submission of learned Advocate appearing on behalf of petitioner that false complaint No. 127/1 of 2013 was filed by Smt. Deva against the petitioner and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the contents of petition and Court has also carefully perused the contents of response filed by non-petitioners. Material proposition of facts have been alleged by petitioner and denied by non-petitioners. Material proposition of facts alleged by one party and denied by another party cannot be decided at this stage. The same fact will be decided when case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case. Petitioner has alleged in petition that false complaint was filed against him under Section 12 of Protection of Women from Domestic Violence Act. On the contrary Smt. Deva wife of petitioner has alleged that petitioner had tortured her physically and mentally under the influence of liquor and had also beaten her mercilessly and due to beatings given by petitioner non-petitioner Deva was forced to admit in hospital. Even it is prima facie proved on record that matter was referred by learned Chief Judicial Magistrate Kullu to Protection Officer Smt.Phulwanti Negi who conducted the inquiry and submitted the report. At this stage it is not expedient in the ends of justice to quash complaint No. 127/1 of 2013 filed under Section 12 of Protection of Women from Domestic Violence Act in view of conflicting facts asserted by one party and denied by another party.

8. Another submission of learned Advocate appearing on behalf of the petitioner that father of non-petitioner No.1 Smt. Deva is posted in police department as Additional

S.P. and he will influence the trial of complaint No. 127/1 of 2013 and on this ground complaint No. 127/1 of 2013 be transferred from District Kullu to some other District is also rejected being devoid of any force for the reasons hereinafter mentioned. It is prima facie proved on record that father of Smt. Deva stood retired on dated 31.12.2013. It is well settled law that proceedings in Court are conducted by Presiding Judge. No allegations have been leveled by petitioner against Presiding Judge who is conducting the proceedings of criminal complaint No. 127/1 of 2013. It is well settled law that in order to allow the transfer of case it must appear to the High Court and not to the party that fair and impartial trial would not be conducted by learned trial Court. It is well settled law that Bench and Bar are two integral parts of justice and it is also well settled law that Judicial Officers must conduct themselves in such a way that prestige and image of judiciary is maintained and there should not be slightest unfeeling between the parties creating an apprehension in the mind of public that Judge would not be impartial. In present case no allegations have been leveled against Presiding Judge who is conducting the trial of present complaint No. 127/1of 2013. In view of the fact that no allegations leveled against the Judge who is conducting the trial of complaint No. 127/1 of 2013 it is held that it is not expedient in the ends of justice to transfer the case from District Kullu to another District. In view of above stated facts point No. 1 is answered in negative.

Point No. 2 (Final Order)

9. In view of above stated facts petition is dismissed. Observations made in this order will not effect the merits of case in any manner and will be strictly confine for the disposal of petition. Petition is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

State of H.P. ……Appellant.
Versus
Nain Singh ……..Respondent.

Cr. Appeal No. 272 of 2009.
Reserved on: July 03, 2015.
Decided on: July 08, 2015.

Indian Penal Code, 1860- Sections 376 and 506- Prosecutrix was raped by the accused one by one- they threatened to kill her if she narrated the incident to anyone- subsequently, she narrated the incident to her mother – Medical Officer found no injury on any part of her body- her hymen was found intact- FIR was lodged belatedly- the manner in which prosecutrix had narrated the incident to 'T' and 'T' had narrated the incident to the mother of the prosecutrix did not inspire confidence- held, that in these circumstances, the judgment of the trial Court acquitting the accused was justified. (Para-13 to 16)

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

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal has been instituted at the instance of the State against the judgment dated 20.11.2008, rendered by the learned Addl. Sessions Judge, Shimla, H.P. in Sessions Trial No. 13-S/7 of 2008, whereby the appellant-accused (hereinafter referred to as the accused) who was charged with and tried for offence punishable under Sections 376 & 506 IPC, has been acquitted by the learned trial Court.

2. The case of the prosecution, in a nut shell, is that the prosecutrix was a student of 6th standard. About 3-4 months before the FIR was registered, when she was returning home from the school, accused called her to his kitchen, bolted the door, laid her on the floor, removed her salwar and committed rape on her. Again, on one day, accused Narayan Singh alias Chainku called her to his house and committed rape on her. Thereafter, accused Shantu enquired about her mother from her. She told him that she was in the jungle. He came to her house and committed rape on her. One Dinesh alias Chhotu took her to cowshed of Goverdhan and also committed rape on her. All these accused were raping the prosecutrix after intervals of 3-4 days. All of them had threatened to kill her if she narrated the incident to anyone. She could not disclose it to her parents, however, she talked with her friends, namely, Kiran, Rena, Ruchi and Suman. Her eye was operated upon on 3.1.2008. The people came to her house to know about her well being. They disclosed about the incident to her mother. Thereafter, she narrated the incident to her mother. But, due to heavy snow fall and her eye operation, they could not lodge the report. FIR was registered under Sections 376 and 506 IPC. The prosecutrix was medically examined. The statements of the witnesses were recorded under Section 161 Cr.P.C. The accused were arrested and they were also medically examined. The prosecutrix was born on 5.9.1995. The matter was investigated and challan was put up after completing all the codal formalities. At the time of framing of the charge, it transpired that the accused persons could not be tried together, as they were involved in separate incidents. The separate challans were put up against all the accused.

3. The prosecution has examined as many as 7 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C to which he pleaded not guilty. He denied that he has committed any offence. The learned Trial Court acquitted the accused on 20.11.2008. Hence, the present appeal.

4. Mr. M.A.Khan, learned Addl. Advocate General, appearing for the State has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. Vinay Thakur, Advocate, for the accused has supported the judgment of the learned trial Court dated 20.11.2008.

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

6. PW-1, prosecutrix was examined without oath. According to her, they are two sisters and one brother. Her sister Mona is elder to her. Her brother Hunny is younger to her. She was studying in sixth standard. Her sister Mona was studying in the 7th standard and her brother in 6th standard. Her parents were agriculturists. She recognized the accused. All of them belong to village Kalgaon. Their houses were adjoining to her house. She was studying in the winter closing school. When she was coming back from the

School, accused met her near his house. He took her to his kitchen. He bolted the door of the kitchen. Then he removed her *salwar*. He also removed his *Pyajama*. Then, he laid her on the floor and after laying on her committed "*galat kaam*" with her. She felt pain. The accused threatened to kill her if she narrated this incident to her parents or anyone else. The accused took her to his kitchen on several occasions and committed the same act. The accused Narayan Singh alias Chainku met her at the tap. He took her to his kitchen and bolted the door of the kitchen. He also removed her salwar and his Pyajama and laid her on the floor. Then, he also did the same thing. She felt pain. Accused Chainku also repeated this act several times. He took her many times to his kitchen. 4-5 days after the occurrence by Nain Singh and Chainku for the first time, accused Shantu arrived at her home. On that day, she was present at home as the school was closed. Her parents were in the fields. Her brother had gone out for playing in the village. Accused Shantu came to her in her kitchen and did the same wrong act. Three days after the occurrence, accused Dinesh alias Chhotu, while she was playing, took her to the cowshed of Goverdhan. He also did the same act with her. All the accused threatened to kill her if she dare to narrate about the incident to anyone. Her brother Hunny, saw the accused Nain Singh doing "galat kaam" with her. Her eye was operated upon during winter vacations. People came to her to know about her well being. One lady Thissi also arrived at their house. She had disclosed about the misdeeds of the accused persons to Thissi. She had also stated about this to Ruchi, Kiran, Renu and Suman. When Thissi had come to see her, she narrated about the incident to her mother. When Thissi narrated the incident to her mother, thereafter they went to the Police Station. She made statement Ext. PW-1/A. In her cross-examination, she deposed that the accused Nain Singh might have done "*galat kaam*" with her even more than ten times. Every accused did the same act with her at the same place at which he did for the first time. She, in her cross-examination, has categorically stated that Thissi had told about this incident to her mother 3-4 months after she had stated about this incident to Thissi. She told Thissi about this incident 3-4 months after accused Dinesh did the misdeed last time with her. She talked to Ruchi when the misdeed was done for the first time with her. There were many houses in her village.

7. PW-2 Hunny was also examined without oath. According to him, he was changing his clothes in his room. He heard some noise from the upper room. He went up and saw accused Narayan Singh in the room with his sister. He saw that the accused was lying on his sister with her salwar down. On seeing him, his sister put on her salwar and the accused told him that she was quarrelling with him. He did not narrate this incident to his parents as his sister had told him not to tell. In his cross-examination, he deposed that he saw Narayan Singh doing misdeed with his sister at Narayan Singh's house.

8. PW-3 Usha Dutta is the mother of the prosecutrix. According to her, her children go to school on foot. The eye of her daughter was operated upon on 3.1.2008 at Rohru. She brought her daughter to their house at village Kalgaon. While the prosecutrix was ill, people used to come to see her. One Thissi also came there. Thissi disclosed that four persons of the village, namely Narayan Singh, Chainku, Shanta Kumar and Dinesh alias Chhotu used to commit rape on her. When she asked the prosecutrix, she stated that they had been committing rape on her for the last 3-4 months before January. The accused used to give her threatenings. They came to know about this incident from Thissi. Thissi came to their house on 7th January. They went to the Police Station Rohru on 18th January, when the FIR was lodged. In her cross-examination, she deposed that Thissi told her about the incident during October-November. Between October-November and 7th January, Thissi had met them about 20 to 25 times.

9. PW-4 Chunu Ram, has proved the copy of Parivar Register Ext. PW-4/A and original certificate Ext. PW-4/B.

10. PW-5 Rajesh Dutta, has proved the date of birth of the prosecutrix Ext. PW-5/A. The date of birth of the prosecutrix was 5.9.1995.

11. PW-6 Lal Man, has investigated the matter. The prosecutrix was got medically examined. He obtained the original MLC. He also prepared the spot map.

12. PW-7 Dr. Pavitra Maitan, has medically examined the prosecutrix. In her opinion, there was nothing suggestive of the fact that the prosecutrix was habitual of sexual intercourse. She also admitted in her cross-examination that there was no evidence of any penetration. She also interrogated the victim for about one hour. She gave the following findings:

"1. The secondary sexual character
Breasts were not well developed, public and axiliary hair had not appeared as yet.
2. No injury marks were seen over any part of the body.
3. Local examination
Per speculum; hymen was intact, no bleeding per vagina was seen.
Per vaginal: It was not done as the hymen was intact.
4. Menstrual history.
No history of menarche was there.
5. Pregnancy test was negative."

13. We have gone through Ext. PW-7/A, copy of MLC of the prosecutrix. According to the prosecutrix, the accused after removing her salwar and their pant used to try for penetration. However, they could not perform it and they used to rub their penis on her private parts (perineum and genitals) and ejaculate outside. Her hymen was found intact. No blood was seen on her vagina. No injury was noticed on any part of the body.

14. The prosecutrix has narrated this incident to her friends, namely, Ruchi, Kiran, Renu and Suman. She also talked to Ruchi, when the misdeed was done for the first time with her, as per her cross-examination. The prosecutrix has narrated the incident to Thissi 3-4 months back. Thereafter, Thissi told her mother about the incident and they went to the Police Station. In her cross-examination, she has specifically stated that Thissi narrated the incident to her mother 3-4 months after she had narrated this incident to Thissi. She talked to Thissi about this incident 3-4 months after accused Dinesh did the misdeed with her.

15. PW-3 Usha Dutta, the mother of the prosecutrix, deposed that one Thissi also came to see her daughter. Thissi disclosed that four persons of the village used to commit rape on the prosecutrix. Thissi came to their house on 7th January and she alongwith the prosecutrix went to the Police Station, Rohru on 18th January to lodge the report. In her cross-examination, PW-3 Usha Dutta has admitted that Thissi stated to her that the girl had spoken to her about this incident during October-November. She met Thissi between October, November and 7th January about 20 to 25 times. If the prosecutrix had told Thissi about the incident in the month of October-November, it is not expected that she would not have narrated the incident to the mother of the prosecutrix, moreover, when she has met her about 20-25 times between October, November and 7th January. The prosecutrix has though narrated the incident to her friends but she has not disclosed it to

her mother. She would have disclosed the incident to her parents instead of narrating it to Thissi. Thissi has told this incident to her mother after 3-4 months of the incident. According to the prosecution case, Thissi has narrated the incident to PW-3 Usha Dutta on 7th January. Still the FIR was registered on 18.1.2008. The feeble explanation given for registration of FIR even after the incident was brought to the notice of the mother i.e. PW-3 Usha Dutta by Thissi Devi was that there was snowfall.

16. In the instant case, there is inordinate delay of more than 3 months in lodging the FIR. It is settled law that FIR must be lodged promptly and in case there is inordinate delay, the same has to be explained. However, in this case, the version of the prosecution, the manner in which the incident has been narrated by the prosecutrix to Thissi and by Thissi to her mother after 3-4 months, does not inspire confidence. The learned trial Court, after correct appraisal of the evidence brought on record, has acquitted the accused.

17. Accordingly, there is no merit in this appeal and the same is dismissed. There is no occasion for this Court to interfere with the well reasoned judgment of the learned trial Court dated 20.11.2008.

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

Amrik Singh .....Petitioner.

Vs.

State of Himachal Pradesh ..... Respondent.

Cr.M.P(M) No. 797 of 2015.
Date of decision: 9.7.2015.

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 15 and 27-A of N.D.P.S. Act- it was reported by FSL, Junga that exhibits stated to be poppy husk are not samples of poppy straw- this report casts doubt regarding the prosecution version- merely because 14 cases were registered against the petition since 1990, it cannot be said that he is not entitled to bail- bail granted. (Para-3 to 8)

For the petitioner : Mr. Rajiv Rai, Advocate.

For the respondent : Mr. Virender Kumar Verma, Ms. Meenakshi Sharma and Mr. Rupinder Singh, Addl. Advocate General with Ms. Parul Negi, Dy. Advocate General.
ASI Suresh Kumar, I.O. Police Station Kot Kehloor, District Bilaspur, H.P.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner has sought regular bail in FIR No. 66 of 2014 dated 4.7.2014 registered at Police Station, Kot Kehloor, District Bilaspur, under sections 15, 27A-61-85 of

Narcotic Drugs and Psychotropic Substances Act (for short: NDPS Act). The respondents have produced the records of investigation and have also placed on record the status report.

2. A perusal of the records of investigation shows that the allegations made against the accused are that on 3.7.2014 at about 8.00 p.m. at place Majari, he was found selling 1.200 Kgs. Poppy straw to Maninder Singh and 900 grams poppy straw to Satnam Singh. It was not in dispute that the samples of the so called poppy straw were sent for chemical examination to the State Forensic Science Laboratory, Junga, who have reported that "*exhibits stated as poppy husk in cloth parcels marked in the laboratory as C & D are not the samples of poppy straw*".

3. The report, prima facie not only casts a shadow of doubt on the prosecution story but demolishes it and on the basis of such report, the liberty of the petitioner cannot be curtailed.

4. At this stage, the learned Deputy Advocate General would argue that petitioner is a menace to the society, as there are as many as 14 cases registered against the petitioner since the year 1990, which pertain to illegal possession of poppy straw, opium and liquor etc and therefore, he should not be released.

5. Suffice it to say that this contention is not available to the prosecution for the simple reason that this court is not dealing with the case of preventive detention but dealing with the case where the liberty of a person is at stake. Liberty is the most precious of all the human rights and all civilized countries have recognized this. The American Declaration of Independence, 1776, French Declaration of the rights of Men and the Citizen, 1789, Universal Declaration of Human Rights and International Covenant on Civil and Political Right, 1966 all speak with one voice that liberty is the natural and inalienable right of every human being. Similarly, Article 21 of the Constitution also provides that no one shall be deprived of his liberty except in accordance with the procedure prescribed by law.

6. At the same time it also cannot be denied that just as liberty is precious for an individual so is the interest of society in maintaining law and order. Both are extremely important for the survival of civilized society and therefore, sometimes in the larger interest of public and the State it may become imperative to curtail the freedom of an individual, but then the same can only be done in accordance with law.

7. The mere fact that the petitioner is an accused in various other cases cannot be a ground to deny bail to him in the present case. It only needs to be reminded that personal liberty is the heart and soul of a citizen and Constitution, therefore, personal liberty can be cribbed, cabined, curtailed and confined only if the same be done in accordance with law.

8. In view of the aforesaid discussion, I find that this is to be a fit case where discretion of bail ought to be exercised in favour of the petitioner, who otherwise is a permanent resident of village Majari, District Bilaspur and there is hardly any chance of his fleeing from justice.

9. Accordingly, the petition is allowed and petitioner is ordered to be released on bail subject to the following conditions:

(i) the petitioner shall furnish bail bonds in the sum of Rs.50,000/- with two sureties of the like amount to the satisfaction of Chief Judicial Magistrate, Bilaspur, District Bilaspur,H.P.

(ii) it is clarified that the petitioner shall fully co-operate with the investigation;

(iii) he shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(iv) he shall not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer;

(v) he shall not leave the country without prior permission of the Court.

The learned Chief Judicial Magistrate, Bilaspur, District Bilaspur is directed to comply with the directions issued by the High Court, vide communication No.HHC.VIG./Misc.Instructions/93-IV.7139 dated 18.03.2013.

10. Any observation made hereinabove shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made hereinabove. Copy 'dasti'.

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

Cr. Appeal No. 30 of 2012 with
Cr. Appeals No. 67 and 190 of 2012.
Judgment reserved on: 03.07.2015
Date of Decision: July 9, 2015

1. Cr. Appeal No. 30 of 2012

Amit Kumar ...Appellant.

Versus

State of H.P. ...Respondent.

2. Cr. Appeal No. 67 of 2012

Vaishali ...Appellant.

Versus

State of H.P. ...Respondent.

3. Cr. Appeal No. 190 of 2012

State of H.P. ...Appellant.

Versus

Naresh Kumar ...Respondent.

Indian Evidence Act, 1872- Section 3- Circumstantial evidence- circumstances from which the conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature to connect the accused with the crime- all the links in the chain of circumstances must be established beyond reasonable doubt and proved circumstances should be consistent, only with the hypothesis of guilt of the accused and totally inconsistent with his innocence - great caution must be taken to evaluate the circumstantial evidence. (Para-17 to 20)

Indian Penal Code, 1860- Section 302- Deceased was residing with his wife 'V' as a tenant- accused 'N' and 'A' frequently visited the deceased- accused 'V' and 'A' developed intimacy and they conspired to kill the deceased- accused came to the house of the deceased- they consumed alcohol and went on a drive in the vehicle- accused murdered the deceased and

threw his dead body with knife and stick- it was proved on record that 'A' was already in police custody- hence, subsequent version that he was arrested on 11.8.2010 is false- disclosure statement leading to the recovery of incriminating articles was not reduced into writing- witnesses had not deposed about the intimacy between accused 'A' and 'V'- witness to recovery of the press card had turned hostile- witness to the delivery of blood stained clothes had also not supported the prosecution version- prosecution had failed to prove the links in the circumstances establishing the guilt and chain of the events did not lead only to one conclusion namely the guilt of the accused- accused acquitted. (Para- 21 to 84)

Cases referred:
Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Aher Raja Khima Versus State of Surashtra, AIR 1956 SC 217
Lal Mandi v. State of W.B., (1995) 3 SCC 603
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
State of U.P. v. Ashok Kumar Srivastava, (1992) 2 SCC 286

For the Appellant(s):	Mr. N.S. Chandel, Advocate, for the appellant in Cr. Appeal No.30 of 2012, Mr. T.S. Chauhan, Legal Aid Counsel, for the appellant in Cr. Appeal No. 67 of 2012 and M/s Ashok Chaudhary, V.S. Chauhan, Addl. AG., and J.S. Guleria, Asstt. AG., for the appellant-State in Cr. Appeal No. 190 of 2012.
For the Respondent:	M/s Ashok Chaudhary, V.S. Chauhan, Addl. AGs., and J.S. Guleria, Asstt. AG., for the respondent-State, in Cr. Appeal No. 30 and 67 of 2012 and Mr. J.R. Poswal, Advocate, for the respondent in Cr. Appeal No. 190 of 2012.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In the appeals filed under Section 374 Cr.P.C., convicts Amit Kumar and Vaishali have assailed the judgment dated 28.11.2011, passed by Sessions Judge, Solan, District Solan, H.P., in Sessions Trial No.8-S/7 of 2010, titled as State of H.P. Versus Amit Kumar & others, whereby they stand convicted for having committed offences punishable under the provisions of Sections 120-B, 302 and 201 of the Indian Penal Code and both sentenced to serve rigorous imprisonment for life and pay fine in the sum of Rs.25,000/- each, under the provisions of Section 302 read with Section 120-B IPC and in default thereof, to further undergo rigorous imprisonment for a period of two years. Also both the accused are sentenced to serve rigorous imprisonment for a period of five years and pay fine of Rs.10,000/- each, under the provisions of Section 201 IPC and in default thereof, to further undergo rigorous imprisonment for a period of one year. Cr. Appeal No.30 of 2012 stands filed by convict Amit Kumar and Cr. Appeal No.67 of 2012 stands filed by convict Vaishali.

2. Also, assailing the aforesaid judgment, State has filed Cr. Appeal No.190 of 2012, under the provisions of Section 378 of the Code of Criminal Procedure, 1973, against the judgment of acquittal of accused Naresh Kumar, on all counts, of similar charges.

3. It is the case of prosecution that in the morning of 06.08.2010, Bhim Singh (PW.1), Rakesh Kumar (PW.2), Vikash Sharma (PW.3) and Vijay Kumar (PW.20) independently noticed a dead body lying just below the road at a place known as Sikander Ghat. Bhim Singh telephonically passed on such information to ASI Mehar Chand (PW.35), who after making entry (Ex.PW.15/A) also informed Police Station, Dharampur, where also such information was recorded. Police officials Mehar Chand (PW.35) and Sukh Darshan (PW.36) reached the spot, where statement (Ex.PW.1/A) of Bhim Singh (PW.1), under the provisions of Section 154 Cr.P.C., was recorded on the basis of which FIR No.97/10 dated 06.08.2010 (Ex.PW.30/C), under the provisions of Section 302 IPC was registered at Police Station, Dharampur, District Solan, H.P. Also Sukh Darshan prepared inquest reports (Ex.PW.1/B and Ex. PW.1/C); took into possession vide memos dead body (Ex. PW.1/F); blood stained soil (Ex.PW.1/D); other incriminating articles i.e. knife (Ex.PW.1/E), chappal and danda (Ex.PW.1/G) lying near the dead body. Dr. Sangeeta Dhillon (PW.14), who conducted the postmortem, after obtaining report (Ex.PW.14/D) of the State Forensic Science Laboratory issued postmortem report (Ex.PW.14/C). Independent witnesses as also police noticed an Identity Card/Press Card (Ex.P-4) of accused Amit Kumar lying near the dead body, who after initial interrogation, on 11.08.2010 surrendered before SI Sukh Darshan, hence arrested by Inspector Jagdish Chand (PW.39). Further investigation also revealed complicity of accused Naresh and Vaishali in the crime and were also arrested by ASI Choli Ram (PW.37) on 13.08.2010 and 14.08.2010 respectively.

4. Investigation revealed that Rajbir @ Gurbinder (deceased) was residing with his wife Vaishali (accused) as a tenant at Baddi, District Solan, H.P. Both accused Naresh Kumar and Amit frequently visited the deceased, which led to development of intimacy between Vaishali and Amit. Hence all the accused conspired to kill Rajbir. As a part of such conspiracy, accused Naresh and Amit came to the house of Rajbir and after consuming alcohol together went for a drive in a vehicle bearing registration No.HR-20S-0908 on the Kumarhatti-Nahan road. After reaching at a place, commonly known as Sikander Ghat they murdered Rajbir and threw his dead body alongwith a knife and danda from the car. Thereafter, accused Amit Kumar took the vehicle to his native place in District Mujaffarnagar (U.P.) and concealed it. He also destroyed the evidence by cleaning stains of the blood from the vehicle. Also all of them concealed their blood soiled clothes/apparels.

5. After their arrest, on 15.08.2010 all the accused got identified the spot of crime. Also by making disclosure statements they got recovered the car, their apparels and other incriminating material.

6. During investigation, police took into possession ATM card (Ex.P-10) of Amit Kumar, so found in the purse of Vaishali; a hand written note book of Vaishali from her house; letter written by Vaishali from the house of Amit Kumar. The incriminating articles, so recovered were sent for opinion of the experts and reports of the State Forensic Science Laboratory and Handwriting Expert Ex. PW.32/D and Ex. PW.33/A to Ex.PW.33/C, were taken on record.

7. To establish proximity between the accused and the fact that during the night of occurrence of the incident i.e. 5/6.08.2010, they were in constant touch with each

other and had long conversation, police took into possession call records of their respective mobile phone numbers.

8. Investigation revealed complicity of the accused in the alleged crime, hence *Challan* was presented in the Court for trial.

9. All the accused were charged for having committed offences punishable under the provisions of Sections 302 and 201 read with Section 120-B of the Indian Penal Code, to which they did not plead guilty and claimed trial.

10. In order to establish its case, in all, prosecution examined as many as thirty nine witnesses. Statements of the accused under Section 313 of the Code of Criminal Procedure were also recorded, in which accused Naresh Kumar pleaded false implication and accused Amit Kumar took the following defence:-

> "I am innocent. I have been falsely implicated in this case. Brother of Vaishali is known me only because he is also the tenant of the same landlord whose shop I have also taken on rent. Shop has been divided into two parts. Premises with me are interconnected with the premises of the brother of Vaishali. In my absence the landlord and brother of Vaishali used to visit my premises as these were interconnected. I did not have any press card at any point of time. The press card allegedly recovered is not mine nor I am correspondent of any newspaper. Ex. P4 the alleged press card is not mine. I do not know any of the co-accused."

Also accused Vaishali took the following defence:-

> "I am innocent. I have been falsely implicated in this case. I do not know accused Naresh Kumar and Amit Kumar is known to my brother because he was also a tenant of his landlord under whom my brother was also tenant. One factory Manager Sh. S.K. Sharma who has been examined as PW used to compel me to meet him alone which fact I had told Rajveer and Rajveer advised me not to go with him any where. I have cordial relations with Rajveer. Police had made me to write and sign at various places forcibly. I am also known by the name of Simran."

In defence, accused Amit Kumar examined one witness.

11. Trial Court, based on the testimony of the prosecution witnesses, found the prosecution to have established its case, beyond reasonable doubt only against accused Amit Kumar and Vaishali and not Naresh Kumar. Hence the present appeals. Correctness and legality of the reasoning adopted by the trial Court, as also its findings requires consideration by this Court.

12. We have heard, M/s N.S. Chandel, T.S. Chauhan, on behalf of the convicts-appellant(s) as also Mr. J.R. Poswal, learned counsel, on behalf of the respondent (in Cr.Appeal No.190 of 2012) and 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 the reasoning adopted by the trial Court is not only perverse but is also not based on correct and complete appreciation of the testimonies of the witnesses and other evidence on record. Judgment of

conviction is not based on legal evidence. Material so placed on record stands ignored. All this has caused serious prejudice to the convicts, resulting into miscarriage of justice.

13. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held as under:

> "7. This Court had ever since Its inception considered the correct principle to be applied by the Court in an appeal against an order of acquittal and held that the High Court has full power to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence the order of acquittal should be reversed. The Privy Council in Sheo Swarup v. King Emperor, AIR 1934 P. C. 227, negatived the legal basis for the limitation which the several decisions of the High Courts had placed on the right of the State to appeal under Section 417 of the Code. Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". He further pointed out at p. 404 that, "the High Court should and will always give proper weight and consideration to such matters as; (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses". In *Sanwat Singh and others v. State of Rajasthan*, AIR 1961 SC 715, after an exhaustive review of cases decided by the Privy Council as well as by this Court, this Court considered the principles laid down in Sheo Swarup's case (supra) and held that they afforded a correct guide for the appellate court's approach to a case against an order of acquittal It was again pointed out by Das Gupta, J., delivering the judgment of five Judges in *Harbans Singh v. State of Punjab*, AIR 1962 SC 439;
>
> > "In many cases, especially the earlier ones the Court has in laying down such principles emphasised the necessity of interference with an order of acquittal being based only on 'compelling and substantial reasons' and has expressed the view that unless such reasons are present an Appeal Court should not interfere with an order of acquittal (vide *Suraj Pal Singh v. The State,* (1952) SCR 194; *Ajmer Singh v. State of Punjab*, (1953) SCR 418; *Puran v. State of Punjab,* AIR 1953 SC 459). The use of the words 'compelling reasons' embarrassed some of the High Courts in exercising their jurisdiction in appeals against acquittals and difficulties occasionally arose as to what this Court had meant by the words 'compelling reasons'. In later years the Court has often avoided emphasis on 'compelling reasons' but nonetheless adhered to the

> view expressed earlier that before interfering in appeal with an order of acquittal a Court must examine not only questions of law and fact in all their aspects but must also closely and carefully examine the reasons which impelled the lower courts to acquit the accused and should interfere only if satisfied after such examination that the conclusion reached by the lower court that the guilt of the person has not been proved is unreasonable. (Vide *Chinta v. The State of Madhya Pradesh*, Criminal Appeal No. 178 of 1959 decided on 18-11-1960; *Ashrafkha Haibatkha Pathan v. The State of Bombay,* Criminal Appeal No. 38 of 1960 decided on 14-12-1960)
>
> ".....On close analysis, it is clear that the principles laid down by the Court in this matter have remained the same. What may be called the golden thread running through all these decisions is the rule that in deciding appeals against acquittal the Court of Appeal must examine the evidence with particular care, must examine also the reasons on which the order of acquittal was based and should interfere with the order only when satisfied that the view taken by the acquitting Judge is clearly unreasonable. Once the appellate court comes to the conclusion that the view taken by the lower court is clearly an unreasonable one that itself is a 'compelling reason' for interference. For, it is a court's duty to convict a guilty person when the guilt is established beyond reasonable doubt, no less than it is its duty to acquit the accused when such guilt is not so established."

[*Aher Raja Khima Versus State of Surashtra*, AIR 1956 SC 217].

14. Similarly, 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.

15. In the backdrop of settled principles of law we proceed to discuss the merits of the appeals.

16. Undisputedly it is not a case of direct evidence but that of circumstantial evidence. We shall first deal with the law on the point.

Law on circumstantial evidence

17. 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.].

18. 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."
>
> (Also 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).

19. 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.

20. 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.

21. In the instant case, prosecution refers to and relies upon the following circumstances against the accused:-

(1) Recovery of dead body and weapon of offence;

(2) Deceased having died as a result of head injury;

(3) Disclosure statement of accused Amit Kumar, Naresh and Vaishali which led to identification of spot of crime;

(4) Deceased lastly seen in the company of the accused;

(5) Amit Kumar as a correspondent was issued Press Card (Ex.P-4) which was recovered from the spot;

(6) Recovery of ATM card (Ex.P-10), belonging to Amit Kumar from the purse of Vaishali;

(7) Recovery of blood stained clothes of Amit Kumar, Vaishali and Naresh Kumar;

(8) Recovery of letter written by Vaishali from the house of Amit Kumar. Also recovery of note book from the house of Vaishali;

(9) Recovery of car containing blood stains so concealed by Amit Kumar and blood stained danda and knife from the spot;

(10) Intimacy between Amit Kumar and Vaishali;

(11) Past immoral conduct of Vaishali;

(12) Evidence of the State Forensic Science Laboratory;

(13) Call details of mobile numbers of the accused, indicating their location at the spot of crime, frequency and duration of their conversations; and

(14) Destruction of evidence i.e. mobile phone of deceased Rajbir.

22. To establish the same we have minutely examined the testimonies of all the witnesses and other evidence on record.

23. That Vaishali and deceased Rajbir were married and were living together in the premises belonging to Bishan Dutt (PW.11) is not disputed, which fact in any case, stands established by the landlord.

24. Significantly, out of 39 prosecution witnesses, 11 independent witnesses namely Rakesh Kumar (PW.2), Vikash Sharma (PW.3), Abhinav Chandel (PW.5), Luxman Sharma (PW.7), Ajay Pathak (PW.9), Vijay Kumar (PW.10), Bishan Dutt (PW.11), Smt. Sharda Devi (PW.12), Naresh Sodi (PW.13), Shalender Kumar (PW.17) and Kuldeep Singh (PW.25), through whom the prosecution wants to establish its case, have turned hostile and not supported the prosecution.

25. We find testimonies of relevant police officials i.e. Amit Chauhan (PW.34), Mehar Chand (PW.35), Sukh Darshan (PW.36), Choli Ram (PW.37), Rama Nand (PW.38) and Jagdish Chand (PW.39) not to be inspiring in confidence. In fact, their version is self contradictory, rendering their testimonies to be uninspiring in confidence.

Circumstance No.1: Recovery of dead body

26. Rakesh Kumar (PW.2), states that he saw dead body of a male with an injury on the head, lying near Sikander Ghat. Danda, knife and chappal were also lying there. Immediately he informed Bhim Singh (PW.1), who also states that telephonically he passed on the information to the Police at Police Post, Dagshai. Version of Vijay Kumar (PW.20) is also to similar effect, save and except that he also refers to a card lying near the dead body. Mehar Chand (PW.35) states that upon receiving such information he made entry (Ex.PW.15/A) in the daily diary and immediately rushed to the spot, where also he noticed the dead body. But this witness only refers to the chappal, Press Card and danda, lying near the dead body. So all did not see either the knife or the card. He furnished information at Police Station, Dharampur, from where Sukh Darshan (PW.36) after reaching the spot recorded the statement of Bhim Singh (Ex.PW.1/A), on the basis of which FIR No.97/10 dated 06.08.2010 (Ex.PW.30/C) was registered at Police Station, Dharampur. Inquest reports (Ex.PW.1/B and Ex.PW.1/C) were prepared and body recovered. The same was sent for postmortem to the Community Health Centre, Dharampur, from where it was referred to the IGMC Hospital at Shimla. The dead body was identified by Abhinav Chandel

(PW.5), brother of accused Vaishali. Thus, circumstance of recovery of a dead body, so identified to be that of Rajbir @ Gurbinder stands proved on record by the police.

Circumstance No.2

27. Dr. Sangeeta Dhillon (PW.14) conducted the postmortem and based on the report of the State Forensic Science Laboratory (Ex.PW.14/D) issued postmortem reports (Ex.PW.14/C and Ex.PW.14/E). On physical examination, doctor found multiple lacerated wounds on various parts of the body. The cause of death, which was instant, was ante mortem head injury, which could have been caused with danda (Ex.P-2). For unexplainable reason doctor admits that "*no injury with sharp edged weapon was observed as per post mortem report Ex. PW.14/C on the dead body of Rajbir deceased".* We hasten to add that doctor had no reason to state such fact. In any event, death having taken place as a result of ante mortem head injury, stands proved on record.

Circumstance No.3

28. Prosecution case with regard to disclosure statements, so made by the accused, which led to recovery of the incriminating articles and identification of spot of crime, in our considered view, stands falsified from record.

29. According to Inspector Jagdish Chand (PW.39), who took over the investigation on 11.08.2010, accused Amit Kumar surrendered same day. Accused Naresh Kumar, who was brought to the Police Station by Choli Ram (PW.37) was arrested on 13.08.2010 and accused Vaishali who was brought to the Police Station by Rama Nand (PW.38) was arrested on 14.08.2010. In the presence of independent witnesses Bhim Singh (PW.1) and Luxman Sharma (PW.7) on 15.08.2010, all the accused got the spot, where they had thrown the dead body, identified. Memo (Ex.PW.1/J) pertains to accused Amit Kumar, memo (Ex.PW.1/K) pertains to accused Naresh Kumar and memo (Ex.PW.1/L) pertains to accused Vaishali.

30. Significantly, Choli Ram does not state that he had brought Naresh Kumar to the Police Station. Also there are no arrest memos on record to corroborate version of these police officials. This only creates a doubt in our mind. But what falsifies their version is perusal of memo dated 06.08.2010 (Ex.PW.15/A), so proved by Rajinder Kumar Sharma (PW.15), who made entry in the daily diary register so maintained by the police, which records that accused Amit Kumar was already in police custody alongwith one Ashok Kumar. Now if Amit Kumar was already in custody, then where is the question of his arrest on 11.08.2010? And who is this Ashok Kumar? Why was he allowed to go scot-free? All this has not been so disclosed or explained by the police/prosecution. This totally shatters the credibility of police officials rendering their version to be false.

31. Conjoint reading of testimonies of the Investigating Officers i.e. Mehar Chand (PW.35), Sukh Darshan (PW.36), Choli Ram (PW.37), Rama Nand (PW.38) and Jagdish Chand (PW.39), who effected recovery of the incriminating articles on the spot, reveals that disclosure statement, so made by the accused, while in custody was not reduced into writing. Why so? and that too in a case of this nature has not been explained.

32. Memos (Ex.PW.1/J to Ex.PW.1/L) deal only with regard to identification of the spot where the accused had thrown the dead body alongwith a danda and knife. Even on this issue Bhim Singh (PW.1) clarifies that neither the accused identified the exact spot nor was he aware as to when it was done. This version of his goes un-rebutted. Significantly Rakesh Kumar (PW.2) is absolutely silent on this issue.

33. Crucially Jagdish Chand admits to have visited the spot prior to 15.08.2010. Accused Amit Kumar already stood arrested prior to 11.08.2010. It is in this backdrop, identification of the spot by the accused pales into insignificance. Thus even this circumstance cannot be said to have been established on the record.

34. At this juncture, we may only observe that even on the question of recovery of incriminating articles pursuant to alleged disclosure statements made by the accused, we do not find the prosecution case to be true.

Circumstance No.4

35. To establish this circumstance, prosecution seeks reliance on the statements of Bishan Dutt (PW.11) and Smt. Sharda (PW.12), who incidentally have not supported the prosecution case at all. They are neighbours residing in the same building. Categorically they have deposed that immediately prior to the occurrence of the incident none other than Vaishali and her husband were seen in the room or the building. Bishan Dutt , who owns the building where the deceased was staying as a tenant, has clarified that there are other occupants/tenants in the building, but none has come forward to establish proximity between accused Amit Kumar and Vaishali. Naresh Sodi has clarified that accused Amit Kumar and brother of accused Vaishali, who were his tenants, were carrying on their business. Earlier deceased Rajbir, who was his tenant, used to reside with his wife Vaishali and relationship between the two were not strained. Thus, even this circumstance has not been proved by the prosecution.

Circumstance No.5

36. According to the prosecution, Press Card (Ex.P-4), allegedly belonging to accused Amit Kumar lying near the dead body, was recovered vide memo (Ex.PW.1/G) dated 06.08.2010 witnessed by Bhim Singh and Rakesh Kumar (PW.2).

37. Now Rakesh Kumar has not supported the prosecution on this count. He was declared hostile and cross-examined by the Public Prosecutor. Significantly in his un-rebutted testimony, he clarifies that police prepared the papers in the rain shelter at Bohali, which is at a distance of 1 ½ km from Sikandar Ghat and not on the spot. But what is crucial is the testimony of Bhim Singh to the effect that "*No press card was taken into possession from the spot but the press card was taken into possession when the seizure memo Ex.PW1/G was prepared.*" Even this witness does not state that seizure memo (Ex.PW.1/G) was prepared on the spot. In fact, according to him, it was prepared at the Panchayat Ghar, which is at a distance of 1 ½ km from the spot where the dead body was recovered. In fact, he is categorical that "*I did not see the press card on the spot.*" According to him, press card (Ex.P-4) was seen for the first time in the hands of the police at the Panchayat Ghar. Naresh Sodi (PW.13), who also has not supported the prosecution, categorically denies having been informed by accused Amit Kumar that press card had fallen near the place where the dead body was recovered.

38. That the card belonged to accused Amit Kumar and was issued by an appropriate authority was a circumstance necessarily required to be proved by the prosecution. As already observed, there is no clear, cogent or consistent evidence to this effect. The statement of Bhim Singh is also silent on this issue. Police officials state that body was lying below the road, whereas card was lying towards the hillside. The width of the road is approximately 30-35 feet. This further renders prosecution case to be doubtful.

39. Vijay Kumar (PW.20), who had also seen the dead body in the morning of 06.08.2010, could not state with certainty as to whether press card (Ex.P-4) was the very same which was lying near the dead body. He clarifies that *"This card was lying in a reverse position",* meaning thereby that he had not seen the card to be that of accused Amit.

40. Mehar Chand (PW.35) does not clearly state that press card, which he had seen lying next to the body was the one which was seized by the police and Sukh Darshan (PW.36), who recovered the same, admits absence of any reference thereof, either in the inquest report (Ex.PW.1/B) or in the site plan (Ex.PW.36/C). Also card is not to be seen in the photographs (Ex.PW.5/A to Ex.PW.5/C), so taken by the police on the spot.

41. According to Sukh Darshan, press card (Ex.P-4) belonging to accused Amit Kumar was of the News Paper 'Hindustan Times'. But when we examine the testimony of Arun Kohli (DW-1), HRD Manager Hindustan Times, it is quite apparent that neither was it issued by the management nor any person by the name of Amit Kumar resident of Sai Road Baddi, Solan, H.P. worked as their correspondent.

42. Thus, in our considered view, prosecution has not been able to establish the circumstance of recovery of press card from the spot or the fact that the same belonged to accused Amit Kumar. On the contrary, defence taken by the accused to this effect stands probablized. The link in the chain thus stands broken.

Circumstance No.6

43. Prosecution wants the Court to believe that ATM card (Ex.P-10) belonging to accused Amit Kumar was recovered from the purse of accused Vaishali vide memo (Ex.PW.6/A) dated 10.09.2010. Card was handed over to the police by Kirpal Singh (PW.6) father of the deceased, in the presence of independent witness Ashok Kumar (PW.22) and Kshama Dutt. Kirpal Singh states that after the cremation, Vaishali came to the matrimonial house. When she was taken away by the police, from her purse he recovered the ATM card belonging to accused Amit Kumar and handed it to the police.

44. We do not find this version of his to be true. No doubt, he is the father of the deceased, but his antecedents are not clean. He has past criminal record.

45. That apart, crucially the purse from which the card was recovered was neither produced nor taken into possession by the police as is so admitted by Jagdish Chand. Why so? has not been explained. Further there is nothing on record to establish that the card was ever used by accused Vaishali. Also none from the bank have been examined to establish ownership thereof.

46. Also no memo of personal search of the accused was drawn when she was arrested on 11.08.2010. Not only this, genuineness of the card and its possibility of being planted cannot be ruled out. To our mind, even this circumstance, cannot be said to have been proved, much less, beyond reasonable doubt.

Circumstance No.7

47. Ajay Pathak (PW.9) allegedly handed over blood stained clothes i.e. Jean / pants (Ex.P-12), shirt (Ex.P-13) and pair of shoes (Ex.P-14) of accused Amit Kumar to the Investigating Officer Rama Nand (PW.38) in the presence of Hari Om Pathak (PW.8) and Bharat Singh (PW.30) vide recovery memo (Ex.PW.8/A).

48. Hari Om Pathak has not supported the prosecution. He denies having handed over any clothes of Amit Kumar to the police nor is he aware about the ownership of the clothes so produced in Court.

49. Bharat Singh, a police official, states that he visited Uttar Pradesh and effected recovery of clothes vide memo (Ex.PW.8/A). Testimony of Rama Nand is also to similar effect.

50. It is the case of prosecution that these blood stained clothes were sent for chemical analysis to the Forensic Science Laboratory. But what contradicts such stand is the version of expert Gian Thakur (PW.33) and report (Ex.PW.33/A) to the effect that no blood was found either on the clothes or on the shoes.

51. Clothes belonging to accused Vaishali were recovered by the police vide memo (Ex.PW.26/A), in the presence of police officials Pratima Devi (PW.26) and Choli Ram (PW.37).

52. Pratima Devi simply states that Vaishali produced her shirt (Ex.P-19), salwar (Ex.P-20) and dupatta (Ex.P-21), which were seized by the police vide memo (Ex.PW.26/A). Version of Choli Ram is also to similar effect.

53. However when we peruse the testimony of Dr. Gian Thakur (PW.33) as also report (Ex.PW.33/A), we find that no blood was found on the clothes. Accused Vaishali was arrested on 14.08.2010 and police took into possession her blood stained clothes vide memo dated 16.08.2010 (Ex.PW.26/A). It is highly improbable that an accused would have continued to wear such clothes for a period of one week. She had met and informed several persons about the missing of her husband. She had also visited her matrimonial house and met her father-in-law. Thus, even by way of this link evidence, prosecution has not been able to establish such fact.

54. Clothes of accused Naresh Kumar were recovered vide memo (Ex.PW.37/A) in the presence of Choli Ram and Bishan Dutt (PW.11).

55. Bishan Dutt has not supported the prosecution case with regard to such recovery. Be that as it may, from the testimony of Dr. Gian Thakur, it is evident that no blood was found on the clothes and shoes of accused Naresh Kumar.

56. Thus, even by way of link evidence, prosecution has not been able to establish this circumstance.

Circumstance No.8

57. Prosecution wants the Court to believe that vide recovery memo dated 16.08.2010 (Ex.PW.39/C), letter written by accused Vaishali was recovered from the house of accused Amit Kumar in the presence of independent witnesses Vikash Sharma (PW.3) and Umesh Sodi. This letter does not even remotely exhibit any intimacy *inter se* the accused. Be that as it may, we have serious doubt about its recovery.

58. Investigating Officer admits that first house of Vaishali was searched from where her note book (Ex.P-7) was recovered, where after only house of Amit Kumar was searched from where the letter in question was recovered. Now what was the occasion for the police to have first recovered the note book from the house of accused Vaishali remains unexplained. Except for the letter in question no other incriminating material, which required comparison, is on record. The letter is neither addressed to Amit Kumar nor does it

record to have been written by Vaishali. In fact contents thereof only exhibit acrimony between the husband and wife on the lines, so stated by Kirpal Singh, contradicting the prosecution case. It also indicates the intent of accused Vaishali to continue her relationship with the deceased. All this despite being subjected to cruelties through the hands of her husband.

59. Premises occupied by accused Amit Kumar, as has emerged from the testimony of Abhinav Chandel (PW.5) was easily accessible and approachable by all. Naresh Sodi (PW.13), has not supported the prosecution. In his un-rebutted testimony he denies recovery of any letter (Mark 'C') from the house of accused Amit Kumar. Witness admits existence of multiple accesses to the house of Amit Kumar and possibility of letter being planted cannot be ruled out.

60. That apart, we do not find testimony of Ajay Pathak (PW.9), who took over the investigation on 11.08.2010, to be inspiring in confidence.

61. It has come on record that accused Amit Kumar surrendered on 11.08.2010, accused Naresh Kumar surrendered on 13.08.2010 and accused Vaishali was arrested on 14.08.2010.

62. Letter was not recovered pursuant to any disclosure statement. Why is it that police officers, in a case of this nature, did not promptly visit the house of the accused persons. The officer admits not to have searched the house of accused Amit Kumar till the time letter was recovered. Recovery of letter, thus itself is in doubt.

63. To match the handwriting of accused Vaishali, police had vide memo dated 16.08.2010 (Ex.PW.3/B) also recovered note book (Ex.P-7) containing the handwriting of accused Vaishali. Though Vikash Sharma does state that the note book was recovered from the house of Vaishali, but then he clarifies that it was not so done in his presence, for he would frequently leave the house as police was taking lot of time in carrying out search and seizure operations.

64. For all the aforesaid reasons and more particularly that letter does not indicate any familiarity between the accused, it cannot be said that prosecution has been able to establish this circumstance.

Circumstance No.9

65. Prosecution wants the Court to believe that after murdering the deceased and throwing away his dead body, Amit Kumar took the blood stained car to his native place in Uttar Pradesh.

66. Ambi Lal (PW.29) states that on 16.08.2010 Vijay Kumar (PW.10) handed over the vehicle to him at Yamuna Nagar. Vehicle seized vide memo dated 16.08.2010 (Ex.PW.10/A) was taken for examination to the Forensic Science Laboratory, Junga for conducting the test. Significantly from the report so issued by the Laboratory (Ex.PW.33/B) and statement of Dr. Gian Thakur (PW.33), it is evident that blood stains detected in the vehicle were disintegrated for serological examination.

67. By way of link evidence prosecution has not been able to establish factum of murder having taken place in the vehicle.

68. That apart what is intriguing is as to how Ambi Lal learnt about the vehicle being parked at Yamunanagar (Haryana). For it is the case of prosecution itself that the

vehicle was concealed at Shamli, District Mujaffarnagar, Uttar Pradesh and it has not come on record that the way to Shamli is through Yamunanagar.

69. Knife (Ex.P-6) was not shown to the doctor and blood found on the danda and the knife was insufficient for serological examination and inconclusive in respect of blood grouping. Hence even this circumstance cannot be said to have been established.

Circumstance No.10

70. Through the testimonies of Abhinav Chandel (PW.5), Kirpal Singh (PW.6) and Shalender Kumar (PW.17), prosecution wants the Court to believe that accused Amit Kumar and Vaishali were having intimate relationship with each other. Having perused the testimonies of these witnesses, we find it not to be so. Both Abhinav Chandel and Shalender Kumar have not supported the prosecution and despite being cross-examined by the Public Prosecutor, nothing incriminating has emerged from their testimonies.

71. It has come in the testimony of Abhinav Chandel that accused Amit Kumar used to reside in the godown which is just adjoining to the shop of this witness. Though she was in talking terms with this witness, he never saw accused Amit Kumar visit the house of accused Vaishali. In fact on 06.08.2010, Vaishali had disclosed to him that deceased had not come home.

72. Though it has come on record that Rajbir, Vaishali and Amit Kumar together had gone on a trip for 4-5 days, but then such fact would not even remotely suggest intimacy between the accused persons.

73. Kirpal Singh states that one month prior to his death deceased telephonically explained his desire of leaving Baddi for the reason that he suspected Vaishali of having relationship with others. But with whom? he does not state. There is no reference of either Amit Kumar or Naresh Kumar in such conversation. In fact, witness admits of Vaishali expressing anguish about the misconduct of her husband. Rajbir used to pickup quarrels with anybody and also give beatings.

74. Shalender Kumar (PW.17) also does not advance the case of prosecution on this count. Hence even this circumstance cannot be said to have been established on record.

Circumstance No.11

75. To establish this circumstance, prosecution examined Nishan Ashesh (PW.23), former husband of accused Vaishali, according to whom the said accused was not of good character and was having extra marital relationship. This was in the past. In law, it cannot be taken to be a circumstance against the accused. Be that as it may, we do not find testimony of this witness to have proved such fact. His testimony is absolutely vague and unspecific. To us, he appears to be a disgruntled husband. He admits that in the year 2007, as also subsequently, accused Vaishali had filed a complaint against him at the Police Station where he had, in writing, undertaken to keep her nicely.

Circumstance No.12

76. As per FSL report (Ex.PW.14/D) deceased had consumed alcohol. There is nothing on record to suggest that the deceased consumed alcohol with the accused. It has come in the testimony of Kirpal Singh (PW.6) that deceased would often pickup quarrel and

beat people. Possibility of deceased being assaulted by persons other than the accused under the influence of alcohol, has not been ruled out by the Investigating Officers.

Circumstance No.13

77. To establish that prior to the incident, all the accused had long conversation with each other and that they were together present at the spot of crime, prosecution refers to and relies upon call record of different mobile numbers 98822-10988 (IDEA), 98053-22275, 98163-06184 (AIR TEL), 98575-73453 (AIR CEL) and 92153-00938 (TATA INDICOM-HR) w.e.f. 01.07.2010 to 08.08.2010. The documents, by no stretch of imagination, establish the location of the owners of the mobile numbers. Also there is no link, so established on record, with regard to the *inter se* conversation between the mobile numbers. Record pertaining to mobile numbers owned by the deceased and accused Naresh Kumar has not been orally proved on record though Devender Verma (PW.24) and Amit Chauhan (PW.34) have stepped into the witness box to prove the mobile record of accused Vaishali and accused Amit Kumar.

78. As such, even this circumstance cannot be said to have been proved on record.

Circumstance No.14

79. Through the testimonies of Kuldeep Singh (PW.25), Ambi Lal (PW.29) and Choli Ram (PW.37), prosecution wants the Court to believe that accused Amit Kumar made disclosure statement (Ex.PW.29/B) to the effect that he had thrown away phone of the deceased in the canal and could get such spot identified. Prosecution evidence, on this count, in view of material contradictions on record, noticed earlier, with regard to the date of arrest of accused Amit Kumar, does not appear to be true. If accused had got the spot identified on 15.08.2010, there was no reason for him to have concealed the factum of throwing away of mobile phone, particularly when weapon of offence, was left by him at the spot of crime. Why would a person destroy mobile phone and not the weapon of offence? After all, police could have got evidence of conversation, if any, which the accused would have had with the deceased by proving log details from the service provider. It is not the prosecution case that the mobile contained some recorded conversation

80. The Court below miserably failed in correctly and completely appreciating the testimonies and correctly applying the legal provisions to the given facts and circumstances. We find defence of the accused to have been probablized on record. Genesis of the prosecution story of accused Amit Kumar having illicit relationship with accused Vaishali, motive behind the crime and the accused having connived with each other, where after they killed the deceased, cannot be said to have been established on record.

81. Thus, in view of the above discussion, it cannot be said that prosecution has been able to establish that the accused after entering into an agreement to cause murder of deceased Rajbir, murdered him and then removed the dead body and thereby caused evidence of commission of crime to disappear with an intent of screening themselves from legal punishment.

82. From the material placed on record, prosecution has failed to establish that the accused are guilty of having committed the offences, they stand charged for through unimpeachable testimony of the prosecution witnesses. The circumstances cannot be said to have been proved by unbroken chain of events. 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 guilt of the accused and leading to no other hypothesis, other than the same.

83. Findings returned by the trial Court, convicting accused Amit Kumar and Vashali, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be based on clear, cogent, convincing, legal and material piece of evidence. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as accused stand wrongly convicted in relation to the charged offences. Also the Court below, in our considered view, has correctly and completely appreciated the evidence so placed on record by the prosecution, in acquitting accused Naresh Kumar.

84. Hence, for all the aforesaid reasons, appeals filed by accused Amit Kumar and Vaishali being Cr. Appeals No.30 of 2012 and 67 of 2012 are allowed and the judgment of conviction and sentence, dated 28.11.2011, passed by Sessions Judge, Solan, District Solan, H.P., in Sessions Trial No.8-S/7 of 2010, titled as *State of Himachal Pradesh Versus Amit Kumar & others,* is set aside and accused Amit Kumar and Vaishali are acquitted of the charged offences. They be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to them accordingly. Release warrants be immediately prepared. Appeal filed by the State being Cr.Appeal No.190 of 2012 against the judgment of acquittal of accused Naresh Kumar, is dismissed. Bail bonds furnished by accused Naresh Kumar are discharged. Appeals stand disposed of, so also pending application(s), if any. Record of the trial Court be immediately sent back.

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

Naseeb ……Appellant.
Versus
State of H.P. ……..Respondent.

Cr. Appeal No. 448 of 2012
Reserved on: July 08, 2015.
Decided on: July 09, 2015.

N.D.P.S. Act, 1985- Sections 18 and 29- Accused was found in possession of bag containing 1.4 k.g of opium- the case property was produced by APP in the Court- prosecution had not proved as to when the case property was withdrawn from the Malkhana- it is mandatory to make corresponding entry at the time of deposit or taking out of the case property in the Malkhana register- DDR is required to be prepared when the case property was taken out from the Malkhana and was re-deposited – it is necessary to ensure the safe custody of the case property from the time of seizure till production- Dy. SP accompanying the police party was not examined- held, that in these circumstances, prosecution version was not proved. (Para-17 and 18)

For the appellant: Mr. Manoj Pathak, Advocate.
For the respondent: Mr. Ramesh Thakur, Asstt. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment and order dated 6.10.2012 and 10.10.2012, respectively, rendered by the learned Special Judge, Shimla, H.P, in Sessions Trial No. 4-S/7 of 2011, whereby the appellant-accused (hereinafter referred to as the accused), alongwith other co-accused, was charged with and tried for offence punishable under Sections 18 & 29 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. The co-accused namely, Hameed Mohammad, Gudoo Ram, Rameshwar Singh and Ashok Kumar were acquitted.

2. The case of the prosecution, in a nut shell, is that on 7.1.2011, during night time at about 1:15 AM, at place Sarivan, bypass NH-22, Shimla-Rampur police officials were on patrolling duty. A vehicle was signaled to stop. One bag was found on the lap of accused Naseeb. The number of the vehicle was HP-12C-2302 (Bolero jeep). Since the incident took place at an isolated place, no independent witnesses could be procured. ASI Rajinder Singh and Constable Ramesh Chand were associated as witnesses. The bag was searched. Opium was found in the polythene envelope kept in the bag. It weighed 1 kg. 400 gms. NCB forms in triplicate were prepared and seal impressions were obtained on a piece of cloth. The contraband was sealed and the same was deposited before the MHC. He sent the same to FSL for chemical examination. 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 19 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. Manoj Pathak, 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. Ramesh Thakur, Asstt. Advocate General for the State has supported the judgment and order of the learned trial Court dated 6/10.10.2012.

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 Yoginder Singh, deposed that on 7.1.2011, the police party left the Police Station for routine patrol duty at 12:30 AM. The police party was camping on NH-22 in the area of Sariwan. At about 1:15 AM, Bolero Camper bearing No. HP-12C-2302 was noticed on way from Matiyana side towards Shimla. The police party laid the naka. The vehicle was stopped. The person sitting on the front seat was found in possession of one black bag. It was kept on his lap by him. SHO interrogated the other occupants of the jeep. The contents of the bag were also checked. It was found to be containing one polythene envelope. The polythene envelope contained black substance. It weighed 1 kg. 400 grm opium. The opium was packed and sealed in a packet with seal 'A' and was taken into possession vide recovery memo Ext. PW-1/B. The black bag alongwith the polythene

envelope were sealed alongwith the opium in the same packet. The SHO prepared report Ext. PW-1/C. He signed recovery memo Ext. PW-1/B. The case property was examined in the Court while examining PW-1 Yoginder Singh. It was produced by APP. The packet contained bag of black colour Ext. P-1, the polythene envelope Ext. P-2 and Opium Ext. P-3. A clear impression of seal "A" was noticed vide Ext. PW-1/F.

7. PW-2 HHC Ramesh Kumar, also deposed the manner in which the jeep bearing registration No. HP-12C-2302, was signaled to stop, searched and sealing proceedings were completed on the spot. He also signed the recovery memo Ext. PW-1/B. SHO prepared the report Ext. PW-1/C and the same was sent to the Police Station through him.

8. PW-4 Kamal Singh, deposed that in his presence, accused Naseeb had not got anything recovered from his house. He was declared hostile and cross-examined by the learned APP. He did not read the document Ext. PW-4/A. He visited the Police Station and was made to sign the document. He denied that the police officials had offered themselves for search and memo Ext. PW-4/A was prepared. He admitted signatures on Ext. PW-4/A.

9. PW-5 LC Ranjna, has proved report Ext. PW-5/A.

10. PW-6 Bhagi Ram, was declared hostile. He was cross-examined by the learned APP. He denied the suggestion that the accused Naseeb has stated before them that he had picked up consignment of opium from the house of Ashok Kumar for Rs. 65,000/-.

11. PW-8 HC Het Ram, deposed that on 7.1.2011, Const. Ramesh Chand produced report Ext. PW-1/C before him, on the basis of which FIR Ext. PW-8/A was registered. Insp./SHO Baldev Thakur had deposited one sealed packet containing opium weighing 1400 gms. He also deposited specimen impression of seal and NCB forms with him. He entered the case property in the register vide Ext. PW-8/B. On 8.1.2011, Insp./SHO Baldev Thakur deposited one sealed packet duly sealed with seal impression "P" containing opium, weighing 100 gms. The sample of seal and NCB form were also deposited with him. Another packet duly sealed with seal "P" containing one lock was also deposited with him. He made entry in the malkhana register. He sent both the sealed packets containing opium to the Chemical Examiner alongwith the specimen impression of the seals and NCB forms and other documents vide RC No. 1/2011, through HHC Surinder. The copy of the RC is Ext. PW-8/C.

12. PW-11 ASI Prem Lal, deposed that the accused had made disclosure statement vide Ext. PW-3/A to the effect that he could identify the house from where he had purchased the opium. He paid Rs. 65,000/- to accused person Ashok Kumar. The disclosure statement Ext. PW-3/A was reduced into writing. He signed the same.

13. PW-12 Ramesh Sharma, deposed that accused had disclosed that he could get some quantity of opium recovered from his house in Tehsil Nalagarh, Distt. Solan. The disclosure statement is Ext. PW-12/A.

14. PW-15 Const. Surinder has taken the case property to the Chemical Examiner vide RC No. 1/2011 and deposited the same on 10.1.2011.

15. PW-18 SHO Baldev Thakur, also deposed the manner in which the accused was apprehended from the jeep, search, seizure and sealing proceedings of the contraband

were completed on the spot. He prepared the rough sketch Ext. PW-18/E of the site of recovery of opium. He tried to send for the non-official witnesses, but none was available since it was odd hour at the night. He deposited the case property with the MHC.

16. The case of the prosecution, precisely, is that on 7.1.2011, the accused was apprehended from the vehicle bearing registration No. HP-12C-2302. He was carrying contraband on his lap. The vehicle was searched. It contained charas. It weighed 1400 gms. The search, seizure and sampling proceedings were completed on the spot. The case property was deposited with the MHC. He sent the same to FSL.

17. The case property, as noticed hereinabove, was produced in the trial Court, while recording the statement of PW-1. It was produced by the APP. The prosecution has not proved as to when the case property was withdrawn from the malkhana. It is mandatory that as and when the case property is deposited or taken out from the malkhana, corresponding entry has to be made in the malkhana register. No DDR report was also prepared when the case property was taken out from the malkhana and produced before the Court and when it was re-deposited in the malkhana after its production before the Court. The DDR is required to be prepared as and when the case property is taken out from the malkhana and re-deposited. In ND & PS cases, it is necessary to ensure the safe custody of the case property from its seizure till its production in the Court. Who has handed over the case property to APP has also not been proved. It casts doubt as to whether it was the same case property which was seized from the accused and produced before the Court in the absence of entry made in the malkhana register at the time of withdrawal and re-deposit in the malkhana. The malkhana register is Ext. PW-8/B. There is entry of the case property being deposited in the malkhana at the initial stage and thereafter on being sent to FSL, Junga on 10.1.2011 and when it was received on 7.2.2011, but no corresponding entry is there when it was again taken out from the malkhana to be produced before the Court.

18. According to PW-18 SHO Baldev Thakur, on 7.1.2011, the Dy. Superintendent of Police was also accompanying the team. He was in uniform. The Dy. Superintendent of Police has not been examined. PW-18 SHO Baldev Thakur did not remember the period up to which the Dy. Superintendent of Police was with the police party. The Dy. Superintendent of Police was a material witness, being the senior most Police Officer, accompanying the police party.

19. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence punishable under Sections 18 & 29 of the N.D & P.S., Act.

20. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 6/10.10.2012, rendered by the learned Special Judge, Shimla, H.P., in Sessions trial No. 4-S/7 of 2011, 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.

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.

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

FAOs (MVA) No. 72 and 151 of 2008.
Date of decision: 10th July,2015.

1. ***FAO No.72 of 2008.***

Anil Kumar .....Appellant

Versus

Shri Nitim Kumar and others ...Respondents.

2. ***FAO No. 151 of 2008.***

Nirmal Spinning Mills .....Appellant

Versus

Master Anil Kumar and others ...Respondents.

Motor Vehicles Act, 1988- Section 166- Tribunal had awarded compensation of Rs. 2,15,500/- along with interest- medical officer had determined the disability of the claimant as 45%- claimant was unmarried and had lost the chance to get married- he was unable to help his parents in their old age- amount of Rs. 1 lakh awarded under the head "pain and suffering, Rs. 1 lacs for the "loss of amenities of life", Rs. 2 lacs under the head "loss of income", Rs. 20,000/- regarding Expenditure on medicines, Rs. 20,000/ as Transport charges, Rs. 10,000/- as Special diet and Rs.18,000/- as attendant charges. (Para-13 to 16)

Motor Vehicles Act, 1988- Section 149- It was contended that vehicle was not insured- particulars of the vehicle given in the FIR, insurance policy and cover note are different- Tribunal had found that esteem car was not insured with the insurer- there was no infirmity with the findings of the Tribunal- held, that Insurer was rightly exonerated from liability.

(Para- 10 to 12)

Cases referred:

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646
N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354 and Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 J & K 81
R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

For the appellant(s): Mr. Tara Singh Chauhah, Advocate in FAO No. 72 of 2008 and Mr. Vivek Sharma, proxy Advocate, for the appellant in FAO No. 151 of 2008.

For the respondent(s): Mr. Vivek Sharma, proxy Advocate, for respondent No. 2 and Mr. Ashwani Sharma, Advocate, for respondent No. 3 in FAO No. 72 of 2008.

Mr. Tara Singh chauhan, Advocate, for respondent No. 1 and Mr. Ashwani K. Sharma, Advocate, fof respondent No. 3 in FAO No. 151 of 2008.

Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

These two appeals are outcome of a common judgment and award dated 31.10.2007, made by the Motor Accident Claims Tribunal, Bilaspur, H.P. in MAC No.46 of

2004, hereinafter referred to as "the Tribunal, for short, whereby compensation to the tune of Rs.2,15,500/- alongwith 6% interest came to be awarded in favour of the claimant and the insured was saddled with the liability, for short "the impugned award", on the grounds taken in the appeal.

2. The claimant has become victim of a vehicular accident on 23.9.2003 which was caused by the driver of Esteem Car bearing registration No. PB-02G-2301, namely, Nitin Kumar, while driving the offending vehicle rashly and negligently. It is averred that the injured/claimant has suffered 50% disability and is suffering mental disorder. The victim is a minor and the appeal has been filed through his natural guardian.

3. The insurer stands exonerated and has not questioned the impugned award.

4. The claimant has disputed the impugned award through the medium of FAO No. 72 of 2008, on the ground of adequacy of compensation and the insured/owner has questioned the impugned award by the medium of FAO No. 151 of 2008, on the ground of adequacy of compensation and also on the ground that the Tribunal has fallen in an error in discharging the insurer from its liability.

5. It pains me to record herein that an unfortunate boy has not been able to seek redressal from the Tribunal or from this Court for the last 12 years, is an eye opener for all the stake holders. It is beaten law of the land that the claim petition is to be decided, as early as, possible and the Tribunal or the High Court should not succumb to the procedural wrangles tangles or technicalities and others grounds. 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.**

6. It is also beaten law of the land that the claim petition is to be determined summarily and that is why the Code of Civil Procedure is not applicable. Some of the provisions of Code of Civil Procedure have been made applicable in terms of the provisions of the Rules framed by the Central Government as well as State Government. The State of Himachal Pradesh has also framed the Himachal Pradesh Motor Vehicle 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.

7. It is apt to reproduce Rule 232 of the 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."*

8. There is no dispute about the rash and negligent driving of the driver. Thus, the findings returned on Issue No. 1 are upheld.

9. I deem it proper to determine whether the Tribunal has rightly exonerated the insurer from the liability.

10. Mr. Ashwani K. Sharma, learned counsel for the insurer argued that the vehicle was not insured and the particulars of the vehicle given in FIR, in the insurance policy and cover note, are different. The Tribunal has rightly made the discussions in paras 33 to 38 of the impugned award.

11. I have gone through the findings returned by the Tribunal. The Tribunal has rightly made the discussion and it is apt to reproduce paras 37 and 38 of the impugned award herein:

> *"37.It is quite evident from Ext. R-2, the insurance cover note, and Ext. R-A the insurance policy that the vehicle which has been insured with respondent no.3 is Maruti Car 800 Ord. having registration No.PB-02E-2301. there is nothing on record which could go to show that due to clerical mistake, on the part of the officials of the insurance company (respondent No.3), the make of the vehicle involved in the accident, i.e. Esteem Car has been entered as Maruti 800-Ord. I would like to point out that the clerical error could have occurred either in the insurance cover note or in the insurance policy and not in both these documents. Moreover, in the aforesaid documents, the insured declared value of the vehicle has been stated to be Rs.50,000/-. In case, as per this insurance policy, Esteem Car would have been insured, it is insured declared value would have been much more than Rs.50,000/- because it is a more expensive Car than ordinary Maruti 800. In this way, on the record, it is not proved that the Esteem Car had been insured with respondent no.3 vide insurance policy Ext. RA which has been issued on the basis of insurance cover note Ext. R-2.*
>
> *38. Since, the Esteem Car has not been proved to be insured with respondent no.3, it is not liable to indemnify the owner of Esteem Car viz. respondent No.2. Consequently, I hold that respondent nos. 1 and 2 being the driver and owner of the Esteem Car, at the relevant time, are jointly and severally liable to pay the aforesaid amount of compensation. This issue is decided accordingly."*

12. Having said so, the Tribunal has rightly exonerated the insurer from its liability.

13. Now coming to the adequacy of compensation. On the face of it, a meager amount has been awarded by the Tribunal. It is beaten law of the land that the compensation is not a booty or boon in the disguise. The compensation has to be awarded while keeping in view percentage of the injury and the loss, the claimants have suffered. A young boy has been made to suffer for his whole life. He is mentally retarded and doctor has declared him 45% disabled. The disability is not denied and there are prescriptions on the files which do disclose that he was admitted in the hospital, was discharged as is evident from Ext. RW2/C, Ext. PW2/D and Ext. PW2/E. There are also documents on the file,

which are duly proved, which do disclose that what amount has been spent by him for his treatment. Copy of FIR also does disclose that the accident had taken place.

14. The claimant has not only suffered from one angle. He is not in a position to get married of his choice, thus has not only destroyed his matrimonial home but has shattered his physical frame and earning capacity. He is virtually become a burden on his parents.

15. A son is supposed to hope and help for their parents, but he has become dependent on them. He has to abandon his studies which is proved by evidence and the Tribunal has discussed this aspect in para 21 of the impugned award. Despite this fact, the Tribunal has shut its eyes.

16. Keeping in view **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** the amount which was to be awarded under the head "pain and suffering" is Rs. 1 lacs, for the "lost of amenities of life" Rs.1 lacs and Rs.2 lacs under the head "loss of income". Total amounting to Rs.4 lacs. Expenditure on medicines Rs.20,000/-, Transport charges Rs.20,000/-, Special diet Rs. 10,000/- and attendant charges Rs.18000/- as awarded by the Tribunal, are maintained.

17. Viewed thus, the claimant is entitled to Rs.4,00,000/-+Rs.68,000/- total amounting to Rs.4,68,000/- with interest @ 6% per annum from the date of claim petition till its realization, as awarded by the Tribunal.

18. In the given circumstances, the appeal filed by the appellant/owner is dismissed.

19. Having said so, the appeal filed by the claimant is allowed and the impugned award is modified as indicated hereinabove and the appeals are disposed of accordingly.

20. The owner is directed to deposit the award amount within six weeks in the Registry of this Court from today. On deposit, the Registry is directed to release the same in favour of the claimant, strictly in terms of the conditions contained in the impugned award.

21. Send down the record forthwith, after placing a copy of this judgment.

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

Budhi Ram Justa …Petitioner.

Versus

State of H.P. and others. …Respondents.

CWP No. 5967/2012
Reserved on: 8.7.2015
Decided on: 10.7.2015

Constitution of India, 1950- Article 226- Petitioner was appointed as Steno-typist in the Industries Department and was promoted as Senior Scale Stenographer- he opted for the post of Junior Scale Stenographer in the H.P. Secretariat- his pay was reduced in the Secretariat – he was permitted to retain his pay scale at the time of absorption- held, that pay of the clerks was protected but the petitioner was discriminated- further, his pay was reduced without issuing any show cause notice- petition allowed. (Para-6 and 7)

For the Petitioner: Mr. P.D. Nanda, Advocate.
For the Respondents: Mr. M.A. Khan, Addl. A.G.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge:

Petitioner was appointed as Steno-typist in the Industries Department on 11.4.1977. He was promoted to the post of Senior Stenographer on 11.4.1989 in the pay scale of Rs. 5800-9200. On completion of 8 years of service in the grade, he was granted pay scale of Rs.6400-10640 under the Assured Career Progression Scheme with effect from 11.4.1997. Applications were invited only from in-service employees of the State possessing 3 years service having knowledge of word processing on computer for the post of Junior Scale Stenographers in the H.P. Secretariat. Petitioner also opted for the same. He was sent on deputation on 15.6.1999. He joined his duties in the H.P. Secretariat on 24.6.1999. He was permanently absorbed in the H.P. Secretariat on 10.10.2000. Pay of the petitioner was abruptly reduced from Rs. 8925/- to Rs. 8100/- in the month of May, 2005. Petitioner assailed this decision by filing O.A. No. 2593 of 2005 before the erstwhile Himachal Pradesh Administrative Tribunal. It was disposed of vide order dated 21.10.2005. The representation made by the petitioner was rejected on 31.1.2006. Petitioner again assailed decision dated 31.1.2006 before the erstwhile Himachal Pradesh Administrative Tribunal by filing O.A. No. 1522 of 2006. It was transferred to this Court and assigned CWP (T) No. 13593/2008. It was decided on 7.1.2011. The LPA was preferred against the judgment dated 7.1.2011. The same was dismissed on 2.3.2012. Thereafter, impugned order Annexure P-15 dated 5.6.2012 was passed by the Chief Secretary to the Government of Himachal Pradesh.

2. Petitioner was permanently absorbed in the H.P. Secretariat on 10.10.2000. In the parent department, his pay scale was Rs. 6400-10640. The pay scale of Junior Scale Stenographer in the H.P. Secretariat was Rs. 4400-7000. Petitioner was permitted to retain his pay scale of Rs. 6400-10640, but the same was abruptly reduced in the month of May, 2005.

3. Mr. P.D. Nanda has vehemently argued that the case of the petitioner was to be considered under FR 5-A. Case of his client was neither governed under FR 22 (1) (a) (2) nor FR 22(1) (a) (3).

4. Mr. M.A. Khan, learned Additional Advocate General has vehemently argued that pay of the petitioner has been fixed strictly as per law. He has referred to FR 22 (1) (a) (2) and FR 22(1) (a) (3).

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

6. Petitioner has filed supplementary affidavit. It is evident from the noting portion, i.e. Annexure P-21 that the matter was discussed qua those employees, who were getting higher pay scale in their parents departments, but were absorbed/sent on deputation in the H.P. Secretariat. Issue qua clerks, who had come on deputation/transferred to Secretariat, was resolved vide Annexure P-22 dated 11.2.1991. It is clear from Annexure P-21 that the matter qua Junior Scale Stenographers was also discussed. It is mentioned therein that the decision principally taken qua clerks should also be made applicable to the Junior Scale Stenographers. How the case of the petitioner and

similarly situate persons is segregated is not borne out from the record except that the pay of clerks was protected vide memorandum dated 11.2.1991. The pay of the petitioner was also required to be protected on the analogy of Annexure P-22 dated 11.2.1991 and Annexure P-1 dated 26.3.1991. The petitioner has been discriminated against by not giving him the benefit of decision which had been taken vide Annexure P-22 dated 11.2.1991 and Annexure P-1 dated 26.3.1991. Pay of the petitioner was also required to be protected by giving him the benefit of FR-5-A. His case was neither governed under FR 22 (1) (a) (2) nor FR 22(1) (a) (3). He was getting pay scale of Rs. 6400-10640 and was working on the higher pay scale of Senior Scale Stenographer, but the pay scale of Junior Scale Stenographer was Rs. 4400-7000 in the Secretariat. In view of this, pay of the petitioner was required to be protected since he was working on the higher cadre in the parent department. Pay of the petitioner has been reduced without issuing him any show cause notice. Petitioner, in fact, was paid initially pay scale of Rs. 6400-10640. Action of the respondents not to give benefit to the petitioner on the analogy of Annexure P-1 and P-22, is arbitrary, thus, violative of Articles 14 and 16 of the Constitution of India. Respondents had been directed by the Single Judge as well as by the Division Bench of this Court to consider the case of the petitioner as per Annexure P-22. The Chief Secretary has failed to take into consideration true letter and spirit of letter dated 11.2.1991 whereby the clerks, who had come on deputation/transferred to Secretariat, their pay was protected. It was immaterial whether the pay structure of the Clerks and Junior Scale Stenographers was different. The employer was the same. Thus, the principles governing one set of employee were to be applied uniformly to another set of employee to avoid discrimination. Petitioner was similarly situate vis-à-vis whose pay was protected vide Annexure P-22 dated 11.2.1991 and Annexure P-1 dated 26.3.1991.

7. Accordingly, in view of the discussion and analysis made hereinabove, the writ petition is allowed. Annexure P-15 dated 5.6.2012 is quashed and set aside. Respondents are directed to fix the pay of the petitioner on the analogy of Annexure P-22 dated 11.2.1991 read with Annexure P-1 dated 26.3.1991, within a period of 8 weeks from today. The pensionary/retiral benefits of the petitioner shall be determined after the pay is fixed, as directed hereinabove. Pending application(s), if any, also stands disposed of. No costs.

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

Chanda Devi & others .....Appellants

Versus

Surender Singh & another ...Respondents

FAO No. 131 of 2008
Decided on : 10.07.2015

Motor Vehicles Act, 1988- Section 166- Age of the deceased was 30 years- Tribunal had wrongly taken the age as 35 years- 1/3rd of the income was to be deducted towards personal expenses, whereas, 1/5th was to be deducted keeping in view the number of dependency- claimants had lost the dependency to the extent of Rs. 2,300/- per month, applying

multiplier of 16' claimants are entitled to the compensation of Rs. 2,300x 12= Rs. 27,600 x 16= Rs. 4,41,600/-. (Para-5 to 9)

Cases referred:
Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120.

For the Appellant :	Mr. Deepak Kaushal, Advocate.
For the Respondents:	Mr. Rohit Chauhan, Advocate vice Mr. Suneet Goel, Advocate, for respondent No. 1 Respondent No. 2 stands deleted. Mr. B.M. Chauhan, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the award dated 1st September, 2007, made by the Motor Accidents Claims Tribunal-II, Sirmaur, District at Nahan (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 46-N/2 of 2005, titled Smt. Chanda Devi & others versus Shri Surender Singh & others, whereby compensation to the tune of Rs.3,39,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimants-appellants herein and against the insurer-respondent No. 3, herein (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. The answer is in the affirmative for the following reasons.

5. The Tribunal has taken the age of the deceased as 35 years. The claimants in para-3 of the claim petition have pleaded the age of the deceased as 30 years at the time of accident, which has also been proved by them by leading evidence. Thus, the Tribunal has fallen in an error by taking the age of the deceased as 35 years at the time of accident. On the face of the record, the age of the deceased was 30 years at the time of accident. Thus, it is held that the age of the deceased was 30 years at the relevant time.

6. The multiplier of '16' is applicable in this case in view of the ratio laid down by the Apex Court in case titled as **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.**

7. The Tribunal has also fallen in an error in deducting 1/3rd of the monthly income of the deceased. Admittedly, his monthly income was Rs.2800/-, which stands

proved by the salary certificate Ext. PW-4/A. 1/5th of the monthly income of the deceased was to be deduced from his personal expenses, in view of para 30 of the ***Sarla Verma's*** case*, supra.* Thus, it can safely be held that the claimants have lost source of dependency to the tune of Rs. 2300/- per month.

8. In the given circumstances, the claimants are held entitled to compensation to the tune of Rs. 2300/- x 12 = Rs.27,600 x 16= Rs. 4,41,600/-.

9. The Tribunal has also fallen in an error in not awarding compensation to the claimants under the heads 'funeral expenses, 'loss of estate', 'loss of love and affection' and 'loss of consortium'.

10. The claimants are held entitled to compensation to the tune of Rs. 10,000/- each, under the heads 'funeral expenses', 'loss of estate, 'loss of love and affection' and 'loss of consortium', total amounting to Rs. 40,000/-.

11. Thus, the claimants are held entitled to compensation to the tune of Rs 4,41,600/- + 10,000/- +10,000/- + 10,000/- + 10,000/-, total amounting to Rs. 4,81,600/-.

12. The insurer is directed to deposit the enhanced amount with interest as awarded by the Tribunal, within eight weeks from today before the Registry. The Registry is directed to release the amount, if any already deposited and the enhanced amount, on its deposition, in favour of the claimants, strictly as per the terms and conditions contained in the impugned award.

13. Accordingly, the impugned award is modified, as indicated above and the appeal is disposed of.

14. Send down the records after placing a copy of the judgment on the Tribunal's file.

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

Laiq Ram .....Appellant.

Versus

State of H.P. .....Respondent.

Cr. Appeal No. 4253 of 2013
Reserved on: July 09, 2015.
Decided on: July 10, 2015.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1kg 150 gms of charas- independent witnesses had not supported the prosecution version- it was not proved on record as to when the case property was withdrawn from the malkhana – it is essential to make an entry in the malkhana register at the time of deposit or withdrawl of the case property- however, no DDR was prepared- it casts doubt that the case property produced in the Court is the same which was recovered at the spot- accused acquitted. (Para-14 to 16)

For the appellant: Mr. Anoop chitkara, Advocate.
For the respondent: Mr. Ramesh Thakur, Asstt. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 28.10.2013, rendered by the learned Special Judge-I, Sirmaur at Nahan, H.P, in Sessions Trial No. 19-ST/7 of 2013, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs. 1,00,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 19.12.2012, police party headed by PW-9 HC Kalyan Singh left the Police Station, Paonta Sahib in official vehicle towards Taruwala-Gongpur and Nihalgarh in routine patrol duty. At about 10:20 PM, when the police party was present at Gondpur near chemical factory, accused came from Tarunwala side towards Nihalgarh. On seeing the police party, he got perplexed. He was apprehended by the police. In the meanwhile, PW-1 Jamshed and PW-2 Mohd. Bilal also reached on the spot. They were joined by PW-9 HC Kalyan Singh and in their presence carry bag of accused was checked. On checking, charas weighing 1kg 150 gms was recovered. After weighing the charas, it was put back into the same bag which was then made into parcel and sealed with seal bearing impression "H". NCB form, Ext. PW-5/A was updated and sample of seal Ext. PW-9/A was drawn by PW-9 HC Kalyan Singh. Thereafter, the seal was handed over to PW-1 Jamshed. The case property was taken into possession by PW-9 HC Kalyan Singh, vide recovery memo Ext. PW-3/C. PW-9 HC Kalyan Singh scribed the rukka Ext. PW-4/A. It was sent to the Police Station, Paonta Sahib, through PW-4 Const. Rahul Kumar, on the basis of which FIR Ext. PW-4/B was registered. The case property was presented before PW-5 SI Ram Pal, Addl. SHO, PS Paonta Sahib. It was resealed with seal bearing impression "H". PW-5 SI Ram Pal updated the relevant columns of NCB form Ext. PW-5/A and deposited the case property after re-sealing with the MHC. The case property was then sent to FSL Junga for chemical examination. 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. The learned trial Court convicted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Anoop Chitkara, 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. Ramesh Thakur, Asstt. Advocate General for the State has supported the judgment of the learned trial Court dated 28.10.2013.

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

6. PW-1 Jamshed deposed that on 19.12.2012 at about 8:30 PM, the police visited his shop at Durga Colony, Paonta Sahib and told him that they require his services. The police made him and his son Bilal to board the police vehicle and took them to the Police Station Paonta Sahib, where they were made to wait for one and a half hour.

Thereafter, they were taken to Gondpur. The police weighed the charas. It was put into parcel. The police prepared some documents in which their signatures were obtained. No carry bag was recovered from the possession of the accused in his presence nor any charas was found therein. He was declared hostile and cross-examined by the learned P.P. He denied the suggestion that on 19.12.2012 at about 10:20 PM when the police had apprehended accused Liaq Ram near chemical factory at Gondpur, at that time, he alongwith his son Bilal joined the police party. He also denied that the accused person was carrying a carry bag which was opened by the police in their presence and upon opening, charas in the shape of small sticks was found in the same. He also denied the suggestion that the police asked Const. Amit Kumar to bring electronic weighing machine from the Police Station. He also denied the suggestion that the carry bag was made into parcel which was sealed with seal impression "H" and after updating the NCB forms in triplicate, the seal was handed over to him vide memo mark "B". He has admitted his signatures on memo Mark A to C.

7. PW-2 Mohd. Bilal is the son of PW-1 Jamshed. He testified that on 19.12.2012 at 8:30 PM when he alongwith his father were going to home after closing their shop in Durga Colony, police vehicle stopped there and took them to the Police Station Paonta Sahib. They were taken to Gondpur near the chemical factory. Thereafter, the police put the charas on weighing scale. It weighed 1 kg. 150 gms. He categorically deposed that no carry bag was recovered by the police from the possession of the accused in their presence. He was also declared hostile and cross-examined by the learned P.P. He denied the suggestion in his cross-examination that on 19.12.2012 at 10:20 PM when the police had apprehended the accused Liaq Ram near chemical factory at Gondpur, at that time, he alongwith his father Jamshed had reached there and they were joined by the police. It was denied that the accused was carrying a carry bag which was opened by the police in their presence and it contained charas. He also denied that Constable Amit Kumar was sent to bring the weighing machine from the Police Station. He has identified his signatures on memo Mark A to C.

8. PW-3 HC Rupender deposed that at 10:20 PM when they reached near lime chemical factory at Gondpur, accused Liaq Ram came from Tarunwala towards Nihalgarh side. He got perplexed. He was carrying a carry bag in his right hand. In the meanwhile, Jamshed (PW-1) and Mohd. Bilal (PW-2), reached on the spot. They were also joined. The bag was opened. It contained charas. Constable Amit Kumar was sent to bring electronic machine from the Police Station. The charas weighed 1kg 150 gms. The charas was put in a parcel and sealed with seal bearing impression "H". NCB forms in triplicate were updated and thereafter sample seal was drawn and seal was handed over to Jamshed (PW-1) vide memo Ext. PW-3/B. The case property was produced before the Court while recording the statement of PW-3. It is not stated as to who has produced the case property in the Court. In his cross-examination, he stated that the witnesses were coming from Gondpur side towards Tarunwala side and they were joined before Amit had gone to bring the weighing scale.

9. PW-4 Const. Rahul Kumar, also deposed the manner in which the accused was apprehended at 10:20 PM, the search, seizure and sealing proceedings were completed on the spot. He has carried rukka Ext. PW-4/A to the Police Station. He handed over the case file to HC Kalyan Singh on the spot. In his cross-examination, he admitted that the lime chemical factory was running at that time.

10. PW-5 SI Rampal Yadav, deposed that FIR Ext. PW-4/B was registered on the basis of rukka Ext. PW-4/A. On the same night at about 3:00 AM, HC Kalyan Singh presented the case property of this case before him, which was sealed with seal bearing impression "H". He resealed the same with seal bearing impression "T" and updated the relevant columns of NCB forms Ext. PW-5/A and thereafter deposited the case property in the malkhana.

11. PW-6 HHC Jitender Singh deposed that on 21.2.2012, I/C malkhana Police Station Paonta Sahib, HHC Narain Singh had handed over one sealed parcel sealed with seal impressions "H" and "T" alongwith the sample seals and NCB forms, which he deposited in FSL, Junga on the same day.

12. PW-7 HHC Narayan Singh, Addl. SHO deposited the case property of this case containing one parcel sealed with seal bearing impressions "H" and "T" alongwith the NCB forms and samples of seal in the malkhana regarding which, he incorporated entries in the malkhana register at Sr. No. 1511. The abstract of the same is Ext. PW-7/A. On 21.12.2012, he sent the case property vide RC No. 425/12 to FSL, Junga through HHC Jitender Kumar.

13. PW-9 HC Kalyan Singh, also deposed the manner in which the accused was apprehended at 10:20 PM, the search, seizure and sealing proceedings were completed on the spot. According to him, when the accused was apprehended, Jamshed (PW-1) and Mohd. Bilal (PW-2) reached on the spot and were associated by him in the proceedings. In their presence, the carry bag of the accused was opened and charas was recovered. In his cross-examination, he admitted that there were houses and shops near the chemical factory. However, the shops were found closed at that time.

14. The case of the prosecution has not been supported by the independent witnesses, Jamshed (PW-1) and Mohd. Bilal (PW-2). The case of the prosecution is that both these persons were coming from Gondpur side towards Tarunwala and were joined as independent witnesses. However, Jamshed (PW-1) and Mohd. Bilal (PW-2) have categorically deposed that the police people visited their shop and made them to board the police vehicle and thereafter they were taken to the Police Station. According to them, no carry bag was recovered from the accused in their presence nor any charas was found therein.

15. The lime factory, according to PW-3 HC Rupender was running at that time when the accused was apprehended. There were houses and shops nearby. But, no independent witnesses were associated by the police either from the lime factory or nearby houses or shops.

16. The case property was produced in the Court while examining PW-3 HC Rupender. The prosecution has not proved as to when the case property was withdrawn from the malkhana. It is mandatory that as and when the case property is deposited or taken out from the malkhana, corresponding entry has to be made in the malkhana register. No DDR report was also prepared when the case property was taken out from the malkhana and produced before the Court and when it was re-deposited in the malkhana after its production before the Court. The DDR is required to be prepared as and when the case property is taken out from the malkhana and re-deposited. In ND & PS cases, it is necessary to ensure the safe custody of the case property from its seizure till its production in the Court. Who has produced the case property before the Court has also not been proved. It casts doubt as to whether it was the same case property which was seized from

the accused and produced before the Court in the absence of entry made in the malkhana register at the time of withdrawal and re-deposit in the malkhana. We have gone through the malkhana register Ext. PW-7/A. There is entry of the case property being deposited in the malkhana at the initial stage and thereafter on being sent to FSL, Junga and when it was received, but no corresponding entry is there when it was again taken out from the malkhana to be produced before the Court.

17. Thus, the prosecution has failed to prove the case against the accused for the commission of offence punishable 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 28.10.2013, rendered by the learned Special Judge-I, Sirmaur at Nahan, H.P., in Sessions trial No. 19-ST/7 of 2013, is set aside. Accused is acquitted of the charges framed against him by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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.

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

Naresh Kumar .....Appellant

Versus

Hari Ram and others .....Respondents

FAOs (MVA) No. 28 of 2008.
Date of decision: 10th July, 2015.

Motor Vehicles Act, 1988- Section 166- Age of the deceased was 37 years- multiplier of '14' was to be applied- Tribunal had wrongly applied multiplier of '16'. (Para-13 and 14)

Motor Vehicles Act, 1988- Section 166- Owner pleaded that vehicle was unauthorizedely taken by the driver – however, he had not lodged any FIR- he had also not explained as to how vehicle went in possession of driver and from where the keys were obtained- hence, the plea of the owner that driver had taken the vehicle without authorization cannot be accepted. (Para-10 and 11)

Cases referred:

Sarla Verma and others versus Delhi Transport Corporation and another , AIR 2009 SC 3104

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

Munna Lal Jain and another versus Vipin Kumar Sharma and others , JT 2015 (5) SC 1

For the appellant: Ms. Devyani Sharma, Advocate.

For the respondents: Mr. G.D. Sharma, Advocate, for respondents No. 1 to 3.
Mr. V.S. Chauhan, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

The order dated 12.5.2008 setting respondents No. 1 to 3 *ex parte* is recalled.

2. Challenge in this appeal is to the judgment and award dated 27.11.2007, made by the Motor Accident Claims Tribunal, Fast Track Court Solan, H.P. in Case No.14 FTC/2 of 2005/2006, hereinafter referred to as "the Tribunal" for short, whereby compensation to the tune of Rs.5,04,000/- alongwith 7 ½ % interest came to be awarded in favour of the claimants and the appellant/owner was saddled with the liability, for short the "impugned award", on the grounds taken in the memo of appeal.

3. Claimants and driver have not questioned the impugned award on any ground, thus it has attained finality, so far it relates to them.

4. The owner has questioned the impugned award on the grounds taken in the memo of appeal.

5. The rash and negligent driving of the driver is not in dispute in this appeal. The only dispute raised in this appeal is that the driver, namely, Hamender Kumar had driven the offending vehicle without authority and permission of the owner at the relevant point of time. On the date of accident, the owner was not at home but was stated to be away from home at Delhi, attending to his some ailing relations.

6. The Tribunal, from the pleadings of the parties, has framed the following issues.

(i) *Whether the death of the deceased Nirmala Devi had been caused on account of rash/negligent driving of the scooter by the respondent No.2? OPP.*

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

(iii) Whether the respondent had taken the scooter un-authorizedly, if so, its effect? OPR-1.

(iv) Relief.

7. The parties were asked to lead evidence. The claimants examined as many as four witnesses, namely, Jeet Ram (PW1), Hari Ram (PW2), Rameshwari (PW3) and Paramjeet Sharma, (PW4).

8. On the other hand, respondents have examined seven witnesses, namely Naresh Kumar (RW1), Neeraj Parkash (RW2), Hamender Kumar (RW3), Rakesh Kumar (RW4), Shyam Kala (RW4-A), Ram Rattan (RW5), and Goverdhan Singh (RW6) and also placed on record the documents details of which are given in the judgment and also in the list of exhibits attached to the impugned award.

9. I have gone through the entire record. I am of the considered view that the Tribunal has rightly discussed the evidence and came to the conclusion that the accident was outcome of the rash and negligent driving of the driver, namely, Hamender Kumar. Even otherwise, findings on Issue No. 1 are not in dispute, so are upheld accordingly.

10. Issues No. 2 and 3 are interlinked so I deem it proper to club these issues. It was for the appellant-owner to prove that the offending vehicle was taken un-authorizidly by Hamender Kumar, has not lodged any FIR. The appellant/owner has not explained as to how the vehicle had gone in his possession and where from he has obtained the key of the vehicle in order to drive the same. The Tribunal has rightly made the discussions right from paras 10 to 13 of the impugned award and has correctly made the decision against the appellant/insured.

11. Mrs. Devyani Sharma, learned counsel for the appellant was asked whether any FIR was lodged, her reply was in negative. Further, she was not in a position to explain how the driver had obtained the key of the vehicle when the vehicle belongs to the owner and he had not engaged him as driver. Viewed thus, the Tribunal has rightly made the discussion.

12. The learned counsel for the appellant stated that the amount awarded is excessive.

13. I have gone through the findings recorded by the Tribunal. Admittedly, the age of the deceased was 37 years at the time of the accident. The Tribunal has fallen in an error in applying the multiplier of "16" which was to be applied as "14" in view of ratio laid down in ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***. Accordingly, multiplier of "14" is applied in this case in view of ***Sarla Verma,*** supra read with ***Munna Lal Jain and another versus Vipin Kumar Sharma and others*** reported in ***JT 2015 (5) SC 1***. It is apt to reproduce paras 12 and 14 of the said judgment herein:

> *"12. The remaining question is only on multiplier. The High Court following Santosh Devi (supra), has taken 13 as the multiplier. Whether the multiplier should depend on the age of the dependants or that of the deceased, has been hanging fire for sometime; but that has been given a quietus by another three-Judge Bench decision in Reshma Kumari (supra). It was held that the multiplier is to be used with reference to the age of the deceased. One reason appears to be that there is certainty with regard to the age of the deceased but as far as that of dependants is concerned, there will always be room for dispute as to whether the age of the eldest or youngest or even the average, etc., is to be taken. To quote:*
>
> > *"36. In Sarla Verma, this Court has endeavoured to simplify the otherwise complex exercise of assessment of loss of dependency and determination of compensation in a claim made under Section 166. It has been rightly stated in Sarla Verma that the claimants in case of death claim for the purposes of compensation must establish (a) age of the deceased; (b) income of the deceased; and (c) the number of dependants. To arrive at the loss of dependency, the Tribunal must consider (i) additions/deductions to be made for arriving at the income; (ii) the deductions*

to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference to the age of the deceased. We do not think it is necessary for us to revisit the law on the point as we are in full agreement with the view in Sarla Verma."

13. xxxxxxx xxxxxxxx xxxxxxxxxx

14. The multiplier, in the case of the age of the deceased between 26 to 30 years is 17. There is no dispute or grievance on fixation of monthly income as Rs.12,000.00 by the High Court."

14. The Tribunal has rightly taken the loss of dependency to the tune of Rs.2000/-.

15. The Tribunal has wrongly awarded Rs.20,000/- as funeral expenses and Rs.1 lacs on account of loss of love and affections. The claimants are held entitled to Rs.10,000/- each under four heads as under:

(i)	Loss of love and affection:		Rs.10,000/-
(ii)	Loss of estate	:	Rs.10,000/-
(iii)	Funeral expenses	:	Rs.10,000/-
(iv)	Loss of consortium	:	Rs.10,000/-
			Total Rs.40,000/-

16. The rate of interest as awarded by the Tribunal is maintained.

17. Viewed thus, the claimants are held entitled to Rs.2000x12=24000/-x14= Rs.3,36000/-+Rs.40,000/=Rs.3,76,000/-. Accordingly, the amount awarded is reduced to Rs.3,76,000/-, with interest, as awarded by the Tribunal, in terms of the impugned award.

18. Accordingly, the impugned award is modified as indicated hereinabove and the appeal is disposed of.

19. The appellant is directed to deposit the compensation amount within four weeks from today before the Tribunal. In default, claimants are at liberty to file execution petition before the Tribunal.

20. Send down the record forthwith, after placing a copy of this judgment.

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

National Insurance Company Ltd. .....Appellant

Versus

Bhag Chand & others .....Respondents

FAO No. 477 of 2008
Decided on : 10.07.2015

Motor Vehicles Act, 1988- Section 149- Temporary certificate of registration shows that it was valid till 18.8.2005- accident had taken place on 24.10.2005- no temporary permit was taken, therefore, it was proved that owner of the vehicle had driven it without registration certificate and other relevant documents which is breach of Sections 157 and 149 of the Act- hence, insurer was wrongly held liable to pay the compensation- however, insurer directed to pay compensation with the right of recovery. (Para-3 to 7)

For the Appellant : Mr. Ashwani K. Sharma, Advocate.
For the Respondents: Mr. R.S. Gautam, Advocate, for respondents No. 1 to 5.
Mr. Romesh Verma, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award, dated 29th April, 2008, made by the Motor Accidents Claims Tribunal, Kinnaur at Rampur Bushahr, H.P. (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 1 of 2006, titled Shri Bhag Chand & others versus Shri Santosh Kumar & another, whereby compensation to the tune of Rs.1,90,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimants-respondents No. 1 to 5 herein and the appellant-insurer i.e. National Insurance Company was saddled with liability (for short, "the impugned award").

2. The claimants and insured i.e. owner-cum-driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. Only the appellant-insurer has questioned the impugned award on two grounds, (i) the driver was not having a valid and effective driving licence at the relevant point of time; (ii) the offending vehicle was being driven without requisite documents in terms of the mandate of the provisions contained in the Motor Vehicles Act, 1988, for short 'the Act', which is a breach.

4. I have gone through the impugned award.

5. The Tribunal has made discussions relating to point No. (ii), *supra,* in para-27 of the impugned award, which on the face of it, are trash and are not in accordance with the provisions of the Act.

6. Perusal of Ext. RW- 2/A , Temporary Certificate of Registration does disclose that it was valid upto 18th August, 2005. The accident took place on 24th October, 2005. No temporary permit was granted. Thus, it can safely be held that the owner of the offending vehicle had driven the offending vehicle without the registration certificate and other requisite documents, at the relevant time, which on the face of it, is a breach of the mandate of the provisions of Sections 147 & 149 of the Act. In terms of the Insurance Policy Ext. RW-1/A, the mandate of the provisions of Section 43 of the Act has not been followed. Having said so, the Tribunal has fallen in error in saddling the insurer with the liability.

7. The claimants are the third party. They are entitled to compensation. It is the duty of the insurer to satisfy the liability. Having said so, the insurer is granted the right of recovery.

8. Accordingly, the impugned award is modified, as indicated above and the appeal is disposed of.

9. The Registry is directed to release the awarded amount in favour of the claimants, strictly as per the terms and conditions contained in the impugned award. The insurer is at liberty to recover the award amount from the owner.

10. Send down the records after placing a copy of the judgment on the Tribunal's file.

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

Oriental Insurance Co. Ltd. ...Appellant.

Versus

Sh. Pardeep Kumar and another ...Respondents.

FAO No. 507 of 2008
Decided on: 10.07.2015

Motor Vehicles Act, 1988- Section 149- Claimant pleaded that he was travelling in the vehicle for the purchase of apple box- owner admitted this fact- claimant had proved on record that vehicle was hired by him and he was travelling in the vehicle along with apple boxes- hence, it cannot be said that he was a gratuitous passenger. (Para-5 to 13)

Cases referred:

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

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

Naresh Verma versus The New India Assurance Company Ltd. & others, ILR (HP) 2014 (V) Page-482

NHPC versus Smt. Sharda Devi & others, ILR(HP) 2014 (V) Page-844

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

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

For the appellant: Mr. Deepak Bhasin, Advocate.

For the respondents: Mr. G.S. Rathore, Advocate, for respondent No. 1.
Mr. Raman Sethi, 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 judgment and award, dated 23.07.2008, made by the Motor Accident Claims Tribunal, Shimla (for short "the Tribunal") in M.A.C. Petition No. 44-S/2 of 2006, titled as Pardeep Kumar versus Shri Kailash Chand and another, whereby compensation to the tune of Rs.3,95,600/- with interest @ 7.5% per annum from the date of the filing of the claim petition till its realization came to be awarded

in favour of the claimant-injured and the appellant-insurer came to be saddled with liability (for short "the impugned award").

2. The appellant-insurer has questioned the impugned award on the grounds taken in the memo of the appeal.

3. The claimant-injured and the owner have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

4. The following questions are to be determined in this appeal:

(i) Whether the Tribunal has rightly held that the owner-insured has not committed any willful breach and saddled the appellant-insurer with liability?

(ii) Whether the amount awarded is excessive?

5. The claimant-injured has specifically averred in paras 10 and 21 (ii) of the amended claim petition that he was travelling in the offending vehicle for purchase of the apple boxes because he was agriculturist and horticulturist and was dealing with the same. It is apt to reproduce paras 10 and 21 (ii) of the amended claim petition herein:

"10. ..... The injured petitioner was travelling in the ill-fated vehicle Swaraj Mazda No. HP-63-1119 from Khamadi to Adarshnagar, in connection with the purchase of apple boxes since he was doing the business of Sale & purchase of Apple. Empty apple boxes were also loaded in the vehicle which were purchased from Guddu Singh S/o Murkhi R/o Vill. Shalog P.O. Kholighat, Teh. Rampur, Distt. Shimla, Sub-Teh. Nankhari, Dist. Shimla, H.P.

xxx xxx xxx

21. .....

ii) That the petitioner also used to buy the apples from the owners of the apples and to sell the apples in the market as such Chandigarh, Delhi etc., on the date of accident the petitioner was going to Adarshnagar after hiring the said Truck involved in the accident. empty apple boxes were in the vehicle because at Adarshnagar, there were no body to supply empty apples boxes. He has purchased apple orchard on contract basis at Adarshnagar, and his labour were working there in the Apple orchard. They have demanded Empty apple boxes (Caron Boxes) on telephonically so he immediately hired this vehicle and loaded these empty boxes in the said vehicle. He was travelling as owner of goods with the ill fated vehicle."

6. The owner-insured has filed the reply to the amended claim petition and has admitted the stand of the claimant-injured. It is apt to reproduce reply on merits to para 10 and 21 (ii) filed by the owner-insured herein:

"10. That in para 10 of the petition, the contents that empty apple boxes were also loaded in the vehicle which

were purchased from Guddu Singh son of Shri Mirkh, R/o village Salog, P.O. Kholighat, sub Tehsil Nankhari, District Shimla (HP) is denied for want of knowledge and rest of contents are admitted.

xxx xxx xxx

21. .....

(ii) That in this para the contents that petitioner use to buy the apples of the owners of the apple orchard and use to sell the apples in the market and on the date of accident the petitioner was going to Adarshnagar after hiring the ill-feted vehicle are admitted and rest of the contents of this para are denied for want of knowledge."

7. Having said so, it is admitted by the owner-insured of the offending vehicle that the claimant-injured had hired the offending vehicle and was travelling in the same at the relevant point of time alongwith empty apple boxes, which he had purchased from one Shri Guddu Singh.

8. The Tribunal has made discussions, while determining issues No. 3, 4, 10 and 11. Even, said Shri Guddu Singh has appeared in the witness box as PW-4 and has corroborated the version of the claimant-injured.

9. The claimant-injured has proved by leading evidence that the offending vehicle was hired and he was travelling in the same alongwith apple boxes at the relevant point of time. Thus, by no stretch of imagination, it can be said that the claimant-injured was travelling in the offending vehicle as a gratuitous passenger at the relevant point of time.

10. This Court in a case titled as **National Insurance Co. Ltd. versus Kamla and others,** reported in **2011 ACJ 1550,** has also discussed the same issue while referring to the judgment of the Apex Court in **National Insurance Co. Ltd. versus Cholleti Bharatamma,** reported in **2008 ACJ 268 (SC)** and held that the person, who had hired the vehicle for transporting goods, was returning in the same vehicle, met with the accident, cannot be said to be an unauthorised/gratuitous passenger.

11. It is apt to reproduce paras 8 to 11 of the judgment rendered in **Kamla's case (supra)** herein:

"8. Coming to the second plea taken by the learned counsel for the appellant that the deceased was a gratuitous passenger, a perusal of the reply filed by respondent No. 2, insurance company shows that they had only pleaded that the deceased was admittedly not employee of the insured and was traveling in the truck as a gratuitous passenger. Thus, it was submitted that the Insurance Company was not liable. Reliance was also placed upon the decision in ***National Insurance Co. Ltd. v. Cholleti Bharatamma, 2008 ACJ 268 (SC)****wherein the plea was taken that the owner himself travel in the cabin of the vehicle and not with the goods so as to be covered under Section 147. However, in case the driver*

permits a passenger to travel in the tool box, he cannot escape from the liability that he was negligent in driving the vehicle and moreover, in a petition under Section 163-A of the Motor Vehicles Act, rash or negligent driving is not to be proved and, therefore, this decision does not help the appellant.

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

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

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

12. The same principle has been laid down by this Court in a bunch of two appeals, **FAO No. 9 of 2007**, titled as **National Insurance Company Limited versus Smt. Teji Devi & others,** being the lead case, decided on 22nd August, 2014; **FAO No. 22 of 2007,** titled as **Naresh Verma versus The New India Assurance Company Ltd. & others,** decided on 26th September, 2014, **FAO No. 77 of 2010,** titled as **NHPC versus Smt. Sharda**

Devi & others, decided on 17th October, 2014, and a bunch of two appeals, **FAO NO. 638 of 2008, titleda s National Insurance Company versus Smt. Sundri Devi and another,** being the lead case, decided on 3rd July, 2015.

13. Applying the test to the instant case, one comes to an inescapable conclusion that the claimant-injured was not travelling in the offending vehicle as a gratuitous passenger.

14. The appellant-insurer has also taken a ground before the Tribunal that the owner-insured has committed willful breach, but has failed to lead evidence and prove the said factum.

15. It is apt to record herein that the learned counsel for the appellant-insurer has not questioned the findings returned by the Tribunal relating to the breach of the terms and conditions of the insurance policy, driving licence, registration certificate, fitness certificate, goods carriage permit of the offending vehicle and collusion between the claimant-injured and the owner-insured.

16. Having said so, the Tribunal has rightly made discussions and saddled the appellant-insurer with liability, needs no interference.

17. Learned counsel for the appellant-insurer further argued that the amount awarded is excessive. Though, it has taken permission of the Tribunal under Section 170 of the Motor Vehicles, Act, 1988 (for short "the MV Act"), but has not been able to prove as to how the amount is excessive.

18. However, I have gone through the impugned award. The Tribunal has made discussions in paras 26 to 32 of the impugned award. A meager amount has been awarded to the claimant-injured. He has suffered 40% permanent disability, which has been proved in terms of the disability certificate, Ext. PW-1/A. The claimant-injured has also placed on record the documents, which do disclose that that the claimant-injured has spent more than Rs. 25,000/- as medical expenses. The Tribunal, has taken the monthly income of the claimant-injured as Rs. 4,500/- per month and after taking into consideration the age of the claimant-injured to be 31 years, has applied the multiplier of '16', which is just and appropriate in view of the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120,** and has assessed loss of income to the tune of Rs.1800/- per month, while taking into account 40% permanent disability suffered by the claimant-injured, which has shattered his physical frame and awarded Rs. 3,45,600/- under the head 'loss of future income'.

19. The Tribunal has fallen in an error in awarding Rs.25,000/- under the head 'pain and suffering and loss of amenities' in view of 40% permanent disability suffered by the claimant-injured. But, unfortunately, the claimant-injured has not questioned the amount awarded under this head, I reluctantly uphold the amount awarded under this head.

20. Having glance of the above discussions, the appeal merits to be dismissed and the impugned award is to be upheld. Accordingly, the impugned award is upheld and the appeal is dismissed.

21. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award after proper identification.

22. Send down the record after placing copy of the judgment on Tribunal's file.

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

Oriental Insurance Company Ltd. .....Appellant.
Versus
Sh.Vinod Kumar Sayog ...Respondent

FAO (MVA) No. 426 of 2008.
Judgment reserved on 03rd July, 2015
Date of decision: 10th July, 2015.

Motor Vehicles Act, 1988- Section 149- Insurer had failed to lead evidence to the fact that owner had committed willful breach- owner led evidence to prove that he had examined the license and the driver was in the employment of 'C' before his engagement as driver by the owner- held that insurer was rightly held liable. (Para-4 to 6)

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

For the appellant: Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For the respondents: Mr. Dheeraj Vashisht, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This appeal is directed against the order dated 11.06.2008, made by the Motor Accident Claims Tribunal, (II), Shimla, H.P. in case No. 10/10 of 2003, titled *Oriental Insurance Company versus Sh. Vinod Kumar Sayog,* hereinafter referred to as "the Tribunal", whereby an Application filed by the insurance company/appellant herein, under Section 174 of the Motor Vehicles Act, for short "the Act" came to be dismissed, for short "the impugned order" on the grounds taken in the memo of appeal.

2. It appears that claimants had filed claim petition before the Tribunal for the grant of compensation to the tune of Rs.7 lacs, as per the break-ups given in the claim petition which was granted vide judgment and award dated 12.8.2002, made by the said Tribunal, whereby compensation to the tune of Rs.2,04,000/- was awarded in favour of the claimants which was questioned by the claimants by the medium of FAO No.509 of 2002 and owner has also filed cross-objection No.222 of 2003. The Appeal filed by the claimants for enhancement was dismissed, however, the cross-objection was disposed of with the

direction to the insurer to recover the award amount from the owner, if it is proved by it that the owner has committed willful breach, vide order dated 9th August, 2004.

3. The insurer had satisfied the award and laid motion for recovery of the award amount from the owner before the Tribunal.

4. The parties have not challenged the judgment made by this Court dated 9th August, 2004, passed in FAO No. 509 of 2002 alongwith cross-objections thus, it has attained finality. In view of the judgment dated 9th August, 2004, supra, it was for the insurer to plead and prove that the driver was not having a valid and effective driving license and that the owner has committed willful breach, in terms of Section 149 of the Act read with the terms and conditions contained in the insurance policy. The insurer has failed to lead any evidence to the effect that the owner had committed any willful breach.

5. The owner has led evidence to prove that he has exercised due care and caution by examining the license read with the fact that the said driver was in the employment of Chaman Lal before his engagement as driver by the owner. He has examined Chaman Lal, who appeared as RW3 and stated that the driver, namely, Shri Govind Singh is a perfect driver and was driving his vehicle before he was engaged as driver by the owner.

6. The Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** has laid down that what is expected of a owner of a vehicle is to examine the license and to see whether the driver is competent to drive the vehicle and nothing more can be expected from him, which the owner has proved before the Tribunal in the said application. It is apt to reproduce para 10 of the said judgment herein:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing*

authority. That is what is explained in Swaran Singh 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."

7. Having said so, the Tribunal has rightly dismissed the application. The impugned order is upheld and he appeal is dismissed. Send down the record forthwith, after placing a copy of this judgment.

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

FAOs No. 502, 503 & 506 of 2008
Decided on: 10.07.2015

FAO No. 502 of 2008

Salochana Devi and another ...Appellants.
Versus
Shyam Lal and another ...Respondents.

.....

FAO No. 503 of 2008

Bimla Devi and another ...Appellants.
Versus
Shyam Lal and another ...Respondents.

.....

FAO No. 506 of 2008

Shakuntala Devi and another ...Appellants.
Versus
Shyam Lal and another ...Respondents.

Motor Vehicles Act, 1988- Section 166- Tribunal had deducted 2/3rd of the income towards personal expenses- held, that 50% of the amount was to be deducted in case of an unmarried person - taking income of the deceased as Rs. 3,000/- and deducting 50% of the amount loss of dependency would be Rs. 1,500/- per month- age of the deceased was 18 years- multiplier of 14 will be applicable- hence, compensation of Rs. 1,500 x 12 x 14 = Rs. 2,52,000/- awarded towards loss of income. (Para-13 to 16)

Cases referred:

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

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

For the appellant(s): Mr. Ramakant Sharma, Advocate.

For the respondents: Mr. Dalip K. Sharma, Advocate, for respondent No. 1.
Mr. Rakesh Thakur, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

All these appeals are outcome of one vehicular accident, thus, I deem it proper to determine all the three appeals by this common judgment.

2. Subject matter of these appeals is the separate judgments and awards, dated 20.06.2008, made by the Motor Accident Claims Tribunal-II, Solan, District Solan, Camp at Nalagarh (for short "the Tribunal") in the respective claim petitions, whereby compensation came to be awarded in favour of the claimants and the owner-insured came to be saddled with liability (for short "the impugned awards").

3. The owner-insured and the driver of the offending vehicle have not questioned any of the impugned awards on any count, thus, have attained finality so far it relate to them.

4. The claimants in all the three claim petitions have questioned the impugned awards on the ground of adequacy of compensation.

5. In order to determine the issue, it is necessary to give flashback of the facts of the case, the womb of which has given birth to the appeals in hand.

6. It is averred in the claim petitions that the driver, namely Shri Joginder Singh, while driving the offending vehicle, i.e. bus, bearing registration No. HP-12-4175, rashly and negligently, on 12.05.2006, at about 10.25 A.M., near bridge Kashmirpur on Nalagarh Bagheri road, caused the accident in which three young bachelor boys, namely Sunil Kumar, Chander Mohan and Gurnam Singh, aged eighteen years, sustained injuries and succumbed to the injuries.

7. The claimants filed separate claim petitions in terms of Section 166 of the Motor Vehicles Act, 1988 (for short "the MV Act") before the Tribunal and sought compensation on the grounds taken in the respective claim petitions.

8. The respondents, i.e. the owner-insured and the driver of the offending vehicle, resisted all the three claim petitions on the grounds taken in the respective memo of objections.

9. Similar set of issues came to be framed in all the three claim petitions. Thus, I deem it proper to reproduce the issues framed by the Tribunal in one claim petition.

10. Following issues came to be framed in M.A.C. Petition No. 4-NL/2 of 2007 on 05.12.2007:

> *"1. Whether the deceased Sunil Kumar died due to rash and negligent driving of respondent No. 2 while driving bus bearing No. HP-12-4175 on 12.05.2006 near Kashmirpur bridge? OPP*
>
> *2. If issue No. 1 is decided in affirmative, as to what amount of the compensation, the petitioners are entitled to and from whom? OPP*
>
> *3. Relief."*

11. Parties led evidence in each of the claim petitions.

12. The Tribunal, after scanning the evidence, oral as well as documentary, held that the driver of the offending vehicle had driven the same rashly and negligently on 12.05.2006, at about 10.25 A.M., near bridge Kashmirpur on Nalagarh Bagheri road and caused the accident in which three young boys, namely Sunil Kumar, Chander Mohan and Gurnam Singh lost their lives and decided issue No. 1 in favour of the claimants and against the respondents in each of the claim petitions. The findings returned by the Tribunal on issue No. 1 are not in dispute. Thus, the same are upheld.

13. The Tribunal has rightly held that the income of each of the deceased, who were young bachelor boys of 18 years, was Rs. 3,000/- per month, but has fallen in an error while deducting two third, whereas in view of the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120,** 50% was to be deducted. Viewed thus, the claimants have lost source of dependency to the tune of Rs.1,500/- per month.

14. The Tribunal has also fallen in an error while applying the multiplier in each of the claim petition. The deceased in each of the claim petitions were eighteen years' of age. In view of the ratio laid down by the Apex Court in **Sarla Verma's case** and **Reshma Kumari's case (supra),** multiplier of '14' is applicable.

15. Viewed thus, the claimants in each of the claim petitions are held entitled to compensation to the tune of Rs. 1,500/- x 12 x 14 = Rs. 2,52,000/-.

16. The Tribunal has also fallen in an error in awarding compensation under the heads 'loss of love and affection' and 'funeral expenses'. The claimants are held entitled to Rs.10,000/- each under the heads 'loss of love and affection' and 'funeral expenses'.

17. Having said so, the claimants are held entitled to total compensation amounting to Rs. 2,52,000/- + Rs. 10,000/- + Rs. 10,000/- = Rs. 2,72,000/- in each of the claim petitions.

18. Having glance of the above discussions, all the three appeals merit to be allowed and the impugned awards are to be modified. Accordingly, the appeals are allowed and the impugned awards are modified, as indicated hereinabove.

19. At this stage, learned counsel for the owner-insured stated at the Bar that the owner-insured has already satisfied the award. The owner-insured is directed to deposit the enhanced awarded amount in each of the claim petitions before the Registry within six weeks. On deposition, the same be released in favour of the respective claimants as per the terms and conditions contained in the respective impugned awards after proper identification.

20. Send down the record after placing copy of the judgment on each of the Tribunal's files.

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

United India Insurance Company Ltd. .....Appellant
Versus
Ms. Manu Sharma & others .....Respondents

FAO No. 478 of 2008
Decided on : 10.07.2015

Motor Vehicles Act, 1988- Section 157- Vehicle was sold by owner- it was contended by the insurer that he was not liable to satisfy the award- held, that transfer of a vehicle cannot absolve insurer from its liability to satisfy the award. (Para-7 to 13)

Cases referred:
G. Govindan versus New India Assurance Company Ltd. and others, AIR 1999 SC 1398
Rikhi Ram and another versus Smt. Sukhrania and others, AIR 2003 SC 1446
United India Insurance Co. Ltd., Shimla versus Tilak Singh and others, (2006) 4 SCC 404

For the appellant : Mr. Ashwani K. Sharma, Advocate.
For the respondents: Mr. Vikas Rathore, Advocate, for respondent No. 1.
Mr. R.R. Rahi, Advocate, for respondent No. 2.
Mr. Naveen Kumar Bhardwaj, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Appellant-insurer, i.e. United India Insurance Company Limited has questioned the award dated 23rd May, 2008, made by the Motor Accidents Claims Tribunal, Kullu, (hereinafter referred to as "the Tribunal") in Claim Petition No. 8/07, titled Manu Sharma versus Bhag Singh & others, whereby compensation to the tune of Rs.80,000/- with interest @ 9% per annum from the date of the award till its realization, came to be awarded in favour of the claimant-respondent No. 1, herein and against the insurer-appellant herein (for short, the "impugned award").

2. I wonder why the insurance company has filed this appeal for such a trivial amount.

3. The claimant has not questioned the adequacy of compensation. Thus, I deem it proper to uphold the same.

4. The owner and driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

5. The question to be determined in this appeal is-whether the Tribunal has rightly saddled the insurer with liability?

6. Learned Counsel for the appellant-insurance company argued that the offending vehicle was sold by the owner at the relevant time and the insurer was not liable to satisfy the award.

7. The argument of the learned Counsel is not tenable for the following reasons.

8. 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.

9. The insured has not brought into the notice of the insurer that he has sold the vehicle. Thus, the insurance policy was valid and the insurer has to satisfy the award.

10. 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."

11. 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."

12. 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."*

13. Having said so, the Tribunal has rightly saddled the insurance company with the liability.

14. Now coming to the second point, the insurer has not led any evidence to prove that the driver of the offending vehicle was not having a valid and effective driving licence at the relevant point. However, driver Bhuvneshwar Singh has examined Smt. Sarla Devi as RW-6 in his favour, who has stated that Bhuvneshwar Singh is also known by the name of Bhupinder Singh.

15. It is apt to reproduce para-21 of the impugned award herein:

> *"21. A dispute has been raised regarding the name of respondent No. 2. The claim petition has been filed in the name of Bhuvneshwar. The documents of the vehicle have also been released in his favour. However, the driving license, which has been produced shows his name as Bhupinder Singh. The respondent No. 2 has stated that he is also known by the name of Bhupinder Singh and in fact this license has been issued to him and was valid on the date of accident. In support of his allegation, he has examined Smt. Sarla Devi, who is the Pradhan of Gram Panchayat Peej. He has supported the version of respondent No. 2 that Bhuvneshwar is also known as Bhupinder and has issued certificate Ext. PW-6/A. She has mentioned in the cross-examination that this certificate has been issued by her on the basis of her personal knowledge and not on the basis of any record available in the Panchayat. The driving license which has been produced also has a*

photograph of the holder of the driving license. It has not been pointed out in the cross-examination of respondent No. 2 that photograph is not of respondent No. 2 as no such suggestion has been given to him. Therefore, in view of the statement of respondent No. 2 himself, and the statement of Sarla Devi, it is established that Bhupinder Singh and Bhuvenshwar are one and the same person and in fact the license has been issued to respondent No. 2 by the Licensing Authority, which license was valid on the date of accident. Some contradictions have been pointed out regarding the address of Bhupinder Singh on the driving license, however, these contradictions are not material. No question has been put to the Licensing Authority or to the respondent No. 2 that this license which has been issued in the name of Bhupinder Singh is in fact a different person and not respondent No. 2. Therefore, I hold that driving license of respondent No. 2 was valid and effective on the date of accident."

16. Having said so, I am of the considered view that the Tribunal has rightly made discussion in para-21 of the impugned award.

17. Accordingly, the impugned award is upheld and the appeal is dismissed.

18. The Registry is directed to release the awarded amount in favour of the claimant, strictly as per the terms and conditions contained in the impugned award.

19. Send down the records after placing a copy of the judgment on the Tribunal's file.

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

United India Insurance Company Ltd. .....Appellant
Versus
Smt. Santosh Kumari & others ...Respondents

FAO No. 492 of 2008
Decided on : 10.07.2015

Motor Vehicles Act, 1988- Section 149- Insurer contended that deceased was labourer and his risk was not covered- insurance policy showed that risk was covered- therefore, appeal dismissed. (Para-3 to 6)

For the appellant : Mr. Sanjeev Kuthiala, Advocate.
For the respondents: Mr. Sandeep Sharma, Advocate vide Mr. Ashwani Pathak, Advocate, for respondent No. 1.
Nemo for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Challenge in this appeal is to the award, dated 21st May, 2008, made by the Motor Accidents Claims Tribunal, (III), Kangra, (hereinafter referred to as "the Tribunal") in

M.A.C.P. No. 43-B/2003, titled as Smt. Santosh Kumari versus Rakesh Kumar & others, whereby compensation to the tune of Rs.1,69,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimant-respondent No. 1, herein and the insurer-United India Insurance Company was saddled with liability (for short, the "impugned award").

2. The claimant, insured-owner and driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. Only the insurer has questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling it with the liability.

4. Learned Counsel for the appellant-Insurance Company argued that the deceased was a labourer employed with the offending vehicle-tractor, his risk was not covered.

5. I have gone through the Insurance Policy Ext. RW-1/B which does disclose that the risk is covered. The Tribunal has rightly made discussion in para-12 of the impugned award.

6. Having said so, no interference is required. Hence, the impugned award is upheld and the appeal is dismissed.

7. The Registry is directed to release the awarded amount in favour of the claimant, strictly as per the terms and conditions contained in the impugned award.

8. 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. AND HON'BLE MR.JUSTICE TARLOK SINGH CHAUHAN, J.

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

versus

State of H.P. and others. .....Respondents.

CWPIL No.8480 of 2014
Date of order: July 13, 2015.

Constitution of India, 1950- Article 226- Court had taken cognizance of non- completion of the road and had issued various directions- the directions were not complied with – initially the contractor stated that he would complete work by end of June, 2016 and thereafter stated that he would complete the work by the end of June, 2017- the contractor directed to complete the work in terms of the contract- a two member committee directed to ensure that money released by the State Government is used only for the purpose for which it is released and not for any other purpose. (Para 14 to 30)

For the Petitioner(s): Ms.Jyotsna Rewal Dua, Senior Advocate, as Amicus Curiae, with Ms.Amrita Messie, Advocate.

Mr.R.K. Sharma, Senior Advocate, with Mr.Devender Jaita and Mr.Rajinder Dogra, Advocates.

Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma & Mr.Anup Rattan, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G., for respondents No.1 and 2.

Mr.N.K. Sood, Senior Advocate, with Mr.Aman Sood, Advocate, Advocate, for respondent No.3.

Mr.Sumeet Raj Sharma, Advocate, for respondent No.4.

Mr.B.C. Negi and Mr.Ankush Dass Sood, Senior Advocates, with Mr.Pranay Partap Singh and Mr.Sweta Julka, Advocates, for HPRIDC.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

We have been passing orders in the instant petition right from 3rd December, 2014 till 6th July, 2015.

2. Vide order dated 3rd December, 2014, this Court had passed certain directions, which are contained in paragraphs 3, 20 and 21 thereof. In order to gauge the progress and ensure that the work in question is executed efficiently and properly, we constituted a Committee comprising of the Chief Secretary, Government of Himachal Pradesh, the Principal Secretary (PW), Government of Himachal Pradesh and the Engineer-in-Chief, HPPWD, and the Committee was directed to file separate status reports on each and every hearing. Besides, all the respondents to the lis were also directed to file their respective status reports/replies.

3. In compliance to the said order, respondents No.1 and 2, {the Principal Secretary (PW) and the Engineer-in-Chief, HPPWD, respectively}, filed affidavit dated 15th December, 2014, in which it was stated that the entire work has been divided into two parts and both the parts were further divided into three milestones each. The first milestone of each part was stated to be achieved by the Contractor by June, 2015, the second milestone of both the parts was to be achieved by December, 2015 and the third milestone, being the last one, was to be achieved by June, 2016.

4. Vide order, dated 23rd March, 2015, the petition was adjourned for four weeks to show the results, on the request of the learned Advocate General. In addition, following order was also passed:

> *".....It is made clear that the first milestone is to be achieved within the time frame already fixed and any dereliction/violation made by any person, including the contractor, including breach of the contract, shall amount to contempt and all the parties and the Officers shall be dealt with accordingly".*

5. In compliance to the above order, respondents No.1 and 2 filed the status report dated 25th April, 2015, in which it was stated that the first milestone would be achieved within the time frame, subject to weather conditions. After perusing the status reports, this Court found that the work of the Contractor was not satisfactory and therefore, a 2-Member Committee was constituted, the description of which has been given in

paragraph 13 of the order dated 2nd May, 2015 and the Chief Secretary was directed to provide all facilities to the Committee in terms of paragraph 14 of the said order.

6. On 20th June, 2015, the learned counsel for respondent No.3-Contractor made a statement that the milestone would be completed within the time frame and sought time to file affidavit to that effect during the course of that day, which opportunity was granted to him.

7. Thereafter, respondent No.3-Contractor filed the affidavit, dated 20th June, 2015, stating therein that the said respondent was not in a position to achieve the milestones within the time frame, taking totally a contrary stand to the statement made by the learned counsel representing respondent No.3-Contractor, as recorded in the order, dated 20th June, 2015. Respondent No.3 in the said affidavit also suggested measures as to how he would complete the work. It is apt to reproduce the relevant portion of the affidavit hereunder:

> *".....The respondent No.3 respectfully submits that in the given circumstances it is in a position to commit before this Hon'ble Court as under:*
>
> ***I) Package-I***
>
> ***a)*** *The hotmix plant for Package I being installed near place known as Chailla will be commissioned in all respects on or before 25th of June, 2015.*
>
> ***b)*** *The obligation to initiate the Black Topping of entire prescribed portion of first milestone in Package-I will be started by respondent No.3 on 27th June, 2015, and will be completed thereafter as soon as possible. The respondent No.3 undertakes that except for the reasons beyond its control, the work of above said component will be carried continuously without any break. It is pertinent to submit that in ideal conditions, with the machinery respondent No.3 has, the progress of 7 metres wide Black Topping of road at the rate of 1 km. in length per day is achievable and the respondent No.3 shall make every endeavour to achieve the said progress.*
>
> ***c)*** *The respondent No.3 further submits and undertakes to complete the 100% excavation/earthwork of the remaining portion of Package I i.e. from Kms.20.00 to 48.00 Kms, by 15th November, 2015.*
>
> ***II) Package-II***
>
> ***a)*** *The hotmix plant for Package II being installed near place known as Patsari will be commissioned in all respects on or before 25th June, 2015.*
>
> ***b)*** *The obligation to initiate the Black Topping of entire prescribed portion of first milestone in Package-II will be started by respondent No.3 on 27th June, 2015, and will be completed thereafter as soon as possible. The respondent No.3 undertakes that except for the reasons beyond its control, the work of above said component will be carried continuously without any break. It is pertinent to submit that in ideal conditions, with the machinery respondent No.3 has, the progress of 7 meters wide Black Topping of road at the rate of 1 km. in length per day is achievable and the respondent No.3 shall make every endeavour to achieve the said progress.*
>
> ***c)*** *The respondent No.3 further submits and undertakes to complete the 100% excavation/earthwork of the remaining portion of Package-II i.e. from Kms. 48.00 to 68.00 Kms, by 15th July, 2015."*

8. The 2-Member Committee appointed by this Court also submitted its report pointing out the exact position existing on the spot, a reference to which has been made by the learned Amicus Curiae in the response, dated 1st July, 2015, filed to the affidavits of the respondents. It is apt to reproduce paragraph (e) of the said response hereunder:

"e) ***Reports by the Committee appointed by this Hon'ble Court***

Two reports have been submitted by the Ld. Committee appointed by this Hon'ble Court. These reports have very specifically given a very clear picture of the 'on spot' position. According to the reports, there is no project like position existing on the spot. The work is behind the schedule. It is unlikely that first milestone will be achieved by the respondents. Reports have pointed out that all 14.50+14.04 Crores =28.54 crores have been spent by the State from which the contractor has not even completed work even in double digit of the total work leave aside the targeted milestone. There are various deficiencies in the working of the contractor which have been pointed out by the Committee in its elaborate reports. Some of the salient features of the reports are:-

Lack of micro level monitoring. Indifference of the managers of the contractors responsible for micro level.

Machinery deployed not owned by the Contractor but sub standard owned by others who are not for obvious reasons will be indifferent to the execution of work in time.

Whatever machinery is deployed is not being utilized to its capacity.

Crusher/main component in such like project is working at less than 3 hours per day. Not adequate supply of aggregated to it.

Hot Mix plant despite repeated commitments still not commissioned.

Bridges and retaining walls not constructed.

Resident Engineer not appointed.

Dumping is being done on the road side and not on approved dumping sites.

Updated and revised programmes are required to be submitted.

Necessity of water sprinklers on the road.

Unattended big pot holes and depressions requiring immediate repairs.

Resident engineers require to be appointed.

Apparent that the contractor is facing big financial problems."

9. This Court, after examining the affidavits/status reports, vide order dated 24th June, 2015, directed the respondents, the learned Amicus Curiae and the 2-Members Committee to file fresh status reports/responses, which stand filed. It is apt to reproduce paragraphs 1, 3, 4 and 5 of the said order hereunder:

"Respondent No.3-Contractor has filed the status report demonstrating therein as to how he is going to complete the project in question in terms of the contract. Learned Advocate General prayed that before passing any order, he may be permitted to file the response to the said report after seeking instructions from the Government. Ms.Jyotsna Rewal Dua, learned Amicus Curiae, also sought time to file response to the said report and make suggestions.

....

The learned Amicus Curiae pointed out that respondent No.4-Consultant has stated in the affidavit that he has made suggestion to the employer that the Contractor be asked to open an escrow account so that the money released to

the Contractor is used for the purpose of construction of the road only and that the labourers etc. are paid regularly. It was also pointed out by respondent No.4-Consultant in the affidavit that respondent No.3-Contractor be asked to submit fresh working programme detailing item-wise work schedule viz. a viz. remaining stipulated period.

We have also gone through the report submitted by the Committee constituted by this Court and we find that the report is an eye-opener for the State Authorities as well as for the other agencies connected with the execution of the work in question.

The Members of the Committee to visit the site before the next date of hearing and file fresh status report in terms of the orders already made and also to file response to the affidavit filed by the Contractor."

10. On 24th June, 2014, the counsel appearing for respondent No.3-Contractor informed the Court that original counsel Mr.Satyen Vaidya has fallen ill seriously and is bed ridden. On 1st July, 2015, when the writ petition was again listed, Mr.Bimla Gupta, Advocate, appeared for respondent No.3-Contractor and respondent No.3-Contractor was asked to file an affidavit that he would not claim any addition/alteration of the terms of the contract or resort to arbitration proceedings to lay a claim for additional amount. Respondent No.3-Contractor was also directed to undertake that he would achieve the milestones in terms of the affidavit, dated 20th June, 2015, at his own risk and responsibility. To do the needful, Mr.Bimal Gupta, Advocate, appearing for respondent No.3, sought time, which was granted.

11. On having been pointed out by the learned Amicus Curiae that the 3-Member Committee, comprising of the Chief Secretary, the Principal Secretary (PW) and the Engineer-in-Chief, HPPWD, has filed affidavits contrary to the factual position on the spot, the said officers were directed to show cause why they be not proceeded in terms of the provisions of the Contempt of Courts Act. The Managing Director and the Director, of respondent No.3, were also directed to remain present in person before the Court.

12. The matter was thereafter listed on 6th July, 2015, on which date Mr.N.K. Sood, Senior Advocate appeared for respondent No.3-Contractor, who sought adjournment, which was reluctantly granted. The matter, subsequently, was taken up on 8th July, 2015, when respondent No.3 filed an application, alongwith affidavit, which was taken on record for consideration at appropriate stage. Mr.N.K. Sood, Senior Advocate, sought adjournment to comply with the directions passed by this court vide order dated 1st July, 2015, which was granted and the matter was fixed for 9th July, 2015.

13. On 9th July, 2015, the learned counsel for the parties were heard at length. The learned Senior Counsel appearing for respondent No.3-Contractor tried to seek indulgence of the Court to the effect that the time frame, as fixed, in terms of the contract for the completion of the work in question, be extended till June, 2017, instead of June, 2016. However, it was made clear to all the parties that alteration/modification in the terms of the contract is the domain of the parties who have executed the contract. This Court has taken the cognizance of the matter only in the interest of the public and to prevent any loss to the state exchequer.

14. During the course of hearing, Mr.Narender Chauhan, Principal Secretary (PW), to the Government of H.P. and Managing Director of the HPRIDC, was also heard at length, who stated that there is no need to extend the date for the completion of the work in

question and it cannot be extended. He also stated that the contract was awarded to the Contractor after examining his experience in the field and that the Contractor has the will to complete the work. He further stated that they have the best team of engineers to execute the work and that they are committed to complete the work in question within the stipulated time frame.

15. The learned Senior Counsel sought permission to place on record the undertaking of respondent No.3 in terms of the orders passed on 1st July, 2015 (supra). However, after going through the undertaking in the open Court, it was found that the undertaking was not in tune with the orders passed, and therefore, respondent No.3 was directed to execute the undertaking strictly in terms of the order passed. After amending the undertaking, the same was placed on record by respondent No.3, which still is not in accordance with the directions passed by this Court. No doubt, respondent No.3, in paragraph 3, of the undertaking has mentioned that the said respondent will not claim any benefit of the orders passed or which may be passed by this Court in future from time to time in relation to the contractual obligations/rights between the contracting parties under the agreement in question, however, we find that the undertaking is not strictly in terms of the order of this Court, constraining this Court to clarify and pass the following order.

16. The contractor cannot and shall not take any benefit from the directions made by this Court from time to time enabling him to seek additional amount. Respondent No.3-Contractor shall not be entitled to claim that the Court has condoned the delay. It is also made clear that the orders passed by this Court shall not cause any prejudice to the rights, interests and liabilities accrued to the parties from the contract and the parties shall be bound by the terms and conditions contained in the contract. The Contractor is directed to take all measures and complete the work expeditiously strictly in terms of the contract.

17. At the cost of repetition, we once again observe that addition/alteration in the conditions of the contract is the domain of the parties to the contract.

18. We also direct that the 2-Members Committee constituted by this Court, vide order dated 2nd May, 2015, shall supersede the other Committees constituted by this Court. However, it is made clear that the Authority(ies)/Officer(s), who is/are competent or authorized to monitor the progress of the work, are at liberty to do so.

19. The 2-Member Committee shall furnish its report fortnightly, as directed earlier. The Committee shall also see that the money released by the State Government to the Contractor is used only for the purpose for which it is released and not for any other purpose. The Committee is further directed to point out whether the Contractor is working with zeal and in terms of the contract and any defiance made by the Contractor shall be brought to the notice of the Court. It is also observed that in case the 2-Member Committee appointed by this Court requires any help from any Officer of the State for the monitoring of the work in question, they are at liberty to approach any Authority of the State, including the Chief Secretary, and the Authorities of the State are bound to provide assistance to the Committee, so that the road is made functional within the time frame.

20. The Chief Secretary is, once again, commanded to comply with the directions contained in paragraph 14 of the order, dated 2nd May, 2015.

21. Mr.Narender Chauhan, Principal Secretary (PW), to the Government of H.P., being the Managing Director of the HPRIDC, shall be responsible to get the work executed in terms of the statement made by him before the Court. In case he feels that the Contractor is

not fulfilling his contractual obligations in terms of the contract, it is his duty to point out the same to the Court well in time, not the way he has done by filing the affidavit at a belated stage.

22. The Chief Secretary, the Principal Secretary (PW) and the Engineer-in-Chief filed the affidavits and made this Court to believe that the Contractor would achieve the first milestone within the time frame already fixed, which was contrary to the position existing on the spot, for which reason, on 1st July, 2015, this Court directed these officers to show cause why they be not proceeded in terms of the Contempt of Courts Act. They have filed replies to the show cause notice, which are not satisfactory. Therefore, the said Officers as also Shri C.S. Sethi, Managing Director, and Capt. Rajbir Singh, Director, of respondent No.3, are directed to show cause why Rule be not framed against them for filing affidavits, which are, prima facie, contrary to the exact position prevailing on the spot, and for the prima facie breach/violation of the orders passed by this Court from time to time.

23. The Managing Director and the Director of respondent No.3, The Chief Secretary, the Principal Secretary (PW) and the Engineer-in-Chief, HPPWD shall also remain present in person before this Court on the next date of hearing.

24. Before parting with, we place on record a word of gratitude for the strenuous efforts and the valuable assistance provided by Mr.Shrawan Dogra, learned Advocate General, Ms.Jyotsna Rewal Dua, Senior Advocate appearing as Amicus Curiae, Mr.R.K. Sharma, Senior Advocate and Mr.Devender Jaita, Advocate.

25. The Registry is directed to furnish a copy of this order to all the Advocates appearing in the instant writ petition and also to all the concerned officers forthwith. List on 17th August, 2015.

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

Jia Lal .....Petitioner.

Vs.

The Himachal Pradesh State Co-operative Milk Producers' Federation Ltd. & anr.
.....Respondents.

CWP No. 1743 of 2013.
Reserved on: 08.07.2015
Decided on: 13.7.2015.

Constitution of India, 1950- Article 226- Petitioner filed a Writ petition which was allowed and revised pay scale were directed to be released w.e.f. 1.1.1986- pay scale was granted to the petitioner- however, notice was issued informing him that the officials in the cadre of Diary Helper had gained monetary benefits and the recoveries were to be made- petitioner was directed to deposit the amount of Rs. 41,297/- petitioner filed a Writ Petition which was ordered to be treated as an appeal- Managing Director ordered the recovery on monthly installments of Rs. 2,000/- per month from the salary of the petitioner- held, that petitioner was drawing salary since 1989 – his annual increments could not have been ordered to be withdrawn arbitrarily after more than two decades when the petitioner had not misled

authorities in any manner- Writ petition allowed and order passed by the respondent directing the recovery from the salary of the petitioner quashed and set aside. (Para-3 to 6)

Case referred:
State of Punjab and others etc. versus Rafiq Masih (White Washer) etc., JT 2015 (1) SC 95

For the petitioner:	Mr. Vinay Kuthiala, Sr. Advocate, with Mr. Gaurav Sharma, Advocate.
For the respondents:	Mr. M.R.Verma, Advocate, for respondent No.1. Mr. Parmod Thakur, Addl. AG with Mr. Neeraj K. Sharma, Dy. AG for respondent No. 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner approached the Court by way of CWP(T) No. 10 of 2008. It was decided by this Court on 10.3.2009. The operative portion of the judgment reads as under:

> "Accordingly, the petition is allowed. Annexure P-12 is quashed and set aside to the extent whereby the revised pay scale has been directed to be released with effect from 1.1.1993. The respondent No. 1 is directed to release the pay scale of Rs. 810-1440 to the petitioners with effect from 1.1.1986. There shall, however, be no orders as to costs."

2. In sequel to the judgment dated 10.3.2009, the petitioner was granted pay scale of 810-1440 w.e.f. 1.1.1986 instead of 1.4.1989. However, the petitioner was issued notice dated 25.9.2010, informing him that the officials in the cadre of Dairy Helper have gained monetary benefits and thus the recoveries were to be made on re-fixation of pay w.e.f. 1.1.1986 instead of 1.4.1989. The petitioner was asked to deposit excess amount of Rs.41,297/-.

3. The petitioner approached this Court by way of CWP No. 6807 of 2010. It was decided alongwith CWP No. 6942 of 2010 on 21.2.2011. The Writ petition was directed to be treated as appeal by respondent No. 1, with a direction to respondent No. 1 to take appropriate action in the light of the observations made in the judgment.

4. The Managing Director of the Federation on 20.2.2013, while referring to letter dated 25.9.2010, ordered the recovery on monthly installments of Rs. 2000/- per month from the salary of the petitioner. There is no reference to the observations made by this Court in the judgment dated 21.2.2011, more particularly, taking notice that the petitioner was getting increments since 1989 and on account of re-fixation of the pay scale in 2010, the incremental benefit already paid since 1989 was sought to be withdrawn as per the impugned order. The Board has to decide whether the benefits, which were being paid as part of the pay scale since 1989, could be recovered belatedly, be it on the pretext of re-fixation of the pay.

5. The petitioner was granted the pay scale w.e.f. 1.1.1986 but surprisingly, the recovery was directed to be effected from the salary of the petitioner. The petitioner was drawing higher salary since 1989 by also taking into consideration the annual increments

and the same could not be ordered to be withdrawn arbitrarily after more than two decades. The petitioner belongs to Class-III service post. The petitioner has not misled or misrepresented the authorities at the time when he was granted increments from time to time.

6. Their lordships of the Hon'ble Supreme Court, in a recent judgment, in the case of ***State of Punjab and others etc. versus Rafiq Masih (White Washer) etc.,*** reported in ***JT 2015 (1) SC 95,*** have laid down the following principles governing the situation where recovery by the employers would be impermissible in law. It has been held as follows:

> "12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:
>
> (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
>
> (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
>
> (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
>
> (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
>
> (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

7. Accordingly, the Writ petition is allowed. The impugned Annexures P-3 dated 25.9.2010 and P-10 dated 20.2.2013, are quashed and set aside. Pending application(s), if any, shall stand disposed of.

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

Kanta Devi .....Petitioner.

Vs.

State of Himachal Pradesh .....Respondent.

Cr.MMO No. 192 of 2015.
Date of Decision : 13th July, 2015.

Code of Criminal Procedure, 1973- Section 310- An application for spot inspection was filed, which was dismissed on the ground that site of occurrence was undisputed- the accused had also taken up a plea of self defence which was not projected by her in her statement-held that it was not proved as to what is the evidence which could not be

appreciated properly and which can be appreciated only after visiting the spot- site of occurrence was not disputed- the local inspection can be conducted to enable the Court to properly appreciate the evidence led during the trial - since there was no ambiguity, therefore, the application was rightly dismissed. (Para 2)

For the Petitioner: Mr. Sanjeev Bhushan, Advocate.
For the Respondent: Mr. Shrawan Dogra, Advocate General
with Mr. R.S. Thakur, Addl. Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The learned Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P. while seized of an appeal preferred by the State of Himachal Pradesh against the findings of acquittal recorded in favour of the accused/petitioner herein by the learned trial Court for hers having allegedly committed offences punishable under Sections 341, 504 and 506 of the IPC, besides also being seized of another appeal preferred at the instance of the accused/petitioner herein for hers having stood convicted by the learned trial Court for hers having committed offences punishable under Sections 323 and 326 of the IPC, was during the pendency of both the aforesaid appeals also seized of an application preferred at the instance of the accused/appellant/petitioner herein under Section 310 of the Code of Criminal Procedure. The learned Additional Sessions Judge, Ghumarwin, for the reasons recorded therein was constrained to dismiss the application preferred before it.

2. The learned counsel appearing for the petitioner herein has contended with much fervour before this Court that the application for local inspection as preferred before the learned Additional Sessions Judge, Ghumarwin was not dismissible as unwarrantably done by the learned Additional Sessions Judge, Ghumarwin. He contends on the strength of the provisions of Section 310 of the Code of Criminal Procedure, which are extracted herein after, that the visit of spot or the visit of the site of occurrence was imperative for adjudging the veracity or the truth of the genesis of the prosecution version. The provisions of Section 310 read as under:-

> **"310. Local Inspection**.- (1) Any Judge or Magistrate, may at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.
>
> (2) Such memorandum shall form part of the record of the case and if the prosecutor, complainant or accused or any other party to the case, so desires, a copy of the memorandum shall be furnished to him free of cost."

However, it is apparent on a reading of the impugned order rendered by the learned Additional Sessions Judge, Ghumarwin that the site of occurrence has remained undisputed besides, there is a revelation in para-2 of the impugned order rendered by the learned Additional Sessions Judge, that the accused/appellant has canvassed the plea of self defence besides the injuries suffered by the complainant being accidental. Nonetheless,

none of the aforesaid pleas of the appellant/accused/petitioner herein have been canvassed by her while recording her statement under Section 313 of the Cr.P.C. Consequently, it appears that in the event of the accused/appellant/petitioner herein having therein not propagated the defence, of injuries sustained by the complainant being accidental nor hers having canvassed the right of private defence inhering in her, may benumb the effect of the aforesaid pleas propagated by her during the course of her counsel cross-examining the prosecution witnesses. However, since the ground of waiver of, for the reasons aforesaid of the aforesaid defences, may stand in the way of the accused/petitioner herein while arguing the pending appeals before the learned Additional Sessions Judge, hence, forestall or pre-empt any reliance by her upon such portions of the cross-examination of the prosecution witnesses manifesting the aforesaid line of defence, it would be unjust to hence oust the petitioner herein during the course of hearing of the aforesaid appeals by the learned Additional Sessions Judge from canvassing both the lines of defence as occur in the cross-examination of the prosecution witnesses. Consequently, the learned Additional Sessions Judge may permit her to even canvass the said pleas even when they remain not projected in her statement recorded under Section 313, Cr.P.C. Now what is of utmost importance is an adjudication on the application under Section 310 of the Cr.P.C., and the tenacity of the reasons afforded by the learned Additional Sessions Judge for dismissing it. For determining the vigour and tenacity of the reasoning afforded by the learned Additional Sessions Judge, Ghumarwin, in dismissing the application, a perusal of the application preferred by the accused/appellant/petitioner herein before the learned Additional Sessions Judge, Ghumarwin, is imperative. It omits to display with precision besides, with accuracy the evidence which has remained not properly appreciated and which would rather come to be properly appreciated only in the event of the learned Additional Sessions Judge proceeding to carry out for viewing it an inspection of the spot for erasing or obliterating any ambiguity qua the factum of the occurrence which took place there, is purportedly imbued with, for hence facilitating an appropriate, fair and just appreciation of evidence qua it nor there is an apposite averment therein that imprecise evidence exists qua the location of the site of occurrence for determining the factum whether as a matter of fact, the occurrence as alleged did take place there, in the manner alleged by the prosecution. The accused/appellant/ petitioner herein has not controverted the factum of the site of occurrence hence in the face of non repudiation by her qua the site or the location of the occurrence gives no leeway to her to contend that the learned Additional Sessions Judge, Ghumarwin proceed to inspect the spot which in her contemplation is rather the spot where the occurrence took place. In any case, permitting the accused/petitioner herein to warrant a direction to the learned Additional Sessions Judge, Ghumarwin to proceed to view the spot other than the one where the occurrence provenly took place, would sequel distortion besides, twisting of the genesis of the prosecution case which may be wholly impermissible especially when the accused/petitioner herein stood convicted by the learned trial Court for hers having committed offences punishable under Sections 323 and 326 of the IPC. Moreover, besides it would tantamount to this Court endorsing/approbating a well contrived mechanism of the petitioner to dislodge or scuttle the judgment of the learned trial Court. Moreover, even though the provisions of Section 310 of the Cr.P.C., empowers or authorizes a Magistrate or a Judge which obviously even an Additional Sessions Judge is, who is seized with an appeal preferred at the instance of the appellant/petitioner against the judgment of the learned trial Court whereby the learned trial Court convicted the appellant/petitioner herein for hers having committed offences punishable under Sections 323 and 326 of the IPC and of an appeal preferred by the respondent herein against the findings of acquittal recorded in favour of the petitioner herein of the charge under Sections 341, 504 and 506 of

the IPC, to even at the instance of the petitioner herein garner its provisions to view or visit a spot for the purpose of properly appreciating the evidence. Nonetheless, the sine qua non for exercising of jurisdiction by a Magistrate or Judge seized of the trial or an appeal arising therefrom as the case may be, is only in the event of there existing a trite, precise or lucid averment in the application portraying with specificity, the factum of a visit to the spot by a Magistrate or a Judge being essential or imperative for facilitating or enabling the Court to properly appreciate the evidence received at the inquiry or the trial. The application at hand is nebulously phrased and omits to point out with specificity besides vaguely portrays that there exists ambiguity about the spot where the alleged occurrence took place. The narration in the application at hand of their existing ambiguity about the site of occurrence is in contradiction and in conflict with the espousal by the petitioner of there being no dispute qua the site of occurrence, consequently, the averred factum therein of ambiguity existing qua the site of occurrence, hence the learned Additional Sessions Judge, Ghumarwin, being enjoined to inspect the site of occurrence is merely an afterthought and hence stands not to be countenanced by this Court. Besides, the factum of existence of any purported ambiguity qua the site of occurrence as displayed in the application at hand and its hence warranting a visit thereto by the Additional Sessions Judge is obviously not grooved in nor embedded upon the fact that such visit is essentially necessary for properly appreciating the evidence as received during the course of inquiry or trial. Consequently, to the considered mind of this Court, it appears that it is a well devised mechanism on the part of the accused/appellant/petitioner herein to in its garb enjoin upon the learned Additional Sessions Judge, Ghumarwin, to render an order thereupon for hence enabling him to visit a spot other than the place where the alleged occurrence took place, so also to dislodge or dispel the entire genesis of the prosecution case, besides overcome the effect of the findings of conviction recorded by the learned trial Court against the accused/petitioner herein for hers having allegedly committed offences punishable under Sections 323 and 326 of the IPC. The said endeavour is not to be vindicated. Moreover, there has been abysmal want of pleadings with precision in the application at hand as to the manner in which the visit or viewing of the place of occurrence by the learned Judge, even if, it is the site where the occurrence uncontrovertedly took place, would facilitate the learned Judge to properly appreciate the evidence which already exists before it. Since the sine qua non for exercise of jurisdiction under Section 310 of the Cr.P.C., on whose exercise for reasons to be recorded by the learned Judge, he would proceed to visit or view any site or any place where the alleged offence allegedly took place, is of such local visit/ viewing of any site or a place related to the commission of offence, being imperative for properly appreciating the evidence received during the inquiry or trial. Obviously when apart from the fact that in paragraph 7 of the application, the applicant/accused/petitioner herein portrays therein that there is ambiguity about the spot where the alleged occurrence took place which for the reasons aforesaid is an unsatisfactory ground for sustaining the application, there being no display therein that the visiting by the Judge of the site of occurrence or to any other place, is essential for a just and fair appreciation of the evidence on record nor also there is a portrayal with specificity qua which purported ambiguous evidence would hence come to be appraised in the proper perspective. Consequently, then the application at hand obviously when does not satisfy or satiate the parameters of Section 310 of the Cr.P.C., therefore, the reasons recorded by the learned Additional Sessions Judge, Ghumarwin, while dismissing the application, inasmuch as his having concluded that the site of occurrence when stands proved arising from the factum of its having remained uncontroverted besides, hence there being no necessity to visit it as the evidence on record abundantly displays the place where the alleged occurrence took place, does not suffer from any perversity or absurdity.

Accordingly, the instant petition is dismissed and the impugned order is affirmed and maintained.

3. All the pending applications also stand disposed of. No costs.

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

National Insurance Company Limited. …Petitioner.

Versus

Khub Ram and another. …Respondents.

CMPMO No. 423 of 2014
Decided on: 13.7.2015

Code of Civil Procedure, 1908- Section 114- A claim petition was filed under Employees Compensation Act, which was compromised- subsequently an application for setting-aside/review of the order was filed, which was allowed- held that Employees Compensation Act does not have any provision of review and a commissioner is not competent to review the award announced by him by implication.(Para 2-4)

Case referred:
Oriental Insurance Co. Ltd. Vs. Kala Devi and others, 1997 ACJ 17

For the Petitioner: Mr. Jagdish Thakur, Advocate.
For the Respondents: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

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

Respondent No.1 filed a claim petition under the Employee's Compensation Act vide W.C. No.68 of 2011. The matter was compromised and the award was made by the learned Commissioner on 28.2.2008. Respondent No.1 moved an application under section 151 read with section 114 of the Code of Civil Procedure seeking setting aside/review of order dated 28.2.2008. The application was resisted by the petitioner. It was allowed by the Civil Judge (Senior Division), Mandi on 9.7.2014 and the award dated 28.2.2008 was reviewed.

2. Mr. Jagdish Thakur, learned counsel for the petitioner, has vehemently argued that award dated 28.2.2008 could not be reviewed by the Civil Judge (Senior Division) vide order dated 9.7.2014 since no express provision has been provided under the Employee's Compensation Act to review the award/order. He has relied upon ***Oriental Insurance Co. Ltd.*** Vs. ***Kala Devi and others***, 1997 ACJ 17. Mr. G.R. Palsra, learned counsel for the respondents has failed to point out under which provision the award dated 28.2.2008 could be reviewed by the Civil Judge (Senior Division).

3. Division Bench of this Court in ***Oriental Insurance Co. Ltd.*** vs. ***Kala Devi and others***, 1997 ACJ 17 has held that the Commissioner under the Act had no power to review by implication. Division Bench has held as under:

> **"10. There is yet another aspect of the case. Admittedly, the claim petition filed by the claimants was disposed of on 12-6-1984 as having been compromised between the parties whereby the claimants had accepted the compensation of Rs, 10t000 in full and final settlement of their claim.The order dated 12-6-1984 dismissing the claim petition as having been compromised was reviewed by the compensation officer and fresh assessment of compensation was made.**
>
> **11. The question which thus arises for consideration is whether the Commissioner under the Act has the power of review.**
>
> **12. A Division Bench of this Court in East India Hotels Ltd. v Union of India and others, C W. P No 155 of 1986, decided on 29-12 1995, while dealing with the power of competent authority to review its order under the provisions of Requisitioning and Acquisition of Immovable Property Act, 1952 by following the ratio laid down by the apex Court in Patel Narshi Thakershi and others v. Pradyumansinghji Arjunsinghji, AIR 1970 SC 1273, has held that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication.**
>
> **13. We have perused the provisions of the Act and we are of the opinion that even by implication it cannot be said that the Commissioner under the Act had the power to review. Rather sub-rule (2) of Rule 32 of Workmen's Compensation Rules, 1924 prohibits the review by the Commissioner This sub-rule provides as under:-**
>
> > **"The Commissioner, at the time of signing and dating his judgment, shall pronounce his decision, and thereafter no addition or alteration shall be made to the judgment other than the correction of clerical or arithmetical mistake arising from any accidental slip or omission."**

4. Accordingly, in view of the law laid down by the Division Bench of this Court, the petition is allowed. Order dated 9.7.2014 rendered by the Civil Judge (Senior Division), Mandi exercising the powers of Workmen's Compensation Commissioner under the Employees' Compensation Act is quashed and set aside. Pending application(s), if any, also stands dismissed. No costs.

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

Vinod @ Dinesh .....Petitioner

Versus

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

Cr.MMO No. 65 of 2015

Date of Decision: 13.7.2015

Code of Criminal Procedure, 1973- Section 311- An application was filed for recalling prosecution witnesses which was dismissed by the Trial Court- the case had reached at the stage of recording the statement of accused under Section 313 of Cr.P.C.- held that the provisions of Section 311 of Cr.P.C. do not empower the defence or the prosecution to recall the witnesses previously examined after recording the statement of the accused. (Para-2)

For the petitioner: Ms. Rameshwari Sharma, Advocate.
For the Respondents: Ms. R.S Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Cr.MP No. 697 of 2015

Given the averments made in the application instituted at the instance of the applicant for setting aside the order of 17.6.2015 by which the petition of the petitioner was dismissed for non-prosecution, the application is allowed. Consequently the order of 17.6.2015 is recalled. Petition be restored to its original number.

Cr.MMO No. 65 of 2015

2. When the matter had reached the stage of recording of the statement of the accused under Section 313 Cr.P.C, the petitioner/accused had instituted an application under Section 311 Cr.P.C before the learned trial Court for recalling/reexamining of prosecution witnesses including Dr. Virender Mohan under whom the accused/petitioner underwent treatment as a patient of psychiatry. The application aforesaid came to be dismissed by the learned trial Court. The dismissal of the application preferred by the petitioner herein by the learned trial Court does not warrant any interference in as much as the contemplation of the provisions of Section 311 Cr.P.C which are extracted hereinafter empowering the trial Court to recall and re-examine any person already examined cannot in any manner be construed so as to permit the accused/petitioner to, after examination of the prosecution witnesses, recall/reexamine them. The power of recalling and re-examining of the prosecution witnesses previously examined or of recalling and re-examining of the witnesses examined by the defence obviously, is a jurisdiction exercisable by the learned trial Court on a motion made before it by the learned P.P or by the learned defence counsel respectively to recall and reexamine their respective witnesses. The provisions of Section 311 Cr.P.C do not empower either the learned defence counsel or the learned PP to recall and reexamine either the prosecution witnesses previously examined or the defence witnesses examined subsequent to the recording of statement of the accused under Section 313 of Cr.P.c. Consequently, the order rendered on application under Section 311 Cr.P.C by the learned trial Court is not ingrained with any illegality or legal impropriety. Resultantly, it necessitates its being vindicated.

> *311. Power to summon material witness, or examine person present-Any Court may, at any stage of any inquiry, trial or other proceeding under this code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his*

evidence appears to it to be essential to the just decision of the case."

3. The order of 5.3.2015 is also impugned before this Court by the petitioner whereby it after the recording of the statement of the accused/petitioner herein under Section 313 Cr.P.C dismissed an application moved at the instance of the latter for examining the witnesses recited in the list. The ground as portrayed in the order dismissing the application preferred by the accused/petitioner herein before the learned trial Court for examining in his defence the witnesses recited therein, is of no reason having been conveyed therein qua the necessity of summoning the witnesses depicted in the list. However, even when the accused/petitioner herein had omitted to, divulge in the application containing the list of witnesses to be examined in his defense, the reason or the necessity for their examination, nonetheless the learned trial Court was under a bounden legal duty for facilitating the affording of an ample and adequate opportunity to the applicant/accused to adduce/lead evidence in defence that it accord to him the necessary permission/order for examining the witnesses depicted in the list of witnesses. In the learned trial Court having not permitted the issuance of summons to the persons as reflected in the list of witnesses proposed to be examined in his defence by the accused, it has thwarted a very valuable right of the applicant to lead/adduce a full and efficacious defence. The baulking of by the learned trial court of adduction of a full and efficacious evidence in defence by the accused/petitioner herein, by not issuing summons for procuring their presence for theirs being examined, on a flimsy ground, has prejudiced the applicant/accused in projecting his defence. Consequently, the impugned order of 5.7.2013 is quashed and set aside. The learned trial Court is directed to issue summons to the persons recited in the list of witnesses as filed before it so as to enable the petitioner/accused to examine them in his defence. The petition stands disposed of, as also, the pending applications, if any.

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

Gulshan Kumar Rana ...Appellant.

Versus

State of H.P. ...Respondent.

Cr. Appeal No. 165 of 2009.
Reserved on: 27th June, 2014.
Decided on: 14.7.2014.

Indian Penal Code, 1860- Section 376- Prosecutrix was returning to her home - she was intercepted by the accused- prosecutrix changed the path sensing bad intention of the accused- accused followed and raped her- she narrated the incident to her mother who informed her husband- matter was reported to the police- Medical Officer had found injuries on the person of the accused and also found injuries on the person of the prosecutrix- held that prosecutrix had taken an untrodden path to save herself from the accused- this fact cannot be used to discard her testimony- presence of injuries on the person of the accused corroborates the version of the prosecutrix- held, that in these circumstances, accused was rightly convicted. (Para-22 to 26)

For the Appellant: Mr. Ashwani Pathak, Advocate.
For the Respondent: Mr. Sharawn Dogra, Advocate General with Mr. Parmod Thakur and Mr. M.A. Khan, Additional Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

This appeal is directed against the judgment, rendered on 30.09.2008, by the learned Sessions Judge, Kangra at Dharamshala, H.P., in Sessions Trial No.27 of 2007, whereby, the appellant has been convicted and sentenced, to, suffer rigorous imprisonment for ten years and to a pay fine of Rs.1,000/- and in default of payment of fine, to further undergo simple imprisonment, for, a period of three months, for the commission of offence under Section 376 of the Indian Penal Code (hereinafter referred to as 'IPC').

2. The brief facts, of the case, are that the prosecutrix, PW-3 was aged about 17 years. She was studying in Government Senior Secondary School, Kunsal, located at a distance of 7-9 kilometers from her house. On 1.6.2007, after the school hours, she was proceeding home from school. The prosecutrix commuted the distance, from Kunsal to Maha-Kaal on foot. She boarded a private bus, at, Maha-Kaal, for Mudh. The accused also boarded the bus at Maha-Kaal. PW-3, the prosecutrix alighted the bus at Mudh. She had to cover the distance from Mudh to her home on foot. The accused, too, alighted at Mudh. The accused asked PW-3, the prosecutrix, if she was proceeding to her house. The prosecutrix on sensing that the accused did not have good intention, informed him, that, she was going to the house of the sister of her mother, in, a different village. The accused left on foot towards village Gawal, though, the accused had been putting up in village Dadeen, which village, is, close to village Gawal. On departure of the accused to village Gawal, the prosecutrix left for her house through a different path passing, through, the forest. The accused was keeping a watch over the movement of PW-3. The accused reached the area of Thathru forest, ahead of PW-3. However, when the prosecutrix reached the Thathru forest area at about 2.45 p.m., the accused intercepted her. The prosecutrix was forcibly taken behind the bushes in the forest. PW-3, the prosecutrix, cried for help. However, none responded to the cries of PW-3, as, the area was thick forest. PW-3 resisted the advances of the accused. The accused is alleged to have committed forcible sexual intercourse twice with the prosecutrix, PW-3, without her consent and will. After committing the crime, the accused left for his destination. PW-3, had reached her house at 5.00 P.M. She had narrated the occurrence to PW-5, her mother and PW-5, then, informed her husband about the rape of her daughter, by the accused. The police was telephonically informed by the father of the prosecutrix. PW-15, Smt. Sureshtha Thakur, Sub Inspector/SHO, Police Station, Baijnath, had recorded rapat No.17, in the daily diary in the Police Station. Copy whereof is Ex.PW14/B. She along with other police personnel rushed to village Gawal.

3. 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.

4. The accused was charged for his having committed an offence punishable under Section 376 of the IPC by the learned trial Court to which he pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined many 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.

5. On appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused.

6. The first witness, who stepped into the witness box to prove the prosecution case, is, Dr. D. D. Rana, Medical Officer, C. H. Baijnath. PW-1, proved, record Ex.PW1/B. The following injuries are divulged in Ex.PW1/B, to have been found on the person of the accused:

> "1. On the posterior part of the body there was abrasion on the right hand arm 7 cm in length, 2 cm in breadth, bluish discoloration. No fresh bleeding.
> 2. Abrasion on the right scapular region 4 cm in length 3 cm in breadth, slight pinkish in colour, side of the margins were bluish in colour, no fresh bleeding.
> 3. Abrasion on the lower back, just near the sacral region left side, 5 cm in length and 3 cm in breadth pinkish in colour, no fresh bleeding was present.
> 4. There was no other injury on the thigh region and sacrotal region."

7. He also deposed that in his opinion the accused was capable of performing sexual act. The injuries as divulged in Ex.PW1/B have been deposed by this witness to be simple in nature and caused within 24 to 36 hours with blunt weapon. He also deposed that the injuries could possibly be inflicted, if, a person runs through the thorny bushes.

8. PW-2, L.C. Sumna Devi, has deposed that on 1.6.2007, she was on duty, as, lady constable at Police Station, Baijnath and on the same day, SI/SHO of the police station aforesaid, directed her to take the prosecutrix for medical examination to Sub Divisional Hospital, Baijnath. She deposes that she had proceeded to take the prosecutrix for her medical examination under reference, comprised in Ex.PW 2/A of the SHO and on receiving the reference, the Medical Officer had examined the prosecutrix, who was accompanying her. On her examination, she deposes that the Medical officer had handed over the MLC in a sealed packet to her, which she further handed over to the SHO.

9. PW-3, the prosecutrix, has deposed that on 1.6.2007, after school hours, she on departing from school, commuted the distance upto Maha-Kaal on foot. She deposes that she was accompanied, by co-student Ms. Sapna up to Maha-Kaal and at Maha-Kaal, she, had boarded a private bus, at, 2.30 p.m. She had alighted the bus at Mudh. She deposes that the accused, whom she identified in the Court, had, also, alighted the bus at Mudh. She deposes that the accused asked her that if she was walking to her house in Village Gawal. However, in response, she told the accused that she intended to visit the sister of her mother in a different village. Nonetheless, she deposes that she did not leave for the house of the sister of her mother, rather, she left for her own house. She deposes that she had taken the route to the house passing, through, the forest. However, she deposes that the accused, who had reached Thathru Forest area prior to her through, an, alternative path, confronted her at Thathru Forest. The accused is alleged to have caught hold her from her arms forcibly and had dragged her to some distance from the path and laid her on the ground and twice committed forcible sexual intercourse with her. Though, she deposes that she had

raised a hue and cry, yet, her cries were unheard, as she was subjected to forcible sexual intercourse, in, a thick forest. Her shirt (Ex.P3) and salwar (Ex.P2) having been deposed to have come to be torn, during the course of the accused having forcibly dragged her from the path, as also, during the course of her being subjected to forcible sexual intercourse. She also deposed that the accused had asked her not to disclose the occurrence to anybody. She also deposes that the accused had also undertaken to marry her. After committing the sexual intercourse, the accused is testified to have managed to escape. She deposes that she on returning home, informed her mother about the occurrence and her mother, further informed her father and thereafter, the police were intimated. She concedes the factum of hers having made statement Ex.PW3/A, to the police. She deposes that she was taken for medical examination to Civil Hospital, Baijnath, where she singed MLC at point 'B' and her salwar, Ex. P-2, shirt, Ex.P-3 and dupata, Ex.P-5, were taken into possession by the medical officer, besides her undershirt Ex.P-4, was also taken into possession by the medical officer. Shirt, Ex. P-3 and salwar, Ex.P-2, have been recorded in the MLC of PW-3, to have been torn. During the course of her cross-examination, she has admitted the suggestion that from village Mudh to her village there are two paths. She has deposed that one path is through forest and another path is meant for general public and is out of the forest. She concedes to the fact that on the fateful day, she had left Mudh for home through the path passing through the forest. She deposes that she had remained at the site of occurrence for about one hour. She has testified that the accused, is, from adjoining village Dadeen. She deposes that she was forcibly dragged from the path and she had sustained injuries and abrasions, which she had disclosed to the medical officer, who had examined her. She has denied the suggestion, that, since the accused is knowing her, she willingly accompanied him through the passage to her house through the forest.

10. PW-4 Shri Bamdhir Singh, who is lecturer of English in Government Senior Secondary School Kunsal, deposes that on 1.6.2007, PW-3 (the prosecutrix) had attended school and had left the school after school hours. He further deposes, that, the prosecutrix was absent on 2.6.2007 and thereafter remained absent up to 6.6.2007. He has also proved on record Ex.PW4/A, which, is, abstract of the attendance register for the month of June, 2007 as maintained by him, which has been deposed to be correct, as per the original record.

11. PW-5, Smt. Pawna Devi deposes qua the fact of PW-3, the prosecutrix being her daughter. She has corroborated the testimony of PW-3 qua the incident as divulged to her by the former. During the course of her cross-examination, she, had denied the suggestion that her daughter was having relations, with the accused for quite some time and when she had come to know of her illicit relations with the accused, she, had managed to register a false case against the accused.

12. PW-6, C. Shakti Chand has deposed that the accused was interrogated by the police and he had made statement Ex.PW6/A. On 3.6.2007, the accused had taken the complainant party and had demarcated the site of occurrence as per the document Ex.PW6/B. He has also deposed that on 5.6.2007, the Medical Officer, C.H. Baijnath had handed over one sealed packet, Ex. P-6 to him, which was deposited by him with the MHC on the same day.

13. PW-7 Subhash Chand, the driver of the private bus proved on record copy of time table and route permit, Ex.PW7/A and Ex.PW7/B respectively.

14. PW-8 Prakaram Singh, Head Teacher in Govt. Primary School, Gawal has deposed that on an application Ex.PW8/A being moved by the police, he had issued the document Ex. PW8/B from the records maintained by the office, pertaining to the age of the prosecutrix.

15. PW-9 Udho Ram, has deposed that he was Panchayat Secretary, G.P. Chobin, in the year, 2007. He has deposed that on an application, Ex.PW9/A, being moved by the police on 6.6.2007, he had prepared the abstract of Parivar Register Nakal, Ex.PW9/B, which is correct as per the original record.

16. PW-10 H.C. Suresh Kumar, had deposed that on 1.6.2007, on receipt of statement of the prosecutrix Ex.PW3/A, through, HHG Ashok Kumar, he had registered FIR Ex.PW10/A against the accused and sent the file to Smt. Shareshta Devi, SI/SHO, through, the same HHG. He had made his endorsement Ex.PW10/B, on statement Ex.PW3/A. He has further deposed that on 1.6.2007, L.C. Suman Devi had deposited with him one sealed packet and on 3.6.2007, PW-6 C. Shakti Chand had deposited with him another sealed packet Ex.P-6, which were entered by him in the relevant register. These sealed packets were sent by him to the chemical examiner through C. Pritam Chand on 7.6.2007 vide R.C. No.54/21. He has denied the suggestion in his cross-examination, that the report was prepared by the SHO, in, the police station and false endorsement of the SHO had been made.

17. PW-11 Baldev Singh Rana has deposed, that, on 1.6.2007, Sh. Majnu Ram, father of the prosecutrix had telephonically informed him about the rape of his daughter having been committed by the accused on which he advised him to report the matter to the police.

18. PW-12 H.C. Sampuran Singh has deposed, that, Suresh Kumar had been working as MHC in the Police Station, Baijnath and he had proceeded on tour on 5th June, 2007. He has deposed that in his absence, he was holding the charge of MHC under the orders of the SHO. On 7.6.2007, he had sent two sealed packets of FIR No. 76/07 to Chemical Examiner through constable Pritam Singh No.1124 vide R.C. No.54/07. He has further deposed that two envelopes containing specimen impression of seal used in applying to the case property had also been separately sent by him to the Chemical Examiner through constable aforesaid.

19. PW-13 C. Pritam Singh, deposed that on 7.6.2007, PW-12 C. Sampuran Singh handed over to him two sealed parcels, as also, two envelopes containing specimen impression of the seal to him, for being deposited with the Chemical Examiner, Junga. He had deposited the same with the Chemical Examiner, Junga on 8.6.2007 vide R.C. No.54/21 and handed over the receipt to PW-12 on 10.6.2007.

20. PW-14 Prem Singh, Dy. S. P. has deposed that he has taken up the investigation of the present case on 2.6.2007, under orders of the Superintendent of Police, Kangra, from SI/SHO Smt. Sureshta Thakur, as, she found the commission of offence under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, having been committed by the accused, yet, on a careful looking into the matter, he had found that no case under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, was made out against the accused. He had visited the spot on 2.6.2007 at the instance of the prosecutrix and arrested the accused on 2.6.2007 after apprising him of the grounds of arrest. He deposed that on 3.6.2007 the accused was interrogated and made disclosure

statement Ex.PW6/A in his presence, as well, in presence of Shakti Chand and Majnu Ram in pursuance to which the accused led the policy party as also the witnesses to the site of the crime in the area of Thathur village and had demarcated the site vide memo Ex.PW6/B. He has further deposed that he had collected the abstract Ex.PW4/A of the attendance register on application Ex.PW4/B. He also deposed, that, on an application Ex.PW9/A being moved before the Registrar of Births and Deaths, he, had collected the abstract of birth certificate, Ex.PW9/B. In cross-examination he has denied the suggestion that on 2.6.2007, PW-3, the prosecutrix had taken him to the site of the crime. He has deposed that it had surfaced in the investigation that the prosecutrix after attending the school had returned therefrom, in, a bus. He has deposed that the house of the prosecutrix, is, at a considerable distance from the school. He has also deposed that the prosecutrix had been returning from the school from Maha-Kaal to Mudh only, in, bus. He has also denied the suggestion, that, the accused had not made any disclosure statement nor led the police party to the site of crime. He has also denied the suggestion that the prosecutrix was a consenting party.

21. PW-15 Smt. Sureshta Thakur, SHO has deposed that on 1.6.2007 at about 5.45 p.m., Sh. Majnu Ram had telephonically informed the police station about rape having been committed by the accused upon the person of his daughter, upon, which she had recorded the rapat No.17, Ex.PW14/B, in the daily diary of the police station and thereafter proceeded to the spot along with other police personnel in the official vehicle. He had reached the village at about 6.30 p.m. and recorded the statement of the prosecutrix, Ex.PW3/A under Section 154 of the Cr.P.C. and had routed this statement to the police station through HHG Ashok Kumar for registration of FIR as per her endorsement Ex.PW15/A. She has deposed on 1.6.2007, she had deputed PW-2, L.C. Suman for getting the prosecutrix medically examined as per her application Ex.PW2/A. She had prepared the rough sketch map Ex.PW15/B, as per the demarcation given by PW-3, the prosecutrix. She deposed that she recorded the statements of Sh. Majnu Ram, Pawna Devi and supplementary statement of the prosecutrix under Section 161 of the Cr.P.C. During the investigation of the case, she found the accused having committed the offences under Section 376 of the IPC and Section 3 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, as such, on 2.6.2007, she had submitted the case file to PW-14 Prem Chand, the then SDOP, Baijnath. After completion of the investigation and on receipt of the report of the Chemical Examiner, she had prepared the final report under Section 173 of the Cr.P.C. against the accused and had instituted the same in the Court. She has also deposed that it was found in the investigation that the prosecutrix had intentionally given wrong information of her destination to the accused so that she was in a position to reach her house safe. She has also found in the investigation that the accused had forcibly taken away the prosecutrix from the path to the site of the crime. In cross-examination, she has admitted that there are two paths to the house of the prosecutrix from village Mudh. She has also denied the suggestion that the accused had committed the sexual intercourse with the prosecutrix with her consent and that she is making false statement in the Court. She has deposed that the prosecutrix had been attending her school from Mud in a bus.

22. PW-16 Dr. Suresh Kaul, Medical Officer, Civil Hospital, Baijnath has deposed that on 1.6.2007, at about 10.15 p.m., on a reference from the police, she had medically examined the prosecutrix aged about 16 and half years approximately. The prosecutrix was brought to her in school uniform and had not changed her clothes, nor taken bath. She was wearing one check shirt, black and white in colour and vest, black Chunni, Black Salwar, torn in the centre from stitch line and was having white dry stain of 20 mm x 20mm in dimension over anterior aspect of the salwar. On examination, she has observed as under:-

> "On local examination of external genitalia, no blood stain over thighs or labia majora, separation of labia minora painful, bruising and laceration about 2mm x2 mm in dimension over intriotus present red in colour and painful. Dust particles and mud present at intriotus, hymen was torn, fresh torn tags were present, inflamed, tender and red in colour. Thick whitish discharge was present intriotus. Vagina admitted one finger, uterus normal in size os closed. Vaginal (posterior) swab taken."

She in her provisional opinion, opined that there was nothing to suggest that sexual intercourse had not taken place. She has deposed that the probable duration of injury was within 24 hours caused with blunt weapon. She has also deposed that she had taken into possession the Salwar, Ex.P2, shirt Ex.P-3, Banyan, Ex.P3, and Dupatta Ex.P-5 of the prosecutrix and had sealed these items with seal of the Medical Officer in packet outer cover whereof is Ex.p-1. She also deposed that she had collected the slides from the posterior vagina of the prosecutrix and had sealed the slides for examination by the Chemical Examiner. She testified that she had handed over the sealed packets containing clothes and the slides to the police. She besides deposed hers having collected the pubic hair of the prosecutrix and had sealed the same with seal of the Medical officer. MLR Ex.PW16/A, has been deposed to have been signed and issued by her. On production by the police before her of Ex.PX, which report of the Chemical Examiner on being examined by her, she disposes that she rendered opinion that there was nothing to suggest that sexual intercourse, had, not taken place. Her final opinion, is, comprised in Ex.PW16/B. In cross-examination, she has denied the suggestion that her opinion was based on conjectures and surmises. She has admitted the suggestion that in every case when the girl is sought to be ravished by force, by dragging her in the forest or otherwise, she would sustain the marks of violence on her person.

23. The learned counsel appearing for the accused/appellant has canvassed before this court, that the conduct of the prosecutrix, PW-3 comprised in her having taken to tread a previously un-trodden path, in as much, as, she on having alighted from a bus at Mudh, having taken to tread the path passing through the forest thicket, even when, an, alternative habitable path, was, available to be trodden by her, bespeaks of suspicion and renders susceptible to doubt, her conduct and her version qua the incident, as comprised in her deposition. As such, it is contended that it is to be, hence, construed by this Court that the sexual act, if any, perpetrated on the person of the prosecutrix by the accused, is consensual. Besides, it is contended by the learned counsel appearing for the appellant, that, when the Hon'ble Apex Court in ***Shivasharanappa and others versus State of Karnataka,*** (2013)5 SCC 705 and **Lahu Kamlakar Patil and another vs. State of Maharashtra, (2013)6 SCC 417**, has denounced and deprecated unnatural conduct and its being construable to be rendering unbelievable the testimony of the witness. In sequel, it is canvassed before this Court, that, the testimony of the prosecutrix, is, uninspiring and necessitates, its, being discarded and rejected.

24. On the other hand, the learned Advocate General has argued that the testimony of the prosecutrix is inspiring, trustworthy and credible and the judgment of conviction and consequent sentence, as imposed upon the accused, does not necessitate irreverence.

25. True, it is that two paths were available to be trodden by the prosecutrix for accessing her house. One was a common path accessible by the general public, hence, habitable and the other path, as trodden by her, was through the forest. Even, though, hers

taking to tread the untrodden path passing through the forest, appears to be unnatural. An inference may tentatively, arise that given the fact that during the course of her treading the untrodden path where she was confronted by the accused, hence, hers encountering the accused in a forest thicket was to screen from public view, the shameful act or the sexual overtures of the accused, were consensual. In other words, *prima facie,* it, may appear, her unnatural conduct, personified in hers having taken to tread the forest path, was for screening their sexual act, from public view. It may, concomitantly, engender an inference of consent of the prosecutrix to the sexual act as perpetrated upon by the accused. However, even, if, assuming that her conduct, though, appears to be unnatural, yet, it also apparent that she had taken to traverse, through, the untrodden path passing through the forest, as, she intended to put off or avert the accused. In other words, her taking to traverse through the untrodden path appears to be with a view to avert hers encountering the accused. The said inference as drawn by this Court of hers taking tread to untrodden path to avert the accused or to preempt his encountering her, arises, on a reading of the testimony of the prosecutrix, wherein, she, had divulged that she had a conversation with the accused, during whose course, where the accused concerted to elicit from her, the path which she would take for reaching home, to which query, she responded that she would not proceed home, rather would take to go to her mother's sister house. The communication of the prosecutrix per se portrays, the, fact of hers having sensed the nefarious designs of the accused, hence, to avoid hers being pursued by the accused, she having mis-communicated and mis-projected, to, the accused the fact of hers not proceeding home but hers proceeding to her mother's sister house. Even, if she had reviewed her decision not to proceed to the mother's sister house as conveyed to the accused by her, hers taking to tread the untrodden path, hence, too, appears to be taken recourse to, by the prosecutrix, to, avert hers being pursued and chased by the accused, who, as apparent on a reading of the deposition of the prosecutrix, personifying the concerted effort of the accused to know the destination of the prosecutrix, hence, revealing his intention to chase her, which pursuit was throughout concerted to be avoided by the prosecution , by the efforts on her part as pronounced aforesaid, rather, to consensually meet him their. Consequently, it appears that the prosecutrix, is, deposing truthfully qua the fact, that, given his dogged determination to pursue and chase, her, despite, her, attempts to avert him, in, which endeavour she had taken to adopt, or to traverse through a untrodden path, she could not put him off or avert him, as the accused had kept an eye on her movements, hence, had preceded, her, arrival in the forest of Thatharu, where the alleged occurrence took place. As a sequel, then, it has to be concluded, that, hers taking to tread the path through a forest, was to avert the accused and such acts or conduct of the prosecutrix does not smack of or rear an inference of unnaturalness. In aftermath, it has also to be get concluded, hence, hers taking to tread untrodden path, does not either convey or personify her acquiescence or consent to the sexual intercourse perpetrated on her person by the accused in the forest path.

26. Now the presence of injuries on the person of the accused has remained unexplained. The injuries observed by the Medical Officer, on, the person of the accused are divulged in MLC, Ex.PW1/B and their perusal indubitably unravel the factum, especially, when it has been deposed by PW1, that the injuries appearing on the person of the accused are inflicted within 24 to 36 hours, hence, proximate to the occurrence, that, hence, there was resistance on the part of the prosecutrix to the forcible sexual overtures of the accused. The above existence of abrasions and the injuries on the person of the accused, while pronouncing upon the resistance of the prosecutrix to the sexual overtures of the accused, the, further fact of her salwar and shirt, Ex. P-2 and Ex.P-3, respectively, having come to be torn, aggravates the palpable fact of hers having resisted the forcible sexual overtures of the

accused. The resistance of the prosecutrix to the forcible sexual overtures of the accused personified by both, the injuries existing on the person of the accused, as well as, the tearing of the salwar and shirt of the prosecutrix, as such, belie any inference or do not render open any conclusion that the sexual overtures perpetrated on the person of the prosecutrix by the accused, was, at all consensual. Rather, momentum to the inference that the sexual act perpetrated on the person of the prosecutrix by the accused was forcible, is lent by the factum of existence and presence of injuries on the person of the accused, as well, as, the prosecutrix, articulated, in, Ex.PW1/B and Ex.PW16/A, which too, hence, communicate that the prosecutrix is deposing truthfully qua the fact of hers having been dragged by the accused, to, the site where the occurrence had taken place.

27. In view of above discussion, we find no merit in this appeal, which is accordingly dismissed and the judgment of the learned trial Court is affirmed.

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

Cr. Appeal Nos. 54 of 2014 & 55 of 2014.
Reserved on: July 10, 2015.
Decided on: July 14, 2015.

1. Cr. Appeal No. 54 of 2014.
Dhyan Singh .....Appellant.
Versus
State of H.P. .....Respondent.
2. Cr. Appeal No. 55 of 2014.
Nikka Ram .....Appellant.
Versus
State of H.P. .....Respondent.

N.D.P.S. Act, 1985- Section 50- Two accused travelling in a three-wheeler intercepted on a secret information-joint search option given to them vide Ext. PW1/A-16.00gm charas was found in the Pithu bag of one accused and 17.80 gm charas was found tied around the waist of the other accused during search- held, that joint option could not have been given and the conviction could not have been recorded on the basis of recovery effected during such search- further one independent witness associated during the search and sampling had not supported the prosecution case-rapat and Malkhana registers not proved to show as to how the case property was retrieved from the Malkhana during trial and re-deposited in the same- the case property not proved to be the same-entire prosecution case becomes doubtful-conviction and sentence improper-accused acquitted. (Para-15 to 21)

For the appellant(s): Mr. Anoop Chitkara, Advocate in both the appeals.
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.

Since common questions of law and facts are involved in these appeals, both these appeals were taken up together for disposal.

2. These appeals are directed against the judgment and order dated 12.12.2013 and 26.12.2013, respectively, rendered by the learned Special Judge, Kinnaur at Rampur Bushahr, H.P, in Sessions Trial No. 0100026/2011, whereby the appellants-accused (hereinafter referred to as the "accused", namely, Nikka Ram and Dhyan Singh), who were 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), have been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years each and to pay fine of Rs. 1,00,000/- each and in default of payment of fine, they were further ordered to undergo rigorous imprisonment for one year each.

3. The case of the prosecution, in a nut shell, is that the police party led by SI Rattan Singh comprising of HC Tilak Raj, HC Neel Kanth, HHC Laiq Ram of PS CID Bharari (Shimla), had departed from headquarters on 3.5.2011 towards Nirath, Rampur etc. in connection with detection of cases under the Act. On 4.5.2011, at about 7:30 AM, the police party reached Nogli, when SI Rattan Singh received secret information that Nikka Ram and Dhyan Singh, who were wearing jeans and green coloured T shirts, were coming with narcotics substance towards Rampur from Nirmand side. On getting this information, SI Rattan Singh prepared 'reasons of belief' in writing and sent the same through HHC Laiq Ram to his superior officer. He then proceeded with other police officials to '*Wazir Bawri*' and set up a *naka*. Some vehicles were checked. At about 9:00 AM, a three wheeler bearing No. HP-50-0683 came from Nirmand side. It was occupied by three persons, a driver and two other persons, who were sitting on the back seat. The persons sitting on the back seat, were wearing jeans and green coloured T shirts and their physical appearance also tallied with the information which was given to SI Rattan Singh. The vehicle was signaled to stop. The driver of the auto disclosed his name as Roshan Lal whereas the other two occupants revealed their identities as Nikka Ram and Dhyan Singh. SI Rattan Singh informed the accused about the information received by him. He apprised them that he wanted to conduct their search. The IO associated Sh. Roshan Lal and HC Tilak Raj in the investigation and apprised the accused that they had a legal right to get their search conducted in the presence of gazetted officer or the Magistrate. The accused consented to be searched before the witnesses. Accused Nikka Ram was holding a carry bag (*Pithu*) on his back. It was searched. One taped wrapper was recovered from it containing charas. It weighed 1.600 kg. The recovered charas was put into the same wrapper and bag and then parceled separately in a cloth parcel after sealing with eight seals of impression "S". Thereafter, personal search of accused Dhyan Singh was conducted and a taped wrapper was found tied on his waist. It was found containing charas. It weighed 1.780 kg. It was packed and re-sealed after performing codal formalities. SI Rattan Singh prepared the seizure memo and filled in NCB forms in triplicate. He prepared *rukka* and sent it through HC Neel Kanth, alongwith the case property for registration of FIR. The FIR was registered. The sealed parcels containing contraband and other documents were produced before SI Balbir Singh by HC Neel Kanth on 4.5.2011 itself and resealed the parcels in separate cloth parcels by affixing seals of "N". He also filled in the relevant columns of NCB form in triplicate and deposited all the articles with MHC Parkash Chand. The contraband was got analyzed in State Forensic Laboratory, Junga. The investigation was completed and the challan was put up after completing all the codal formalities.

4. The prosecution, in order to prove its case, has examined as many as 14 witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution case. They have raised the plea of false implication. According to them, there were two more persons in the auto when it was stopped. Those two persons alighted

from it. The police already had the contraband with them and they were planted with it. The learned trial Court convicted and sentenced the accused, as noticed hereinabove.

5. Mr. Anoop Chitkara, 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 12.12.2013/26.12.2013.

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

7. PW-1 HC Tilak Raj deposed that on 4.5.2011, at about 7:30 AM, he alongwith HC Neel Kanth, HHC Laiq Ram and Const. Brij Lal went in govt. vehicle towards NH-22 at place Nogli. A secret information was received by SI Rattan Singh that Nikka Ram and Dhyan Singh, resident of Banzar, wearing blue jean pants and green T shirts, were coming in some vehicle from Nirmand to Rampur with the contraband. The gist of the information was recorded under Section 42(2) of the ND & PS Act and sent through HHC Laiq Ram to Dy. S.P (CID) Bharari. Thereafter, they headed towards '*Wazir Bawdi*' and laid a naka. They checked heavy and light vehicles coming from Nirmand side. At about 9:00 AM, a three wheeler bearing No. HP-50-0683 came from Nirmand side. The accused persons were informed about their right to get searched before the Gazetted Officer or Magistrate. They opted to be searched by the police. Seizure memo was prepared vide Ext. PW-1/A. Thereafter, the *Khakhi* coloured *Pithu* bag on which word "*Diesel*" was inscribed was checked by the IO. It contained one taped wrapper of light yellow colour in which black coloured substance was found in the shape of sticks and chapatti. It was found to be charas. It weighed 1 Kg. 600 gms. Thereafter, the recovered charas was put in the same *Pithu* bag and sealed with seal impression "S" (8 numbers) and taken into possession vide seizure memo Ext. PW-1/B. Thereafter, IO had conducted the personal search of accused Dhyan Singh. He was found tying one tape wrapper of light yellow colour with his waist. It was checked and found to be charas. It weighed 1 kg. 780 gms. The charas was put into the same tape wrapper and put in white coloured cloth and made into a parcel and sealed with seal impression "S". The charas was taken into possession vide seizure memo Ext. PW-1/B. The seal after use was handed over to independent witness Roshan Lal. The IO filled in the NCB forms in triplicate on the spot. The IO also prepared the spot map. The case property was produced in the Court, while examining him by the learned APP.

8. PW-4 HHC Laiq Ram, also deposed the manner in which the accused were apprehended, search, seizure and sealing proceedings were completed on the spot. IO Rattan Singh received secret information and he prepared the '*reasons of belief*' under Section 42(2) of the Act. It was handed over to him to give the same to Dy. SP (CID), Crime Shimla. He proceeded to Shimla by bus at about 8:45 PM.

9. PW-5 HC Pradeep Kumar deposed that Laiq Ram handed over to him a copy of '*reasons of belief*', which he immediately produced before the Dy. SP, Sunil Negi, CID (Crime).

10. PW-6 HC Prakash Chand deposed that SHO Balbir Singh handed over to him *rukka* written by SI Rattan Singh for registration of FIR. He entered the *rukka* and FIR No. 11 of 2011 was registered on the same day. At about 6:40 PM, SI Balbir Singh handed over to him the case property of this case i.e. two parcels, out of which, one parcel was resealed with 5 seals of impression "N" allegedly containing one parcel sealed with 8 seals of

impression "S" in which 1 kg. 600 gms. charas was contained. The other parcel was also sealed with 5 seals of impression "N" in which one parcel containing 1 kg. 780 gms. charas sealed with 8 seals of impression "S" was handed over to him alongwith the sample seals "S" and "N", NCB forms in triplicate, copy of seizure memo and reseal certificate to be deposited in the malkhana. He made entry of the same in the malkhana register at Sr. No. 45. The extracts of the malkhana register are Ext. PW-6/A and Ext. PW-6/B. He proved copy of RC vide Ext. PW-6/C.

11. PW-9 Roshan Lal is the independent witness. According to him, when he reached at '*Wazir Bawdi*', there were four passengers with him in the three wheeler. Four-five persons in civil dress signaled to stop the three wheeler. He stopped the same. Two of the passengers ran away. One bag was lying on the side of the road. The police took into possession his three wheeler and bag. The accused persons were also taken by the police to Nogli from his three wheeler in their vehicle. They prepared some documents and obtained his signatures thereon. He was declared hostile. In his cross-examination, he admitted that on 4.5.2011, he was carrying milk in his three wheeler from '*Tikri Kainchi*'. He also admitted that when he reached at place *Remu*, two boys signaled to stop the three wheeler and he stopped the same. They boarded the three wheeler. He also admitted that he alongwith HC Tilak Raj were associated as witnesses. He denied the suggestion that the police had told that they had received information that boys sitting in the three wheeler were having contraband. He denied the suggestion that the accused persons opted to be searched by the police. He also denied that thereafter, the police party gave their personal search to the accused. He identified his signatures on Ext. PW-1/A. He denied the suggestion that *khakhi* coloured *Pithu* bag on which word "*diesel*" was inscribed, on the back of accused Nikka Ram, was checked by the I.O and on checking one tape wrapper of light yellow colour in which black coloured substance was found in the shape of sticks and chapatti. He also denied that it was found to be charas. He also denied that the recovered substance was weighed with the help of weight and scale carried by the police in the IO kit and it was found to be 1 kg. 600 gms charas. He also denied that the recovered charas was put in the same *Pithu* bag and sealed with seal impression "S" (8 seals). He denied that the parcel was taken into possession vide seizure memo Ext. PW-1/B. He also denied that the IO conducted the personal search of accused Dhyan Singh. He further denied that during the search, the accused had tied one tape wrapper of light yellow colour with his waist and on checking the tape wrapper, black coloured substance in the shape of sticks and chapatti was found and on smelling it was found to be charas. He also denied that the substance was weighed and was found to be 1 kg. 780 gms. charas. He further denied that the recovered charas was put in the same tape wrapper and was put in a white coloured cloth and made into a parcel and sealed with 8 seals of impression "S". He denied that the seal after use was handed over to him. He also denied that seizure memo Ext. PW-1/B was prepared by the police in his presence and the contents were read over and explained to him. He admitted his signatures on Ext. PW-1/E. In his cross-examination by the learned Advocate appearing on behalf of the accused, he testified that the papers on which his signatures were obtained were not read over to him by the police. He only put his signatures at the instance of the police as the police had threatened him to impound his three wheeler and to implicate him in this case. He signed the papers under the fear of being implicated in this case falsely.

12. PW-10 HC Bala Ram has taken the parcels to FSL Junga vide RC No. 31 of 2011.

13. PW-11 SI Balbir Singh deposed that Constable Neel Kanth brought a *rukka* Ext. PW-11/A for registration of the case alongwith the case property and FIR Ext. PW-11/B was registered. One parcel sealed with 8 seal impressions of seal "S" containing charas weighing 1 kg. 600 gms. was wrapped in a separate piece of cloth and second parcel sealed with 8 seals of "S" allegedly containing charas 1 kg. 780 gms., wrapped in a separate piece of cloth were resealed with 5 seals of impression "N" and sample of seal "N" was taken on a piece of cloth vide Ext. PW-11/D. The column Nos. 9 to 11 of NCB form Ext. PW-6/C were filled in by him. Re-sealing certificate was prepared. The parcel alongwith the samples of seals "S" and "N", NCB forms in triplicate, seizure memo, certificate of resealing were handed over to MHC Prakash Chand to keep in a safe custody.

14. PW-12 SI Rattan Singh deposed the manner in which the accused were apprehended, search, seizure and sealing proceedings were completed on the spot. In his cross-examination, he admitted that he had issued single notice to both the accused persons, apprising them of their right to be searched before the gazetted officer or the Executive Magistrate.

15. PW-13 ASI Neel Kanth, also deposed the manner in which the accused were apprehended, search, seizure and sealing proceedings were completed on the spot, including filling up of NCB forms. The IO prepared the *rukka* Ext. PW-11/A and it was handed over to him alongwith two parcels. He handed over the *rukka* to MHC for registration of case alongwith the case property for keeping in the safe custody.

16. The case of the prosecution, precisely, is that the three wheeler was signaled to stop. It was coming from Nirmand towards Rampur side. It was driven by PW-8 Roshan Lal. The bag carried by accused Nikka Ram was searched. It contained charas. On the personal search of accused Dhyan Singh, charas was also recovered. The same was produced before PW-11 SI Balbir Singh. He resealed the same and produced before the MHC for safe custody. The contraband was sent for chemical examination at FSL Junga.

17. The accused were given joint option as per the contents of PW-1/A, to be searched either before the Executive Magistrate or the Gazetted Officer. It is settled law by now that the option is to be given to the accused to be searched before the Executive Magistrate or the gazetted Officer individually. It has vitiated the trial.

18. Their lordships of the Hon'ble Supreme Court in the case of ***State of Rajasthan vrs. Parmanand and another,*** reported in ***(2014) 5 SCC 345,*** have held as follows:

> "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."

19. The case of the prosecution has not been supported by independent witness PW-9 Roshan Lal. According to him, no recovery was made from the *Pithu* bag carried by accused Nikka Ram and body of Dhyan Singh. He was made to sign the papers under threat by the police.

20. The case property was produced in the Court, while examining PW-1 HC Tilak Raj. The case property has been produced before the Court by the learned APP. The prosecution has not proved as to when the case property was withdrawn from the malkhana. It is mandatory that as and when the case property is deposited or taken out from the malkhana, corresponding entry has to be made in the malkhana register. No DDR was also prepared when the case property was taken out from the malkhana and produced before the Court and when it was re-deposited in the malkhana after its production before the Court. We have gone through the extract of malkhana register Ext. PW-6/A and Ext. PW-7/B. In ND & PS cases, it is necessary to ensure the safe custody of the case property from its seizure till its production in the Court. Who has produced the case property before the Court has also not been proved. It casts doubt as to whether it was the same case property which was seized from the accused persons and produced before the Court in the absence of entry made in the malkhana register at the time of withdrawal and re-deposit in the malkhana or it was the case property of some other case.

21. Thus, the prosecution has failed to prove the case against the accused persons for the commission of offence punishable under Section 20 of the N.D & P.S., Act.

22. Accordingly, in view of the analysis and discussion made hereinabove, both the appeals are allowed. Judgment and order of conviction and sentence dated 12.12.2013 and 26.12.2013, respectively, rendered by the learned Special Judge, Kinnaur at Rampur Bushahr, H.P., in Sessions trial No. 0100026/2011, 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.

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

Civil Revision No. 178 of 2007 a/w
Civil Revision No. 44 of 2014.
Judgment reserved on: 02.07.2015
Date of decision: July 14th , 2015.

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1. C.R. No. 178 of 2007

Sh. Lin Kuei Tsan ... Petitioner

Vs.

Sh. Ashok Kumar Goel ... Respondent

2. C.R. No. 44 of 2014

Sh. Lin Kuei Tsan …Petitioner

Vs.

Sh. Ashok Kumar Goel ….Respondent.

H.P. Urban Rent Control Act, 1987- Section 14- Landlord filed a petition for eviction of the tenant on the ground that the premises are required bonafide for the purpose of re-construction/rebuilding which cannot be carried out without the premises being vacated by the tenant - the landlord pleaded that the building was aged more than 100 years and had outlived its utility – the landlord wanted to repair the building by pulling down the existing old structure- the tenant on the other hand denied that the condition of the building was not proper-the landlord had rented out part of the premises for running a Restaurant during the pendency of the proceedings- landlord contended that the disposal of the petition would have taken a long time and it was not possible for him to keep the building vacant till the disposal of the petition - held that the land lord is only required to show that he requires the building in a bonafide manner for demolition and re-construction - age and condition of building are required to be taken into consideration to determine the bonafide need of the landlord- merely because another co-owner has not been arrayed is not sufficient to doubt the bonafide of the landlord- a sanctioned map is not a condition precedent for establishing the bonafide – the fact that a portion of the building is rented out temporarily by the landlord is not sufficient to doubt his bona fides. (Para 15 to 33)

Cases referred:

Prem Chand alias Prem Nath vs. Smt. Shanta Prabhakar1997(2) RCR, 672
Jagat Pal Dhawan vs. Kahan Singh (dead) by LRs and others (2003) 1 SCC 191
Phoola Devi and others vs. Chandu Lal and others 2010 (1) Him. L.R. 523
Hari Dass Sharma vs. Vikas Sood and others (2013) 5 SCC 243
Deepak Boot House and another vs. Dr. Piyare Lal Sood, 2014 (1) Shim. L.C. 47
Janmejai Sood vs. Ram Gopal Sood, ILR 2014 H.P XLIV (VI) 28
Vinod Kumar vs. Varinder Kumar Sood, ILR 2015 XLV (III) HP 404
Naresh Kumar and others vs. Surinder Paul 2001 (2) SLC 337
Hindustan Petroleum Corporation Limited vs. Dilbahar Singh (2014) 9 SCC 78

For the petitioner : Mr. R. K. Bawa, Senior Advocate, with Mr. Ajay Sharma, Advocate, in both the petitions.

For the respondent : Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj K. Vashisht, Advocate, in both the petitions.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, J.

This revision petition under Section 24 (5) of the Himachal Pradesh Urban Rent Control Act, 1987 is preferred by the petitioner/tenant against the judgment dated 10.9.2007 passed by learned Appellate Authority, Fast Track Court, Shimla in RBT No. 69-S/14 of 2005/2002 whereby he set-aside the order dated 29.11.2001 passed by learned

Rent Controller, Court No.4, Shimla in Case No. 80/2 of 1999/1998 and ordered the eviction of the tenant.

2. The parties shall be referred to as the landlord and the tenant. The landlord filed an eviction petition against the tenant on number of grounds, however, for the purpose of determination of this revision petition the only ground which survives for consideration is as to whether the premises in question are bonafidely required by the landlord for the purpose of building or rebuilding which cannot be carried out without the building being vacated by the tenant.

3. It is not in dispute that the building No. 20, the Mall, Shimla is owned by the landlord and the tenant is in occupation of one shop on the level of the Mall Road and the entire basement below it consisting of a room and a toilet under the stairs. The tenant was already in possession of the disputed premises when the same was purchased by the landlord from its previous owner Sh. Mehar Chand S/o Lala Mauza Mal. The eviction of the tenant was sought on the following grounds:-

(i) Arrears of rent alongwith interest ;

(ii) Liability to pay future rent ;

(iii) The tenant after commencement of the Himachal Pradesh Urban Rent Control Act, 1987 (hereinafter referred to as the 'Act') had without the prior written consent of the landlord carried out material additions and alterations in the basement floor of the building thereby impair the value and utility and thus liable to be evicted; and

(iv) That the premises in question are bonafidely required by the landlord for the purpose of building or rebuilding which building or rebuilding cannot be carried out without the tenanted premises being vacated by the tenant/petitioner.

4. It is not in dispute that insofar as the grounds No. (i) to (iii) are concerned, the same have been rendered redundant because the arrears of the rent already stand paid in accordance with law and insofar as the eviction of the tenant on the ground of his having committed such acts as are likely to impair materially the value and utility of the building is concerned, the same was not pressed before the learned Appellate Authority as would be clear from para 12 of the judgment of the Appellate Authority.

5. In support of ground No.(iv), the landlord pleaded that the premises in dispute under the tenancy and occupation of the tenant were bonafidely required by him for the purpose of building or rebuilding which building or rebuilding could not be carried out without the tenanted premises being vacated by the tenant. The building was more than 100 years age and had now out-lived its span of life. The upper two floors of the building were in the physical possession and in occupation of the landlord and his wife where the landlord and his wife were jointly running a hotel and the landlord was also having his office on a part of the said premises under his occupation. It was specifically pleaded that the landlord wanted to reconstruct/rebuild the entire building by pulling down the existing old structure which was made of dhajji, bricks and chuna surkhi and would be replaced by RCC structure which would be put to personal use by opening restaurant and hotel therein. It was further pleaded that the structure of the building had been badly damaged on account of fire which had occurred in the adjoining building No. 19, The Mall, Shimla. Lastly, it was submitted that the landlord was possessed of sufficient means to reconstruct the building and for such reconstruction, the landlord was also taking steps for approval of the plans on

old lines as the RCC structure is to be built in place of the present old structures on old lines.

6. The tenant contested the eviction petition by raising preliminary objections that the petition had not been properly verified because of which the same was not maintainable, the petition lacked material particulars, locus standi of the landlord to sue, the petition being bad for non-joinder of necessary parties viz the other owners of the building, the landlord had not come to the Court with clean hands and he was harassing the tenant for the last many years were taken. It was also pleaded that no steps had been taken by the landlord for obtaining requisite sanction from the Municipal Authorities or Town and Country Planning Department for doing the building and re-building work. The landlord had already carried out unauthorized construction in the building in question.

7. On merits, the relation of landlord and tenant was admitted. It was averred that the basement floor below the shop is/was used by him (respondent) as a work-shop. The rest of the premises were used as a residence. The tenant was residing in the basement with his family members. The rented premises consist of a shop on the Mall Road and residential portion cum work-shop comprising of three rooms and WC in the basement floor facing Middle Bazar. No rough plan of the premises had been submitted by the landlord as required under the law. The tenant was carrying on the business in the name and style of 'Ta Tung and Company' from the very beginning. He had been dragged into a number of frivolous proceedings by the landlord for the last many years. The building was in good condition and neither the landlord needed it for rebuilding nor he had any intention to do so. The landlord was in occupation of the upper portion of the building and was running a hotel in the name and style of 'Hotel Ghar' in the top floor of the building. Recently, the landlord had inducted a new tenant in a part of the building just above the shop in question. All this showed the falsity of the claim put forth by the landlord. For the last several years, the landlord was renovating and repairing the portions of the building which were in his occupation. The landlord was also doing the addition and alteration work in the portion just above the portion in dispute. Municipal authorities had initiated action against the landlord for carrying out the work unauthorisedly. The structure was neither 100 years old nor it is made of dhajji, bricks or chuna surkhi. The landlord did not want to replace old structure with the new RCC structure. The landlord did not want to open a Restaurant or Hotel as claimed. He was running flourishing business of multi storeyed hotel in Fingask Estate, Shimla and in Chotta Shimla known as 'Moon International Hotel'. The building in dispute was not damaged due to the fire which broke out in the adjoining building No. 19, The Mall, Shimla. It was averred that the landlord did not have sufficient funds to reconstruct the building nor he had taken any steps for approval of the plan on the old lines. On these pleadings, the tenant sought the dismissal of the petition with penal and special costs.

8. In rejoinder, the landlord reiterated the contents of the petition and refuted the objections put forth by the tenant. It was denied that the building was in sound condition or that he had carried out additions or alterations in the portion which was in his occupation.

9. On 7.12.1999 the learned Rent Controller, framed the following issues:

1. *Whether the respondent has committed such acts as have or are likely to impair the value and utility as alleged? OPP.*

2. *Whether the tenanted premises are required by the petitioner for building or re-building purpose as alleged? OPR*
3. *Whether the petition is not maintainable in the present form? OPR*
4. *Whether the petitioner is estopped to file the present petition as alleged? OPR*
5. *Whether the petitioner has no locus-standi to file the petition? OPR*
6. *Whether the petition is bad for non-joinder of necessary parties? OPR*
7. *Relief.*

10. The learned Rent Controller, vide order dated 29.11.2001 dismissed the petition filed by the landlord. Aggrieved by the order dated 29.11.2001 passed by learned Rent Controller, the landlord filed appeal under Section 24 of the Himachal Pradesh Urban Rent Control Act, before the learned Appellate Authority, Shimla, who vide judgment dated 10.9.2007 accepted the appeal and set-aside the order of the learned Rent Controller and directed the eviction of the tenant on the ground of bonafide need of the landlord for building or rebuilding purpose which cannot be carried out without the premises being vacated.

11. Feeling aggrieved and dissatisfied with the impugned judgment dated 10.09.2007 passed by the learned Appellate Authority, the tenant has preferred this revision before this Court on the ground that the learned appellate authority had not appreciated that the eviction orders could not be passed against the tenant on the mere asking of the landlord particularly when there was no iota of evidence produced on record which may prove that the tenanted premises in question are bonafidely required by the landlord for rebuilding. It is further averred that the bonafides of the landlord stand not only doubted but demolished when it is proved on record that the landlord had not only rented a part of the tenanted premises in occupation to the ICICI Bank, but had also carried out extensive construction work in the third and fourth floor of the premises. It is further averred that the bonafides of the landlord are lacking when it is proved on record that there is no proposed building map submitted by the landlord on the ground taken in the memo of the petition.

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

13. Mr. R.K. Bawa, learned Senior counsel for the tenant has strenuously argued that the bonafide of the landlord can be judged from the fact that even after the decision of the learned appellate authority and during the pendency of this revision petition the landlord has again rented out a part of the premises in the third floor for running a restaurant in the name and style of "SICHUAN PALATE" and this fact has been duly brought to the notice of this Court by moving an application being CMP No. 8461 of 2014.

14. On the other hand, Mr. Ajay Kumar, learned senior counsel for the landlord has submitted that once it is disputed that the premises are more than 100 years old, then the mere fact that a part of the premises may have been let out, from time to time, would not in any manner adversely reflect upon the bonafides of the landlord as the landlord cannot be expected to keep the premises vacant and wait for the decision of the case. He further argued that in terms of the latest law the landlord now was not required to prove the sanctioned map and was further not even required to prove his financial resources, though the landlord in the instant case had otherwise led sufficient evidence to prove that he had already submitted the map and had further led evidence to show that he had the finances to raise the construction. This fact according to landlord has not been denied even by the

tenant when he in his reply to the petition had admitted the landlord to be having a flourishing business in multi storeyed hotel at Fingask Estate, another hotel at Chhota Shimla known as 'Moon International Hotel' and lastly running a flourishing business of property dealing from the premises in question.

15. The term 'bonafide' used in Section 14 of the H. P. Urban Rent Control Act, 3 (c) is referable to the bonafides of the landlord. Section 14 (3) (c) of the Act reads as under:-

> *"**14(3) (c).** In the case of any building or rented land, if he requires it to carry out any building work at the instance of the Government or local authority or any Improvement Trust under some improvement or development scheme or if it has become unsafe or unfit for human habitation or is required bona fide by him for carrying out repairs which cannot be carried out without the building or rented land being vacated or that the building or rented land is required bonafide by him for the purpose of building or rebuilding or making thereto any substantial additions or alterations and that such building or rebuilding or addition or alteration cannot be carried out without the building or rented land being vacated:*
>
> *[Provided that the tenant evicted under this clause shall have right to reentry on new terms of tenancy, on the basis of mutual agreement between the landlord or tenant, to the premises in the re-built building equivalent in area to the original premises for which he was tenant.*
>
> *Provided further that in case of non residential premises, the landlord shall not compel the tenant for a change of business under the new terms of tenancy; and]".*

16. In view of the above position, the landlord in the instant case is only required to show that he requires the building bonafidely for demolition and reconstruction. If the landlord wants to demolish by taking into condition of the building then the bonafide is also referable to the building that is why normally though not mandatorily required, the age and condition of the building and the other aspects such as means etc. are taken into consideration to decide as to whether the building really requires demolition and reconstruction to judge the bonafides of the landlord.

17. The tenant has filed CMP No. 8461 of 2014 for taking into on record the subsequent events whereby a portion of the third floor has been rented out by the landlord for running a restaurant "SICHUAN PALATE". Indisputably, as of today, the premises are lying vacant. Even otherwise, the tenant has miserably failed to prove parting of possession by the landlord in favour of third person.

18. The learned counsel for the tenant would then argue that the bonafides of the landlord are lacking for the following reasons:

(i) That the landlord was not exclusive owner of the premises ;

(ii) There was a loan standing on the building and, therefore, could not be demolished.

(iii) The sanctioned map though not a sine qua non for evicting the tenant under law would go a long way to prove the bonafides of the landlord and;

(iv) No reason why the co-owner had not been made a party.

19. Indisputably, the premises in question were owned by the landlord and his wife Kamlesh and this fact has infact been mentioned in the eviction petition, though not in so many words. Even otherwise, it is more than settled that one co-owner can maintain an eviction petition. That apart, no prejudice has otherwise been shown to have been caused to the tenant by not arraying the co-owner so as to make a grievance. It was not disputed before me that the co-owner Smt. Kamlesh is no more in the land of living and, therefore, even this objection of the tenant therefore holds no water.

20. Now, coming to the question of loan, it would be seen from the material placed on record that as a matter of fact there was no loan outstanding against the premises. Rather, it was the landlord who infact had given a personal guarantee for the same but after repayment of the entire loan amount alongwith interest, the financing authority itself has given 'No Dues Certificate', the copy whereof is placed as Annexure R-1 with the sur-rejoinder filed to CMP No. 8461 of 2014.

21. The learned Rent Controller in order to hold the tenant not liable for eviction on the ground of the landlord requiring the premises bonafide for the purpose of rebuilding or reconstruction, gave the following reasons:

> *"....In this case, the version of the landlord is that he went to rebuild the building, but if his intentions are so, then why he has recently raised third and fourth floor by spending huge amount. He has further rented out a portion of a newly constructed floor to a new tenant and is getting considerable rent. It is submitted that in such a situation rebuilding itself is not possible and the present petition deserves dismissal. I have also gone through the evidence. Admittedly, the petitioner has recently raised fresh construction over third and fourth floor of the building in question. He has also rented out a portion of upper floor to a tenant, in these circumstances, how demolition or rebuilding is possible is unexplained. No proposed building map has been placed on record to show that the proposed rebuilding undertaking will be of such a nature and of such an extent that it is not possible to carry out the same until the premises are vacated by the respondent. In these circumstances, I hereby proceed to hold that petitioner has failed to establish his bonafide on record..."*

22. A perusal of the aforesaid findings prima-facie establishes that the learned Rent Controller considered irrelevant material and discarded the relevant material to arrive at the aforesaid conclusion. This would be further clear when this Court takes note of certain precedents on the subject.

23. In ***Prem Chand alias Prem Nath*** vs. ***Smt. Shanta Prabhakar1997(2) RCR, 672***, the Hon'ble Supreme Court carved out different and independent situations/circumstances enabling the landlord to apply eviction of the tenant and it was held that even if the building was not unsafe or unfit for human habitation but the landlord required it for building or rebuilding or making substantial additions and alterations, he was entitled to the order of eviction. It was held as under:

> *"8. A careful reading of the above Section will show that the Section contemplates different independent situations/circumstances enabling the landlord to apply for eviction of a tenant. Those different and independent situations/circumstances can be set out as follows:-*

"(i) When the tenanted premises are required by the landlord to carry out any building work at the instance of the Government or local authority or any Improvement Trust under some improvement or development scheme' or

(ii) When the tenanted premises have become unsafe or unfit for human habitation; or

(iii) When the tenanted premises are required bonafide by the landlord for carrying out repairs which cannot e carried out without such tenanted premises being vacated; or

(iv) When the tenanted premises are required bonafide by the landlord for purposes of building or rebuilding or making thereto any substantial additions or alterations and that such building or rebuilding or addition or alteration cannot be carried out without the building or rented land being vacated."

9. From the above analysis, it will be seen that the condition of the buildings required to be considered when the application falls under the above mentioned Category Iii). Admittedly, the application for eviction in the present case falls under Category (iv) and there is no requirement in such cases to go into the condition of the building. It is true that this Court has held that the requirement of the condition of the building is a vital factor whether such requirement is specifically stated in the Section or not. It must be remembered that the decision of this Court was rendered while interpreting Section 14 (1) (b) of the Tamil Nadu Act which is not in pari materia with the Himachal Pradesh Act. In other words, there are no different categories as set out above in the Tamil Nadu Act as in Himachal Pradesh Act."

24. The judgment of the Hon'ble Supreme Court in ***Jagat Pal Dhawan*** vs. ***Kahan Singh (dead) by LRs and others (2003) 1 SCC 191*** has been relied by both the parties in support of the case wherein the Hon'ble Supreme Court held that while trying eviction petition on grounds of demolition and reconstruction, the Court may look into the relevant facts regarding age and condition of building, availability of necessary funds and whether building plan have been sanctioned by local authorities in order to assess landlord bonafides, even if the statute concerned has not specifically made them ingredients of the grant of eviction. The relevant observations of the Hon'ble Supreme Court are as under:

"6**.** *Section 14(3)(c) provides inter alia that a landlord may apply to the Controller for an order directing the tenant to put the landlord in possession of tenancy premises in case of any building or rented land being required bona fide by him for the purpose of building or rebuilding which cannot be carried out without the building or rented land being vacated. The provision does not have as an essential ingredient thereof and as a relevant factor the age and condition of the building. The provision also does not lay down that the availability of requisite funds and availability of building plans duly sanctioned by the local authority must be proved by the landlord as an ingredient of the provision or as a condition precedent to his entitlement to eviction of tenant. However still, suffice it to observe, depending on the facts and circumstances of a given case, the Court may look into such facts as relevant, though not specifically mentioned as ingredient of the ground for eviction, for the purpose of determining the bona fides of the landlord. If a building, as proposed, cannot be constructed or, if the landlord does not have*

means for carrying out the construction or reconstruction obviously his requirement would remain a mere wish and would not be bona fide.

9. So is the view taken in R.V.E. Venkatachala Gounder v. Venkatesha Gupta and Ors., [2002] 4 SCC 437 and in Harringaton House School v. S.M. Ispahani and Anr., [2002] 5 SCC 229. The fact that demolition and reconstruction would result in modernization, making additional space available and/or would augment the earning of the landlord are relevant factors for determining the bona fides of the requirement for demolition and reconstruction.

10. The locality where the premises are situated has, with the lapse of time, become a busy commercial locality. The structure of the building is more than 100 years old. It is in mud mortar and with slates' roofing-Instead of outdated two floor space, the landlord proposes to construct a modern three-storeyed building which would obviously provide additional space and much better return to the landlord. The landlord has stated that he had no other residential house of his own available with him and having reconstructed the building he would like to shift his residence too in his own newly constructed house. The bona fides of such a requirement could not have been doubted solely on the ground that the structure of the building, though old and outdated, had not gone so weak as was needed to be demolished immediately.

11. So far as the neighbours are concerned, none has objected to the proposed reconstruction. In any case that is a matter to be settled by the landlord with his neighbours. The learned counsel for the appellant submitted during the course of hearing, and rightly in our opinion, that even if the neighbours were not agreeable to have the common wall demolished and replaced by a new wall the appellant was prepared to raise additional walls of his own next to the common walls, if any, and rest his entire structure on such walls. This obviates the need of proving consent of the adjoining building owners for the proposed reconstruction.

14. In the abovesaid circumstances we are clearly of the opinion that relief of eviction as sought for could not have been denied to the appellant. There is no material available to hold that the landlord has something else in his mind such as getting rid of the tenant without raising construction. Sub-Section (5) of Section 14 of the Act protects the interest of the tenant by guarding against malafide evictions. It provides that where a landlord has obtained possession of the building or rented land for the purpose of building or rebuilding and puts the building to any other use or lets it out to any tenant other than the tenant evicted from it, the tenant who has been evicted may apply to the Controller for an order directing that he shall be restored to possession of such building or rented land and the Controller shall make an order accordingly. This provision would not permit the building from which the tenant is being evicted being subjected to any other user or misuse.

15. The appeal deserves to be allowed. The orders of the High Court and the Courts below are set aside. Instead the tenant- respondent is directed to vacate the tenancy premises as the same are required bona fide by the landlord-appellant for carrying out building or rebuilding under Section 14 (1)(c) of the Act which cannot be carried out without the building being

vacated. The tenant is allowed four months time for vacating the premises subject to his filing the usual undertaking within a period of three weeks from today before the executing Court undertaking to deliver vacant and peaceful possession over the suit premises to the landlord-appellant on the expiry of the time granted and in between clearing and continuing to clear all the arrears of rent and not creating any third party interest. Costs as incurred."

25. In ***Phoola Devi and others*** vs***. Chandu Lal and others 2010 (1) Him. L.R. 523,*** a learned Single Judge of this Court while holding that the premises were bonafidely required by the landlord for reconstruction and rebuilding observed as under:

"*6. The learned counsel for the petitioners has submitted that in the ejectment petition the petitioner has not pleaded the reasons for reconstruction of the premises. He has submitted that in view of Section 14(3)(c) of the Act the landlord is required to plead the reasons to reconstruct, rebuild the premises. The perusal of Section 14(3)(c) of the Act indicates that the landlord is entitled to eject the tenant on several grounds of eviction which are independent. In para 18(3) of the ejectment petition, it has been pleaded that premises in dispute are required bonafide for the purpose of reconstruction and rebuilding and the work of reconstruction cannot be carried out without vacating the premises. The Section 14(3) (c) provides that a landlord may apply to the Controller for an order directing the tenant to put the landlord in possession of tenancy premises in the case of any building or rented land if he requires it bonafide for the purpose of building or rebuilding. The Section 14(3)(c) no where provides that reasons for rebuilding and reconstruction are to be pleaded in the petition.*

7. In Prem Chand alias Prem Nath Vs. Shanta Prabhakar (Smt.) (1998) 1 SCC 274 after noticing Section 14 (3) (c) of the Act it has been held as follows :-

"A careful reading of the above section will show that the section contemplates different independent situations /circumstances enabling the landlord to apply for eviction of a tenant. Those different and independent situations/circumstances can be set out as follows:-

"(i) When the tenanted premises are required by the landlord to carry out any building work at the instance of the Government or local authority or any Improvement Trust under some improvement or development scheme; or

(ii) When the tenanted premises have become unsafe or unfit for human habitation; or

(iii) When the tenanted premises are required bona fide by the landlord for carrying out repairs which cannot be carried out without such tenanted premises being vacated; or

(iv) When the tenanted premises are required bona fide by the landlord for purposes of building or rebuilding or making thereto any substantial additions or alterations and that such building or rebuilding or addition or alteration cannot be carried out without the building or rented land being vacated."

From the above alanysis, it will be seen that the condition of the building is required to be considered when the application falls under the above-mentioned category, (ii) Admittedly, the application for

eviction in the present case falls under category (iv) and there is no requirement in such cases to go into the condition of the building. It is true that this Court has held that the requirement of the condition of the building is a vital factor whether such requirement is specifically stated in the section or not. It must be remembered that the decision of this Court was rendered while interpreting Section 14(1)(b) of the Tamil Nadu Act which is not in pari material with the Himachal Pradesh Act. In other words, there are no different categories as set out above in the Tamil Nadu Act as in Himachal Pradesh Act."

8. The Supreme Court in Jagat Pal Dhawan Vs. Kahan Singh (dead) by LRS. And others (2003) 1 SCC 191 has again noticed Section 14 (3) (c) of the Act and held as follows:-

"Section 14(3)(c) provides inter alia that a landlord may apply to the Controller for an order directing the tenant to put the landlord in possession of tenancy premises in case of any building or rented land being required bonafide by him for the purpose of building or rebuilding, which cannot be carried out without the building or rented land being vacated. The provision does not have as an essential ingredient thereof and as a relevant factor the age and condition of the building. The provision also does not lay down that the availability of requisite funds and availability of building plans duly sanctioned by the local authority must be proved by the landlord as an ingredient of the provision or as a condition precedent to his entitlement to eviction of the tenant. However still, suffice it to observe, depending on the facts and circumstances of a given case, the court may look into such facts as relevant, though not specifically mentioned as ingredient of the ground for eviction, for the purpose of determining the bona fides of the landlord. If a building, as proposed, cannot be constructed or if the landlord does not have means for carrying out the construction or reconstruction obviously his requirement would remain a mere wish and would not be bona fide."

9. The landlord while appearing as PW-1 has stated that condition of the building is not good, it is lying broken at several places. It is 80 - 90 years old. He wants to reconstruct it after demolition. He has got the plan Ex.PW-1/A approved from Municipal Corporation. In cross-examination, he has denied that he is not in a position to reconstruct the building. It has come in the statement of PW-1 landlord that after approval of the plan Ex.PW-1 /A, he could not reconstruct the premises due to litigation. He has also stated that he is an income tax assessee. PW-3 Satinder Kalia has stated that he has seen the premises, the condition of the shop is in bad shape and is dilapidated. In cross-examination, a suggestion was given to him which he has admitted that the landlord has reconstructed the portion adjacent to the disputed premises.

10. DW-1 Rakesh son of Puran Chand has stated that Puran Chand and Durga Dass were the tenants in the shop, his father has died. After the death of Durga Dass, he and his father were running the shop. In cross-examination, he has admitted that tarpaulin has been placed on the shop. He got the shop inspected through Architect about 15 - 20 days earlier. DW-2 V.C.Sharma has stated that on the asking of Phulia Devi he had inspected the shop in question

and prepared report Ex.DW-2/A. There is scarp on the roof of the shop as a result of which the roof is being damaged. He was told that the scrap is of the landlord. In core area repair is permissible but construction is banned. DW-3 Raj Kumar in examination in chief has stated that the condition of the disputed shop is good. In cross-examination, he has stated that the roof leaks and it has been covered by tarpaulin. DW-4 Bhajana Ram is not in a position to state that the premises in dispute was 80 years old. He has denied that the shop in dispute is covered by tarpaulin.

11. The building plan has been sanctioned vide Ex.PW-1/A, but it is the case of the landlord that despite approval of the building plan, he could not reconstruct the building due to litigation. The bona fide of the landlord to reconstruct is supported from the fact that in addition to sanction plan he has constructed adjacent portion of the building which has been established when suggestion was given to PW-3 Satinder Kalia in cross-examination conducted by the tenants that the adjacent portion of the premises has been reconstructed by the landlord. PW-1 in his statement has stated that he wants to reconstruct the premises after demolishing it. PW-3 Satinder Kalia has stated that the condition of the shop is in bad shape and it is in dilapidated condition. PW-1 Chandu Lal has also stated that the condition of the shop is also not good and it has broken at several places and it is about 80 - 90 years old.

12. DW-2 in his report Ex.DW-2/A has stated that condition of the building is good and it does not require any repair, renovation or reconstruction. DW-1 Rakesh has stated that he got the shop inspected through architect 15 - 20 days ago. His statement was recorded on 27.6.2006. Thus, according to him, the shop was inspected by the architect somewhere around the first week of June, 2006. DW-2 V.C.Sharma has stated that he had visited the site on 25.4.2006. The perusal of report Ex.DW-2/A indicates that DW-2 allegedly inspected the shop on 25.4.2006 on the request of Puran Chand tenant. There are thus apparent contradictions regarding the dates of visit of the shop for carrying out inspection by the expert of the petitioners. DW-2 V.C. Sharma in Ex.DW-2/A has stated that the shop was got inspected on the request of Puran Chand tenant, but there is no Puran Chand tenant, therefore, report Ex.DW-2/ A is a suspicious document.

13. In Amar Nath vs. Mrs. Balbir Kochhar and others 1997 (1) S.L.C. 227, it has been held that the arrangement to be made in respect of the finances is only a circumstance in order to test the bona fide and is not a requirement of law. There is no derth of arranging the finances in todays as lot of financial corporations, banks and persons having surplus money do always lent out for such projects. On the requirement of sanction plan in the same judgment, it has been held that there is no statutory requirement that the building plan has to be got sanctioned before ejectment is sought. When the ejectment petition is filed no one is sure about the time consuming factor in litigation and thus the storing of the building material would lead to nowhere. In Naresh Kumar and others vs. Surinder Paul 2001 (2) S.L.C. 337 judgment Harswarup vs. Ram Lok Sharma, 2000 (3) S.L.C. 160 has been noticed wherein it has been held that mere fact that the landlord has not obtained necessary permission under the H.P.Roadside Land Control Act, 1968 and /or the approval of the Town and Country Planning Department before the filing of the petition would not mean

that the need of the landlord is not bona fide. Similar view has been taken in Amarjeet Singh vs. Anju Rani 1997 (1) SLC 492.

14. The learned counsel for the petitioners has submitted that the premises is situated in core area where reconstruction is not permitted. The learned counsel for the landlord has submitted that reconstruction in the core area is not absolutely banned. The reconstruction is permissible with the approval of competent authority. In Naresh Kumar (supra), it has been held that there is no absolute ban on reconstruction within the "core area". Reconstruction on old lines is permissible within such area with the prior approval of the State Government.

15. In P.S. Pareed Kaka and others vs. Shafee Ahmed Saheb 2004 (1) R.C.R. 503, it has been held by the Apex Court that even if the building is in good condition, if it is not suitable for the landlord, he can always demolish even a good building and put up a new building to suit his requirements. It is not necessary for the landlord to prove that the condition of the building is such that it requires immediate demolition particularly when the premises is required by the landlord.

16. The two authorities below have recorded a finding of fact that the premises in question is bonafide required by the landlord for reconstruction and rebuilding. The learned counsel for the petitioners has failed to establish that the finding recorded by the two authorities below is perverse. It has also not been established that material evidence having bearing on the merits of the case has been ignored or irrelevant evidence has been considered in support of the findings. In Naresh Kumar (Supra) after noticing Chaman Prakash Puri vs. Ishwar Dass Rajput and another 1995 Suppl. (4) SCC 445 and Sarla Ahuja vs. United India Insurance Company Ltd. 1999 (1) RCJ 158, it has been held that it is not permissible for this court in exercise of revisional jurisdiction to come to a different fact finding unless the findings arrived at by the two courts below, on the facts of the case, are so unreasonable that no court could have reached such a finding on the material available. This has, however, not been established in the present case. There is no merit in the revision."

26. The question whether the requirement of sanctioned building plan is sine qua non before ordering the eviction of the tenant came up for consideration before the Supreme Court in ***Hari Dass Sharma vs. Vikas Sood and others (2013) 5 SCC 243*** and the Hon'ble Supreme Court after discussing the case of ***Jagat Pal Dhawan*** (supra), held that under Section 14 (3) (c) of the Act, the requirement of having a duly sanctioned plan was not a condition precedent for maintaining a petition for eviction. The relevant observations of the Hon'ble Supreme Court are as follows:

"*13. In Jagat Pal Dhawan v. Kahan Singh (dead) by L.Rs. & Ors. (supra), this Court had the occasion to consider the provisions of Section 14(3)(c) of the Act and R.C. Lahoti J. writing the judgment for the Court held that Section 14(3)(c) does not require that the building plans should have been duly sanctioned by the local authorities as a condition precedent to the entitlement of the landlord for eviction of the tenant. To quote from the judgment of this Court in Jagat Pal Dhawan v. Kahan Singh (dead) by L.Rs. & Ors. (supra): (SCC p. 194, para 6)*

"6.....The provision also does not lay down that the availability of requisite funds and availability of building plans duly sanctioned by

the local authority must be proved by the landlord as an ingredient of the provision or as a condition precedent to his entitlement to eviction of the tenant. However still, suffice it to observe, depending on the facts and circumstances of a given case, the court may look into such facts as relevant, though not specifically mentioned as ingredient of the ground for eviction, for the purpose of determining the bona fides of the landlord. If a building, as proposed, cannot be constructed or if the landlord does not have means for carrying out the construction or reconstruction obviously his requirement would remain a mere wish and would not be bona fide."

It will be clear from the aforesaid passage that this Court has held that availability of building plans duly sanctioned by the local authorities is not an ingredient of Section 14(3)(c) of the Act and, therefore, could not be a condition precedent to the entitlement of the landlord for eviction of the tenant, but depending on the facts and circumstances of each case, the Court may look into the availability of building plans duly sanctioned by the local authorities for the purpose of determining the bonafides of the landlord.

17. In fact, the only question that we have to decide in this appeal filed by the appellant is whether the High Court could have directed that only on the valid revised/renewed building plant being sanctioned by the competent authority, the order of eviction shall be available for execution. The High Court has relied on the decision of this Court in Harrington House School v. S.M. Ispahani & Anr.(2002) 5 SCC 229 and we find in that case that the landlords were builders by profession and they needed the suit premises for the immediate purpose of demolition so as to construct a multi-storey complex and the tenants were running a school in the tenanted building in which about 200 students were studying and 15 members of the teaching staff and 8 members of the non-teaching staff were employed and the school was catering to the needs of children of non-resident Indians. This Court found that although the plans of the proposed construction were ready and had been tendered in evidence, the plans had not been submitted to the local authorities for approval and on these facts, R.C. Lahoti, J, writing the judgment for the Court, while refusing to interfere with the judgment of the High Court and affirming the eviction order passed by the Controller, directed that the landlords shall submit the plans of reconstruction for approval of the local authorities and only on the plans being sanctioned by the local authorities, a decree for eviction shall be available for execution and further that such sanctioned plan or approved building plan shall be produced before the executing court whereupon the executing court shall allow a reasonable time to the tenant for vacating the property and delivering the possession to the landlord and till then the tenants shall remain liable to pay charges for use and occupation of the said premises at the same rate at which they are being paid.

18. In the present case, on the other hand, as we have noted, the Rent Controller while determining the bonafides of the appellant-landlord has recorded the finding that the landlord had admittedly obtained the sanction from the Municipal Corporation, Shimla, and has accordingly passed the order of eviction and this order of eviction has not been disturbed either by the Appellate Authority or by the High Court as the Revision Authority. In our considered opinion, once the High Court maintained the order of eviction

passed by the Controller under Section 14(4) of the Act, the tenants were obliged to give vacant possession of the building to the landlord and could only ask for reasonable time to deliver vacant possession of the building to the landlord and hence the direction of the High Court that the order of eviction could only be executed on the revised plan of the building being approved was clearly contrary to the provisions of Section 14(4) of the Act and the proviso thereto."

27. Notably, the ratio of the judgment in ***Hari Dass Sharma's*** case (supra) has been repeatedly followed by this Court in ***Karam Chand and others*** vs. ***Jasbir Kaur and others,*** C.R. No. 125 of 2012**,** decided on 16.8.2013, ***Roshan Lal Bhardwaj*** vs**. *Ashok Sud and another,*** C.R. No. 4034 of 2013 decided on 4.10.2013**, *R.R.Sharma vs. Gopla and others,*** C.R. No. 4053 of 2013 decided on 24.10.2013**, *Deepak Boot House and another*** vs. ***Dr. Piyare Lal Sood, 2014 (1) Shim. L.C. 47, Janmejai Sood*** vs**. *Ram Gopal Sood,*** C.R. 62 of 2013 decided on 4.11.2014, ***Vinod Kumar*** vs. ***Varinder Kumar Sood,*** C.R. No. 60 of 2013 decided on 13.5.3015.

28. In view of the aforesaid exposition of law, the submission of the tenant even if assumed to be correct that the landlord does not have a sanctioned plan, holds no water as the same is not a pre-requisite for maintaining a petition for eviction.

29. Learned counsel for the tenant would then argue that since the premises is in the core area where the reconstruction is not permitted, therefore, the eviction petition ought to be dismissed. Needless to say even this issue is no longer *res-integra* in view of the judgment rendered by this Court in ***Naresh Kumar and others*** vs. ***Surinder Paul 2001 (2) SLC 337,*** which in turn, has been relied upon by this Court in ***Phoola Devi's*** case (supra) and it was held that reconstruction even in the core area was not banned absolutely and reconstruction on the old lines was permissible within the core area with the prior approval of the State Government.

30. In addition to what has been observed aforesaid, it would be seen that not only the landlord has resources, which fact is not denied by the tenant, but even his plea appears to be bonafide when the tenant himself does not dispute that the premises are more than 100 years old.

31. The fact that the landlord may have rented out a part of the building or carried out extensive repairs, will not work as an impediment or disadvantage in considering his bonafides. After all, it is for the landlord to decide as to in what manner the premises are to be used and it is not open for the tenant to dictate terms. Therefore, no exception can be taken to the act of the landlord in letting out temporarily a portion of the building. After all, the landlord is not expected to keep the premises vacant during the pendency of the litigation which was instituted nearly two decades back i.e. on 30.10.1998.

32. It is by now more than settled that this Court will not normally interfere with the findings of fact recorded by the first appellate authority, only because on reappreciation of the evidence, its view is different from the authority below.

33. The consideration or examination of evidence by this Court is confined to find out that the findings of fact recorded by the authority below is according to law and does not suffer from any error of law. This was so held by the five Judges Bench of the Hon'ble Supreme Court in ***Hindustan Petroleum Corporation Limited vs. Dilbahar Singh (2014) 9 SCC 78*** and it was further held that finding of facts recorded by the

authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice that it is open to correction because it is not treated as a finding according to law. In that event, this Court in exercise of its revisional jurisdiction is entitled to set-aside the impugned order as being not legal or proper. However, even while satisfying itself to the regularity or correctness, legality or propriety of the impugned order, this Court will not exercise its power as an appellate power to reappreciate or reassess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a Court of first appeal. This court while satisfying itself regarding the decision being in accordance with law, may examine whether the order impugned before it suffers from procedural illegality or irregularity, which is not the case in the instant revision.

34. In view of the aforesaid discussion, I find no illegality, impropriety or perversity in the order of the learned appellate authority and accordingly, the revision is dismissed, so also the pending application(s) if any.

35. Before parting, it may be noticed that the respondent-landlord has taken exception of findings recorded by the learned Appellate Authority to the effect that the eviction order shall not be available for execution unless the petitioner/landlord/appellant produces before the Executing Court the building plan duly sanctioned/approved by a competent authority whereupon and whereafter only the Executing Court shall allow the execution of the ejectment order. He would argue that once the requirement of having a duly sanctioned plan is held not to be a pre-requisite for maintaining the eviction petition by the Hon'ble Supreme Court in ***Hari Dass Sharma's*** case (supra) and by this Court in numerous judgments (some of which have already been quoted above) then such a condition could not have been imposed by the learned Appellate Authority. He further contended that the law declared by the Hon'ble Supreme Court in terms of the mandate of Article 141 of the Constitution of India is binding on all unless the same is held to be prospective in the judgment itself.

36. I have considered the aforesaid submission and I am of the considered opinion that no exception to such condition can be taken by the landlord, particularly, when the landlord has not chosen to assail these findings by filing a separate revision petition. Even otherwise this condition is otherwise just and equitable.

37. Further, this Court cannot also loose sight of the fact that it was the landlord who in order to prove and establish his bonafides had himself pleaded that he was taking steps for approval of the building plans on old lines and this was one of the considerations which weighed with the learned Appellate Authority to conclude that the need of the landlord was bonafide. Therefore, at this stage the landlord cannot be permitted to resile from his pleadings or else this would itself cast a doubt on his bonafides.

38. The Hon'ble Supreme Court in ***Jagat Pal Dhawan's*** case (supra) has itself held that the availability of building plan duly sanctioned by local authorities is not an ingredient of Section 14 (3) (c) of the Act and, therefore, could not be a condition precedent to the entitlement of the landlord for eviction of the tenant, but depending upon the facts and circumstances of each case, the Court may look into the availability of the building plan duly sanctioned by local authorities for the purpose of determining the bonafides of the landlord.

39. Though the present revision petition has been dismissed, however, it is made clear that in terms of the judgment of the Hon'ble Supreme Court in ***Hari Dass Sharma's*** case (supra), it shall be open to the tenant to apply for re-entry into the building in accordance with the proviso to Clause (c) of Section 14 (3) of the Act, introduced by the Amendment Act, 2009.

C.R. No.44 of 2014

40. The tenant by way of instant revision has questioned the order dated 24.3.2014 passed by the learned Rent Controller (V), Shimla whereby pursuant to the execution proceedings having been carried out by the landlord, the tenant was granted three months' time to vacate the premises, however with the right of re-entry. Now, that the revision petition preferred by the tenant itself has been dismissed and the order passed by the appellate authority, has been upheld, this revision is disposed of with the clarification that the eviction order shall not be put to execution unless the petitioner/landlord/ appellant produces before the Executing Court the building plan duly sanctioned/approved by a competent authority and it shall be open to the tenant to apply for re-entry into the building in accordance with the proviso to Clause (c) of Section 14 (3) of the Act introduced by the Amendment Act. Pending application(s) if any, stands disposed of. The parties are left to bear their own costs.

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

M/s Winsome Textile Industries Limited. …Petitioner.

Versus

State of H.P. and another. …Respondents.

CWP No. 7138 of 2014
Reserved on: 8.7.2015
Decided on: 14.7.2015

Industrial Disputes Act, 1947- Section 25- Workman/respondent No. 2 pleaded that he was working as Generator Operator and was entitled to Rs. 84,797/- he made various requests for the payment of the amount but the amount was not paid- a reference was sought on behalf of the workman by the trade union - respondents contended that the reference was not properly made and Union had no authority to espouse the claim of the workman- held, that there is no proper format to espouse the case of single workman - where the proof of support by workman was available, the reference is maintainable.

(Para- 8 and 9)

Case referred:

J.H. Jadhav vs. Forbes Gokak Ltd., (2005) 3 SCC 202

For the Petitioner: Mr. Rahul Mahajan, Advocate.

For the Respondents: Mr. Parmod Thakur, Addl. A.G. with Mr. Neeraj K. Sharma, Dy. A.G. for the respondent-State.

Mr. Tara Singh Chauhan, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge:

This petition is instituted against the award dated 9.7.2014 rendered by the Presiding Judge, H.P. Industrial Tribunal-cum-Labour Court, Shimla in Reference No. 102 of 2009

2. "Key facts" necessary for the adjudication of this petition are that respondent No.2-workman has raised the industrial dispute. The following reference was made by the State to the Industrial Tribunal-cum-Labour Court:

> **"Whether demand raised by President, CITU, District Committee, Solan, before the Managing Director, M/s Winsome Textiles Industries Ltd., 1, Industrial Area Baddi, District Solan that worker Shri Ramesh Chand s/o Sh. Sunder Ram be paid an amount of Rs. 84,797/-, only for the arrears of increment from the period 1.4.2003 to December, 2007 is legal and justified? If yes, what relfief and consequential service benefits the above worker is entitled to."**

3. Respondent No.2 filed claim petition. According to the averments made in the claim petition, he was working as Generator Operator since 23.5.1995. He was entitled to Rs. 84,797/- with effect from 1.4.2003 to December, 2007. He has made various requests through Centre of Indian Trade Unions to the petitioner-management. The reply was filed by the petitioner. Preliminary objection was taken that the reference made to the Labour Court-cum-Industrial Tribunal was neither competent nor maintainable as there was no trade union in the industrial establishment of the Winsome Textile Industries Limited at Baddi, District Solan. The annual increments were already paid to respondent No.2.

4. Issues were framed by the Industrial Tribunal-cum-Labour Court on 30.8.2010.

5. Respondent No.2 appeared as PW-1. According to him, his annul increments were stopped from 1.4.2003 upto 2007. His basic salary of Rs. 280/- per month was also deducted with effect from 1.4.1997. He has proved copy of representation Ex.PA and copy of demand notice dated 10.10.2006 mark 'X', which was sent to the Managing Director of the petitioner-company. He has denied the suggestion that there was no union in the company. According to him, there were two unions, i.e. (i) Bharatiya Mazdoor Sangh (BMS) and (ii) Centre of Indian Trade Unions (CITU). He has deposed that mark 'X' was raised through CITU.

6. PW-2 Shyam Lal has supported the version of PW-1.

7. The employer has led evidence of Sh. Surinder Kumar by filing affidavit Ex.R-1. According to him, respondent No.2 has never served letter dated 8.2.2008 on the company. The claim for increments with effect from 1.4.2003 to December, 2007 was beyond the terms of reference.

8. Issue No.3 "whether the petition was not maintainable, as alleged? OPR" was framed on 30.8.2010. Learned Presiding Judge, Labour Court gave specific findings that the case of respondent No.2 was espoused by CITU through its President. The Court has also gone through mark 'X'. It has been sent by the Centre of Indian Trade Unions to the

Managing Director of the petitioner company on 10.10.2006. The Labour Court has partly allowed the claim petition of respondent No.2 and he has been held entitled to annual increments @ Rs. 400/- w.e.f. 1.4.2003 to December, 2007 by deducting the amount of increments which were already paid to him w.e.f. 1.4.2003 to December, 2007. Case of respondent No.2 has been espoused, as discussed hereinabove, by the Centre of Indian Trade Unions. It has come in the statement of PW-1 that two Trade Unions were operating, i.e. (i) Bharatiya Mazdoor Sangh and (ii) Centre of Indian Trade Unions. In case the petitioner was aggrieved by reference No.102/2009, the same was required to be challenged specifically. Petitioner has never challenged reference No. 102 of 2009. Now, the petitioner is estopped from challenging the making of reference at this belated stage, which was made in the year 2009. The reference was specific to the effect whether respondent No.2 was entitled to sum of Rs.84,797/- towards the arrears of increments from 1.4.2003 to December, 2007. Thus, it cannot be said that the award made by the Labour Court-cum-Industrial Tribunal was beyond the terms of reference.

9. Their Lordships of the Hon'ble Supreme Court in ***J.H. Jadhav*** vs. ***Forbes Gokak Ltd***., (2005) 3 SCC 202 while dealing with the requirement of espousal of cause of single workman by the union have held that there is no particular form prescribed to effect such espousal. Normally, union must express itself in the form of a resolution which should be proved if in issue. However, proof of support by union may also be available in other ways. And it would depend on facts of each case. Their Lordships have further held that Division Bench has misapplied principles of judicial review in interfering with decision of Tribunal. Their Lordships have held as under:

> **"[7] As far as espousal is concerned there is no particular form prescribed to effect such espousal. Doubtless, the Union must normally express itself in the form of a resolution which should be proved if it is in issue. However proof of support by the Union may also be available aliunde. It would depend upon the facts of each case. The Tribunal had addressed its mind to the question, appreciated the evidence both oral and documentary and found that the Union had espoused the appellant's cause."**

10. 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 RAJIV SHARMA, J.

Shiv Shambhu & anr. .....Petitioners.

Versus

Amrit Ram (Dead through LRs Chaman Lal & ors.) & ors. .....Respondents.

CMPMO No. 285 of 2014.
Reserved on: 6.7.2015.
Decided on: 14.7.2015.

Code of Civil Procedure, 1908- Order VI Rule 17- Plaintiff filed an application seeking amendment of the plaint pleading that the order dated 24-11-2004 passed by Assistant

Collector and the order passed in appeal by Collector were illegal – the application was allowed by the Trial Court- the suit was instituted on 26-10-2004- the issues were framed on 28-10-2005- the order dated 24-11-2004 was within the knowledge of the plaintiffs and was not assailed – the Trial had already commenced and it was not shown that in spite of exercise of due diligence, amendment could not have been sought earlier- the order passed by trial court set-aside (Para 6 to 10)

Cases referred:
State of Madhya Pradesh vrs. Union of India and another, (2011) 12 SCC 268
J.Samuel and others vrs. Gattu Mahesh and others, (2012) 2 SCC 300

For the petitioners: Mr. Dheeraj Vashishta, Advocate.
For the respondents: Mr. Y.P.Sood, Advocate, for respondents No. 1(i) to 1(iii) and 2 to 5.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is directed against the order dated 15.05.2014, rendered by the learned Civil Judge (Sr. Divn.), Una, H.P.

2. Key facts, necessary for the adjudication of this petition are that the respondents-plaintiffs (hereinafter referred to as the plaintiffs for the convenience sake) have filed a suit for declaration to the effect that the land as detailed in the plaint and entered in the jamabandi for the year 1985-86, situated in Village Takka, Tehsil and Distt. Una, H.P. stood already partitioned and the plaintiffs were exclusive owners of the land measuring 1 kanal 7 marlas bearing Khewat No. 572, Khatauni No. 787, Kh. Nos. 51/30/1, 341/3, as mentioned in the jamabandi since 1970-71 and also consequential relief for permanent injunction restraining the petitioners-defendants (hereinafter referred to as the defendants) from initiating any proceedings with the Tehsildar (Settlement) for again getting regular partition and blocking the passage comprised in Kh. No. 51/30, Khewat No. 780, Khatauni No. 1053, as entered in the Jamabandi and also restraining them from raising any construction of any kind on any specific portion of the land. In the alternative, the plaintiffs have prayed for demolition by way of mandatory injunction in case the defendants forcibly raise construction over Kh. Nos. 51/30/1 and 341/3, bearing Khatauni No. 787.

3. The written statement was filed by the defendants. Replication was also filed by the plaintiffs. The learned Civil Judge (Sr. Divn.) Una, framed the issues and thereafter, the application under Order 6 Rule 17 for amendment of the plaint was filed. Reply was filed by the defendants. According to the plaintiffs, the order dated 24.11.2004 rendered by the Asstt. Collector in case No. 82/04 and the order passed in Appeal No. 1/2005/SO by the Collector, Settlement Kangra, Distt. Kangra were illegal, wrong, without jurisdiction, null and void. The application was contested by the defendants. According to them, the order passed by the Asstt. Collector and Collector, Settlement Kangra, were in accordance with law.

4. The suit was instituted on 26.10.2004 and issues were framed on 28.10.2005. The mode of partition was approved on 30.7.2004 vide Ext. DW-3/H. After the closure of the evidence of the plaintiffs, the evidence of the defendants was closed on

7.10.2010. The plaintiffs' evidence in rebuttal was ordered on 6.12.2010 for 13.1.2011. The application was filed belatedly to prolong the proceedings and to overcome the order passed by the revenue authorities. The learned Civil Judge (Sr. Divn.), Una, allowed the application on 15.5.2014. Hence, this petition.

5. I have heard learned counsel for the parties and gone through the impugned order dated 15.5.2014, carefully.

6. The application filed by the plaintiffs under Order 6 Rule 17 CPC was definitely an attempt to prolong the proceedings. The evidence of the defendants was closed on 7.10.2010. The evidence in rebuttal of the plaintiffs was ordered on 6.12.2010 for 13.1.2011. The suit was instituted on 26.10.2004. The issues were framed by the learned Civil Judge (Sr. Divn.), Una on 28.10.2005. Order dated 24.11.2004 rendered by the Assistant Collector, Settlement Officer, Barsar and upheld by the Collector, Settlement Kangra on 26.2.2007 in Appeal No. 1/2005/SO, were within the knowledge of the plaintiffs and despite that they have not assailed the same. The learned trial Court has come to the wrong conclusion that the amendment sought for by the plaintiffs was material to determine the controversy between the parties. The trial has already commenced and no ground has been made out by the plaintiffs to move an application under Order 6 Rule 17 CPC.

7. Mr. Y.P.Sood, Advocate, for the respondents-plaintiffs has strenuously argued that his clients did not intend to lead any evidence; however, the fact of the matter is that defendants would definitely be prejudiced by allowing the amendment application, more particularly, when the suit was listed for final hearing.

8. Their lordships of the Hon'ble Supreme Court in the case of ***State of Madhya Pradesh vrs. Union of India and another,*** reported in ***(2011) 12 SCC 268***, have held that when application is filed after the commencement of the trial, it must be shown that inspite of due diligence, such amendment could not have been sought earlier. Their lordships have held as under:

> "7). The above provision deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it must be shown that in spite of due diligence, such amendment could not have been sought earlier.
>
> 8). The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.
>
> 9) Inasmuch as the plaintiff-State of Madhya Pradesh has approached this Court invoking the original jurisdiction under Article 131 of the Constitution

of India, the Rules framed by this Court, i.e., The Supreme Court Rules, 1966 (in short `the Rules) have to be applied to the case on hand. Order XXVI speaks about "Pleadings Generally". Among various rules, we are concerned about Rule 8 which reads as under:

> "8. The Court may, at any stage of the proceedings, allow either party to amend his pleading in such manner and on such terms as may be just, but only such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

The above provision, which is similar to Order VI Rule 17 of the Code prescribes that at any stage of the proceedings, the Court may allow either party to amend his pleadings. However, it must be established that the proposed amendment is necessary for the purpose of determining the real question in controversy between the parties.

10) This Court, while considering Order VI Rule 17 of the Code, in several judgments has laid down the principles to be applicable in the case of amendment of plaint which are as follows:

(i) Surender Kumar Sharma v. Makhan Singh, (2009) 10 SCC 626, at para 5:

> "5. As noted hereinearlier, the prayer for amendment was refused by the High Court on two grounds. So far as the first ground is concerned i.e. the prayer for amendment was a belated one, we are of the view that even if it was belated, then also, the question that needs to be decided is to see whether by allowing the amendment, the real controversy between the parties may be resolved. It is well settled that under Order 6 Rule 17 of the Code of Civil Procedure, wide powers and unfettered discretion have been conferred on the court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties, it can be allowed on payment of costs. Therefore, in our view, mere delay and laches in making the application for amendment cannot be a ground to refuse the amendment."

(ii) North Eastern Railway Administration, Gorakhpur v.

Bhagwan Das (dead) by LRS, (2008) 8 SCC 511, at para16:

> "16. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings. In Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been

originally correct, but the amendment would cause him an injury which could not be compensated in costs."

(iii) Usha Devi v. Rijwan Ahamd and Others, (2008) 3 SCC 717, at para 13:

"13. Mr Bharuka, on the other hand, invited our attention to another decision of this Court in Baldev Singh v. Manohar Singh. In para 17 of the decision, it was held and observed as follows: (SCC pp. 504-05) "17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion on the court to allow an amendment of the written statement at any stage of the proceedings."

(iv) Rajesh Kumar Aggarwal and Others v. K.K. Modi and Others, (2006) 4 SCC 385, at paras 15 & 16:

"15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties."

(v) Revajeetu Builders and Developers v. Narayanaswamy and Sons and Others, (2009) 10 SCC 84, at para 63:

"63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case;

and (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

The above principles make it clear that Courts have ample power to allow the application for amendment of the plaint. However, it must be satisfied that the same is required in the interest of justice and for the purpose of determination of real question in controversy between the parties."

9. Their lordships in the case of ***J.Samuel and others vrs. Gattu Mahesh and others,*** reported in ***(2012) 2 SCC 300,*** have held that omission of specific plea that inspite of due diligence the party could not have raised the matter before the commencement of the trial, mandatorily amounts to negligence and lack of due diligence. Their lordships have explained the term "due diligence". It has been held as under:

"15) In this legal background, we have to once again recapitulate the factual details. In the case on hand, Suit O.S. No. 9 of 2004 after prolonged trial came to an end in September, 2010. The application for amendment under Order VI Rule 17 CPC was filed on 24.09.2010 that is after the arguments were concluded on 22.09.2010 and the matter was posted for judgment on 04.10.2010. We have already mentioned that Section 16(c) of the Specific Relief Act contemplates that specific averments have to be made in the plaint that he has performed and has always been willing to perform the essential terms of the Act which have to be performed by him. This is an essential ingredient of Section 16(c) and the form prescribes for the due performance. The proviso inserted in Rule 17 clearly states that no amendment shall be allowed after the trial has commenced except when the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial.

18) The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their plaints. The Court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that:

> "… no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."
>
> 19) Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term `Due diligence' is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.
>
> 20) A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit."

10. Accordingly, the petition is allowed. Order dated 15.5.2014, passed by the learned Civil Judge (Sr. Divn.), Una, is set aside. The learned trial Court is directed to decide the suit within 10 weeks from today. The parties are directed to appear before the learned trial Court, through their counsel on 22.7.2015.

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

Sneh Lata Pathak .....Petitioner.

Versus

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

CWP-T No. 2924 of 2008.
Decided on : 14th July, 2015.

Constitution of India, 1950- Article 226- Petitioner made a request to proceed on long leave on which leave of 16 months was granted to her–subsequently she applied for extension which was declined–the college was taken over and the petitioner was directed to join the duties immediately otherwise her services would be terminated- she failed to join duties and her services were terminated- the record showed that the petitioner had joined duties with D.A.V. college Kotkhai prior to termination of her services - therefore, respondent no. 4 was under no obligation to conduct the inquiry before dispensing with her services- petition dismissed. (Para-2)

For the Petitioner: Mr. C.N. Singh, Advocate.
For Respondents No.1 and 2: Mr. Shrawan Dogra, Advocate General with Mr. Vivek Singh Attri, Dy. A.G.
For respondent No.3: Mr. J.L. Bhardwaj, Advocate.
For Respondent No.4 and 5: Mr. Raman Sethi, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The writ petitioner was serving with the respondent No.4-College in the capacity of Lecturer in Economics. During the course of her employment with the respondent No.4, the petitioner herein endorsed a communication, comprised in Annexure A-I, to the management of respondent No.4-college conveying her request for hers being permitted to, in consonance with the provisions contained in the H.P. University Ordinances Hand Book Page 184 rule 53, proceed on long leave from 10th March, 2000 onwards. However, no action, on the communication forwarded by the petitioner to respondent No.4-college, was taken by the latter. The petitioner continued to make representations to the management of respondent No.4-college qua sanction of leave, as sought for, in her favour. It appears on a reading of Annexure A-II that the management of respondent No.4-college accorded sanction of leave upto 16 months in favour of the petitioner. However, her request to the Management of respondent No.4-college, for further extension of leave beyond 16 months stood, as borne out from a perusal of Annexure A-II, rejected by it under communication bearing No.05/AGCN DT.12.4.2002. The management of respondent No.-4-college wherein the petitioner was serving having not accorded to her the desired extension of leave beyond 16 months, constrained the petitioner to, under Annexure A-II, make a further representation to it for grant of further extension of leave beyond 16 months. The petitioner sought extension of leave beyond a period of 16 months as stood sanctioned in her favour, on the anvil of rule 53(b) ordinances XXXVIII, page 185 of H.P. University Hand Book. The representation of the petitioner addressed to the Management of respondent No.4-college was forwarded in original by the latter to the Deputy Registrar (Academic), H.P. University, Shimla. The Deputy Registrar (Academic), H.P. University, Shimla while being seized of the representation of the petitioner forwarded to him in original by respondent No.4-college, communicated to the Management of respondent No.4-College under Annexure A-IV, that the representation of the petitioner for extension of leave beyond 16 months, be examined in the light of Rule 53(b) of the Appendix 'A" to Chapter-XXXVIII, paragraph 38.5.B(d) of First Ordinances of H.P. University (as amended). In the meantime, the respondent No.4-college was, under Annexure A-V, taken over by the Government of Himachal Pradesh. Consequently, the Management of respondent No.-4 communicated to the petitioner under Annexure–VI, that her representation would be dealt with by the Directorate of Education. Moreover, after the taking over of the respondent No.-4-college by H.P. Government under Annexure A-V, the respondent No.6 was absorbed as a lecturer on regular basis in the respondent No.4-college. Besides, there exists a portrayal in Annexure R-4/E of the claim of the petitioner for grant of leave beyond 16 months necessitating rejection besides there is a revelation therein of the petitioner having been directed to join her duties immediately after expiry of the period of leave sanctioned in her favour, in absence whereof, it was conveyed therein to her that her name will be removed from the roll of the institution. However, the petitioner omitted to join duties as mandated by Annexure R-4/E, in sequel, as imminent on a reading of Annexure R-4/F her services stood terminated.

2. The petitioner herein is aggrieved by the factum of her services having come to be terminated under Annexure R-4/F even when the respondents had not proceeded to hold any inquiry. Consequently, the petitioner seeks quashing of Annexure R-4/F besides, a relief is claimed that the absorption of respondent No.6 in respondent No.4-college is untenable as the petitioner had a superior right over respondent No.6 for absorption in the

respondent No.4-college on its taking over by the Government of Himachal Pradesh. The argument as meted out by the learned counsel for the petitioner herein for rendering unvindicable the act of respondent No.4 in dispensing or terminating with the service of the petitioner even without holding any inquiry would stand to gain succor and sinew with this Court only in the event of there being abundant material on record manifesting the fact that the petitioner had not willfully abandoned her job under respondent No.4-college or material pronouncing upon the fact that her contract of service with the respondent No4-College hence stood not revoked or rescinded. However, as evident from a reading of Annexure R-4/C which is a communication addressed by the petitioner to the Principal, Arya College, Nurpur bespeaking the fact that she stood selected as a lecturer in Economics on a regular basis in DAV College, Kotkhai and had in that capacity joined her duties on 10.03.2000. Consequently, when Annexure R4/C stands communicated to respondent No.-4-college on 27th April, 2000, whereas, Annexure R-4/F whereunder her services stood terminated was issued subsequently on 23.07.2001. Therefore, when the termination of the services of the petitioner by respondent No.4 only occurred subsequent to the forwarding of a communication by the petitioner to the respondent No.4, manifesting the fact of hers having joined as a lecturer on regular basis in DAV College, Kotkhai, obviously, then with the petitioner having omitted to not accede to the request made by the respondent No.4-College to join her duties therein in the face of hers being not entitled to the leave as claimed by her, naturally rendered the contract of service entered into by the petitioner with the respondent No.4-College, to suffer revocation and rescission. In other words, with the petitioner having joined services as a lecturer in economics on a regular basis with the DAV College, Kotkhai, her joining there in that capacity prior to the issuance of Annexure R-4/F, constituted then the factum of hers having entered into a fresh contract of service with the Management of DAV College, Kotkhai. The implication thereof was that she hence rescinded the earlier contract of service with the respondent No.4-College. As a natural concomitant, the deduction is that the respondent No.4-college was not hence under any obligation to, when she was no longer in service with it constituted by the factum of the contract of service of the petitioner with it having, for the reason aforesaid, suffered rescission, proceed to hold any inquiry before terminating or dispensing with the services of the petitioner. In aftermath, it is apparent that with the volitional abandonment of job by the petitioner under the respondent No.4-college, the latter was disobliged to hold any inquiry before dispensing with or terminating the services of the petitioner. As a concomitant then when the petitioner had no surviving contract of service with respondent No.4-college, she is interdicted to agitate or canvass or claim any right of hers being entitled to be absorbed as a regular lecturer with the respondent No.4-college on the latter having been taken over by the Government of Himachal Pradesh. Besides, she also cannot with any fervour contend that the absorption of respondent No.6 as a lecturer in the respondent No.4-College after its taking over by the Government of Himachal Pradesh is lacking in any legal vigour. Consequently, there is no merit in this petition which is accordingly dismissed. All pending applications also stand disposed of.

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

State of Himachal Pradesh and others .....Petitioners.

Versus

Hari Dutt .....Respondent.

CWP No.1744 of 2008.
Judgment reserved on :06.07.2015.
Date of decision: July 14, 2015.

Constitution of India, 1950- Article 226- Respondent was engaged as Beldar – he worked in different capacities of Beldar, fitter and mate - he was engaged as fitter and was offered appointment as work charged Beldar- however, he declined such offer and stated that since he had been working as a fitter, therefore, he be appointed as Work Charged Fitter Grade-I he was given the appointment on work charge basis as Fitter Grade-II on the completion of 10 years - when the record regarding the employment of the petitioner was not produced before the Tribunal, the Tribunal held that the plea of the petitioner that he be appointed as fitter Grade-I was acceptable - it was contended in the writ petition filed before the Court that there are no posts of fitter Grade I and 2 but the posts are categorized as junior technician-the tribunal had drawn an adverse inference on failure to produce the record-held that the petitioner was entitled to be regularized on completion of 10 years as per the directions of the tribunal - Petition dismissed. (Para 10 -13)

Cases referred:

Mool Raj Upadhyaya versus State of H.P. and others 1994 Supp (2) SCC 316

Secretary, State of Karnataka and others versus Uma Devi (3) and others (2006) 4 SCC 1

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

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

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

By medium of this petition, the State has questioned the order passed by the Himachal Pradesh Administrative Tribunal (for short the 'Tribunal') on 11.01.2008 whereby the respondent was ordered to be appointed as work charged Pipe Fitter Grade-I with effect from 01.01.1995.

2. The facts in brief are that the respondent was engaged as 'Beldar' on 22.09.1983 and thereafter at different intervals had worked as 'Beldar', Fitter and Mate till 20.11.1984. He was thereafter engaged as a Fitter with effect from 22.11.1984 and was offered appointment as work charged 'Beldar' with effect from 01.01.1994, but he declined to accept such offer and represented that since he had been working as Fitter Grade-I, therefore, he on completion of requisite service be appointed as work charged Fitter Grade-I. However, even then on completion of requisite 10 years of daily waged service, the

respondent was only given appointment on work charged basis as Fitter Grade-II instead of Grade-I which constrained him to file original application before the learned Tribunal.

3. The petitioners in their reply sought to justify their action by submitting that the services of the respondent had been regularized as Fitter Grade-II strictly as per the directions of the Hon'ble Supreme Court in ***Mool Raj Upadhyaya*** *versus* ***State of H.P. and others 1994 Supp (2) SCC 316.***

4. When the matter was pending before the Tribunal, the petitioners despite repeated directions from it did not furnish the complete details of the working days/years of the respondent after 21st of December, 1984 till 8th February, 1996 clearly indicating as to which job the respondent had been performing during this period. It only produced the mandays chart of the work performed by the respondent and further pleaded that there was no difference in the wages paid to the respondent as Pipe Fitter, W.C. Fitter and Fitter Grade-I.

5. This constrained the learned Tribunal on 04.04.2007 to pass the following order:-

> "Heard for some time when it was appeared that Annexure A filed with the supplementary affidavit may not be correct. This impression is created by the fact that as per Annexure A the applicant as Grade II Fitter was paid at the rate of Rs.31/- per day during the months of August and September, 1989 against muster roll No.638. However, it appears that during the months of November and December, 1989 he worked as Fitter Ist Grade during the subsequent period but still he was paid the wages at the rate of Rs.31/- per day which does not seem to be probable. Even during the period prior to October-November, 1989 the applicant was paid daily wages as a Fitter at the rate of Rs.31.45 paisa which evidently is more than daily wages of Fitter Grade II and Fitter Grade I as payable in November and December, 1989. In these circumstances the learned Deputy Advocate General prays for time to seek clarification in this regard, hence the matter is adjourned and be listed during the courses of next circuit."

6. In compliance to the above orders, the petitioners filed supplementary affidavit, relevant portion whereof reads as under:-

> "In pursuance to above directions it is stated that the applicant has been paid wages as Fitter Grade-I and Fitter Grade-II i.e. Rs.31/- in the month of August and September, 1989 as well as in the month of November and December, 1989 which is correct as per record."

7. However, even the aforesaid supplementary affidavit was not found satisfactory and this further constrained the learned Tribunal on 05.12.2007 to pass the following order:-

> "The supplementary affidavit filed by the respondents perused but it does not disclose specifically as to whether a Fitter Grade I and a Fitter Grade II are paid the same daily wages/pay scale or for the purpose of daily wage these are to distinct categories of posts. Adjournments were given to clarify this position which is not clarified in the supplementary affidavit. In these circumstances the concerned Executive Engineer be present in person on the next date to answer the aforesaid query with the help of relevant notifications, orders, instructions pay scale etc. whatever may be relevant."

8. Notably, even despite the aforesaid order, the concerned Executive Engineer did not choose to produce the record containing notification etc. fixing daily wages of different daily rated categories. This, then compelled the learned Tribunal to draw an inference that the respondent had throughout worked and was paid the wages of Fitter Grade-I from November 28, 1984 till the grant of work charged status to him and, therefore, it was concluded that he was daily rated Fitter Grade-I. It is apt to reproduce Para-9 of the impugned judgment which reads thus:-

> "9. The concerned Executive Engineer did not choose to produce the record containing notification etc. fixing daily wages of different daily rated categories. It is against this background of constant failure of respondents to clearly bring to the fore whether Fitter Grade-I and Fitter Grade-II are distinct categories or are equal in the matter of the wages and particularly the failure to produce relevant records that the legitimate inference that had the record been produced it would have belied the implied claim of equation of various categories of Fitter in the matter of wages and that the wages paid to the applicant were those payable to Fitter Ist Grade would have affirmed. The result of the inference is that the applicant throughout worked as and was paid wages of Fitter Grade-I from November 28,1984 till grant of work charged status to him therefore he was a daily rated Fitter Grade-I."

Based on the aforesaid reasoning the learned Tribunal passed the aforesaid directions which have now been assailed in this writ petition before this Court.

9. It is vehemently contended by the learned Advocate General that the learned Tribunal fell in error in not considering the clarification given by the petitioners in the supplementary affidavit filed on 03.12.2007 where it had specifically been mentioned vide Para No.5 that there is no post of Fitter Grade-I and Grade-II as per notification dated 26.09.2000 and the Government categorized the post as Technician and allowed three tier pay scale as on the cadre strength of 01.01.1996 in the pay scale of `3120-5160, 4020-6200 and 4500-7220. Therefore, the grade that was to be allowed to the respondent fell in the category of Junior Technician and accordingly the respondent has rightly been regularized as Fitter Grade-II now Junior Technician.

10. The petitioners have also pressed into service the judgment of the Hon'ble Supreme Court in ***Secretary, State of Karnataka and others*** *versus* ***Uma Devi (3) and others (2006) 4 SCC 1*** to canvass that in order to claim regularization it was incumbent upon the respondent to have proved that his recruitment was in accordance with the scheme as envisaged in the Constitution. The appointment of the respondent was contrary to the R&P Rules and, therefore, his services could not have been ordered to be regularized.

We have heard learned Advocate General for the petitioners and Shri Y.P.S. Dhaulta, Advocate, for the respondent.

11. Indisputably, the findings recorded by the learned Tribunal are pure finding of fact and can be interfered with only on well settled principles.

12. Now in case the notification dated 26.09.2000 is perused, the same is definitely of no avail to the petitioners because the Court is primarily concerned with the instructions that were prevailing or would govern the regularization of the daily wager, more particularly, Fitter Grade-I, in the year 1994. That being so, the petitioners cannot be permitted to rely upon the aforesaid notification which was not even in existence at the time

when the case of the respondent for conferment of work charged status was to be considered.

13. Coming to the applicability of the judgment of ***Uma Devi's case*** (supra), it may be noticed that it was not even the case of the petitioners before the Tribunal that the respondent was not at all entitled to regularization. Rather, the dispute was only with respect to the post on which the services of the respondent were to be regularized. Therefore, we are constrained to observe that it is on account of implacable and obdurate attitude of the petitioners that they have taken recourse and shelter to ***Uma Devi's case*** (supra) to defeat the legitimate claim of the respondent. Little realizing, that even as per ***Uma Devi's case*** (supra) it is not that the State Government in no circumstance can regularize the services of daily waged employees. This exception has itself been carved out in Para-53 of the judgment by observing that the Union of India/State Governments/their instrumentalities should take steps to regularize the services of such irregular employees, who have worked for more than 10 years. Reference in this regard can conveniently be made to a very recent judgment in ***Surendra Kumar and others*** *versus* ***Greater Noida Industrial Development Authority and others, Civil Appeal No.4916 of 2015 arising out of SLP (Civil) No.662 of 2014), decided on 2nd July, 2015***, wherein the Hon'ble Supreme Court observed as under:-

> "10. In the impugned judgment, the Division Bench proceeded on the premise as if Uma Devi's case (supra) held that the State Government, in no circumstance, can regularize the services of contractual employees. In para (53) of Uma Devi's case (supra), the Constitution Bench carved out an exception by observing that the Union of India/State Governments/their instrumentalities should take steps to regularise the services of such irregular employees who have worked for more than ten years and para (53) reads as under:-
>
> > "53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in State of Mysore Vs. S.V. Narayanappa , (1967) 1 SCR 128, R.N. Nanjundappa Vs. T. Thimmiah , (1972) 1 SCC 409, and B.N. Nagarajan Vs. State of Karnataka, (1979) 4 SCC 507, and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not sub judice, need not be reopened based on

this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

14. In view of the aforesaid discussion, we find no illegality, impropriety or perversity in the order passed by the learned Tribunal and, therefore, there being no merit in this petition, the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Sushil Kumar Dogra .....Petitioner.

Versus

State of H.P. and others. .....Respondents.

CWP No.6608 of 2014
Date of order: July 14, 2015.

Constitution of India, 1950- Article 12- Co-operative societies do not fall within the definition of State- Writ Petition is not maintainable against them. (Para-2 and 3)

Cases referred:

Sanjeev Kumar and others vs. State of H.P. and others, Latest HLJ 2014 (HP) 1061
Chandresh Kumar Malhotra vs. H.P.State Coop. Bank and others 1993(2) Sim.L.C. 243
Vikram Chauhan vs. The Managing Director and ors. Latest HLJ 2013 (HP) 742 (FB)
Thalappalam Ser. Co-op. Bank Ltd. and others vs. State of Kerala and others, 2013 AIR SCW 5683

For the Petitioner: Mr.Sanjeev Kumar Suri, Advocate.

For the respondents: Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma & Mr.Anup Rattan, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G., for respondents No.1 to 3.
Nemo for respondents No.4 and 5.
Mr.Ajay Sharma, Advocate, for respondents No.6 to 9.

The following order of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

The present petition has been filed by the petitioner seeking quashment of order, dated 1st December, 2008, passed by the Joint Secretary (Cooperation), to the Government of Himachal Pradesh. The petitioner, who was a party before the Revisional Authority, remained satisfied with the order passed by the said Authority in the year 2008 and in the year 2014, i.e. after a lapse of around six years, all of a sudden, the petitioner filed the instant writ petition for quashing the

order of the Revisional Authority. It is not known as to in which capacity the petitioner has filed the present writ petition. Less said is better.

2. Coming to another aspect of the case, this Court in CWP No.6709 of 2013, titled **Sanjeev Kumar and others vs. State of H.P. and others**, decided on 4.8.2014, **reported in Latest HLJ 2014 (HP) 1061**, while replying on the earlier decision of this Court in **Chandresh Kumar Malhotra** vs. **H.P.State Coop. Bank and others 1993(2) Sim.L.C. 243,** which decision was also affirmed by the Hon'ble Full Bench of this Court in **Vikram Chauhan** vs. **The Managing Director and ors. Latest HLJ 2013 (HP) 742 (FB),** has held that the cooperative societies cannot be termed as "State" within the meaning of Article 12 of the Constitution.

3. The Apex Court, in the decision rendered in **Thalappalam Ser. Co-op. Bank Ltd. and others vs. State of Kerala and others, 2013 AIR SCW 5683,** after discussing the entire law on the subject, has also held that a Cooperative Society does not fall within the expression "State" or an "instrumentality of the State", with the meaning of Article 12 of the Constitution of India.

4. Applying the decisions supra, the writ petition is not maintainable and the same is dismissed as such, alongwith pending applications, if any.

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

Arun Patial son of Shri Shyam Singh ….Petitioner
Versus
State of H.P. ….Non-petitioner

Cr.MP(M) No. 955 of 2015
Order Reserved on 10th July 2015
Date of Order 15th July 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner 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- the allegations against the petitioner are grievous and heinous in nature- the petitioner had cheated various persons-the petitioner is not cooperating with the investigating agency- custodial interrogation of the petitioner is essential in the present case and it would not be proper to release the petitioner on bail-the petition dismissed. (Para 7)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
State vs. Captain Jagjit Singh, AIR 1962 SC 253

For the Petitioner: Mr. Amit Sharma, Advocate.
For the Non-petitioner: Mr. M.L. Chauhan, Additional Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with FIR No. 105 of 2015 dated 24.6.2015 registered under Sections 420 and 120-B IPC at P.S. Amb District Una (H.P.)

2. It is pleaded that petitioner did not misrepresent any fact to the complainant and it is further pleaded that complainant had full knowledge of the defect at the time when he purchased the machine. It is pleaded that petitioner will not tamper with prosecution evidence in any manner and will not hamper the prosecution case and will abide by all terms and conditions imposed by Court. It is pleaded that complaint of complainant was promptly attended and further pleaded that petitioner is only dealer of M/s ABEL Excavators & Earthmovers Pvt. Limited and petitioner had no role in manufacturing the defect. Prayer for anticipatory bail application is sought.

3. Per contra police report filed. As per police report FIR No. 105 of 2015 dated 24.6.2015 registered against the petitioner under Sections 420 and 120-B IPC in P.S. Amb District Una (H.P.). There is recital in police report that company M/s ABEL Excavators and Earthmovers Private Limited of which Shri Arun Patial is Manager has no authority to sell the machine. There is recital in police report that despite no authority to sell the machine petitioner had sold four machines of huge consideration amount. There is further recital in police report that petitioner Arun Kumar had also committed cheating with Raman Kumar and Bimla Devi and got financed the money in the name of M/s S.S. Traders from the bank and did not supply the tractor and water tanks to Raman Kumar and Bimla Kumari and their amount misappropriated for the personal economic benefit. There is further recital in police report that petitioner Arun Patial has took the loan from PNB Amb to the tune of ` 30 lacs (Rupees thirty lacs only) and did not liquidate the loan amount and separate complaint against the petitioner was filed which is under investigation. There is further recital in police report that another FIR No. 96 of 2015 dated 16.6.2015 under Section 420 and 120-B IPC is also pending against the petitioner which was filed by Manjit Singh Parmar. There is further recital in police report that petitioner had committed cheating with many persons and had collected huge amount in an illegal manner. There is also recital in police report that petitioner has joined the investigation of case but is not cooperating with investigating agency and is not submitting any record of bills. There is recital in police report that specimen hand writing of petitioner is required in present case. Prayer for dismissal of anticipatory bail application is sought.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioner and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether anticipatory bail application filed under Section 438 Cr.P.C. by petitioner is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

Findings on Point No.1

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

7. Another submission of learned Advocate appearing on behalf of the petitioner that petitioner is only dealer of M/s ABEL Excavators and Earthmovers Private Limited and he has no role in manufacturing the defect and any condition imposed by Court will be binding upon the petitioner and on this ground anticipatory bail application be allowed is rejected for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration) Also see AIR 1962 SC 253 titled State vs. Captain Jagjit Singh.*** In the present case allegations against the petitioner are very heinous and grave in nature. Allegations against the petitioner are that petitioner was not legally competent to sell the machine but despite non-competency petitioner has sold the machine and committed cheating of huge amount with various persons. Specimen hand writing and signatures of petitioner are essential in present case for proper investigation. Court is of the opinion that records relating to bills and receipt are also essential in present case for proper investigation. There is recital in police report that petitioner is not cooperating with investigating agency. In view of above stated facts 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. Court is of the opinion that custodial interrogation of the petitioner is essential in present case for proper investigation. If the petitioner is released on bail at this stage then interest of State and general public will be adversely affected and investigation of case will also be adversely affected.

8. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if bail is granted to petitioner then petitioner will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is accepted for the reasons hereinafter mentioned. There is apprehension in the mind of the Court that if anticipatory bail is granted to the petitioner then petitioner will induce and threat the prosecution witnesses. Court is of the opinion that it is not expedient in the ends of justice to grant anticipatory bail in favour of petitioner keeping in view the involvement of huge monetary amount. Point No.1 is answered in negative.

Point No.2 (Final Order)

9. In view of my findings on point No.1 bail application filed by petitioner under Section 438 Cr.P.C. is rejected. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 438 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 438 of Code of Criminal Procedure stands disposed of.

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

Ashok Kumar .....Petitioner.
Versus
State of H.P. .....Respondent.

Cr.MP(M) No. 972 of 2015.
Date of Decision : 15th July, 2015.

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Section 376 and 342 of IPC- the prosecutrix is major – she had alleged that accused had committed sexual intercourse with her for three years on the pretext of the marriage- she could have known about the fact that accused was married during the course of three years, hence prima facie the prosexutrix had made false allegations against the bail-applicant-bail granted. (Para 2)

For the Petitioner: Mr. Vikas Rathore, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The bail petitioner is in judicial custody for his having allegedly committed offences punishable under Sections 376 and 342 of the IPC recorded in FIR No.156/2015 of 01.05.2015 registered at Police Station, Sadar, District Chamba, H.P. hence, the instant bail application under Section 439 of the Cr.P.C., has been filed by him for releasing him from judicial custody wherein he is presently lodged.

2. The Investigating Officer is present in Court and has filed a detailed status report. It has been incisively perused. It discloses the evident fact of the bail applicant as well as the prosecutrix being major. The prosecutrix is aged 28 years. She for a prolonged duration stretching upto three years had permitted the bail applicant to sexually access her. The consent as meted out by the prosecutrix to the bail applicant to sexually access her is espoused by the learned Deputy Advocate General to be on the pretext of marriage or allurement of marriage proffered by the bail applicant to her. He also contends that even the said pretext was in its entirety false constituted by the fact that the bail applicant was then married, hence was incapacitated to fulfill the promise of marriage or allurement of marriage meted out by him to the prosecutrix. The imminent fact of the prosecutrix having permitted the bail applicant to sexually access her for a prolonged duration stretching upto three years does give leeway to an easy inference that when at the earliest or at the initial stage of hers succumbing to the sexual overtures of the bail applicant on the purported pretext of marriage or allurement of marriage having been meted out by the bail applicant to her and the bail applicant having omitted to upto three years carry out or fulfill his promise yet the prosecutrix having permitted the bail applicant to successively sexually access, that hence the effect or the impact of the pretext of marriage even if false as meted out by the bail applicant to the prosecutrix stood waned as well as subsided. Moreover, even if, the bail applicant was married at the time of his meting out a promise of marriage or allurement of marriage to the prosecutrix on the strength whereof the prosecutrix permitted him to

sexually access her yet the imminent fact of hers having inordinately prolonged her permission to the bail applicant to sexually access her does obviously render upon a conclusion, especially when their habitations are inter se located at a distance of 40 kilometers, besides when she repeatedly visited Chamba, she could easily have gauged or fathomed the truth or veracity of the factum whereunder she was permitting the bail applicant to sexually access her. Naturally, when she omitted to discover the falsity or the truth of the pretext despite hers visiting Chamba and hers interacting over the mobile phone of the bail applicant, does rather constrain this Court to conclude that the prosecutrix when could have known earlier the marital status of the bail applicant, she is concealing the fact of hers having known the marital status of the bail applicant and which precluded him to accomplish the promise of marriage as meted out by him to her or then she has concocted, besides has engineered a wholly false story in the FIR lodged at her instance qua the prolonged duration of the sexual intercourses which occurred inter se her and the bail applicant stretching over a period of three years being the out come of the pretext of marriage proffered by the bail applicant to her. An aggravated momentum to the aforesaid inference is lent by the fact that she had for an inordinate period of three years continuously permitted the bail applicant to sexually access her even when she could earlier have not relented to the sexual overtures of the bail applicant even when he after the initial sexual encounter with her had not fulfilled the promise of marriage meted out by him to her. Her repeated sexual indulgences thereafter with the bail applicant wanes the effect, if any, of the pretext under which she initially succumbed to the sexual overtures of the bail applicant. Consequently, this Court holds with formidability that the prosecutrix prima facie has constituted false allegations against the bail applicant.

3. In view of the aforesaid discussion and when at this stage no material has been placed on record by the prosecution disclosing that in case the facility of bail is accorded to the bail applicant, there is every likelihood of his fleeing from justice or tampering with prosecution evidence. Consequently, the instant application is allowed and the indulgence of bail is granted to the bail applicant subject to his complying with the following conditions:-

(i) that the bail applicant shall furnish personal bond in the sum of Rs.50,000/- with one local surety in the like amount to the satisfaction of the learned Chief Judicial Magistrate, Chamba.;

(ii) that the bail applicant shall join the investigation, as and when required by the Investigating Agency;

(iii) that he shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iv) that he shall not leave India without the prior permission of the Court ;

(v) that he shall deposit his passport, if any, with the SHO, Police Station concerned;

4. With the aforesaid observations the present petition stands disposed of. It is, however, made clear that the findings recorded hereinabove will have no bearing on the merits of the case. Dasti Copy.

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

Court on its own motion .....Petitioner.
Versus
State of H.P. and others. .....Respondents.

CWPIL No.10 of 2015
Date of order: July 15, 2015.

Constitution of India, 1950- Article 226- Court had taken suo motu notice of erratic and inadequate water supply in and around Shimla- status report was ordered to be filed- Court directed the respondent No. 2 to ensure regular water supply- Municipal Corporation stated that water storage tank had been constructed at two places, which could not be made functional for want of funds- direction issued to the respondent to file affidavit giving the detail of the water supply to the hoteliers, to place on record Mechanism for regularization of water supply, to point out the steps taken where the hoteliers failed to submit detailed information, to outline the steps taken for tapping of natural water resources, to place on record mechanism for blocking the leakages, to make the water storage tanks operational, steps taken to install AMRs - a committee constituted to ensure that regular and adequate water supply be provided to all the residents – another committee constituted to suggest the ways and means to ensure the supply of water, to make an exercise whether any proposal is required to be made to effect changes in the rules in place, suggest plans so that adequate water supply can be made in future also and to take all the steps for doing the needful and to file status report within two weeks. (Para- 4 to 13)

For the Petitioner: Court on its own motion.
For the respondents: Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma & Mr.Anup Rattan, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G., for respondent No.1.
Mr.Hamender Chandel, Advocate, for respondent No.2.
Mr.Satyen Vaidya, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Learned Single Judge/Vacation Judge of this Court, during Summer Vacation, has taken suo motu cognizance of the issue involving erratic and inadequate water supply in and around Shimla town and directed the respondents to do the needful and file status reports by or before 29th June, 2015, vide order dated 11th June, 2015, whereafter, the matter came up before a Coordinate Bench of this Court on 29th June, 2015, when respondent No.2 sought two weeks time to file the compliance report, while respondents No.1 and 3 filed their status reports in the Registry. The Court directed respondent No.2 to ensure regular water supply within the limits of Municipal Corporation, Shimla and the other respondents were directed to provide all assistance to respondent No.2 for achieving the said purpose. In addition, the Principal Secretary (I&PH), the Commissioner, Municipal Corporation, Shimla and the Executive Director (Personnel), H.P. State Electricity Board, Shimla were directed to remain present before the Court.

2. Respondents have filed the status reports/compliance reports. After going through the reports, we find that the respondents have not taken steps to do the needful and the reports submitted are not satisfactory.

3. It is worthwhile to mention here that the affidavits filed by the respondents are contradictory, which fact was admitted by Mr.J.K. Verma, learned Deputy Advocate General, and he prayed for filing fresh affidavits.

4. Significant to note that in paragraph 10 of the status report, respondent No.2 has mentioned that water storage tanks have been constructed above Corner House, Sanjauli, with storage capacity of 3.0 lac liter, and near Tara Mata Mandir at BCS having storage capacity of 6.0 lac liter, but the same could not have been made operational for want of funds. Despite the fact that the Municipal Corporation is having its own resources, for want of petty amount of Rs.25.00 lacs, the Corporation has failed to make the water storage tanks operational, is an eye opener to all the respondents, including the Chief Secretary, to the Government of Himachal Pradesh.

5. Mr.P.C. Dhiman, Additional Chief Secretary, present in person before this Court, stated that the needful would be done and the said storage tanks would be made operational, either by the funds allotted by the State Government or from the resources of the Municipal Corporation.

6. In paragraph 10 of the status report, respondent No.2 has also stated that the Corporation is contemplating to install Automatic Meter Readers (for short AMRs). Respondent No.2 has also pointed out that some of the hotels have been provided water connections directly from the main lines.

7. Keeping in view the fact that water is the primary need of life and the issue involved touches every human being living in Shimla, respondent No.2-Corporation is directed to do the needful as under:

(i) Furnish details about the quantity of water being supplied to the hoteliers.

(ii) What Mechanism is in place to regulate the water supply to the hoteliers and public in general?

(iii) To point out the steps taken in those cases where the hoteliers failed to submit detailed information, the mention of which has been made in paragraph 6 of the status report.

(iv) What cogent steps have been taken for tapping of natural water resources in and around Shimla?

(v) What system is in place in order to plug the leakages and what steps have been taken for doing the needful?

(vi) To make the storage tanks operational by or before the next date of hearing.

(vii) What steps the respondents have taken to install AMRs?

(viii) How many water connections have been given directly from the main water line and what steps have been taken to do the needful, as required under the law.

8. In order to effectively redress the issue, we deem it proper to constitute the following committee:

1. Engineer-in-Chief (I&PH) – Chairman.

2. Concerned Superintending Engineer (I&PH) – Member
3. Commissioner, M.C. Shimla – Member.

9. The Committee is directed to ensure that the regular and adequate water supply is provided to all the residents living in and around Shimla Town, and that, the directions contained in the order, dated 11th June, 2015, are complied with in letter and spirit.

10. We also deem it proper to constitute another Committee consisting of the following:

i. Chief Secretary, to the Govt. – Chairman
ii. Additional Chief Secretary (I&PH) – Member
iii. Principal Secretary (Law) – Member
iv. Commissioner, M.C., Shimla – Member
v. Director, Town and Country Planning Department, Himachal Pradesh, Shimla – Member

11. The above Committee is directed to:

(i) suggest ways and means to ensure that the water supply, in and around Shimla town, is regulated effectively and properly;

(ii) make an exercise whether any proposal is required to be made to effect changes in the rules/regulations/policy in place, in order to have effective water supply.

(iii) suggest plans/schemes required to be formulated, keeping in view the future needs, at least for two decades, so that adequate water supply can be made in future also.

12. The Committee is also directed to take all measures for doing the needful in terms of the directions passed by this Court from 11th June, 2015, read with the averments contained in the status report, dated 13th July, 2015, filed by respondent No.2.

13. Respondents and the Committees (supra) are directed to file status reports/compliance reports within two weeks from today. Respondents are directed to file their status reports/affidavits through the learned Advocate General, who will make an exercise that the affidavits are not contradictory.

14. Mr.B.C. Negi, Senior Advocate, is requested to appear as Amicus Curiae and assist this Court. The Registry is directed to furnish a complete copy of the paper book to Mr.Negi within two days from today. The learned Amicus Curiae is also requested to file his suggestions/response by or before the next date of hearing.

15. Before parting with, we may observe that any deviation/violation of the directions passed by this Court shall be seriously viewed.

16. List on **5th August, 2015**, on which date, respondent No.3 shall remain present in person before this Court. Copy dasti.

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

Komal Chaudhary .....Petitioner.
Versus
State of H.P. and others. .....Respondents.

CWPIL No.2219 of 2014
Date of order: July 15, 2015.

Constitution of India, 1950- Article 226- Respondents directed to file fresh status report indicating the facilities, infrastructure provided in health centres, right from the level of a Primary Health Centre to Medical Colleges- respondent union of India directed to outline the steps taken by it to provide assistance to the State Government. (Para-3 and 4)

For the Petitioner: Ms.Ritta Goswami, Advocate, for the petitioner.
For the respondents: Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma & Mr.Anup Rattan, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G., for respondents No.1 to 3.
Mr.Pranay Partap Singh, Proxy Counsel, for respondent No.4.
Mr.Sanjay Kumar Sharma, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

The petitioner has sought five reliefs on the grounds taken in the writ petition. While going through the orders passed by this Court from time to time and the fact that the issue involved is mainly related to the health facilities available in various health centres in the entire State, we deem it proper to array the Union of India through Secretary (Health), Government of India, New Delhi and the Director General of Health Services, Government of India, New Delhi as respondents, who shall figure as respondents No.6 and 7 in the array of respondents. The Registry is directed to make necessary correction in the cause title.

2. Issue notice to the newly added respondents. Mr.Ashok Sharma, learned Assistant Solicitor General of India, on instructions, waives notice for the said respondents. A copy of the paper book be furnished to the learned Assistant Solicitor General of India, by the Registry within two days.

3. Respondents No.1 to 3 are directed to file fresh status report specifically indicating the facilities/infrastructure provided in health centres, right from the level of a Primary Health Centre to District/referral hospitals and zonal hospitals, including the two Medical Colleges i.e. Indira Gandhi Medical College, Shimla and Dr.Rajendra Prasad Government Medical College, Tanda. The respondents shall also indicate about the pattern of administration existing in all the above hospitals and the officers entrusted with the job of ensuring availability of life saving drugs and other infrastructure development works.

4. Respondents No.4, 6 and 7 are also directed to file their replies. They shall also indicate in the reply about the steps they have taken to provide assistance to the State

for the improvement of health services in the State of Himachal Pradesh. A reference shall also be made whether there is any mechanism in place by which they can provide funds to the State Government or to a particular hospital for the improvement and development of health infrastructure.

5. Replies/status reports, as above, read with the orders passed by this Court from time to time, be filed within two weeks. List on 4th August, 2015. Copy dasti.

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

Naresh Kumar son of Shri Kesru Ram ....Petitioner

Versus

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

Cr.MP(M) No. 956 of 2015
Order Reserved on 10th July 2015
Date of Order 15th July 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 354 and 506 of IPC - held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- the allegations against the petitioner are grievous and heinous and amount to Sexual harassment - a married woman has a right to live with dignity and honour and none can be allowed to attack the dignity or honour of married woman - the Courts are under legal allegations to protect the right and dignity of married woman-considering the allegations made against the petitioner, it would not be expedient to grant the anticipatory bail and the investigation will be seriously hampered-the petition is dismissed. (Para 7)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
State vs. Captain Jagjit Singh, AIR 1962 SC 253
Ram Kripal vs. State of M.P., AIR 2007 SCW 2198
Raju Pandurang vs. State of Maharashtra, AIR 2004 SC 1677

For the Petitioner: Mr. R.S.Chandel, Advocate.
For the Non-petitioner: Mr. M.L. Chauhan, Additional Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with FIR No. 96 of 2015 dated 1.7.2015 registered under Sections 354 and 506 IPC at P.S. Theog District Shimla (H.P.)

2. It is pleaded that petitioner has been falsely implicated in present case. It is pleaded that petitioner and complainant belong to same place and are neighbours and there are disputes between the petitioner and family members of complainant. It is pleaded that any terms and conditions imposed by Court will be binding upon the petitioner and petitioner will join the investigation of case and will not tamper with prosecution witnesses in any manner. Prayer for acceptance of anticipatory bail application is sought.

3. Per contra police report filed. As per police report on dated 1.7.2015 prosecutrix Reeta Devi wife of Sanjay resident of village Batani Tehsil Theog District Shimla came in police station personally and filed criminal complaint against the petitioner. There is recital in police report that petitioner used to perform unwarranted actions towards prosecutrix with request to develop sexual relations with prosecutrix. There is further recital in police report that prosecutrix narrated the incident to her husband and thereafter matter was reported to the father and mother of petitioner but despite reporting the matter to the father and mother of accused, petitioner did not stop his unwarranted actions towards the prosecutrix. There is further recital in police report that on dated 1.7.2015 prosecutrix went to school Chamarot along with her children at about 9.30 AM and when she came back then on way petitioner had concealed himself in the orchard and petitioner caught the prosecutrix and petitioner told the prosecutrix that he loves her and thereafter petitioner started touching the body of prosecutrix. There is further recital in police report that petitioner also torn the shirt of prosecutrix. There is further recital in police report that thereafter prosecutrix narrated the entire incident to her family members and Pardhan Sher Singh. There is also recital in police report that thereafter FIR was registered and investigation was conducted. There is recital in police report that site plan was prepared and torn shirt of prosecutrix took into possession. Statement of prosecutrix was recorded under Section 164 Cr.P.C. before learned Additional Chief Judicial Magistrate Theog. There is further recital in police report that petitioner is harassing the prosecutrix since many months and insisting the prosecutrix for development of sexual relations. There is further recital in police report that if anticipatory bail is granted to petitioner then petitioner would commit similar offence and petitioner would also threat the prosecution witnesses. Prayer for rejection of anticipatory bail application is sought.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioner and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether anticipatory bail application filed under Section 438 Cr.P.C. by petitioner is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

Findings on Point No.1

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

7. Another submission of learned Advocate appearing on behalf of the petitioner that any condition imposed by Court will be binding upon the petitioner and on this ground

anticipatory bail application be allowed is rejected for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration). See AIR 1962 SC 253 titled State vs. Captain Jagjit Singh.*** In the present case there are heinous and grave allegations against the petitioner relating to sexual harassment to the married women. It is well settled law that married woman has legal right to live in the society with dignity and honour. No one can be allowed to attack on the dignity and honour of married women in the civilized society. Courts are under legal obligation to protect the honour and dignity of married women. In view of direct allegations against the petitioner that petitioner caught the prosecutrix and touched the body of prosecutrix from different parts and in view of direct allegations that petitioner also torn the shirt of prosecutrix Court is of the opinion that it is not expedient in the ends of justice to grant the anticipatory bail to the petitioner. Court is of the opinion that if anticipatory bail is granted to the petitioner at this stage then investigation of case will be adversely affected. Even w.e.f. 3.2.2013 Section 354-A, 354-B, 354-C, 354-D have been added in Section 354 IPC relating to sexual harassment, relating to criminal force to woman with intent to disrobe, relating to voyeurism, relating to stalking. Essential ingredients of offence under Section 354 IPC are (1) That assault must be on woman. (2) That accused must have caused criminal force upon prosecutrix. (3) That criminal force must have been used on the woman intending thereby to outrage her modesty. ***(See AIR 2007 SCW 2198 titled Ram Kripal vs. State of M.P. Also see AIR 2004 SC 1677 titled Raju Pandurang vs. State of Maharashtra)*** Court is of the opinion that if anticipatory bail is granted to the petitioner at this stage then interest of State and general public will also be adversely affected. Court is of the opinion that custodial interrogation of petitioner is essential in present case in order to curb sexual assault cases upon women in society.

8. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if bail is granted to petitioner then petitioner will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is accepted for the reasons hereinafter mentioned. There is apprehension in the mind of the Court that if anticipatory bail is granted to the petitioner then petitioner will induce and threat the prosecution witnesses. Since the case is at the initial stage of investigation it is not expedient in the ends of justice to grant the anticipatory bail to the petitioner keeping in view the heinous and grave allegations of sexual assault upon prosecutrix who is a married women. Point No.1 is answered in negative.

Point No.2 (Final Order)

9. In view of my findings on point No.1 bail application filed by petitioner under Section 438 Cr.P.C. is rejected. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 438 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 438 of Code of Criminal Procedure stands disposed of.

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

Parat Singh son of Shri Hari Ram ….Petitioner
Versus
State of H.P. and another ….Non-petitioners

Cr.MMO No. 62 of 2015
Order Reserved on 10th July, 2015
Date of Order 15th July, 2015

Code of Criminal Procedure, 1973- Section 482- Petitioner pleaded that he was undergoing sentence at Central Jail, Nahan under Section 302 of IPC- he applied for parole of 42 days to look after his aged father, which was not granted-the respondent pleaded that the petitioner was released on parole for 42 days and had not surrendered on the expiry of period of parole-he applied for extension of parole, which was rejected- held that the fundamental rights of convicted persons are suspended after conviction - the petitioner had availed the parole of 42 days- it is not expedient in the interest of justice to release the petitioner on parole-the petition dismissed. (Para-5)

For the Petitioner: Mr. Vinod Kumar, Advocate.
For Non-petitioners: Mr. M.L.Chauhan, Additional Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Section 482 Cr.P.C. read with Article 227 of the Constitution of India for grant the parole of 42 days. It is pleaded that petitioner is citizen of India and is serving sentence at Modern Central Jail Nahan. It is pleaded that petitioner was appointed as Branch Manager on dated 6.12.1990 and was posted at branch office at Paonta Sahib. It is further pleaded that petitioner was working against the regular post but due to ill-luck of petitioner he was involved in criminal offence punishable under Section 302 IPC vide FIR No. 193 dated 20.5.2004. It is pleaded that petitioner at present is undergoing the sentence at Central Jail Nahan under Section 302 IPC since May 2004 and petitioner applied for parole of 42 days only to look after his old father aged 85 years who is generally bed ridden and two children aged 10 and 5 years. It is pleaded that petitioner has sought the parole of 42 days or temporary release from jail for a period of six months. It is pleaded that petitioner will abide by all terms and conditions imposed by Court. Prayer for acceptance of petition sought.

2. Per contra response filed on behalf of the non-petitioners pleaded therein that petitioner is governed under Himachal Pradesh Good Conduct Prisoners (Temporary Release) Act 1968. It is pleaded that parole is granted as per recommendations of District Magistrate after consulting the Superintendent of Police. It is pleaded that petitioner has been sentenced to life imprisonment under Section 302 IPC by learned Sessions Judge Sirmaur at Nahan and at present petitioner is undergoing the sentence at Model Central Jail Nahan. It is pleaded that vide letter No. 4-62/2008-Jails dated 31.3.2014 parole of 42 days was sanctioned in favour of petitioner and petitioner was released from jail for the period of 42 days w.e.f. 1.11.2014 to 12.12.2014 and was due to surrender in jail on 13.12.2014 but

thereafter petitioner submitted another application dated 20.11.2014 for extension of parole for 42 days to look after his ailing father which was rejected by non-petitioner No.2 vide wireless message No.4-62/2008-Jails dated 16.12.2014. It is pleaded that petitioner is not legally entitled to be released on parole. Prayer for dismissal of petition sought.

3. Court heard learned counsel appearing for the petitioner and heard learned Additional Advocate General appearing on behalf of non-petitioners and also perused the entire record carefully.

4. Following points arise for determination in present case:-

1. Whether petition filed by the petitioner under Section 482 Cr.P.C. read with Article 227 of Constitution of India for grant of parole of 42 days or temporary release from jail for a period of six months is liable to be accepted as mentioned in memorandum of grounds of petition?
2. Final Order.

Reasons for findings on Point No.1.

5. Submission of learned Advocate appearing on behalf of petitioner that petitioner is legally entitled to release on parole to look after his old father aged 85 years who is bed ridden and to look after his minor children aged 10 and 5 years is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that parole of 42 days was granted to the petitioner w.e.f. 1.11.2014 to 12.12.2014. Court is of the opinion that after conviction all fundamental rights of the convicted person granted under the Constitution of India are suspended and after conviction convicted is governed by H.P. Good Conduct Prisoners (Temporary Release) Act 1968. In view of the fact that petitioner had already availed the facility of 42 days parole w.e.f. 1.11.2014 to 12.12.2014 and in view of the fact that petitioner is convicted under Section 302 IPC for life imprisonment Court is of the opinion that it is not expedient in the ends of justice to release the petitioner on parole on the ground mentioned in petition. Court is of the opinion that in view of the conviction of petitioner under Section 302 IPC it is not expedient in the ends of justice to release the petitioner on parole in the interest of State and general public immediately after availing benefit of parole of 42 days. Point No. 1 is answered in negative.

Point No. 2 (Final Order)

6. In view of findings on point No. 1 petition filed under Section 482 Cr.P.C. read with Article 227 of Constitution of India is rejected. Petition is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

State of H.P. & ors. .....Appellants.

Versus

Vidya Vati (dead through Lrs.) & ors. .....Respondents.

RSA No. 415 of 1992.
Reserved on: 14.7.2015.
Decided on: 15.7.2015.

Specific Relief Act, 1963- Section 34- Plaintiffs filed a suit for declaration that they were partners of the firm since 1971- public notices were issued which were published in the

newspapers- intimation was given to the bank and other commercial establishment- notices were received from tehsildar regarding the payment of sale tax- the record showed that assessing authority was not satisfied about the correctness and had asked for the books of accounts-the proceedings could have been taken within 5 years but were taken beyond the period of five years – held that the orders were without jurisdiction and the Civil Courts have the jurisdiction to adjudicate upon the matter. (Para 10-20)

Cases referred:
Madan Lal Arora vrs. Excise and Taxation Officer, Amritsar, AIR 1961 SC 1565
State of Kerala vrs. M/S N. Ramaswami Iyer and sons., AIR 1966 SC 1738
Magulu Jal Vrs. Bhagaban Rai, AIR 1975 Ori. 219
Ramkanya Bai and another vrs. Jagdish and others, (2011) 7 SCC 452

For the appellant(s): Mr. Parmod Thakur, Addl. AG.
For the respondents: Mr. P.S.Goverdhan, Advocate, for respondent No.1.

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 1.6.1992, passed in Civil Appeal No.67 of 1988.

2. Key facts, necessary for the adjudication of this regular second appeal are that the predecessor-in-interest of proforma respondents-plaintiffs, namely Suraj Singh and Vidya Vati (hereinafter referred to as the plaintiffs) instituted a suit for declaration that they were not partners of a firm namely, M/S United Himachal Motors and Industries, Mandi, H.P. and they have retired from this partnership firm since December, 1971. The public notices were issued on 17.3.1972. These were duly published in daily edition of The Tribune. The information to various banks and other commercial establishments with which the firm was dealing was also sent. They no longer were liable to pay any sales tax. On 25.6.1986, they received notices from Recovery Tehsildar, Mandi, requiring them to pay Rs. 10.1797.34 as sales tax otherwise the property was to be attached. They were not afforded any opportunity of being heard, thus there was fundamental breach of principles of natural justice. The sales tax sought to be recovered belong to assessment years 1971-72, 1972-73, 1973-74 and 1974-75.

3. The suit was resisted by the appellants-defendants (hereinafter referred to as the defendants). According to them, the plaintiffs were liable to pay the sales tax. The issues were framed by the learned Sub Judge, Ist Class, Court No. II, Mandi, H.P. The learned Sub Judge, Court No. II, Mandi, dismissed the suit on 1.9.1988. The plaintiffs, feeling aggrieved, preferred an appeal before the learned District Judge, Mandi, H.P. The learned District Judge, Mandi, allowed the same on 1.6.1992. It was barred by limitation. The delay was condoned by this Court on 10.9.1993.

4. The RSA was admitted on the following substantial questions of law on 10.9.1993:

> "1. Whether Civil Court has jurisdiction to try Civil Suit in view of bar created under Section 29 of the General Sales Tax Act, 1968?

2. Whether the provisions of Section 84 of the H.P. Land Revenue Act, 1954 are mandatory and without depositing even under protest, the arrears of sales tax after declaring the same amount as an arrears of Land Revenue, the Civil Suit is not maintainable?

3. Whether the retirement from the partnership after incurring the liability will absolve that partner from the liability?"

5. The regular second appeal was dismissed by this Court on 4.9.1998. The defendants filed Civil Review No. 11 of 2001. It was allowed on 11.4.2002. The plaintiffs preferred SLP before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court disposed of the SLP on 12.8.2002. Thereafter, the learned Single Judge passed the following order on 29.8.2002:

> "When this appeal is taken up for hearing learned counsel for the respondents has placed on record a copy of the order dated 12.8.2002 passed by the Supreme Court in SLP(Civil) No. 12143/2002. The order of the Supreme Court is as under:
>
> > "Learned counsel for the petitioner contends that he has not been heard while condoning the delay. But from the record we notice that on that question notice had been issued, therefore, that issue is still open to the petitioner to argue as also on the question of the maintainability of the review petition. On that ground we do not find reason to entertain this SLP. The special leave petition is dismissed."
>
> In view of the order of Supreme Court the application for condonation of delay in filing the review petition and the review petition are restored to their original numbers in which learned counsel for the respondents will be heard.
>
> In future the matter may be listed before another Bench."

6. The issues were framed in CMP(M) No. 259 of 2000 on 19.5.2003. The statement of AW-1 Dhian Singh was recorded. The delay was condoned by this Court on 9.12.2014. Civil Review was allowed on 30.6.2015 and RSA was ordered to be reheard on 13.7.2015, after recalling the judgment rendered on 4.9.1998. Smt. Vidya Vati had died on 13.6.2011. CMP(M) No. 945 of 2014 for bringing on record her LRs was allowed by this Court in CR No. 11 of 2001 on 9.12.2014. Accordingly, LRs of late Smt. Vidya Vati are permitted to be brought on record in RSA No. 415 of 1992, as per details given in CMP(M) No. 945 of 2014. The Registry is directed to carry necessary correction in the cause title.

7. Mr. Parmod Thakur, learned Addl. Advocate General, on the basis of the substantial questions of law framed, has vehemently argued that the Civil Court has no jurisdiction to try the civil suit in view of the bar created under Section 29 of the General Sales Tax Act, 1968. He then contended that the partners were not absolved from payment of the sales tax. He further contended that the provisions of Section 84 of the H.P. Land Revenue Act, 1954 were mandatory. On the other hand, Mr. P.S. Goverdhan, Advocate, has supported the judgment and decree passed by the learned District Judge, Mandi, H.P on 1.6.1992.

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

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

10. Section 14 (2) (4) and (5) of the H.P. General Sales Tax Act, 1968, read as under:

> **"14. Assessment of tax** .- (2) If the assessing authority is not satisfied without requiring the presence of dealer who furnished the returns or production of evidence that the returns furnished in respect of any period are correct and complete, he shall serve on such dealer a notice in the prescribed manner requiring him, on a date and at a place specified therein, either to attend in person or to produce or to cause to be produced any evidence on which such dealer may rely in support of such returns.
>
> (4) If a dealer, having furnished returns in respect of a period, fails to comply with the terms of a notice issued under sub-section (2), the assessing authority shall, within five years after the expiry of such period, proceed to assess to the best of his judgment the amount of the tax due from the dealer.
>
> (5) If a dealer does not furnish returns in respect of any period by the prescribed date, the assessing authority shall, within five years after the expiry of such period, after giving a dealer a reasonable opportunity of being heard, proceed to assess, to the best of his judgment, the amount of tax, if any, due from the dealer."

11. It is, thus evident that as per Section 14(2), if the assessing authority is not satisfied without requiring the presence of dealer who furnished the returns or production of evidence that the returns furnished in respect of any period are correct and complete, he shall serve on such dealer a notice in the prescribed manner requiring him, on a date and at a place specified therein, either to attend in person or to produce or to cause to be produced any evidence on which such dealer may rely in support of such returns. If a dealer, having furnished returns in respect of a period, fails to comply with the terms of a notice issued under sub-section (2), the assessing authority shall, within five years after the expiry of such period, proceed to assess to the best of his judgment, the amount of the tax due from the dealer under sub Section (4) of Section 14. If the dealer does not furnish returns in respect of any period by the prescribed date, the assessing authority shall, within five years after the expiry of such period, after giving a dealer a reasonable opportunity of being heard, proceed to assess, to the best of his judgment, the amount of tax, if any, due from the dealer under sub Section (5) of Section 14 of the Act. Thus, notice is required to be issued to the dealer before the proceedings are initiated.

12. Ext. A-1, order pertains to assessment of financial year 1971-72. The return in respect of the goods sold during the financial year 1971-72 was required to be filed within 30 days of the expiry of each quarter. Thus, the return in respect of the last quarter was to be filed by 30.4.1972. According to the recital in the order, the dealer could not produce the account books and the relevant record and alleged that the records and the books were lying with the Income Tax Officer for the last several years. It appears that the return had been filed within the period prescribed but the assessing authority was not satisfied about its correctness and required the dealer to produce the account books and other papers as evidence in support of the facts and figures stated in the return. However, this exercise was to be undertaken within 5 years of the expiry of the date prescribed for filing returns i.e. 30.4.1972. The order Ext. A-1 is dated 30.6.1980. It is not evident from the record as to

when the proceedings for passing of this order were initiated. The defendants were given opportunity to lead evidence in rebuttal. However, they did not avail the opportunity. It was for the defendants to prove that the proceedings were initiated, which led to the passing of the order Ext. A-1 within 5 years. Thus, the first appellate Court has rightly drawn the adverse inference against the defendants. The proceedings were to be initiated within a period of 5 years.

13. Order Ext. A-2, pertains to the assessment year 1972-73. The return for the last quarter of this year was required to be filed on 30.4.1973. The firm was required to produce account books which means that the assessing authority was not satisfied with the correctness of the returns filed by the firm. No evidence has been led by the defendants to show as to when the proceedings for the assessment of the tax for the assessment year 1972-73 were initiated. This was also required to be done within a period of 5 years. Similarly, Order Ext. A-3 deals with the assessment year 1973-74. It is dated 30.9.1981. In this case also, the defendants have failed to prove as to when the proceedings were initiated for the assessment year 1973-74. The learned first appellate Court has rightly come to the conclusion that the proceedings in fact were initiated in the year 1981.

14. Now, the Court will advert to Ext. A-4, copy of assessment year 1974-75. It is dated 30.9.1981. The returns were filed after due date and the assessing authority was not satisfied as to the correctness of the figures. No evidence has been led by the defendants as to when the proceedings which led to the passing of the order dated 30.9.1981 were initiated. Rather, the proceedings, it appears, were initiated in the year 1981. The learned first appellate Court has rightly come to the conclusion that the orders were passed after the expiry of 5 years period prescribed under sub Sections (4) and (5) of Section 14 of the H.P. General Sales Tax Act, 1968.

15. Their lordships of the Hon'ble Supreme Court in the case of ***Madan Lal Arora vrs. Excise and Taxation Officer, Amritsar,*** reported in ***AIR 1961 SC 1565,*** have held that Section 11(4) of the East Punjab General Sales Tax Act, 1948 deals with the case of a dealer who has furnished returns in respect of a period and has thereafter been asked to produce evidence to support the returns but has failed to do so. Their lordships have further held that the power to make assessment to the best of his judgment can, however, be exercised only within the three years mentioned therein and not after three years have elapsed. Their lordships have held as under:

> "3. Sub-section (4) of s. 11 deals with the case of a dealer who has furnished returns in respect of a period and has thereafter been asked to produce evidence to support the returns but has failed to do so. The subsection provides that in such a case the assessing authority may proceed to make an assessment which to the best of his. judgment should be made irrespective of the returns. The reason for this provision is that the correctness of the returns having been doubted by the assessing authority, the dealer has not availed himself of the opportunity afforded to him to remove these doubts. The sub-section however provides that the power can be exercised within the three years mentioned in it. Quite plainly, the power cannot be exercised after these three years have gone by.
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> 4. The question is, how to compute the three years? The sub- section 'says "within three years after the expiry of such period". So the three years have to be counted from the expiry of the period mentioned. What then is that period? The words are "such period". The period referred therefore is the

period mentioned earlier. in the sub-section, and that is the period in respect of which returns had been furnished by the dealer. This is also made clear by sub-s. (1) of s. 11. That deals with a case where the returns are accepted. Both sub-ss. (1) and (4) deal with returns for the same period. Now s. 10(3) provides that every registered dealer shall furnish such returns by such dates and to such authority as may be prescribed" "Prescribed" means prescribed by rules framed under the Act. Under r. 20 of these rules, a registered dealer like the petitioner, had to furnish returns quarterly. The rules define "return period" as "the period for which returns are prescribed to be furnished by a dealer". It would therefore appear that when sub-sec. (4) of s. 11 talks of "returns in respect of a period", that refers in the case of the petitioner to the quarters in respect of which he submitted the returns. We when come to this that the three years within which the authority could proceed to make the best judgment assessment had to be counted from the end of each quarter in respect of which returns had been filed."

16. Their lordships of the Hon'ble Supreme Court in the case of ***State of Kerala vrs. M/S N. Ramaswami Iyer and sons.,*** reported in ***AIR 1966 SC 1738,*** while interpreting the provisions of Travancore-Cochin General Sales Tax Act, 1950, have held that even if the jurisdiction of the Civil Court may be excluded by statute, where provisions of statute have not been complied with or statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure, Civil Courts have jurisdiction to examine those cases. Their lordships have held as follows:

"8. It is true that even if the jurisdiction of the civil court is excluded, where the provisions of the statute have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure, the civil courts have jurisdiction to examine those cases : Secretary of State for India v. Mask & Company(2). Counsel for the respondents urged that the case of the respondents fall within that exception, since the Sales-tax Officer in imposing tax-liability acted in defiance of the mandatory provisions of the Act and in support of the argument he placed reliance upon r. 7 of the Rules framed under the Act and the definition of "turnover" under the Act. Under the Act sales-tax is charged for the year at the prescribed rates on the total turnover of the dealer. The Government of Travancore-Cochin promulgated rules in exercise of powers under s. 24 of the Travancore- Cochin General Sales Tax Act, and r. 7 dealt with computation of "net turnover". In r. 7(1) by cls. (a) to (k) certain exemptions admissible in the computation of the net turnover were set out. By notification No. SRI-1643-51- RD dated March 31, 1951 it was directed that with effect from April 1, 1951, the following clause shall be added :

"(1) all amounts of sales-tax collected by the dealer."

By this amendment in the computation of the taxable turnover, the amounts of sales tax collected by the dealer were not to be included. But this amendment was to have effect only from April 1, 1951, and in the proceeding in this appeal tax-liability for the assessment period ending March 31, 1951 fell to be determined. The exemption was therefore inoperative in the computation of taxable turnover for the assessment year in question."

17. In the case of ***Magulu Jal Vrs. Bhagaban Rai,*** reported in ***AIR 1975 Ori. 219,*** the following principles have been culled out for exclusion of jurisdiction of Civil Courts:

> "20. The following principles may be laid down as well settled by the aforesaid authorities :
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> (i) Exclusion of the jurisdiction of the Civil Court is not to be readily inferred. Such exclusion must either be explicitly expressed or clearly implied.
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> (ii) Even if jurisdiction is so excluded, Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. Civil Court would interfere if it finds the order of the special tribunal is unfair, capricious or arbitrary.
>
> (iii) Where a liability not existing at common law is created by statute which at the same time gives a special and particular remedy for enforcing it. a remedy provided by the statute must be followed and the Court's jurisdiction is ousted. The scheme of the particular Act is to be examined to see if remedies normally associated with actions in Civil suits are prescribed by the statute.
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> (iv) The Legislature may entrust the special 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 to do something more. The Legislature shall have to consider whether there shall be an appeal from the decision of the tribunal as otherwise there will be none. In cases of this nature, the tribunal has jurisdiction to determine all facts including the existence of preliminary facts on which exercise of further jurisdiction depends. In the exercise of the jurisdiction the tribunal may decide facts wrongly or if no appeal is provided therefrom there is no appeal from the exercise of such jurisdiction.
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> (v) Even in a case when the Civil Court would have jurisdiction on a finding that the special tribunal has acted beyond the scope of its authority as in point No. (ii), it cannot substitute its own decision for that of the tribunal but would give a direction to dispose of the case in accordance with law."

18. In the case of ***Ramkanya Bai and another vrs. Jagdish and others,*** reported in ***(2011) 7 SCC 452,*** their lordships of the Hon'ble Supreme Court have held that exclusion of jurisdiction of Civil Court is not to be readily inferred. It has been held as follows:

> "15. Having regard to section 9 of the Code of Civil Procedure, a civil court can entertain any suit of civil nature except those, cognizance of which is expressly or impliedly barred. In Kamala Mills Ltd. v. State of Bombay [AIR 1965 SC 1942] this court held :
>
> "13.....The normal rule prescribed by section 9 of the Code of Civil Procedure is that the courts shall (subject to the provisions contained in the Code) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.....
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> ....
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> 32. Whenever it is urged before a civil court that its jurisdiction is excluded either expressly or by necessary implication to entertain claims of a

civil nature, the Court naturally feels inclined to consider whether the remedy afforded by an alternative provision prescribed by a special statute is sufficient or adequate. In cases where the exclusion of the civil Courts' jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or the sufficiency of the remedies provided for by it may be relevant but cannot be decisive. But where exclusion is pleaded as a matter of necessary implication, such considerations would be very important, and in conceivable circumstances, might even become decisive. If it appears that a statute creates a special right or a liability and provides for the determination of the right and liability to be dealt with by tribunals specially constituted in that behalf, and it further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, it becomes pertinent to enquire whether remedies normally associated with actions in civil Courts are prescribed by the said statute or not." (emphasis supplied)

16. In Dhulabhai v. State of Madhya Pradesh - 1968 (3) SCR 662, a Constitution Bench of this Court held that exclusion of the jurisdiction of the civil court is not readily to be inferred with, unless the following, among other conditions apply :

"32. .... (1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment become necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

19. In the instant case, since the orders passed by the competent authority were beyond the period prescribed, the same were without jurisdiction. Accordingly, the Civil Court had the jurisdiction to adjudicate upon the matter.

20. Mr. Parmod Thakur, learned Addl. Advocate General for the State has also argued that the provisions of Section 84 of the H.P. Land Revenue Act, 1954 are mandatory. Since the orders passed by the competent authority were beyond jurisdiction, as such, the orders of the Collector declaring the arrears of sales tax as arrears of land revenue have rightly been held to be without jurisdiction by the learned first appellate Court. Thus, the bar of Section 84 of the H.P. Land Revenue Act, 1954 would not have come into play.

21. Now, as far as the retirement of the plaintiffs is concerned, the same is dealt with under Section 72 of the Partnership Act. The notice of retirement has been got published by the plaintiffs in daily newspaper "The Tribune", as per Ext. PW-2/A. PW-2 Tarwan Singh has stated that the notice had been issued in the issue dated 17.3.1972. He proved certificate issued by the Advertising Manager to the effect that the notice had been published in the issue dated 17.3.1972 vide certificate Ext. PW-2/B. The Excise and Taxation Officer, Mandi had also been separately intimated by one of the plaintiffs i.e. Suraj Singh through letter dated 11.12.1971 to the effect that he and his wife Vidya Vati have retired from the firm. The same is Ext. PF. The copy was also addressed to Income Tax Officer, Mandi but the copy was endorsed to the Excise and Taxation Officer, Mandi. PW-1 Suraj Singh has proved Ext. PF, writing. The plaintiffs have also proved orders Exts. P-I and P-J rendered by the Income Tax Authorities, according to which, Suresh Kumar and Dinesh Chand, partners of the firm in question, alone were treated as the partners of the firm for the assessment year 1973-74. There is presumption that the Excise and Taxation Officer has also received the copies of these orders. The defendants have not led any evidence to rebut that the copy of letter Ext. PF was not received by the Excise and Taxation Officer, Mandi. The plaintiffs have duly proved that the Excise and Taxation Officer, Mandi was intimated/informed about the retirement of the plaintiffs. Since the plaintiffs have retired as partners, they were not required to pay sales tax after their retirement as per Section 28 of the H.P. General Sales Tax Act, 1968. They have ceased to be the partners of the firm, named M/S United Himachal Motors and Industries, Mandi. The learned first appellate Court, has rightly declared Exts. A-1 to A-4, illegal and void, since proceedings were initiated after the period of 5 years. These orders being void, the Collector has rightly been restrained from recovering the arrears of sales tax from the property of the plaintiffs. The substantial questions of law are answered accordingly.

22. Consequently, there is no merit in this appeal and the same is dismissed.

****

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

LPA No. 99 of 2014 a/w LPAs No. 65, 66, 70, 71, 76 to 83, 100, 101, 109, 122, 181 and 182 of 2014
Reserved on: 07.07.2015
Decided on: 15.07.2015

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1. LPA No. 99 of 2014

Sukh Dev Kumar & others …Appellants.

Versus

State of Himachal Pradesh & others …Respondents.

2. LPA No. 65 of 2014

Ramesh Chand & others …Appellants.

Versus

Prem Lal & others …Respondents.

3. LPA No. 66 of 2014

Ramesh Chand & others …Appellants.

Versus

Himachal Pradesh Govt. Special Certificate

awardees Junior Basic Teacher Association (Registered) & others …Respondents.

4. LPA No. 70 of 2014

Lalit Kumar Bhandari & others …Appellants.

Versus

Prem Lal & others …Respondents.

5. LPA No. 71 of 2014

Vijay Bhimta & others …Appellants.

Versus

Himachal Pradesh Govt. Special Certificate awardees Junior Basic Teacher Association (Registered) & others …Respondents.

6. LPA No. 76 of 2014

Devinder Kumar & others …Appellants.

Versus

State of H.P. & others …Respondents.

7. LPA No. 77 of 2014

Surinder Kumar & others …Appellants.

Versus

Himachal Pradesh Govt. Special Certificate awardees Junior Basic Teacher Association (Registered) & others …Respondents.

8. LPA No. 78 of 2014

Rameshwari Sharma & others …Appellants.

Versus

Prem Lal & others …Respondents.

9. LPA No. 79 of 2014

Taam Lal & others …Appellants.

Versus

Himachal Pradesh Govt. Special Certificate awardees Junior Basic Teacher Association (Registered) & others …Respondents.

10. LPA No. 80 of 2014

Dine Ram Anand & others …Appellants.

Versus

Prem Lal & others …Respondents.

11. LPA No. 81 of 2014

Rama Devi & others …Appellants.

Versus

Himachal Pradesh Govt. Special Certificate awardees Junior Basic Teacher Association (Registered) & others …Respondents.

12. LPA No. 82 of 2014

Kamni Sharma & others …Appellants.

Versus

Himachal Pradesh Govt. Special Certificate awardees Junior Basic Teacher Association (Registered) & others ...Respondents.

13. LPA No. 83 of 2014

Khem Chand & others ...Appellants.
Versus
Prem Lal & others ...Respondents.

14. LPA No. 100 of 2014

Bhagat Ram & others ...Appellants.
Versus
State of H.P. & others ...Respondents.

15. LPA No. 101 of 2014

Sushil Kumar & others ...Appellants.
Versus
State of Himachal Pradesh & others ...Respondents.

16. LPA No. 109 of 2014

Anju Bala Sharma & others ...Appellants.
Versus
Himachal Pradesh Govt. Special Certificate awardees Junior Basic Teacher Association (Registered) & others ...Respondents.

17. LPA No. 122 of 2014

Urmila Kumari & others ...Appellants.
Versus
State of Himachal Pradesh & others ...Respondents.

18. LPA No. 181 of 2014

State of Himachal Pradesh & others ...Appellants.
Versus
Prem Lal ...Respondent.

19. LPA No. 182 of 2014

The State of Himachal Pradesh & another ...Appellants.
Versus
Himachal Pradesh Govt. Special Certificate awardees Junior Basic Teacher Association (Registered) ...Respondent.

Constitution of India, 1950- Article 226- Petitioner had sought quashing of policy decision made by respondent prescribing five years qualifying service- petitioner also sought mandamus commanding the respondents to take all necessary steps to grant benefit of Special JBT Certificate after completion of five years' service – respondents pleaded that as per scheme framed by it voluntary teachers who had completed 10 years of continuous services in Government Primary School be given JBT Certificate and the voluntary teachers who had worked in the Literacy campaign be given one year's relaxation- Government thereafter took a policy decision prescribing that voluntary teachers who had completed five years of continuous services are to be regularized – Writ Court had quashed the Annexure filed along with the reply- petitioner had not sought the quashing of that annexure- held,

that Court cannot travel beyond the pleading and cannot make out a case not pleaded by the party - writ petitioner had prayed for rewriting of the policy- government decision and policy cannot be the subject matter of writ petition unless arbitrariness is shown in the decision making process – policy decision cannot be quashed on the ground that wiser decision could have been taken- affected persons were not arrayed as party and the Court cannot quash the order after inordinate delay- appeal allowed, writ petition dismissed.

(Para-10 to 59)

Cases referred:

State of J. & K & Anr. versus Ajay Dogra, 2011 AIR SCW 2605

Bachhaj Nahar versus Nilima Mandal & Ors., 2009 AIR SCW 287

Union of India versus Ibrahim Uddin and another, (2012) 8 Supreme Court Cases 148

Sidheshwar Sahakari Sakhar Karkhana Ltd. Vs. Union of India and others, 2005 AIR SCW 1399

Manohar Lal Sharma Vs. Union of India and another, (2013) 6 SCC 616

Mrs. Asha Sharma versus Chandigarh Administration and others, 2011 AIR SCW 5636

Bhubaneswar Development Authority and another versus Adikanda Biswal and others, (2012) 11 SCC 731

Centre for Public Interest Litigation and Ors. versus Union of India and Ors. with Dr. Subramanian Swamy versus Union of India and Ors., 2012 AIR SCW 3569

M/s. Bajaj Hindustan Ltd. vs Sir Shadi Lal Enterprises Ltd. & Ors., 2011 AIR SCW 1102

State of U.P. & Ors. versus Chaudhari Ran Beer Singh & Anr., 2008 AIR SCW 2296

Nand Lal & another versus State of H.P. & others, 2014 (2) Him L.R. (DB) 982

Vijay Kumar Gupta vs State of Himachal Pradesh & others, ILR(HP) (D.B.) 2015 (XLV-I) 351

B.S. Bajwa and another vs State of Punjab and others, (1998) 2 Supreme Court Cases 523

H.S. Vankani & Ors. versus State of Gujarat & Ors., 2010 AIR SCW 2116

Vijay Kumar Kaul and Ors. versus Union of India and Ors., 2012 AIR SCW 3277

State of Uttar Pradesh and others versus Arvind Kumar Srivastava and others, 2014 AIR SCW 6519

A.P. Public Service Commission versus K. Sudharshan Reddy & Ors., with A.P. Public Service Commission versus Y.T. Naidu & Ors., 2006 AIR SCW 3430

LPA No. 99 of 2014

For the appellants: Mr. Onkar Jairath, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Vikram Thakur, Deputy Advocate Generals, for respondents-State.
Ms. Sunita Sharma, Advocate, for respondent No. 4.

LPAs No. 65 & 66 of 2014

For the appellants: Mr. Ashwani Pathak, Advocate.

For the respondents: Ms. Sunita Sharma, Advocate, for respondent No. 1.
Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Vikram Thakur, Deputy Advocate Generals, for respondents-State.

LPAs No. 70 & 71 of 2014

For the appellants: Mr. Dilip Sharma, Senior Advocate, with Mr. Manish Sharma, Advocate.

For the respondents: Ms. Sunita Sharma, Advocate, for respondent No. 1.
Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Vikram Thakur, Deputy Advocate Generals, for respondents-State.

LPAs No. 76 & 100 of 2014

For the appellants: Mr. Sanjeev Bhushan, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Vikram Thakur, Deputy Advocate Generals, for respondents-State.
Ms. Sunita Sharma, Advocate, for respondent No. 3.

LPAs No. 77 & 109 of 2014

For the appellants: Mr. Bhuvnesh Sharma, Advocate.

For the respondents: Ms. Sunita Sharma, Advocate, for respondent No. 1.
Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Vikram Thakur, Deputy Advocate Generals, for respondents-State.

LPAs No. 78 to 83 of 2014

For the appellants: Mr. V.D. Khidtta, Advocate.

For the respondents: Ms. Sunita Sharma, Advocate, for respondent No. 1.
Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Vikram Thakur, Deputy Advocate Generals, for respondents-State.

LPA No. 101 of 2014

For the appellants: Mr. K.B. Khajuria, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Vikram Thakur, Deputy Advocate Generals, for respondents-State.
Ms. Sunita Sharma, Advocate, for respondent No. 4.

LPA No. 122 of 2014

For the appellants: Mr. Jai Dev 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 & Mr. Vikram Thakur, Deputy Advocate Generals, for respondents-State.
Ms. Sunita Sharma, Advocate, for respondent No. 4.

LPAs No. 181 & 182 of 2014

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

For the respondents: Ms. Sunita Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

All these appeals are outcome of a common judgment, dated 01.01.2013, made by the Writ Court/learned Single Judge in two writ petitions being CWP No. 2979 of 2012, titled as Sh. Prem Lal versus State of Himachal Pradesh and others, and CWP No. 4977 of 2012, titled as Himachal Pradesh Govt. Special Certificate awardees Junior Basic Teacher Association (Registered) versus State of Himachal Pradesh and another, whereby both the writ petitions came to be allowed (for short "the impugned judgment").

2. The appellants in all the appeals except LPAs No. 181 and 182 of 2014 were not parties to the lis before the Writ Court/learned Single Judge and have sought leave to file appeals by the medium of miscellaneous applications, which were granted by this Court and delay was also condoned while granting the limitation petitions. Registry was directed to diarize the appeals. The respondents appeared and the appeals were listed for hearing.

3. During the pendency of the said appeals, the State also filed two appeals alongwith limitation petitions. Limitation petitions were diarized and notices were issued to the respondents. Respondents appeared and contested the limitation petitions, which were granted by this Court and the Registry was directed to diarize the appeals.

4. The writ petitioners-respondents herein questioned the said order before the Apex Court by the medium of Special Leave to Appeal (Civil) No. 665-666 of 2015, which came to be dismissed vide order, dated 08.01.2015 and the orders made by this Court granting limitation petitions were upheld.

5. The questions, which arise for determination in all these appeals, are:

(i)Whether the impugned judgment made by the Writ Court/learned Single Judge, on the grounds taken in the respective writ petitions by the writ petitioners, is legally correct?

(ii) Whether the impugned judgment is virtually encroaching upon the powers of the State Government to make policy decision, which necessitated filing of two appeals by the State, i.e. LPAs No. 181 & 182 of 2014?

(iii) Whether the Writ Court/learned Single Judge was within its powers to quash the effective date given in the policy, Annexure P-4?

(iv) Whether the impugned judgment has adversely affected the rights of the appellants in all the LPAs except LPAs No. 181 and 182 of 2014?

6. In the given circumstances, we deem it proper to club and determine all these appeals by this common judgment.

7. In both the writ petitions, the writ petitioners have sought similar set of reliefs on the grounds taken in the memo of the respective writ petitions. Thus, we deem it proper to reproduce the reliefs sought by the writ petitioner in CWP No. 2979 of 2012 herein:

> *"i. That the Annexure P-4 dated 11.12.1998 is liable to be quash and set aside to the extent cut of date mentioned in the letter and direct the respondent to apply the instruction uniformly and regularize the teacher appointed under the policy framed in the year 1986 after five years of service.*
>
> *ii. That the respondents may be directed to implement the direction given by the respondent No. 2 and to take immediate steps to grant benefit of special J.B.T. certificate after completion of 5 years services to the petitioner, who was appointed between 1986 to 1991 and to grant regularization from the date of the petitioner become eligible for grant of special JBT certificate after five years of service with all consequential benefits, increments, seniority and pay scales from time to time.*
>
> *iii. That to direct the respondents to collect the data as per Annexure P-6 within time bound manner.*
>
> *iv. That entire record pertaining to this case may kindly be summoned for the kind perusal of this Hon'ble Court.*
>
> *v. Any other relief which this Hon'ble Court deems and just may also be passed in favour of the petitioner and against the respondents in the interest of justice."*

8. While going through the writ petitions, one comes to an inescapable conclusion that the writ petitioners have sought quashment of the policy decision, dated 11.12.1998 (Annexure P-4 in CWP No. 2979 of 2012) which was made by the respondents, whereby the qualifying service for grant of Special Junior Basic Training Certificates (for short "Special JBT Certificates") has been prescribed as five years with effect from 01.08.1998. It is apt to reproduce relevant portion of letter dated 11.12.1998 (Annexure P-4) herein:

> *"No. EDN-C-B(2)-1/98*
> *Government of Himachal Pradesh*
> *Department of Primary Education*
>
> *From*
>
> *The Commr.-cum-Secretary (Edu.) to the*
> *Government of Himachal Pradesh.*
>
> *To*
>
> *The Director of Primary Education,*
> *Himachal Pradesh, Shimla-171001.*
>
> *Dated Shimla-171001, the 11th Dec. 1998.*

Subjet:- Amendment of Education Code and regularisation of Volunteer Teachers.

Sir,

Jai Hind.

I am directed to refer to your letter No. EDN-H(II)PRY-B(6)-8/98-VT Dated 29.7.1998 and to say that the matter relating to amendment to Education Code and regularisation of Volunteer Teachers was under consideration of the Government and it has now been decided that the provision relating to issue of special certificate shall be re-written as under:-

"J.B.T. Special Certificate may be granted to teachers who have put in approved continuous service in Primary Department or a recognised school for not less than five years on the day of submission of application. The awardee should have at least passed the Middle Standard Examination and he/she should be a teacher of good moral character duly certified by the Head of Office."

This provision shall be effective from 1.8.1998.

You are, therefore, requested to consider awarding Special Certificates to the eligible Volunteer Teachers numbering 4159 who will be regularised, with effect from 1.8.1998. After regularisation they will be subjected to all the terms and conditions which are applicable to newly recruited J.B.T. teachers, as on fresh appointments, like, under-going medical examination, character verification, probation and application of reservation roster etc. etc. Further, their first appointment shall not be less than 25 kilometers from their permanent place of residence. They shall have to undergo refresher course/condensed course as per the instructions of the Government issued from time to time. (Emphasis added)"

9. The writ petitioners have questioned Annexure P-4 only to the extent of fixing the effective date as 01.08.1998 and have also sought that the five years' time frame prescribed in the said letter be treated as criterion for all those Volunteer Teachers who were appointed between 1986 to 1991. In fact, the writ petitioners have prayed for change of the time frame of ten years prescribed in the policy decision made in the year 1995 contained in letter, dated 27.11.1995, read with letter, dated 15.12.1995 (Annexure P-2). The writ petitioners have also sought writ of mandamus commanding the respondents to take all necessary steps to grant benefit of Special JBT Certificate after completion of five years' service to the writ petitioners, who have been appointed between 1986 to 1991 as Volunteer Teachers and to grant regularization from the date they became eligible for grant of Special JBT Certificate after completion of five years' service.

10. The writ respondents-State resisted the writ petitions on the grounds taken in the respective replies and have specifically stated that the writ petitioners were appointed as Volunteer Teachers under the Himachal Pradesh Volunteer Teacher Scheme, 1985 (for

short "1985 Scheme") and they have accepted the terms and conditions. They have also pleaded that the Government of Himachal Pradesh had taken a policy decision vide letter, dated 27.11.1995 that the Volunteer Teachers who had completed ten years of continuous service in Government Primary Schools be given special JBT Certificates and the Volunteer Teachers who had worked in the Literacy campaign for two years be given one year's relaxation in grant of Special JBT Certificates. Meaning thereby, instead of ten years, they had to complete nine years of continuous service. The writ petitioners were governed by the said Scheme and also got relief of regularization in terms of the said policy and have accepted the terms and conditions contained in the said policy.

11. We deem it proper to reproduce relevant portion of letter dated 15.12.1995 (Annexure P-2 in CWP No. 2979 of 2012), wherein reference of letter dated 27.11.1995 has been given, herein:

> *".....*
> *The Govt. of Himachal Pradesh vide their letter No. EDN-C-B(2)5/95 dated 27.11.1995 has decided that the Volunteer Teachers who have completed 10 years continuous service in Govt. Primary Schools be given special Junior Basic Training certificates. The Volunteer teachers who have worked in the literacy campaign for two years be given one years relaxation in grant of special Junior Basic Training certificates i.e. in their case ten years period would be reduced to 9 (Nine) years.*
> *It has also been decided that refresher inservice course of about three months duration would be organised for the Volunteer teachers holding special J.B.T. certificates....."*

12. The writ respondents, in their reply, have specifically averred that the writ petitioner in CWP No. 2979 of 2012 joined his duties as Volunteer Teacher on 05.01.1987 and was regularized as JBT on 06.01.1996, in terms of the guidelines issued vide letter dated 27.11.1995 (supra) and has been given seniority from the date of his regularization.

13. Thereafter, another conscious decision was taken by the State authorities vide letter, dated 11.12.1998 (Annexure P-4 to CWP No. 2979 of 2012), that the Volunteer Teachers, who have completed five years of continuous service in Government Primary Schools on the date of commencement of the said amendment, i.e. 01.08.1998, are to be regularized. This decision is not applicable to the writ petitioners, whose services have been regularized as per the earlier scheme and that decision was made at that point of time.

14. It is apt to reproduce paras 4 and 5 of the reply filed by the writ respondents in CWP No. 4977 of 2012 herein:

> *"4. That it is submitted that after amendment in education code, policy amended and volunteer teachers so appointed after 1992 onwards have been regularized after putting 5 years' service as per direction contained in the letter dated 11-12-1998 and 21-12-1998 annexed by the petitioner as annexure P-3 and P-4 with the present civil writ petition.*
> *5. That the claim of petitioner that annexure P-3 dated 11-12-1998 may be quashed and set aside as the same*

brings disparity amongst two set off incumbents in as much as under policy dated 11-12-1998, the criteria was reduced to 5 years which in anneuxre P-2 was 10 years. Therefore, by way of this writ petition petitioner sought parity to the incumbents engaged between 1984 to 1991 with incumbents so engaged under second policy and also regularised upon completion of 5 years volunteer service. To this relief it is respectfully submitted that as is evident from kind perusal of Annexure P-2, 10 years continuous service to the volunteer teachers before regularisation as JBT was fixed by the Government as a mandatory condition taking into consideration the large number of incumbents working in the said category. However, if the Government subsequently during the year 1998 decided to reduce it to 5 years, the same does not give any cause of action to the petitioner at this belated stage after ore than 12 to 15 years that too without challenging the wires of policy. Both the policy decisions having been taken by the Government at the relevant time after taking into account various factors prevailing at that time which includes the number of incumbents likely to be benefited and subsequently when it was reduced to 5 years to eliminate the category of volunteer teachers so as to make all the incumbents regular were eligible. Hence, taking lead from Mool Raj verdict/policy framed by Hon'ble Apex Court during the year 1994 when first timer daily wager who were having 10 or more years of continuous service were directed to be regularised the daily wagers were even having 20 or more years daily wage service. Subsequently the Government reduced it to 8 years and now 6 years, such incumbents so engaged and regularised during the year 1994 cannot now claim that our juniors have been prescribed in lesser period of daily wage service. Hence, they are not entitled for parity. Taking these fats and circumstances into consideration the claim of the petitioner for providing of 5 years voluntary service instead of 10 years voluntary service before regulrisation as JBT is not legally sustainable."

15. It is also apt to reproduce paras 2 & 3 of the preliminary submissions and para 4 of the reply on merit filed by the respondents-State in CWP No. 2979 of 2012 herein:

"2. That the Govt. of H.P. has taken a policy decision vide letter of dated 27 November, 1995 that the Volunteer Teachers who have completed 10 years of continuous service in Government Primary Schools be given special Junior Basic Training Certificates. The Volunteer Teachers who have worked in the Literacy campaign for two years be given one year relaxation in grant of special Junior

> *Basic Training Certificates i.e. in their case ten years period would be reduced to 9 years.*
>
> *3. The petitioner was appointed as Volunteer Teacher on 31-12-1986 and joined his duties on 5-1-1987 and regularized as JBT on 06-01-1996 after awarding special JBT certificate after completion of 9 years of regular service and one year benefit was given due to his work in literacy campaign for more than 2 years and has been given seniority from the date of his regularization. The seniority to each Volunteer Teacher appointed under this scheme have been given from the date of regularization after completion of 10 years of service.*
>
> .....
>
> *4. That in reply to this para it is submitted that JBT Special Certificate was granted to those teachers who have put in continuous service not less than 5 years on the day of submission of application as per annexure annexed as P-4 with the civil writ petition. This Govt. decision does not apply to the petitioner case. The Govt. decision was was taken to those Volunteer Teachers who were appointed in the year 1992."*

16. The question arises - whether the Writ Court/learned Single Judge has rightly quashed letter dated 30.03.2011, which is a document filed by the writ respondents-State with their reply to CWP No. 2979 of 2012 as Annexure R-1, which was not the subject matter of the writ petition?

17. It is apt to reproduce para 18 of the impugned judgment herein:

> *"18. Accordingly, the writ petitions are allowed. Annexure R-1, dated 30.03.2011, in CWP No. 2979 of 2012 is quashed and set aside. The cut off date, i.e. 01.08.1998 is struck down after applying the principle of severability. The petitioners will be deemed to have been granted Special JBT certificates immediately after completion of five years and would also be deemed to have been regularized after five years of service with all consequential benefits to bring them at par with those teachers, who were appointed under 1991 Volunteer Teachers Scheme. The pending application(s), if any, also stands disposed of. No costs."*

18. In terms of letter dated, 30.03.2011 (Annexure R-1 annexed with CWP No. 2979 of 2012), the request for granting seniority to the Volunteer Teachers appointed in the year 1986 from the date of their initial appointment was rejected on the ground that the Volunteer Teachers appointed in the year 1986 have been regularized against vacant posts after grant of Special JBT Certificates on completion of ten years' continuous service in terms of the guidelines dated 27.11.1995 and the Volunteer Teachers appointed right from the year 1992 have been regularized after granting Special JBT Certificates with effect from 01.08.1998 on completion of minimum five years service and that only after grant of Special JBT Certificates, the Volunteer Teachers are considered to be eligible for

seniority and financial benefits. It has further been mentioned in the said letter that the Volunteer Teachers appointed right from the year 1992 have also been granted seniority and financial benefits with effect from the date of their regularization after grant of Special JBT Certificates and not from the date of their initial appointment.

19. The writ petitioners have not sought quashment of Annexure R-1 and no pleadings have been made to that effect in the writ petitions. We wonder how the Writ Court/learned Single Judge has quashed Annexure R-1, which was not sought for.

20. It is beaten law of land that the Court cannot travel beyond the pleadings and the relief sought.

21. Our this view is fortified by the judgment of the Apex Court in the case titled as **State of J. & K & Anr. versus Ajay Dogra,** reported in **2011 AIR SCW 2605.** It is apt to reproduce paras 14, 15, 16, 22 and 23 of the judgment herein:

> *"14. A perusal of the writ petitions would prove and establish that the only prayer made in those writ petitions was to grant relaxation to the criteria and standard of physical conditions prescribed for and required to be fulfilled. In aforesaid writ petitions, neither the validity of Rule 176 with regard to physical conditions were challenged nor such conditions prescribed in the advertisement were challenged on the ground of its validity contending inter alia that there is no nexus of the said conditions with the object sought to be achieved. We find that the physical conditions prescribed in the advertisement are in consonance with Rule 176 of the Police Rules which are statutory Rules. No where in the pleadings, it is stated that such conditions prescribed are illegal or invalid. Constitutional validity of the aforesaid Rule was never challenged in any of the writ petitions.*
>
> *15. The High Court, however, without there being any pleading in that regard went beyond the pleadings and held that such physical conditions laid down are bad and arbitrary as what has been prescribed have no nexus with the object sought to be achieved.*
>
> *16. The aforesaid decision rendered by the High Court is contrary to and inconsistent with the law laid down by this Court in the case of V.K. Majotra v. Union of India & Ors., reported in (2003) 8 SCC 40 : (AIR 2003 SC 3909 : 2003 AIR SCW 4504). In the said decision also what was urged before this Court was neither raised in the pleadings nor it was urged before the High Court by any of the parties to the writ petition. In the said case, the issue was as to whether a person not having judicial experience could be appointed as Vice Chairman of the Central Administrative Tribunal. This Court found that the aforesaid issue was not raised in the writ petition and similarly, vires of the section was also not challenged. This Court in the aforesaid context, held as follows:-*

"8. .....It is also correct that vires of Sections 6(2)(b), (bb) and (c) of the Act were not challenged in the writ petition. The effect of the direction issued by the High Court that henceforth the appointment to the post of Vice-Chairman be made only from amongst the sitting or retired High Court judge or an advocate qualified to be appointed as a judge of the High Court would be that Sections 6(2)(b), (bb) and (c) of the Act providing for recruitment to the post of Vice- Chairman from amongst the administrative services have been put to naught/obliterated from the statute-book without striking them down as no appointment from amongst the categories mentioned in clauses (b), (bb) and (c) could now be made. So long as Sections 6(2)(b), (bb) and (c) remain on the statute-book such a direction could not be issued by the High Court....."

In paragraph 9 of the said decision, this Court has discussed the issues in the following terms:-

"9. We are also in agreement with the submissions made by the counsel for the appellants that the High Court exceeded its jurisdiction in issuing further directions to the Secretary, Law Department, Union of India, the Secretary, Personnel and Appointment Department, Union of India, the Cabinet Secretary of the Union of India and to the Chief Secretary of the U.P. Government as also to the Chairman of CAT and other appropriate authorities that henceforth the appointment to the post of presiding officer of various other Tribunals such as CEGAT, Board of Revenue, Income Tax Appellate Tribunal etc. should be from amongst the judicial members alone. Such a finding could not be recorded without appropriate pleadings and notifying the concerned and affected parties."

17 to 21. .....

22. In our considered opinion, the ratio of the aforesaid decisions of this Court are squarely applicable to the facts of the present case. There was no challenge to the constitutional validity of Rule 176 of the Police Rules so far as it relates to prescribing physical conditions regarding the height and the chest. The stipulations in the advertisement regarding standard of physical condition was also not challenged in the Writ Petition. The High Court was not justified in going into the validity of the aforesaid criterion in absence of any such challenge. The High Court also has not specifically declared the Rule prescribing minimum height standard and chest standard ultra vires and, therefore, so long as that Rule

exists in the statute book, no such direction as issued by the High Court could be issued. Consequently, the directions issued by the High Court in the present case are required to be set aside.

23. We, therefore, hold that the High Court was not justified to decide the validity of the aforesaid Rule and the advertisement without there being any challenge to the same. We also hold that it was not appropriate for the High Court to set aside the said conditions which are mandatory in nature."

22. The Apex Court in another case titled as **Bachhaj Nahar versus Nilima Mandal & Ors.,** reported in **2009 AIR SCW 287,** held that the Court cannot make out a case not pleaded and grant relief not sought for. It is apt to reproduce para 12 of the judgment herein:

"12. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in Bhagwati Prasad and Ram Sarup Gupta (supra) referred to above and several other decisions of this Court following the same cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo motu."

23. The Apex Court in the case titled as **Union of India versus Ibrahim Uddin and another,** reported in **(2012) 8 Supreme Court Cases 148,** held that the Court cannot travel beyond the pleadings. It is apt to reproduce paras 77 ad 85.6 of the judgment herein:

"77. This Court while dealing with an issue in Kalyan Singh Chouhan v. C. P. Joshi, (2011) 11 SCC 786 : (2011)

> *4 SCC (Civ) 656 : AIR 2011 SC 1127, after placing reliance on a very large number of its earlier judgments including Trojan & Co. v. Nagappa Chettiar, AIR 1953 SC 235; Om Prakash Gupta v. Ranbir B. Goyal, (2002) 2 SCC 256 : AIR 2002 SC 665; Ishwar Dutt v. Collector (LA), (2005) 7 SCC 190 : AIR 2005 SC 3165; and State of Maharashtra v. M/s. Hindustan Construction Co. Ltd., (2010) 4 SCC 518 : (2010) 2 SCC (Civ) 207 : AIR 2010 SC 1299, held that relief not founded on the pleadings cannot be granted. A decision of a case cannot be based on grounds outside the pleadings of the parties. No evidence is permissible to be taken on record in absence of the pleadings in that respect. No party can he permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. It was further held that where the evidence was not in the line of the pleadings, the said evidence cannot be looked into or relied upon.*
>
> .....
>
> *85.6. The court cannot travel beyond the pleadings as no party can lead the evidence on an issue/point not raised in the pleadings and in case, such evidence has been adduced or a finding of fact has been recorded by the Court, it is just to be ignored. Though it may be a different case where in spite of specific pleadings, a particular issue is not framed and parties having full knowledge of the issue in controversy lead the evidence and the court records a finding on it."*

24. Learned counsel for the writ petitioners-respondents herein frankly conceded that the writ petitioners have not prayed for the said relief in the writ petitions and was not in a position to justify how the Writ Court/learned Single Judge has granted the same.

25. Now, coming to the second limb of the impugned judgment, whereby cut off date, i.e. effective date of the policy, has been struck down. The impugned judgment, on the face of it, is not legally correct for the following reasons:

26. The Government has made two policy decisions. In the policy decision made in the year 1995 in terms of letter dated 27.11.1995, ten years' continuous service as Volunteer Teachers was prescribed for granting Special JBT Certificates and the services of the Volunteer Teachers, who had obtained the said Special JBT Certificates, were to be regularized. The same was applicable and governing the Volunteer Teachers appointed from 1985 till 1991. It was accepted by the parties, was not questioned and the services of so many Volunteer Teachers, including the writ petitioners, were regularized.

27. Thereafter, the Government made another conscious decision, vide letter, dated 11.12.1998, in terms of which the services of the Volunteer Teachers, who were appointed right from the year 1992 and had completed five years' continuous service, were to be regularized after granting Special JBT Certificates with effect from 01.08.1998. The said decision appears to have been taken while keeping in view the circumstances prevailing at the relevant point of time.

28. The writ petitioners have not pleaded that the said decision is mala fide or is based on some bias or has no rationale.

29. In fact, the prayer of the writ petitioners is to re-write the policy of 1995 and fix the time frame of five years of continuous service for grant of Special JBT Certificates, as provided in terms of policy decision taken in the year 1998, instead of the time frame of ten years, as provided in the policy decision taken in the year 1995, which is not permissible.

30. It is a beaten law of land that Government decision and policy cannot be subject matter of a writ petition, unless its arbitrariness is shown in the decision making process.

31. The Apex Court in a series of judgments held as to how policy decisions of the Government can be questioned and whether the Writ Courts have powers to quash the said policy decisions, that too, on what counts.

32. The Apex Court in a case titled as **Sidheshwar Sahakari Sakhar Karkhana Ltd. Vs. Union of India and others,** reported in **2005 AIR SCW 1399,** has laid down the guidelines and held that Courts should not interfere in policy decision of the Government, unless there is arbitrariness on the face of it.

33. The Apex Court in another case titled as **Manohar Lal Sharma Vs. Union of India and another,** reported in **(2013) 6 SCC 616,** has laid down the same principle.

34. The Apex Court in the case titled as **Mrs. Asha Sharma versus Chandigarh Administration and others,** reported in **2011 AIR SCW 5636** has held that policy decision cannot be quashed on the ground that another decision would have been more fair, wise, scientific or logical and in the interest of society. It is apt to reproduce para 10 of the judgment herein:

> *"10. The Government is entitled to make pragmatic adjustments and policy decisions, which may be necessary or called for under the prevalent peculiar circumstances. The Court may not strike down a policy decision taken by the Government merely because it feels that another decision would have been more fair or wise, scientific or logic. The principle of reasonableness and nonarbitrariness in governmental action is the core of our constitutional scheme and structure. Its interpretation will always depend upon the facts and circumstances of a given case. Reference in this regard can also be made to Netai Bag v. State of West Bengal [(2000) 8 SCC 262 : (AIR 2000 SC 3313)]."*

35. It appears that the writ respondents have examined all aspects and made the decision. Thus, it cannot be said that the decision making process is bad. The Court can not sit in appeal and examine correctness of policy decision.

36. The Apex Court in the case titled as **Bhubaneswar Development Authority and another versus Adikanda Biswal and others,** reported in **(2012) 11 SCC 731,** laid down the same principle. It is apt to reproduce para 19 of the judgment herein:

> *"19. We are of the view that the High Court was not justified in sitting in appeal over the decision taken by*

the statutory authority under Article 226 of the Constitution of India. It is trite law that the power of judicial review under Article 226 of the Constitution of India is not directed against the decision but is confined to the decision making process. The judicial review is not an appeal from a decision, but a review of the manner in which the decision is made and the Court sits in judgment only on the correctness of the decision making process and not on the correctness of the decision itself. The Court confines itself to the question of legality and is concerned only with, whether the decision making authority exceeded its power, committed an error of law, committed a breach of the rules of natural justice, reached an unreasonable decision or abused its powers."

37. The Apex Court in a case titled as **Centre for Public Interest Litigation and Ors. versus Union of India and Ors. with Dr. Subramanian Swamy versus Union of India and Ors.,** reported in **2012 AIR SCW 3569,** held that the Court cannot substitute its opinion for the one formed by the experts in the particular field. It is apt to reproduce relevant portion of para 79 of the judgment herein:

"79. In majority of judgments relied upon by learned Attorney General and learned counsel for the respondents, it has been held that the power of judicial review should be exercised with great care and circumspection and the Court should not ordinarily interfere with the policy decisions of the Government in financial matters. There cannot be any quarrel with the proposition that the Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. We are also conscious of the fact that the Court should not interfere with the fiscal policies of the State. ....."

38. The Apex Court in a case titled as **M/s. Bajaj Hindustan Ltd. versus Sir Shadi Lal Enterprises Ltd. & Ors.,** reported in **2011 AIR SCW 1102,** held that the Court cannot sit in judgment over wisdom of policy of legislature or executive. It is apt to reproduce paras 22, 42 and 44 of the judgment herein:

"22. It is settled law that in the areas of economics and commerce, there is far greater latitude available to the executive than in other matters. The Court cannot sit in judgment over the wisdom of the policy of the legislature or the executive.

23 to 41. .....

42. We should not be understood to have meant that the judiciary should never interfere with administrative decisions. However, such interference should be only within narrow limits e.g. when there is clear violation of the statute or a constitutional provision, or there is

arbitrariness in the Wednesbury sense. It is the administrators and legislators who are entitled to frame policies and take such administrative decisions as they think necessary in the public interest. The Court should not ordinarily interfere with policy decisions, unless clearly illegal.

43. .....

44. The power to lay policy by executive decisions or by legislation includes power to withdraw the same unless it is by mala fide exercise of power, or the decision or action taken is in abuse of power. The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law. The court leaves the authority to decide its full range of choice within the executive or legislative power. In matters of economic policy, it is settled law that the court gives a large leeway to the executive and the legislature. Granting licences for import or export is an executive or legislative policy. The Government would take diverse factors for formulating the policy in the overall larger interest of the economy of the country. When the Government is satisfied that change in the policy was necessary in the public interest it would be entitled to revise the policy and lay down a new policy."

39. In another case titled as **State of U.P. & Ors. versus Chaudhari Ran Beer Singh & Anr.,** reported in **2008 AIR SCW 2296,** the Apex Court held that the Court should not substitute its own judgment for the judgment of the executive. It is apt to reproduce para 12 of the judgment herein:

"12. Cabinet's decision was taken nearly eight years back and appears to be operative. That being so there is no scope for directing reconsideration as was done in Ram Milan's case, though learned counsel for the respondents prayed that such a direction should be given. As rightly contended by learned counsel for the State, in matters of policy decisions, the scope of interference is extremely limited. The policy decision must be left to the Government as it alone can decide which policy should be adopted after considering all relevant aspects from different angles. In matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown. Courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the government the Court cannot interfere even if a second view is possible from that of the Government."

40. This Court in a case titled as **Nand Lal & another versus State of H.P. & others,** reported in **2014 (2) Him L.R. (DB) 982,** after discussing the judgments of the Apex Court held that it is for the writ petitioners to show that the decision making process was bad or there was some arbitrariness.

41. The writ petitioners have not pleaded that the decision making process is bad or there is arbitrariness on the face of it and have not been able to carve out a case for its quashment.

42. This Court in **CWP No. 4625 of 2012-C,** titled as **Gurbachan versus State of H.P. & others,** decided on 15.07.2014 and a batch of two writ petitions, **CWP No. 9480 of 2014,** titled as **Vijay Kumar Gupta versus State of Himachal Pradesh & others,** being the lead case, decided on 09.01.2015, has laid down the same principle.

43. The writ petitioners have not questioned the policy decision, dated 27.11.1995 to the effect that the time frame, i.e. prescribing ten years' service, was bad. What they have sought is that the time frame of five years prescribed in Annexure P-4 be also prescribed in Annexure P-2 read with letter dated 27.11.1995, is without any lawful cause. How the time frame fixed in a later policy decision can be made applicable to a earlier policy decision.

44. Applying the principle to the instant case, no case for interference/quashment is made out by the writ petitioners. They are governed by the conscious decision made in the year 1995 and the Volunteer Teachers appointed right from the year 1992 are governed by the conscious decision made in the year 1998. Only on this count, the impugned judgment needs to be set aside.

45. Further, the writ petitioners had not impleaded the affected parties as party-respondents in the memo of writ petitions. Thus, the writ petitions, on the face of it, were not maintainable, were to be dismissed for non-joinder and mis-joinder of necessary parties. Unfortunately, this issue has not been discussed by the Writ Court/learned Single Judge in the impugned judgment.

46. The appellants have stated that the seniority list stands published and the impugned judgment has effect of dislodging the seniority, which has attained finality in the year 2002. The appellants have given the details in their respective appeals as to how the impugned judgment has effect of dislodging the settled seniority, which has attained finality. The appellants have also pleaded as to how they are adversely affected by the impugned judgment.

47. The writ petitioners have filed writ petitions in the year 2012 and after the lapse of fourteen years, have questioned the policy decision (Annexure P-4), is highly belated and the writ petitioners are caught by law of laches, estoppel, waiver and acquiescence. They have not even explained delay and laches.

48. It is beaten law of land that the seniority fixed cannot be dislodged by a person, who is a fencer, that too, after considerable delay.

49. The Apex Court in a case titled as **B.S. Bajwa and another versus State of Punjab and others,** reported in **(1998) 2 Supreme Court Cases 523,** laid down the same principle. It is apt to reproduce para 7 of the judgment herein:

> *"7. Having heard both sides we are satisfied that the writ petition was wrongly entertained and allowed by the single Judge and, therefore, the Judgments of the single Judge and the Division Bench have both to be set aside. The undisputed facts appearing from the record are alone sufficient to dismiss the writ petition on the ground of laches because the grievance made by B. S. Bajwa and B. D. Kapoor only in 1984 which was long after they had entered the department in 1971-72. During this entire period of more than a decade they were all along treated as junior to the other aforesaid persons and the rights inter se had crystallised which ought not to have been re-opened after the lapse of such a long period. At every stage the others were promoted before B. S. Bajwa and B. D. Kapoor and this position was known to B. S. Bajwa and B. D. Kapoor right from the beginning as found by the Division Bench itself. It is well settled that in service matters the question of seniority should not be re-opened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This alone was sufficient to decline interference under Article 226 and to reject the writ petition."*

50. It would also be profitable to reproduce para 25 of the judgment rendered by the Apex Court in a case titled as **H.S. Vankani & Ors. versus State of Gujarat & Ors.,** reported in **2010 AIR SCW 2116,** herein:

> *"25. Seniority is a civil right which has an important and vital role to play in one's service career. Future promotion of a Government servant depends either on strict seniority or on the basis of seniority-cum-merit or merit-cum-seniority etc. Seniority once settled is decisive in the upward march in one's chosen work or calling and gives certainty and assurance and boosts the morale to do quality work.*
>
> *It instills confidence, spreads harmony and commands respect among colleagues which is a paramount factor for good and sound administration. If the settled seniority at the instance of one's junior in service is unsettled, it may generate bitterness, resentment, hostility among the Government servants and the enthusiasm to do quality work might be lost. Such a situation may drive the parties to approach the administration for resolution of that acrimonious and poignant situation, which may consume lot of time and energy. The decision either way may drive the parties to litigative wilderness to the advantage of legal professionals both private and Government, driving the parties to acute penury. It is well known that salary*

they earn, may not match the litigation expenses and professional fees and may at times drive the parties to other sources of money making, including corruption. Public money is also being spent by the Government to defend their otherwise untenable stand. Further it also consumes lot of judicial time from the lowest court to the highest resulting in constant bitterness among parties at the cost of sound administration affecting public interest. Courts are repeating the ratio that the seniority once settled, shall not be unsettled but the men in power often violate that ratio for extraneous reasons, which, at times calls for departmental action. Legal principles have been reiterated by this Court in Union of India and Another. v. S.K. Goel and Others (2007) 14 SCC 641 : (AIR 2007 SC 1199 : 2007 AIR SCW 1235), T.R. Kapoor v. State of Haryana, (1989) 4 SCC 71 : (AIR 1989 SC 2082), Bimlesh Tanwar v. State of Haryana, (2003) 5 SCC 604 : (AIR 2003 SC 2000 : 2003 AIR SCW 1508). In view of the settled law the decisions cited by the appellants in G.P. Doval's case (AIR 1984 SC 1527) (supra), Prabhakar and Others case, (AIR 1976 SC 1093), G. Deendayalan, R.S. Ajara are not applicable to the facts of the case."

51. The Apex Court in the case titled as **Vijay Kumar Kaul and Ors. versus Union of India and Ors.,** reported in **2012 AIR SCW 3277,** held that belated claim for seniority so made cannot be allowed, more so, when the employees/affected parties/appellants were not impleaded as parties. It is apt to reproduce paras 21 and 22 of the judgment herein:

"21. From the aforesaid pronouncement of law, it is manifest that a litigant who invokes the jurisdiction of a court for claiming seniority, it is obligatory on his part to come to the court at the earliest or at least within a reasonable span of time. The belated approach is impermissible as in the meantime interest of third parties gets ripened and further interference after enormous delay is likely to usher in a state of anarchy.

22. The acts done during the interregnum are to be kept in mind and should not be lightly brushed aside. It becomes an obligation to take into consideration the balance of justice or injustice in entertaining the petition or declining it on the ground of delay and laches. It is a matter of great significance that at one point of time equity that existed in favour of one melts into total insignificance and paves the path of extinction with the passage of time."

52. The Apex Court in the case titled as **State of Uttar Pradesh and others versus Arvind Kumar Srivastava and others,** reported in **2014 AIR SCW 6519,** held that relief cannot be extended to the persons who have approached the Court after long delay, that too, who are fence-sitters. It is apt to reproduce para 24 of the judgment herein:

> *"24. Viewed from this angle, in the present case, we find that the selection process took place in the year 1986. Appointment orders were issued in the year 1987, but were also cancelled vide orders dated June 22, 1987. The respondents before us did not challenge these cancellation orders till the year 1996, i.e. for a period of 9 years. It means that they had accepted the cancellation of their appointments. They woke up in the year 1996 only after finding that some other persons whose appointment orders were also cancelled got the relief. By that time, nine years had passed. The earlier judgment had granted the relief to the parties before the Court. It would also be pertinent to highlight that these respondents have not joined the service nor working like the employees who succeeded in earlier case before the Tribunal. As of today, 27 years have passed after the issuance of cancellation orders. Therefore, not only there was unexplained delay and laches in filing the claim petition after period of 9 years, it would be totally unjust to direct the appointment to give them the appointment as of today, i.e. after a period of 27 years when most of these respondents would be almost 50 years of age or above."*

53. The Apex Court in the case titled as **A.P. Public Service Commission versus K. Sudharshan Reddy & Ors.,** with **A.P. Public Service Commission versus Y.T. Naidu & Ors.,** reported in **2006 AIR SCW 3430,** held that dislodging seniority after long gap creates chaotic situation, is against the principle of service jurisprudence. It is apt to reproduce paras 18 and 20 of the judgment herein:

> *"18. Having carefully considered the submissions made on behalf of the respective parties, we are unable to agree with the submissions advanced by Mr. Rao since in our view, after having held the impugned Government Order to be violative of Arts. 14 and 16 of the Constitution of India, it was the intention of this Court to maintain the status quo as it existed with regard to the appointments already made where certain candidates had already been given the benefit of weightage. We are inclined to agree with Mr. Ranjit Kumar that the Court intended to protect not only the appointment of such candidates but also all their service conditions, which included their right to seniority as had accrued to them at the time of their initial appointment. In our view, the said intention of this Court was quite clear from the language used. If this Court had intended that the weightage given to the concerned candidates was not to count towards their position in the merit list, it would have said so*

> *explicitly. On the other hand, while mentioning the fact of their appointment on the strength of such weightage this Court went on to say that such candidates would not be adversely affected by the judgment. In other words, the decision rendered in the judgment would not adversely affect their existing service conditions.*
>
> *19. .....*
>
> *20. Apart from the above, the other submission of Mr. Ranjit Kumar regarding the difficulty of unsettling the settled position after all these years cannot also be lightly brushed aside."*

54. Applying the test to the instant case, the writ petitions were to be dismissed also on the count that the writ petitioners have come to the Court after a long delay, which has not been explained by them and which has effect of dislodging the status and position of the appellants herein, who were not parties before the Writ Court/learned Single Judge.

55. Some of the appellants came to be appointed by direct recruitment as teachers after passing the competitive examination. The writ petitioners have no contest with them and cannot claim for the benefit which affects the appellants adversely.

56. The decision contained in letter, dated 27.11.1995, read with letter, dated 15.12.1995 (Annexure P-2 in CWP No. 2979 of 2012) was made applicable to those Volunteer Teachers who were appointed under the 1985 Scheme up to the year 1991 and the writ petitioner in CWP No. 2979 of 2012 stands regularized as JBT Teacher on 06.01.1996, as pleaded in para 3 of the preliminary submissions of the reply filed by the writ respondents-State in CWP No. 2979 of 2012. The decision/ scheme made in terms of letter dated 11.12.1998 (Annexure P-4 in CWP No. 2979 of 2012) was made applicable to those Volunteer Teachers, who were appointed right from the year 1992. The writ petitioners also obtained relief in terms of the earlier policy and cannot claim relief in terms of the second policy. Thus, it can be safely held that they have been treated as two different classes.

57. The replies and the appeals also contain the details how the impugned judgment is encroaching upon the powers of the State, which has powers to make conscious policy decisions. The Courts have no power to interfere with the policy decisions made by the State Government, as discussed hereinabove.

58. Viewed thus, all the four questions framed hereinabove are replied accordingly.

59. Having said so, all the appeals are allowed, the impugned judgment is set aside and the writ petitions are dismissed.

60. Pending applications, if any, are also disposed of accordingly.

****

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

Sukhdev Singh ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Criminal Appeal No.93 of 2013
Reserved on : 1.7.2015
Date of Decision: July 15, 2015

Indian Penal Code, 1860- Section 302- Dead body of a lady who was subsequently identified as Ashi, wife of accused, was recovered by the police - investigation revealed that the accused suspected the deceased of having illicit relationship and murdered her out of humiliation- no direct evidence of the commission of offence was brought on record by the prosecution – held that in case of circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should be fully proved – the circumstances must be conclusive in nature to fully connect the accused with the commission of crime and they should be consistent only with the hypothesis of the guilt of the accused-the court must take cautious approach and should adopt great caution while evaluating the circumstantial evidence- dead body was found from the house of the accused-medical evidence established that the deceased died as a result of asphyxia due to strangulation-the deceased and the accused were together in their matrimonial home prior to the incident- accused had told PW-1 that he had strangulated his wife with a dupatta after a quarrel- material contradiction in the testimony of witness is not sufficient to discard it - the accused had the knowledge as to what transpired within the room-he had not given any explanation of the circumstances leading to the inference of the guilt of the accused – held that the accused was rightly convicted by the trial Court.

Cases referred:

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

For the Appellant :Mr. Bhupinder Ahuja, Advocate.
For the Respondent :Mr. Ashok Chaudhary, Mr. V.S. Chauhan, Additional Advocates General and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Sukhdev Singh, hereinafter referred to as the accused, has assailed the judgment dated 8.10.2012, passed by Additional Sessions Judge, Fast

Track Court, Una, District Una, Himachal Pradesh, in Sessions Case No.28-VII/2011 (Sessions Trial No.28/2011), titled as *State of Himachal Pradesh v. Sukhdev Singh*, whereby he stands convicted of the offence punishable under the provisions of Section 302 of the Indian Penal Code, and sentenced to undergo imprisonment for life and pay fine of `25,000/- and in default thereof to further undergo rigorous imprisonment for a period of one year.

2. It is the case of prosecution that on 11.4.2011, accused Sukhdev Singh went to Police Station, Amb and got recorded Rapt (Ex.PW-10/A), to the effect that he had murdered his wife. Inspector Gurdeep Singh (PW-13) alongwith other police officials visited the house of the deceased, situated in village Baheri and found dead body of a lady, with a *Chunni* around her neck, lying on the bed. The dead body was identified to be that of Ashi by the Up Pradhan Rakesh Lath (PW-2) and Jagat Ram (PW-1) (father of the deceased). On the spot, statement of Jagat Ram (Ex. PW-1/A) was recorded, on the basis of which FIR No.48, dated 11.4.2011 (Ex. PW-11/A), under the provisions of Section 302 of the Indian Penal Code, was registered at Police Station, Amb, District Una. Inquest report (Ex.PW-3/A) was prepared on the spot. Dead body was taken into possession. Also *Chunni* (Ex. P-1) was taken into possession vide Memo (Ex.PW-2/A). Dr. Ravi Sharma (PW-15) and Dr. S.K. Bansal, conducted the postmortem of the dead body and report (Ex.PW-15/A) taken on record. Blood stained clothes were sent for chemical analysis to the Forensic Science Laboratory and report (Ex. PW-13/D and 13/E) obtained. Investigation revealed that the accused suspected his wife of having illicit relationship and out of humiliation, murdered her. 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 302 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as 17 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took defence of 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. Bhupinder Ahuja, Advocate, on behalf the accused, as also M/s Ashok Chaudhary, V.S. Chauhan, learned Additional Advocate General, and Mr. J.S. Guleria, learned 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. Undisputedly, it is not a case of direct evidence but that of circumstantial evidence. We shall first deal with the law on the point.

8. 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. [Also: *Pudhu Raja and another Versus State Represented by Inspector of Police*, (2012) 11 SCC 196; *Madhu Versus State of Kerala*, (2012) 2 SCC 399; *Dilip Singh Moti Singh versus State of Gujarat*, (2010) 15 SCC 622, *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.].

9. Also, apex Court in *Padala Veera Reddy v. State of Andhra Pradesh and others,* 1989 Supp (2) SCC 706, Court 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."
>
> (Also: *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).

10. 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.

11. 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 guilty of the accused.

12. In the instant case, prosecution refers to and relies upon the following circumstances against the accused:

1. Recovery of the dead body from the house of the accused.
2. Deceased having died on account of asphyxia due to strangulation.
3. Accused and the deceased seen together in the matrimonial house, immediately prior to the occurrence of the incident.
4. Confessional statement of the accused.

13. There is nothing on record to establish that the deceased was having illicit relationship with any person. It has come in the testimony of parents of the deceased, Jagat Ram (PW-1) and Rachna Devi (PW-4), that the deceased was a divorcee and was married to accused Sukhdev Singh on 10.10.2010. Noticeably, in the unrebutted testimony of parents of the deceased, it has also come on record that accused used to maltreat the deceased, which fact she had brought to their notice. Though, no written complaint was filed with any authority, but the matter was brought to the notice of the mediator.

Circumstance No.1

14. That dead body of the deceased was recovered from the house of the accused, stands conclusively established by the prosecution, through the testimonies of Jagat Ram (PW-1), Rakesh Lath (PW-2), Tarsem Lal (PW-3), Inspector Gurdeep Singh (PW-13) and ASI Ram Sawroop (PW-14).

15. Inspector Gurdeep Singh states that in the morning of 11.4.2011, accused came to the Police Station and got recorded Rapt (Ex.PW-10/A), to the effect that he had murdered his wife. The same was read over and explained to him. Accused admitted the contents thereof to be true and correct. The witness further states that he reached the house of the accused and saw dead body of a lady, lying on the bed, which was identified by Up Prahdan Rakesh Lath (PW-2) and Jagat Ram (PW-1) (father of the deceased), who also have corroborated such version. Dead body was taken into possession and sent for postmortem, as is evident from the testimony of Inspector Gurdeep Singh and LC Sunita (PW-16).

Circumstance No.2

16. Dr. Ravi Sharma (PW-15), who conducted the postmortem, issued report (Ex.PW-15/A). In Court, the doctor has described the physical condition of the body and the injuries as under:

> "Legature mark completely encircling the neck, horizontally 12" in length and 5 cm wide, 3-4 layer underlying skin is bruised and ecchymosed, subcutaneous tissue, ecchymosed, neck not stretched. Fracture of the super horn of the laryngeal cartilage. Tracheal rigns broken. Injury to underlying neck muscles present. No other external sign of injury over the body. Intima of the carotid arteries teared. Tongue swollen.
>
> Scalp and verterbra Normal.
>
> Thoracic wall and ribs normal. Pleure and both lungs showing petechie. Left side of heart empty and right side full of blood. Abdominal wall and oropharynx normal. Stomach showing semi solid material with foul smell. Small and large intestine having foul smelling gases. Liver, spleen congested. Kidney and bladder normal. Non gravid uterus normal. No injury to other musculo skeleton system. Sealed viscera, vaginal swabs and blood sample were sent to the RFSL Dharamshala. Clothes and belonging of the deceased were handed over to the police. After going through the reports Exts. PW-13/D and PW-13/E we opined that the deceased had died as a result of asphyxia due to strangulation. The probable duration between injury and death was within minutes and between death and post mortem was between 12-24 hours. We have issued post mortem report Ext. P15/A which bears my signatures and the

> signatures of Dr. S.K. Bansal the other member of the Board. The strangulation is possible with Duppatta Ext. P-1 shown to me today in the Court." (Emphasis supplied)

Thus, prosecution has been able to establish circumstance of the deceased having died as a result of asphyxia due to strangulation.

Circumstance No.3

17. Significantly, Ram Dei (PW-9), mother of the accused, in her uncontroverted testimony, has deposed that after having meals on 10.4.2011, all the family members retired to their respective rooms. Both, the accused and the deceased, slept in their room and the other members of the family slept together in another room. The following morning (11.4.2011) at about 7-8 a.m., when she went to serve tea to her son and the deceased, she noticed the room to be bolted from outside. On opening the door, she saw the deceased lying on the bed. She shook her body, but the deceased did not respond. As such she cried, became unconscious and fell on the ground. She also informed her neighbour Gurmeet Chand (PW-5) about the same.

18. Gurmeet Chand is the immediate neighbour of the accused. He saw the accused going towards village Churru at about 5-5.15 a.m. on 11.4.2011.

19. The prosecution, thus, through the testimony of these witnesses, has been able to establish the circumstance of the accused and the deceased being together in the matrimonial house, immediately prior to the occurrence of the incident. Accused has not come forward to explain his absence from the house, nor has he set up any plea of alibi.

Circumstance No.4

20. From the Rapt (Ex.PW-10/A), so proved on record by HHC Sada Shiv (PW-10) and Inspector Gurdeep Singh (PW-13), it is quite apparent that after visiting the Police Station, accused got recorded his statement of having murdered his wife, for the reason that he harboured suspicion of her having illicit relationship with "other persons". This document is not signed by the accused. However, the matter does not end here, on 11.4.2011, at about 6.37 p.m., accused had also telephonically called Jagat Ram (PW-1) and informed him that "*he had a quarrel with Ashi and that he had murdered her by strangulating her with her Dupatta and that he is going to Police Station, Amb. My wife was standing by my side and I informed her that the accused present in the court had caused the murder of our daughter namely Ashi".* Version of this witness also stands corroborated by Gurmeet Chand (PW-5). Though it has come in the testimony of Jagat Ram that he does not remember the telephone number of the accused, but then such fact would not render his unrebutted testimony to be doubtful. Thus, the circumstance of confessional statement by the accused also stands proved.

21. Learned counsel has invited our attention to the contradiction in the testimonies of Gurmeet Chand and Ram Dei. On one hand, Ram Dei states that seeing the dead body, she fell unconscious and recovered only after a period of one hour, whereas on the other hand, Gurmeet Chand states that Ram Dei came to his house and informed that something had happened to her daughter-in-law. She requested him to come to her house.

22. On first brush, the contradiction seems to be glaring, which on careful reading and appreciation of testimonies of these witnesses is not so. Factum of Ram Dei having informed Gurmeet Chand about the death of the deceased is categorically, in fact

unrebuttedly, clear, as is so deposed by her. Whether she went to his house or not, is a different matter. Testimonies of these witnesses, solely on this count, cannot be brushed aside, for we find that on material aspect the witness has deposed naturally and truthfully. Benefit of passage of time, perhaps the reason of different version coming on record, with regard to visit of Ram Dei to the house of Gurmeet Chand, ought to be given to the witnesses. Ram Dei categorically states that house of Gurmeet Chand is just adjoining to her house. Hearing her cries, Gurmeet Chand may have arrived on the spot. In any event, contradiction in the testimony of these witnesses, would not render the prosecution case to be doubtful or the testimonies of other witnesses to be unbelievable and their versions unreliable.

23. That deceased was strangulated with *Dupatta* (Ex. P-1) also stands proved on record through the testimonies of Dr. Ravi Sharma and other spot witnesses, in whose presence recovery was effected as also Inspector Gurdeep Singh.

24. Relying upon a decision rendered by the Hon'ble Supreme Court of India in *Murli alias Denny v. State of Rajasthan,* (1995) Supp1 SCC 39, learned counsel for the appellant contended that the conviction be altered from Section 302 to Section 304 (Part I) of the Indian Penal Code. The decision rendered by the apex Court is in the given facts and the circumstances and is clearly distinguishable and not applicable to the instant facts.

25. In the instant case, there was no provocation, of whatsoever nature, warranting such drastic action on the part of the accused. Accused and the deceased were newly married. There is absolutely no evidence of extra marital relationship and also no reference of any suspects. After taking meals, the family retired to their respective bed rooms. There is no evidence of the accused having confronted his wife with regard to her illicit relationship. No outsider had visited the house. Also, there was no call from anyone. He does not suspect his family members to have committed the murder. What transpired inside the room was entirely within his personal knowledge. He ought to have come forward and explained as to what transpired immediately prior to the incident, between the two, which he failed to do so.

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

27. In our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, not only ocular but also corroborative in the shape of recovery of weapon of offence.

28. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

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

Sunil Kumar @ Sonu. .....Appellant.
Vs.
State of H.P. ....Respondent.

Cr. Appeal No.4231 of 2013.
Judgment reserved on: 2.7.2015
Date of Judgment: July 15, 2015.

Indian Penal Code, 1860- Section 376- Accused raped the prosecutrix thrice and threatened to eliminate her in case incident was narrated to any person- prosecutrix suffered from stomach pain and when she was taken to Medical Officer pregnancy of six months was detected- prosecutrix narrated the incident to her mother on which FIR was registered- prosecutrix delivered a female child and as per DNA report, accused is a biological father of the child- prosecutrix subsequently deposed that she was raped and threatened by the accused- her testimony is trustworthy- she was born on 12.5.1997 as per birth certificate- incident had taken place in the month of January and February, 2011- prosecutrix was minor on the date of incident – prosecution version cannot be doubted merely because of the fact that prosecutrix had not narrated the incident to any person- testimony of the prosecutrix was corroborated by DNA report- held, that in these circumstances, accused was rightly convicted by the trial Court. (Para-11 to 23)

Cases referred:
Dayal Singh and others Vs. State of Uttaranchal, AIR 2012 SC 3046
Sohrab and another Vs. State of Madhya Pradesh, AIR 1972 SC 2020
State of U.P Vs. M.K. Anthony, AIR 1985 SC 48
State of Rajasthan Vs. Om Parkash, AIR 2007 SC 2257
Prithu @ Prithi Chand and another Vs. State of H.P., 2009 (11) SCC 588
State of UP Vs. Santosh Kumar and others, 2009 (9) SCC 626
State Vs. Saravaran and another, AIR 2009 SC 151
Appabhai and another Vs. State of Gujarat, AIR 1988 SC 696
Rammi @ Rameshwar Vs. State of Madhya Pradesh, AIR 1999 SC 3544
State of H.P Vs. Lekh Raj and another, 2000 (1) SCC 247
Laxman Singh Vs. Poonam Singh and others, 2004 (10) SCC 94
Kuriya and another Vs. State of Rajasthan, 2012 (10) SCC 433
Bhe Ram Vs. State of Haryana, AIR 1980 SC 957
Rai Singh Vs.State of Haryana, AIR 1971 SC 2505
Dalbir Singh and others Vs.State of Punjab, AIR 1987 SC 1328
Jose Vs. State of Kerala, AIR 1973 SC 944

Vadivelu Thevar Vs. The State of Madras, AIR 1957 SC 614
Masalti and others Vs. State of Uttar Pradesh, 1965 SC 202
M/s Visakha Agro Chemicals (P) Ltd and others Vs. Fertilizer Inspector-cum-Assistant Director of Agriculture Visakhapatnam and another, 1997 (2) crimes 648
State of Punjab Vs. Gurmal Singh and others, 1996 (2) SCC 384
State of Rajasthan Vs. N.K., 2000 SCC (5) 30
State of HP Vs. Lekh Raj and another, 2000 (1) SCC 247
Madan Gopal Vs. Naval Dubey 1992 (3) SCC 204
Rajesh Patel Vs. State of Jharkhand, 2013 (3) SCC 791
Bodhisattwa Gautam Vs. Subhra Chakraborty, AIR 1996 SC 922
State of Punjab Vs. Gurmit Singh and others, AIR 1996 SC 1393
Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753
Rafiq Vs. State of Uttar Pradesh, AIR 1981 SC 559

For the appellant: Mr. Shivendra Singh, Advocate.
For the respondent: Mr. M.L.Chauhan, Addl. Advocate General with Mr.J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against judgment and sentence passed by the learned Sessions Judge Mandi H.P in Sessions Trial No. 28 of 2012 titled State of HP Vs. Sunil Kumar decided on 15.6.2013.

BRIEF FACTS OF THE PROSECUTION CASE:

2. It is alleged by prosecution that accused along with his mother Meera Devi and Dila Ram used to reside in the house of maternal aunt namely Smt. Nimo Devi at village Sudhrani in the year 2011. It is further alleged by prosecution that prosecutrix is the younger daughter of Smt. Nimo Devi. It is further alleged by prosecution that prosecutrix was born on dated 12.5.1997. It is further alleged by prosecution that in the month of January/February 2011 accused committed rape upon prosecutrix thrice by way of gagging her mouth when prosecutrix was sleeping with her maternal uncle, accused and mother of accused. It is further alleged by prosecution that thereafter accused threatened prosecutrix that he would eliminate prosecutrix in case she would narrate the incident to anybody. It is further alleged by prosecution that on dated 6.8.2011 when prosecutrix came back from school she was having stomach pain. It is further alleged by prosecution that thereafter mother of prosecutrix took prosecutrix to medical officer where medical officer detected pregnancy of prosecutrix of about six months. It is further alleged by prosecution that thereafter prosecutrix disclosed whole matter to her mother and thereafter mother of the prosecutrix filed a complaint before police officials Ext PW6/A. It is further alleged by prosecution that thereafter FIR No. 106 Ext PW10/A was registered. It is further alleged by prosecution that thereafter investigating officer filed application for medical examination of prosecutrix and thereafter prosecutrix was medically examined on dated 8.8.2011 vide MLC Ext PW5/B. It is further alleged by prosecution that investigating officer visited spot and prepared site plan Ext PW17/C. It is further alleged by prosecution that prosecutrix produced one bed sheet Ext P3 which was took into possession vide seizure memo Ext

PW7/A. It is further alleged by prosecution that birth certificate of prosecutrix Ext PW2/B was obtained. It is further alleged by prosecution that prosecutrix was born on dated 12.5.1997. It is further alleged by prosecution that prosecutrix delivered a female child on dated 16.10.2011. It is further alleged by prosecution that application was moved before Medical Superintendent Zonal Hospital Mandi with the request to preserve blood samples of prosecutrix as well as her newly born child for DNA profiling. It is further alleged by prosecution that x-ray of the prosecutrix was also conducted and x-ray films are Ext PW4/A to Ext PW4/E. It is further alleged by prosecution that ultra sound of prosecutrix was also conducted and ultra sound films are Ext PW8/A to Ext PW8/C and report of Dr.Jyoti Vaidya is Ext PW8/G. It is further alleged by prosecution that sealed parcels were deposited in FSL Junga vide RC No. 47 of 2012. It is further alleged by prosecution that four sealed parcels were sent to RFSL Gutkar vide RC No.15 of 2012. It is further alleged by prosecution that accused was also medically examined at Zonal Hospital Mandi and his MLC report is Ext PW18/A. It is further alleged by prosecution that application Ext PW18/B was filed before Medical Superintendent Zonal Hospital Mandi for preserving blood sample of accused and DNA profiling. It is further alleged by prosecution that investigating officer moved application before Principal Government High School Sudhrani for supply of birth certificate of prosecutrix. It is further alleged by prosecution that FSL report Ext PA placed on record. It is further alleged by prosecution that as per DNA report Ext PZ accused is biological father of newly born children from prosecutrix. Charge was framed against accused under Section 376 IPC. Accused did not plead guilty and claimed trial.

3. Prosecution examined nineteen witnesses in support of its case.

Sr.No.	Name of Witness
PW1	Dr. Anuradha Sharma
PW2	Munshi Ram
PW3	Dr. Sanjeev Sharma
PW4	Dr. Rakesh Kumar
PW5	Dr. Sarla Chand
PW6	Smt. Nimo Devi
PW7	Ms. Haseena
PW8	Dr. Jyoti Vaidya
PW9	Budhi Singh
PW10	Rajmal
PW11	Ashwani Kumar
PW12	Dhani Ram
PW13	Khem Chand
PW14	Prakram Singh
PW15	Prem Kumar
PW16	Anil Kumar
PW17	Shyam Lal
PW18	Aswani Kumar
PW19	Anil kumar

4. Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	Description.
Ext. PW1/A	Application
Ext. PW1/B	Identification form of Himani
Ext. PW1/C	Identification form of Prosecutrix
Ext.PW2/A	Application
Ext. PW2/B	Date of birth certificate of prosecutrix
Ext.PW3/A to 3D	Rotational Videography (RVG) of prosecutrix
Ext. PW4/A to 4/E	X-ray of right wrist, right elbow, right knee, right ankle and right hip of prosecutrix
Ext PW4/G	Report
Ext PW5/A	Application
Ext PW5/B	MLC
Ext PW5/C	X-ray form
Ext PW6/A	Statement of Smt. Nimo Devi
Ext PW7/A	Memo
Ext PW8/A to 8/C	Ultra sound films of prosecutrix.
Ext PW9/A	Copy of RC
Ext PW9/B	Receipt of FSL
Ext PW10/A	FIR
Ext PW10/B	Endorsement
Ext PW11/A	Copy of RC No. 15/2012
Ext PW12/A	Copy of RC No.72/2012
Ext PW12/B	Receipt of FSL
Ext PW13/A	Abstract of entry Nos. 526 and 527
Ext PW13/B	Abstract of entry of parcel at serial No.35
Ext PW14/A	Abstract of register No.19
Ext PW17/A	Endorsement
Ext PW17/B	Copy of departure report
Ext PW17/C	Spot Map
Ext PW17/D	Specimen seal impression
Ext PW18/A	Request for conducting MLC of accused Sunil Kumar.
Ext PW18/B	Application to M.O for preservation of blood of accused.
Ext PW18/C	Identification form of Sunil Kumar.
Ext PW18/D to 18/F	Copies of forwarding letters/notes
Ext PW18/G	Application
Ext PW18/H	Certificate

Ext PA	MLC of Sunil Kumar
Ext PA-I	FSL report
Ext PZ	Report regarding DNA test given by SFSL Junga HP
Ext PX	G.D No. 34(A).

5. Statement of accused under Section 313 Cr.PC was recorded. Accused stated that he is innocent. Accused did not lead any defence evidence despite opportunity granted by learned trial Court.

6. Learned trial Court convicted accused under Section 376 IPC to undergo rigorous imprisonment for seven years and to pay fine of Rs.50000/- (Fifteen thousand). Learned trial Court further directed that in default of payment of fine convicted would further undergo simple imprisonment for period of one year. Learned trial Court further directed that whole amount realized would be paid to prosecutrix.

7. Feeling aggrieved against the judgment and sentence passed by learned trial Court appellant filed present appeal.

8. Court heard learned Advocate appearing on behalf of appellant and learned Additional Advocate General appearing on behalf of the State and also perused entire record carefully.

9. Point for determination in present appeal is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice to appellant.

10. ORAL EVIDENCE ADDUCED BY PROSECUTION:

10.1 PW1 Dr. Anuradha Sharma has stated that she is posted in Zonal Hospital Mandi since October 1998. She has stated that on dated 4.4.2012 police officials of police station Aut moved an application before Medical Superintendent Zonal Hospital Mandi which was marked to her for necessary action. She has stated that application is Ext PW1/A.She has stated that thereafter she obtained blood samples of prosecutrix as well as blood sample of newly born baby on FTA cards and also obtained identification form of newly born baby Ext PW1/B. She has stated that identification form of prosecutrix is Ext PW1/C. She has stated that thereafter she handed over FTA cards as well as identification forms to police officials. She has stated that she identified prosecutrix as well as female child in Court.

10.2. PW2 Munshi Ram has stated that on dated 30.5.2012 police officials of police post Bali Chowki moved an application before him with direction to provide birth certificate of prosecutrix. He has stated that application is Ext PW2/A. He has stated that thereafter he prepared birth certificate Ext PW2/B. He has stated that as per birth certificate prosecutrix was born on 12.5.1997. He has stated that as per record the date of birth of prosecutrix was entered as per information given by one Kaur Singh resident of Sudhrani.

10.3. PW3 Dr. Sanjeev Sharma has stated that he was posted in Zonal Hospital Mandi since 2010. He has stated that on dated 22.6.2012 Dr. Sarla Chand medical officer Zonal Hospital Mandi referred prosecutrix to him for determination of age. He has stated that he clicked rotational videography RVG of prosecutrix and took four prints in number which are Ext PW3/A to Ext PW3/D. He has stated that he had given age verification report

of prosecutrix which is Ext PW3/E. He has stated that age of prosecutrix was found between 16-18 years. He has denied suggestion that prosecutrix was not referred to him nor he conducted age determination test.

10.4. PW4 Dr.Rakesh Kumar Radiologist has stated that on dated 21.6.2012 Dr. Sarla Chand referred the prosecutrix to him for determination of radiological age. He has stated that x-rays were done under his supervision. He has stated that x-ray of right wrist, right elbow, right knee, right ankle and right hip were obtained under his supervision which are Ext PW4/A to Ext PW4/E. He has stated that Dr. Sarla Chand also filled x-ray form which is Ext PW4/F. He has stated the he had given his report which is Ext PW4/G. He has stated that as per his opinion radiological age of prosecutrix was found between 17-19 years. He has admitted that nutrition habits can affect the radiological age of person.

10.5. PW5 Dr. Sarla Chand has stated that for the last six years he was posted as medical officer in Zonal Hospital Mandi. She has stated that on dated 8.8.2011 on the application of police officials Ext PW5/A she conducted medico legal examination of prosecutrix and she identified prosecutrix in Court. She has stated that she conducted medico legal examination of prosecutrix on dated 8.8.2011. She has stated that prosecutrix was brought to hospital by lady constable with the alleged history of sexual assault by her cousin brother in January/February 2011 thrice. She has stated that before conducting her medico legal examination she obtained the consent of her mother Nimo Devi as well as consent of prosecutrix. She has stated that prosecutrix was conscious, co-operative, well oriented to the time and space. She has stated that pulse of the prosecutrix was 72 p.m regular, B.P was 130/74 mm. She has stated that on examination of prosecutrix she observed as follows.1. Breasts developing, pubic hairs black in colour fully grown up, axillary hair black in colour growing no marks of any injury seen on her body. 2. Height of uterus was about 26 weeks and foetal parts were palpable. 3. Labia Majora and minora developing, cervix and vagina healthy, foul smelling discharge present, hymen old torned and healed. 4 Two fingers inserted easily, uterus enlarged bi-lateral fornices clear, vaginal swabs taken and preserve LMP-18/1/2011. She has stated that she advised ultra sound for exact age of gestation. She has stated that she handed over following specimens to police officials.1. True copy of MLC. 2. Pubic hair. 3. Vaginal swabs. 4. Sample of seal. 5. Clothes. She has stated that investigating agency also made quarries in the application Ext PW5/A which was answered by her as under.1. Prosecutrix was exposed to sexual intercourse however the exact time, how many times could not be stated upon. 2. Prosecutrix was found pregnant of about 26 weeks however exact age of gestation could be given after ultra sound report. 3. No struggle marks were seen on the body of prosecutrix. After examining the ultra sound report on 9.8.2011 Dr. Jyoti Vaidya Radiologist opined that there was single living foetus of 24 weeks plus 4 days of age. Dr. Jyoti Vaidya also opined that prosecutrix was having pregnancy of 6 months plus 4 days. She has stated that investigating agency had also requested her to conduct requisite tests for age determination test. She has stated that she advised x-ray and dental opinion. She has stated that as per opinion of Radiologist the age of prosecutrix was between 17 to 19 years and as per opinion of dental the age of prosecutrix was between 16 to 18 years. She has stated that she opined that age of prosecutrix was between 16 to 19 years.

10.6 PW6 Smt. Nimo Devi has stated that she is agriculturist by profession. She has stated that prosecutrix is her younger daughter aged about 15 years. She has stated that on dated 6.8.2011 when prosecutrix came back from school prosecutrix was having stomach pain. She has stated that thereafter she went to medical officer Zonal Hospital

Kullu. She has stated that medical officer after examination told that prosecutrix was having pregnancy of about six months. She has stated that upon her persistent inquiry prosecutrix disclosed that her cousin brother Sonu @ Sunil Kumar accused present in court who is son of her real sister had committed forcible sexual intercourse with prosecutrix. She has stated that prosecutrix disclosed to her that accused had committed rape after gagging mouth of prosecutrix. She has stated that thereafter her daughter was medically examined at Zonal Hospital Mandi. She has denied suggestion that she and prosecutrix had not gone to Kullu hospital for medical examination. She has denied suggestion that the age of prosecutrix was about 20/21 years. She has denied suggestion that she kept accused in her house as Gharjawai (Son-in-law). She has denied suggestion that in the area there is customs to marry with the children of brother and sister. She has stated that prosecutrix disclosed to her that accused had rape prosecutrix thrice. She has denied suggestion that accused had not committed rape upon prosecutrix.

10.7. PW7 prosecutrix has stated that she has studied upto 8th class and thereafter she discontinued her study in the year 2011. Prosecutrix has stated that in the year 2011 her maternal uncle Dile Ram and her maternal aunt Meera Devi and her son Sunil Kumar accused present in Court used to reside in her house at village Sudhrani. Prosecutrix has stated that in the month of January/February 2011 accused Sunil Kumar present in Court raped her thrice after gagging her mouth. Prosecutrix has stated that accused had threatened her that he would eliminate prosecutrix if prosecutrix would disclose incident to anyone. Prosecutrix has stated that in the month of August when she came back from school she sustained pain in her stomach and then her mother checked her stomach from medical officer. Prosecutrix has stated that medical officer after examination disclosed to her mother that prosecutrix was having pregnancy of about five months in her womb. Prosecutrix has stated that thereafter her mother filed a complaint to the police. Prosecutrix has stated that thereafter she was brought to Zonal Hospital Mandi for her medico legal examination. Prosecutrix has stated that medical officer had obtained her consent as well as consent of her mother and thereafter police visited at the spot, prepared spot map and took into possession bed sheet. Prosecutrix has stated that on dated 16.10.2011 she delivered female child in Zonal Hospital Mandi. Prosecutrix has stated that bed sheet is Ext P2. Prosecutrix has stated that accused is the father of female child. Prosecutrix has denied suggestion that she was not medically examined by any medical officer. Prosecutrix has stated that accused and his mother left the village when she was brought to hospital for medical check up. Prosecutrix has denied suggestion that her mother wants to marry her with accused. Prosecutrix has denied suggestion that her mother was interested to keep accused as Gharjawai (Son-in-law). Prosecutrix has denied suggestion that when accused and her mother left village thereafter present case was filed against accused. Prosecutrix has denied suggestion that accused did not commit rape upon her. Prosecutrix has denied suggestion that accused did not gage her mouth. Prosecutrix has denied suggestion that female child born did not belong to accused.

10.8. PW8 Dr. Jyoti Vaidya has stated that in the month of August M.O was posted as Radiologist in Zonal Hospital Mandi. M.O has stated that on dated 9.8.2011 prosecutrix was referred by Dr. Sarla Chand medical officer Zonal Hospital Mandi for ultra sound examination of prosecutrix. M.O has stated that reference slip is Ext PW5/C. M.O has stated that M.O conducted ultra sound. M.O has stated that ultra sound films are Ext PW8/A to Ext PW8/C. M.O has stated that there was pregnancy of 24 weeks 4 days.

10.9. PW9 HHC Budhi Singh has stated that on dated 6.4.2012 MHC police station Aut handed over him a sealed parcel with direction to take the same to FSL Junga vide RC No.47 of 2012. He has stated that copy of RC is Ext PW9/A and receipt of FSL is Ext PW9/B. He has stated that he deposited case property on dated 7.4.2012 in FSL Junga. He has stated that case property remained intact in his custody. He has denied suggestion that no case property was given to him nor he took the same to FSL Junga.

10.10. PW10 Rajmal has stated that in the year 2010-11 he remained posted as investigating officer police station Aut. He has stated that on dated 6.8.2011 HHG Dharam Singh came to police station Aut along with statement of Smt Nimo Devi recorded under Section 154 Cr PC Ext PW6/A. He has stated that thereafter he recorded FIR Ext PW10/A. He has stated that thereafter he prepared case file and handed over the same to HHG Dharam Singh with direction to take the same to the spot. He has denied suggestion that no statement of Smt. Nima Devi was brought to police station. He has denied suggestion that he did not register FIR. He has denied suggestion that FIR was anti dated.

10.11. PW11 Ashwani Kumar has stated that he was posted at Balichowki police station Aut. He has stated that on dated 29.1.2012 MHC police station Aut handed over to him four sealed parcels with direction to take the same to RFSL Gutkar. He has stated that along with four samples MHC handed over to him docket, copy of FIR, letter of medical officer Zonal Hospital Mandi and specimen seal impression. He has stated that same articles were handed over to him vide RC No.15/2012 copy of which is Ext.PW11/A. He has stated that he deposited these articles at RFSL Gutkar.

10.12. PW12 Dhani Ram has stated that for the last two and half years he was posted as constable general duty in police post Balichowki. He has stated that on dated 20.5.2012 MHC police station Aut handed over him one parcel containing blood sample along with docket specimen seal impressions, copy of FIR, MLC and other documents vide RC No. 72/2012 Ext PW12/A with direction to take same to FSL Junga. He has stated that he deposited said articles with FSL Junga on dated 21.5.2012. He has stated that receipt of FSL is Ext PW12/B. He has stated that case property remained intact in his custody. He has denied suggestion that no case property was given to him. He has denied suggestion that he did not take case property to FSL Junga.

10.13**.** PW13 Khem Chand has stated that he was posted as MHC in police station Aut since 2010. He has stated that he brought relevant register No.19 as well as record of road certificate. He has stated that on dated 9.8.2011 HHG Desh Raj deposited parcel containing bed sheet which was sealed in a parcel. He has stated that he entered articles in register No.19 at serial No.526. He has stated that on dated 10.8.2011 HHG Puran Chand deposited three sealed parcels with him. He has stated that one parcel sealed with seal ZH was stated to be containing wearing apparels of prosecutrix, second parcel sealed with seal ZH containing pubic hairs of prosecutrix and third parcel containing vaginal swabs along with sample seal. He has stated that he duly entered all these articles at serial No.527. He has stated that abstract of entry No.526 and 527 is Ext PW13/A. He has stated that case property was deposited in malkhana at serial No.526 and 527 and were sent to RFSL Gutkar through constable vide RC No.15 dated 29.1.2012. He has stated that copy of RC is Ext PW11/A which is correct as per original record. He has stated that similarly on dated 20.5.2012 constable Dhani Ram deposited sealed parcel sealed with seal ZH Mandi with him stated to be containing liquid blood sample. He has stated that he entered parcel at serial No.35 in register No.19 and abstract of the same is Ext PW13/B which is correct as per original record. He has stated that sample was sent to FSL Junga on the same day through

constable Dhani Ram vide RC No.72/2012 copy of which is Ext PW12/A. He has stated that receipt of FSL is Ext PW12/B. He has stated that case property remained intact in his custody. He has stated that RC and receipt is correct as per record brought by him in Court. He has denied suggestion that no case property was deposited with him. He has denied suggestion that he did not send case property to FSL Junga/RFSL Gutkar.

10.14. PW14 Prakram Singh has stated that he was posted as investigating officer police station Aut since 2011. He has stated that on dated 6.4.2012 constable Dhani Ram deposited a sealed parcel sealed with three seals of ZH Mandi stated to be containing FTA papers pertaining to blood samples of prosecutrix as well as her daughter. He has stated that he entered parcel in register No.19 at serial No.21/23. He has stated that abstract of register No.19 is Ext PW14/A which is correct as per record brought by him in Court. He has stated that he also sent relevant documents along with parcel to FSL Junga. He has stated that copy of RC is Ext PW11/A and receipt Ext PW11/B are correct as per original record. He has denied suggestion that no parcel was deposited with him. He has denied suggestion that he did not send parcel to FSL Junga.

10.15 PW15 Prem Kumar has stated that on dated 13.2.2012 he brought four parcels along with report from RFSL Gutkar and handed over the same to MHC police station Aut. He has denied suggestion that no parcel was brought by him from RFSL Gutkar.

10.16 PW16 SI Anil Kumar has stated that after completion of investigation case file was produced before him and he found a prima facie case under Section 376 IPC against accused. He has stated that he prepared challan and submitted the same in the Court of Judicial Magistrate Ist Class Court No.2 Sundernagar.

10.17 PW17 ASI Shyam Lal has stated that in the year 2011 he remained posted as Incharge police post Bali Chowki police station Aut District Mandi. He has stated that on dated 6.8.2011 complainant Nimo Devi made her statement Ext PW6/A before him which was recorded as per her version. He has stated that after recording statement he read over the matter to her and thereafter put her RTI on it. He has stated that thereafter he made endorsement on the statement under Section 154 Cr PC and his endorsement is Ext PW17/A. He has stated that after making his endorsement he sent statement to police station through HHG Karam Singh on the basis of which FIR No.106 dated 6.8.2011 Ext PW10/A was registered. He has stated that endorsement regarding registration of FIR is Ext PW10/B. He has stated that when complainant Nimo Devi made her statement he was on patrolling duty. He has stated that he moved application before medical officer Zonal Hospital Mandi which is Ext PW5/A with a request to conduct medico legal examination of prosecutrix but on the same day her medico legal examination could not be conducted. He has stated that on dated 7.8.2011 he visited the spot and prepared spot map Ext PW17/C. He has stated that on the same day prosecutrix produced one bed sheet which was took into possession vide memo Ext PW7/A. He has stated that bed sheet was put in a sealed parcel which was sealed with seal impression 'M' and he also obtained specimen seal impression of seal 'M'. He has stated that one of the specimen seal impression 'M' is Ext PW17/D. He has stated that he also recorded the statements of witnesses as per their versions. He has stated that case property was deposited with MHC police station Aut. He has stated that further investigation was entrusted to ASI Ashwani Kumar as he was transferred from police post Bali Chowki. He has denied suggestion that statement of complainant under Section 154 Cr.PC was manipulated by him. He has denied suggestion that complainant did not give any statement before him. He has denied suggestion that the same were not read over to her. He

has denied suggestion that he did not visit at the spot. He has denied suggestion that bed sheet was not took into possession. He has denied suggestion that he had recorded the statement of the witnesses at his own.

10.18. PW18 ASI Ashwani Kumar has stated that investigation of the case was entrusted to him. He has stated that he obtained birth certificate of prosecutrix by moving application Ext PW2/A. He has stated that thereafter certificate Ext PW2/B was prepared and provided by Secretary Gram Panchayat Khalwan. He has stated that thereafter he also made efforts to nab the accused. He has stated that on dated 16.10.2011 prosecutrix had delivered a female child in Zonal Hospital Mandi. He has stated that on dated 4.4.2012 he moved application before medical superintendent Zonal Hospital Mandi Ext PW1/A with a request to preserve blood samples of prosecutrix as well as her newly born child for DNA profiling. He has stated that blood samples of newly born baby of prosecutrix as well as prosecutrix were took by medical officer. He has stated that identification form of newly born child is Ext PW1/B and identification form of prosecutrix is Ext PW1/C. He has stated that prosecutrix was also medically examined and her x-rays were conducted for the purpose of determination of her age. He has stated that documents are Ext PW3/A to Ext PW3/D and report of M.O is Ext PW3/E. He has stated that x-ray forms are Ext PW4/A to Ext PW4/E. He has stated that accused Sunil Kumar was arrested on dated 17.5.2012. He has stated that accused was also medically examined by medical officer. He has stated that report of medical officer is Ext PA. He has stated that request for conducting medico legal examination of accused Sunil Kumar is Ext PW18/A. He has stated that similarly he also moved application before Medical Superintendent Zonal Hospital Mandi for preserving blood sample of accused Sunil Kumar for DNA profiling. He has stated that he also recorded the statements of the witnesses as per their versions. He has stated that he also filed application before Principal Government High School Sudhrani Ext PW18/G for obtaining birth certificate of prosecutrix. He has stated that thereafter birth certificate of prosecutrix was issued by head master Government High School Sudhrani. He has stated that as per birth certificate prosecutrix was born on 12.5.1997. He has stated that birth certificate is Ext PW18/H. He has stated that after receipt of FSL report Ext PA he produced case file before SHO police station Aut for preparation of challan. He has denied suggestion that he did not request to Medical Superintendent Zonal Hospital Mandi for obtaining blood sample of accused for DNA profiling. He has denied suggestion that Medical Superintendent did not obtain blood sample of accused. He has denied suggestion that birth certificate was not obtained. He has denied suggestion that he did not move application through competent authority.

10.19 PW19 SI Anil Kumar has stated that after the receipt of report regarding DNA Ext PZ he prepared supplementary challan and submitted the same in Court.

11. Submission of learned Advocate appearing on behalf of appellant that prosecution has not brought on record any cogent and reliable evidence that appellant had committed rape upon prosecutrix and in the absence of such evidence appellant could not be punished under Section 376 IPC and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. PW7 prosecutrix has stated in positive manner when she appeared in witness box that in the month of January/February 2011 appellant had raped her thrice after gagging her mouth. PW7 prosecutrix has stated in positive manner that appellant had threatened prosecutrix to eliminate her in case prosecutrix would disclose the fact of rape to anybody. Prosecutrix has stated in positive manner before learned trial Court that accused had raped her. Court is of

the opinion that testimony of prosecutrix is trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of prosecutrix. There is no evidence on record in order to prove that prosecutrix had hostile animus against appellant at any point of time.

12. Another submission of learned Advocate appearing on behalf of appellant that the age of prosecutrix was more than sixteen years at the time of alleged incident and there is no evidence of threat on record given by appellant to prosecutrix and prosecutrix was not dumb or mentally retarded and no injury was attributed to prosecutrix by appellant and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. As per birth certificate issued under Section 12/17 of Registration of Births and Deaths Act 1969 Ext PW2/B it is proved on record that prosecutrix was born on dated 12.5.1997. Birth certificate Ext PW2/B relating to prosecutrix has been issued by a public servant in discharge of his official duty and is a relevant fact under Section 35 of Indian Evidence Act 1872. Appellant did not adduce any cogent, positive and reliable evidence on record in order to rebut birth certificate Ext PW2/B placed on record issued under Section 12/17 of the Registration of Births and Deaths Act 1969. Birth certificate Ext PW2/B was registered on dated 26.5.1997 and entry in birth register was recorded on dated 26.5.1997 prior to the incident. It was held in case reported AIR 2011 SC 1691 titled Murugan @ Settu Vs. State of Tamil Nadu that documents made ante litem motam can be relied upon safely when such documents are admissible under Section 35 of Indian Evidence Act 1872. Document Ext PW2/B placed on record is admissible under Section 35 of Indian Evidence Act 1872. Hence it is held that prosecutrix was minor at the time of incident. As per prosecution story incident took place in the month of January/February 2011. Hence it is held that prosecutrix was minor at the time of incident in the month of January/February 2011 as per birth certificate Ext PW2/B placed on record issued under Section 12/17 of Registration of Births and Deaths Act 1969.

13. Another submission of learned Advocate appearing on behalf of appellant that there is no evidence on record that any kind of threat or fear was given to prosecutrix by appellant and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. Prosecutrix has specifically stated when she appeared in witness box that accused gagged her mouth at the time of commission of criminal offence of rape and also threatened minor prosecutrix to keep mum and not to disclose incident to anyone otherwise he would eliminate minor prosecutrix. It is proved on record beyond reasonable doubt that accused had threatened minor prosecutrix to eliminate her in case she would disclose incident to anyone.

14. Another submission of learned Advocate appearing on behalf of appellant that there was no injury upon the body of prosecutrix and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. It is held that minor prosecutrix surrendered to appellant due to fear of her death because it is proved on record by way of testimony of prosecutrix that appellant had threatened the prosecutrix to eliminate her in case she would disclose the incident to anyone and it is proved on record that appellant had gagged the mouth of prosecutrix at the time of commission of rape. Even case of the prosecution falls under description No.3 as defined under Section 375 IPC which is quoted “When her consent was obtained by putting her in fear of death or of hurt”. In the present case it is proved on record as per testimony of prosecutrix that appellant had threatened prosecutrix that he would eliminate her in case she would disclose the fact to anyone. It is also proved on record that appellant had

committed offence of rape after gagging mouth of prosecutrix. Hence it is held that present case falls within third description as defined under Section 375 IPC.

15. Another submission of learned Advocate appearing on behalf of appellant that as per testimony of PW3 Dr. Sanjeev Sharma, PW4 Dr.Rakesh Kumar Radiologist and PW5 Dr. Sarla Chand the age of prosecutrix was between 16 to 19 years and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that experts are not eye witness of the incident. It is well settled law that opinion of expert is advisory in nature. It is well settled law that purpose of expert opinion is primarily to assist the Court in arriving at final conclusion and report of expert is not binding upon the Court. It is well settled law that if the evidence of eye witness is trustworthy then Court is well within jurisdiction to discard expert opinion. See AIR 2012 SC 3046 titled Dayal Singh and others Vs. State of Uttaranchal**.** It is well settled law that exact age is not determinable through ossification test and variation of two years is possible on either side if variation of two years is took into consideration towards lesser side then the age of the prosecutrix comes to fourteen years strictly in conformity with birth certificate placed on record.

16. Another submission of learned Advocate appearing on behalf of appellant that testimony of prosecutrix is not credible and it requires corroboration and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. It is held that testimony of minor prosecutrix is trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of minor prosecutrix. There is no evidence on record in order to prove that minor prosecutrix had hostile animus against appellant at any point of time.

17. Another submission of learned Advocate appearing on behalf of appellant that there is material contradictions in the testimony of prosecution witnesses and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. Learned Advocate appearing on behalf of appellant did not point out any material contradiction which goes to the root of case. It is well settled law that minor contradictions are bond to come in a criminal case. In the present case incident took place in January/February 2011 and testimonies of prosecution witnesses were recorded on 19.11.2012, 20.11.2012, 22.11.2012, 12.12.2012, 13.12.2012, 14.12.2012, 28.1.2013 and 6.2.2013. It is well settled law that even if there are some discrepancies and contradictions in the evidence of witnesses then entire evidence should not be discarded if contradictions did not go to the root of case. Even in present case minor contradictions did not go to the root of case. See AIR 1972 SC 2020 titled Sohrab and another Vs. State of Madhya Pradesh. See AIR 1985 SC 48 titled State of U.P Vs. M.K. Anthony, See AIR 2007 SC 2257 titled State of Rajasthan Vs. Om Parkash, See 2009 (11) SCC 588 titled Prithu @ Prithi Chand and another Vs. State of H.P. See 2009 (9) SCC 626 titled State of UP Vs. Santosh Kumar and others. See AIR 2009 SC 151 titled State Vs. Saravaran and another. See AIR 1988 SC 696 titled Appabhai and another Vs. State of Gujarat. See AIR 1999 SC 3544 titled Rammi @ 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 titled Kuriya and another Vs. State of Rajasthan**.** It is well settled law that concept falsus in uno falsus in omnibus is not applicable in criminal case.See AIR 1980 SC 957 titled Bhe Ram Vs. State of Haryana. Also See AIR 1971 SC 2505 titled Rai Singh Vs.State of Haryana.It was held in case reported in AIR 1987 SC 1328 titled Dalbir Singh and others Vs.State of Punjab that there is no hard and fast rule which could be laid

down for appreciation of evidence as it is a question of fact and each case has to be decided on the facts as they proved in a particular case. It was held in case reported in AIR 1973 SC 944 titled Jose Vs. State of Kerala that conviction can be based on the sole testimony of a single witness if testimony is trustworthy, reliable and inspire confidence of Court. See AIR 1957 SC 614 titled Vadivelu Thevar Vs. The State of Madras and also see 1965 SC 202 titled Masalti and others Vs. State of Uttar Pradesh.

18. Another submission of learned Advocate appearing on behalf of appellant that there is no corroboration of rape as per testimony of medical officer and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that as per testimony of Dr. Jyoti Vaidya who conducted ultra sound of minor prosecutrix that there was pregnancy of 24 weeks and four days. It is proved on record that DNA profile of prosecutrix, female child and appellant were obtained and even DNA report Ext PZ issued by FSL Junga proved beyond reasonable doubt that prosecutrix is the biological mother of female child and accused is the biological father of female child. It is proved on record that DNA profile report Ext PZ submitted by FSL Junga remained un-rebuttal on record.

19. Another submission of learned Advocate appearing on behalf of appellant that all prosecution witnesses are interested witnesses and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that in sexual offence case generally prosecutrix used to narrate incident to their mother and father. In the present case rape was committed upon minor prosecutrix in the four walls of house. It is well settled law that relative witness is not interested witness. See AIR 1981 SC 1390 titled State of Rajasthan Vs. Smt. Kalki and another.

20. Another submission of learned Advocate appearing on behalf of appellant that investigation of case was conducted in a bias manner and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. There is no evidence on record in order to prove that investigating agency had any hostile animus against appellant at any point of time. It is proved on record that investigation was conducted by investigating agency strictly in accordance with law in impartial manner. Investigating agency recorded the testimony of prosecution witnesses, prepared site plan, obtained MLC of prosecutrix and appellant and also obtained DNA report of minor prosecutrix, appellant and female child. It is proved on record that appellant is biological father of female child born from prosecutrix.

21. Another submission of learned Advocate appearing on behalf of appellant that all recoveries and specimen signatures have been prepared in violation of Article 20 (3) of the Constitution of India and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that prosecution has collected entire evidence strictly in accordance with law. There is no positive and reliable evidence on record in order to prove that prosecution has collected evidence contrary to law in the present case. It is held that entire oral and documentary evidence was collected by prosecution in accordance with law.

22. Another submission of learned Advocate appearing on behalf of appellant that all material questions have not been put to appellant under Section 313 Cr.PC and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the statement of appellant recorded under Section 313 Cr. PC. It is held that all material questions have been put to accused

when accused was examined under Section 313 Cr.PC. It is held that no miscarriage of justice was caused to the appellant by way of non putting any incriminating questions to the appellant under Section 313 Cr.PC.

23. Another submission of learned Advocate appearing on behalf of appellant that FSL reports placed on record are inadmissible and the laboratory which had tested the articles was not competent and was not fully equipped with latest technology and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. FSL report Ext PA and Ext PZ have been issued by FSL Junga under Section 293 Cr.PC. Scientific expert reports placed on record are admissible under Section 293 Cr.PC Appellant did not file any application before learned trial Court to examine personally any scientific officer posted in DNA department and posted in Biology and Serology department. It was held in case reported in 1997 (2) crimes 648 titled M/s Visakha Agro Chemicals (P) Ltd and others Vs. Fertilizer Inspector-cum-Assistant Director of Agriculture Visakhapatnam and another that Court has to accept the report issued under Section 293 Cr.PC as valid evidence without examining the author of report. It is well settled law that testimony of prosecutrix must be appreciated in the background of entire case and Court should be sensitive while dealing with cases involved in sexual molestation. See 1996 (2) SCC 384 titled State of Punjab Vs. Gurmal Singh and others, See 2000 SCC (5) 30 titled State of Rajasthan Vs. N.K. See 2000 (1) SCC 247 titled State of HP Vs. Lekh Raj and another. See Madan Gopal Vs. Naval Dubey 1992 (3) SCC 204. It was held in case reported in 2013 (3) SCC 791 titled Rajesh Patel Vs. State of Jharkhand that testimony of prosecutrix is sufficient to convict the accused if it inspires confidence of Court. It was held in case reported in AIR 1996 SC 922 titled Bodhisattwa Gautam Vs. Subhra Chakraborty that rape is not only a crime against the woman but it is a crime against entire society. It was held that rape destroyed the entire psychology of woman and pushes the woman into deep emotional crisis. It was held in case reported in AIR 1996 SC 1393 titled State of Punjab Vs. Gurmit Singh and others that testimony of victim in case of sexual offence is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement Court should not find difficult to act on the testimony of victim of sexual assault alone to convict the accused where testimony of prosecutrix inspires confidence of Court and found reliable. It is well settled law that corroboration in rape cases is not sine qua non for conviction of accused. It was held in case reported in AIR 1983 SC 753 titled Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat that law does not require corroboration in rape case and if evidence of prosecutrix is trustworthy then there is no bar to convict the accused on the testimony of prosecutrix alone. See AIR 1981 SC 559 titled Rafiq Vs. State of Uttar Pradesh.

24. In view of the above stated facts and case law cited supra appeal filed by appellant is dismissed and the judgment and sentence passed by learned trial Court are affirmed. It is held that learned trial Court had properly appreciated oral as well as documentary evidence placed on record in accordance with law. Records of learned trial Court be sent back forthwith along with certify copy of judgment. Appeal filed by appellant is disposed of. Pending application(s) if any are also disposed of.

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

Surinder Kumar ..... Petitioner.
Versus
State of H.P. and others. ....Respondents

CWP No. 3862 of 2014.
Judgment reserved on 13.7.2015
Date of decision: 15th July, 2015.

Constitution of India, 1950- Article 226- Petitioner prayed for quashing the notification issued by respondent creating sub Tehsil, Jole and for shifting it to Chowki Minar- petitioner had not pleaded that decision to set up of a new sub-Tehsil suffers from any arbitrariness or malafides - creation of sub-Tehsil is in the domain of the Executive- Court cannot interfere with the same unless it is prima facie, illegal or suffers from arbitrariness- policy decision cannot be questioned on the ground that another decision would have been more fair or wise, scientific or logical or in interest of the society- Court should not substitute its wisdom in place of the wisdom of executive- petition dismissed. (Para- 4 to 9)

Cases referred:
Vijay Kumar Gupta versus State of H.P. and others , ILR (HP), 2015 (XLV (I)) 351 (D.B.)
Mrs. Asha Sharma v. Chandigarh Administration & Ors. 2011 AIR SCW 5636
State of U.P. & Ors v. Chaudhari Ran Beer Singh & Anr. 2008 AIR SCW 2296

For the petitioner: Mr. Bhupinder Roach, proxy counsel for Mr. Pankaj Sharma, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals, & J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

The petitioner, by the medium of this writ petition, has invoked the jurisdiction of this Court for quashing the notification dated 18.2.2014 (Annexure P1) issued by the respondents whereby sub-Tehsil has been created at Jole in Bangana Tehsil in District Una with further prayer that the same be set up at Chowki Minar, Tehsil Bangana District Una, on the grounds taken in the writ petition.

2. The petitioner has stated in para 2 of the writ petition that he is a social worker, public spirited person and right to information activist. He has neither filed this writ petition in representative capacity nor has sought leave of this Court to file it as such, in terms of Order 1 Rule 8 of the Code of Civil Procedure, for short "CPC".

3. This writ petition has also not been diarized as a Public Interest Litigation. However, respondents have filed the reply and have stated that the Government has taken a conscious decision for setting- up of new sub-Tehsil at Jole in Bangana Tehsil in District

Una, in terms of notification dated 18.2.2014 (AnnexureP1) and have given details for setting-up of the said sub-Tehsil at Jole in the reply.

4. The petitioner has also not taken any ground in the writ petition that the decision for setting up of a new sub-Tehsil at the aforesaid place, suffers from arbitrariness or is malafide. He has not arrayed any officer(s) in his/their personal capacity as respondents in the array of the respondents.

5. The creation of sub-Tehsil at some place is entirely in the domain of the Executive not of any other agency. The Court cannot interfere unless it is *prima facie* illegal or suffers from arbitrariness. This Court has dealt with this issues in ***CWP No. 621 of 2014*** titled ***Nand Lal and another versus State of H.P. and others*** decided on 21.5.2014. It is apt to reproduce paras 9 to 17 of the said judgment herein.

> *"9. The Apex Court in Sidheshwar Sahakari Sakhar Karkhana Ltd. Vs. Union of India and others, 2005 AIR SCW 1399, has laid down the guidelines and held that Courts should not interfere in policy decision of the Government, unless there is arbitrariness on the face of it.*
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> *10. The Apex Court in a latest decision reported in Manohar Lal Sharma Vs. Union of India and another, (2013) 6 SCC 616, also held that interference by the Court on the ground of efficacy of the policy is not permissible. It is apt to reproduce paragraph 14 of the said decision as under:*
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> > *"14. On matters affecting policy, this Court does not interfere unless the policy is unconstitutional or contrary to the statutory provisions or arbitrary or irrational or in abuse of power. The impugned policy that allows FDI up to 51% in multi-brand retail trading does not appear to suffer from any of these vices."*
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> *11. The respondents in their reply have specifically averred that they have considered the issue and it was found that Village Ramshehar is at the distance of 19 kilometers from the existing Government College at Nalagarh, whereas the distance between the Government College Nalagarh and Diggal is 40 kilometers and the justification for opening a Government College at Diggal was found more appropriate than at Ramshehar, as per the norms and policy. It is apt to reproduce paras 3 to 5 of the reply herein:*
>
> > *"3 to 5.That in reply to these paras, it is submitted that on the demand of the people of Ramshehar area feasibility report was sought from Principal, Govt. College Nalagarh through Director of Higher Education. From the perusal of report it is revealed that Ramshehar is at the distance of 19 km from the existing Govt. College Nalagarh. As per norms/guidelines the distance of existing nearby College to proposed college shall not be usually less than 25 Kms. The distance condition can be relaxed depending upon the need of the area/town where the existing Colleges are overcrowded and having the enrolment of students more than 3000 but the enrolment of G.C. Nalagarh is only 1855 which is at a distance of 19 Km from Ramshehar.*

Keeping in view the norms for opening of new Govt. College and on the basis of report submitted Principal of Govt. College Nalagarh, the proposal was examined carefully and was turned down."

12. The petitioners have filed rejoinder to the reply filed by the respondents and have not specifically denied the said pleadings contained in the reply.

13. The respondents have also specifically pleaded in their reply that the decision was made after taking all aspects in view. It is apt to reproduce paras 6 & 7 of the reply herein:-

"6 & 7. That in reply to this para it is submitted that both the proposals/feasibility reports in respect of opening of new Govt. College at Ramshehar and at Diggal was received. From the perusal of the report it is gathered that GC Nalagarh is at the distance of 19km from Ramshehar, whereas nearest Colleges to Diggal are GC Nalagarh and GC Arki at the distance of 38 and 40km respectively. Hence if the College is notified at Ramshehar instead of Diggal then the genuine dema of the people of Diggal area would be ignored, who are in dire need of College. It is worthwhile to mention here that out of 13 fedding Senior Secondary Schools of Ramshehar area 6 schools i.e. Digal, Badhalag, Chandi, Chmadhar, Goyla and Chhiachhi are more approachable/near to Diggal instead of Ramshehar."

14. The Apex Court in the case titled as Mrs. Asha Sharma versus Chandigarh Administration and others, reported in 2011 AIR SCW 5636 has held that policy decision cannot be quashed on the ground that another decision would have been more fair, wise, scientific or logical and in the interest of society. It is apt to reproduce para 10 herein:

"10. The Government is entitled to make pragmatic adjustments and policy decisions, which may be necessary or called for under the prevalent peculiar circumstances. The Court may not strike down a policy decision taken by the Government merely because it feels that another decision would have been more fair or wise, scientific or logic. The principle of reasonableness and nonarbitrariness in governmental action is the core of our constitutional scheme and structure. Its interpretation will always depend upon the facts and circumstances of a given case. Reference in this regard can also be made to Netai Bag v. State of West Bengal [(2000) 8 SCC 262 : (AIR 2000 SC 3313)]."

15. It appears that the respondents have examined all aspects and made the decision. Thus, it cannot be said that the decision making process is bad. The Court can not sit in appeal and examine correctness of policy decision. The Apex Court in the case titled as Bhubaneswar Development Authority and another versus Adikanda

Biswal and others, reported in (2012) 11 SCC 731 laid down the same principle. It is apt to reproduce para 19 of the judgment herein:

> *"19. We are of the view that the High Court was not justified in sitting in appeal over the decision taken by the statutory authority under Article 226 of the Constitution of India. It is trite law that the power of judicial review under Article 226 of the Constitution of India is not directed against the decision but is confined to the decision making process. The judicial review is not an appeal from a decision, but a review of the manner in which the decision is made and the Court sits in judgment only on the correctness of the decision making process and not on the correctness of the decision itself. The Court confines itself to the question of legality and is concerned only with, whether the decision making authority exceeded its power, committed an error of law, committed a breach of the rules of natural justice, reached an unreasonable decision or abused its powers."*
>
> *16. It is not known that in which capacity, the petitioners have filed the present writ petition and whether they have sought permission to file the writ petition in the representative capacity or as Public Interest Litigation.*
>
> *17. We find no ground for interference in this writ petition, hence it is dismissed alongwith all pending application(s), if any."*

6. The similar principles of law have also been laid down by this Court in ***CWP No. 9480 of 2014*** alongwith connected matter titled ***Vijay Kumar Gupta versus State of H.P. and others*** decided on 9.1.2015 and ***CWP No. 4625 of 2012*** titled ***Gurbachan versus State of H.P. and others*** decided on 15.7.2014.

7. Applying the test in this case, neither any arbitrariness is shown nor any malafide is alleged. The only grievance projected by the petitioner is that the place at Chowki Minar Tehsil Bangana District Una, is more suitable place for creation of sub-Tehsil in view of the territory of adjoining District Dharamshala. Thus, it means that the grievance of the petitioner is that the second decision was also possible, but that cannot be a ground to quash the notification.

8. The apex Court in case titled ***Mrs. Asha Sharma v. Chandigarh Administration & Ors.*** reported in ***2011 AIR SCW 5636*** has held that the policy decision cannot be questioned on the ground that another decision would have been more fair or wise, scientific or logical and in the interest of the society. It is apt to reproduce para 10 of the said judgment herein.

> *"10.The Government is entitled to make pragmatic adjustments and policy decisions, which may be necessary or called for under the prevalent peculiar circumstances. The Court may not strike down a policy decision taken by the Government merely because it feels that another decision would have been more fair or wise, scientific or logical. The principle of reasonableness and non-arbitrariness in governmental action is the core of our constitutional scheme and structure. Its interpretation will always depend upon the facts and*

circumstances of a given case. Reference in this regard can also be made to Netai Bag v. State of West Bengal, 2000 8 SCC 262."

9. The apex Court in another case titled ***State of U.P. & Ors v. Chaudhari Ran Beer Singh & Anr***. Reported in 2008 AIR SCW 2296 held that the Court cannot substitute its own judgment for the judgment of the executive. It is apposite to reproduce para 12 of the said judgment herein.

"12. Cabinet's decision was taken nearly eight years back and appears to be operative. That being so there is no scope for directing reconsideration as was done in Ram Milan's case, though learned counsel for the respondents prayed that such a direction should be given. As rightly contended by learned counsel for the State, in matters of policy decisions, the scope of interference is extremely limited. The policy decision must be left to the Government as it alone can decide which policy should be adopted after considering all relevant aspects from different angles. In matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown. Courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the government the Court cannot interfere even if a second view is possible from that of the Government."

10. Having glance of the above discussion, the writ petition merits dismissal and is accordingly dismissed, alongwith pending applications, if any.

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

Balwant Singh .....Petitioner.

Versus

Gulsher Ali ....Respondent.

Cr.MMO No. 69 of 2015
Judgment reserved on : 10.7.2015.
Date of decision: July 16, 2015.

Code of Criminal Procedure, 1973- Section 311- Complaint was filed for the commission of offence punishable under Section 138 of Negotiable Instruments Act- accused filed an application under Section 311 of Cr.P.C for allowing him to produce the original receipt, examining the witnesses and re-examination of the complainant- application was rejected on the ground that certificate did not find mention in the agreement and the statements- undue hardship would be caused to the complainant and the relevance of the certificate was not explained- held, that Section 311 empowers the Court to summon any person as a witness and this power can be exercised at any stage of the proceedings- document sought to be

produced was executed subsequent to the execution of the documents produced by the complainant- contents of the certificate show that some settlement may have been arrived between M and the accused- duty of the Court is to arrive at a truth- complainant will have an opportunity to cross-examine the witnesses and to lead rebuttal evidence, hence, no prejudice would be caused to him- petition allowed. (Para- 5 to 17)

Cases referred:
Zahira Habibullah Sheikh (5) and another vs. State of Gujarat and others (2006) 3 SCC 374
Raja Ram Prasad Yadav vs. State of Bihar and another (2013) 14 SCC 461
Mannan Sk and others vs. State of West Bengal and another AIR 2014 SC 2950

For the Petitioner	:	Ms. Shalini Thakur, Advocate, vice Ms. Jyotsna Rewal Dua, Advocate.
For the Respondent	:	Mr. Karan Singh Kanwar, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This petition under Section 482 Cr.P.C. read with Article 227 of the Constitution is directed against the order dated 30.1.2015 passed by learned Judicial Magistrate 1st Class, Court No.2, Paonta Sahib in Criminal Case No. 13/3 of 2008 whereby the application moved by the petitioner for leading additional evidence under Section 311 Cr.P.C. has been ordered to be dismissed.

2. The petitioner is facing a complaint under Section 138 of the Negotiable Instruments Act, 1889 (for short 'Act') on the allegation that he had issued a cheque to the complainant/ respondent which had been dishonoured for want of sufficient funds.

3. The facts, in brief, are that one Gulsher Ali had filed a complaint against the petitioner alleging that he owed Rs.1,56,000/-to him as a friendly loan and for discharging his debt, he on 16.4.2008 issued a cheque amounting to Rs.1,56,000/- vide cheque No. 777927. Upon presentation, the cheque was returned back on 3.10.2008 by the bank with the remarks "insufficient balance". The legal notice followed which was duly replied to and it was explained that no amount was due towards the complainant and there was some genuine dispute between the parties regarding the vehicle Tata Sumo bearing registration No. HR-70-1411, wherein the parties had affected a compromise. This vehicle was purchased by the petitioner in the month of June, 2007 for a sum of Rs.2,30,000/- from Mamudeen and an amount of Rs.70,000/- was paid as an earnest money and whereas two blank cheques were given to the complainant/respondent as security. The accused paid the amount in terms of the compromise, whereafter he was required to pay a sum of Rs.25,000/- after three months and an amount of Rs.1,15,000/- was paid on 16.9.2008 in the presence of the witnesses. In this manner, the complainant/ respondent-claimant had received a sum of Rs.1,85,000/- from the petitioner and an amount of Rs.45,000/- remained which the petitioner had agreed to pay but for the same the complainant/respondent was required to return the blank cheque of the petitioner.

4. During the pendency of the complaint, the petitioner filed an application under Section 311 Cr.P.C. for allowing him to produce original receipt dated 25.9.2008

executed by Mamudeen with a further prayer for examining the witnesses of the said certificate and also for re-examination of the complainant.

5. This application was rejected mainly on three grounds:

(i) *The certificate dated 25.9.2008 did not find mention in the agreement Ex.CW-1/B dated 6.6.2007 and statements Ex.CW-2/A, Ex. CW-2/B, Ex.CW-4/A and Ex.CW-4/B dated 28.8.2008?*

(ii) *That undue hardship would be caused to the complainant in case the application is allowed.*

(iii) *It was not explained how the certificate dated 25.9.2008 is relevant to the case.*

6. It is contended by learned counsel for the petitioner that the learned Court below has acted in hyper-technical manner in rejecting the impugned application without taking into consideration that the certificate was essential for the just decision of the case. Whereas, on the other hand, Mr. Karan Singh Kanwar, learned counsel for the respondent would argue that the application is gross misuse of the process of the court and the same has been filed only to delay the outcome of the complaint.

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

8. For the proper appreciation of the controversy involved, reference to Section 311 Cr.P.C. would be necessary and the same reads as under:

> "***311***. ***Power to summon material witness, or examine person present***..- *Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case".*

9. The Hon'ble Supreme Court in ***Zahira Habibullah Sheikh (5) and another*** vs. ***State of Gujarat and others (2006) 3 SCC 374*** has held as under:

> *"27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.*

28. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

29. The object of the Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross- examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross- examination to the complainant. These aspects were highlighted in Jamatraj Kewalji Govani vs. State of Maharashtra, AIR 1968 SC 178.

30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

31. In 1846, in a judgment which Lord Chancellor Selborne would later describe as "one of the ablest judgments of one of the ablest judges who ever sat in this court," Vice-Chancellor Knight Bruce said : (ER p. 957):

> *"The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however, valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of*

examination..... Truth, like all other good things, may be loved unwisely - may be pursued too keenly - may cost too much."

The Vice-Chancellor went on to refer to paying "too great a price .... for truth". This is a formulation which has subsequently been frequently invoked, including by Sir Gerard Brennan. On another occasion, in a joint judgment of the High Court, a more expansive formulation of the proposition was advanced in the following terms: "The evidence has been obtained at a price which is unacceptable having regard to the prevailing community standards."

32. Restraints on the processes for determining the truth are multi-faceted. They have emerged in numerous different ways, at different times and affect different areas of the conduct of legal proceedings. By the traditional common law method of induction there has emerged in our jurisprudence the principle of a fair trial. Oliver Wendell Holmes described the process :

"It is the merit of the common law that it decides the case first and determines the principles afterwards ..... It is only after a series of determination on the same subject- matter, that it becomes necessary to "reconcile the cases", as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it any every step."

33. The principle of fair trial now informs and energizes many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation - peculiar at times and related to the nature of crime, persons involved - directly or operating behind, social impart and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system.

34. As will presently appear, the principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the law of evidence. There is, however, an overriding and, perhaps, unifying principle. As Deane, J. put it:

"It is desirable that the requirement of fairness be separately identified since it transcends the context of more particularized legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law."

35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated completely with disdain and as persona non grata. Courts have always been

considered to have an over-riding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

37. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.

38. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the

concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.

39. The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

10. What would be the scope and ambit of the powers conferred upon a Court under Section 311 Cr.P.C. has been exhaustively discussed by the Hon'ble Supreme Court in ***Raja Ram Prasad Yadav*** vs. ***State of Bihar and another (2013) 14 SCC 461*** wherein it has been held that the powers under Section 311 of the Code to summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re examine any person already examined, can be exercised at any stage provide that the same is required for the just decision of the case. I may quote with project the observations made in paragraphs 14 to 17 which read thus:

*"**14**. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with*

the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

15. *In this context, we also wish to make a reference to certain decisions rendered by this Court on the interpretation of Section 311 Cr.P.C. where, this Court highlighted as to the basic principles which are to be borne in mind, while dealing with an application under Section 311 Cr.P.C.*

15.1*. In the decision reported in Jamatraj Kewalji Govani vs. State of Maharashtra AIR 1968 SC 178, this Court held as under in paragraph 14: (AIR pp. 182-83)*

> *"14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction." (Emphasis added)*

15.2. *In the decision reported in Mohanlal Shamji Soni vs. Union of India and another, 1991 Suppl.(1) SCC 271, this Court again highlighted the importance of the power to be exercised under Section 311 Cr.P.C. as under in paragraph 10: (SCC p. 277)*

> *"10....In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re- examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."*

15.3*. In the decision in Raj Deo Sharma (2) vs. State of Bihar, 1999 (7) SCC 604, the proposition has been reiterated as under in paragraph 9: (SCC p. 613)*

> *"9. We may observe that the power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in A.R. Antulay case nor in Kartar Singh case such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the*

court under Section 311 of the Code. We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person." (Emphasis added)

15.4. *In U.T. of Dadra and Nagar Haveli and Anr. vs. Fatehsinh Mohansinh Chauhan 2006 (7) SCC 529, the decision has been further elucidated as under in paragraph 15: (SCC p. 538)*

> *"15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice." (Emphasis added)*

15.5. *In Iddar & Ors. vs. Aabida & Anr. (2007) 11 SCC 211, the object underlying under Section 311 Cr.P.C., has been stated as under in para 9: (SCC pp. 213-14)*

> *"9……'27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is 'at any stage of inquiry or trial or other proceeding under this Code'. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.'* " (Emphasis added)*

15.6. *In P. Sanjeeva Rao vs. State of A.P. (2012) 7 SCC 56, the scope of Section 311 Cr.P.C. has been highlighted by making reference to an earlier decision of this Court and also with particular reference to the case, which was dealt with in that decision in paragraphs 20 and 23, which are as under: (SCC pp. 63-64)*

"20. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs, Amritsar (2000) 10 SCC 430. The following passage is in this regard apposite: (SCC p. 432, para 6)

> *"6.....In such circumstances, if the new counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."*
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> *23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself." (Emphasis added)*

15.7. *In a recent decision of this Court in Sheikh Jumman vs. State of Maharashtra (2012) 12 SCC 486, the above referred to decisions were followed.*

16. *Again in an unreported decision rendered by this Court dated 08.05.2013 in Natasha Singh vs. CBI (State) (2013) 5 SCC 741, where one of us was a party, various other decisions of this Court were referred to and the position has been stated as under in paragraphs 15 and 16: (SCC pp. 748-49):*

> *"15. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be*

tendered by a witness, is germane to the issue involved. An opportunity of rebuttal, however, must be given to the other party. The power conferred under Section 311 Cr.P.C. must, therefore, be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as 'any Court', 'at any stage', or 'or any enquiry', trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should, therefore, be whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr., AIR 1958 SC 376; Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors. AIR 2004 SC 3114; Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors., AIR 2006 SC 1367; Kalyani Baskar (Mrs.) v. M.S. Sampoornam (Mrs.) (2007) 2 SCC 258; Vijay Kumar v. State of U.P. & Anr., (2011) 8 SCC 136; and Sudevanand v. State through C.B.I. (2012) 3 SCC 387.)"

17. *From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:*

17.1*. Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?*

17.2. *The exercise of the widest discretionary power under Section 311 Cr.P.C should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.*

17.3. *If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and reexamine any such person.*

17.4. *The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.*

17.5*. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.*

17.6. *The wide discretionary power should be exercised judiciously and not arbitrarily.*

17.7. *The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.*

17.8. *The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.*

17.9*. The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.*

17.10. *Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.*

17.11*. The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.*

17.12*. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.*

17.13*. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.*

17.14*. The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."*

11. The provisions of Section 311 Cr.P.C. was yet again subject matter of a recent decision in ***Mannan Sk and others*** vs**. *State of West Bengal and another AIR 2014 SC 2950***and it was held:

> *"10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or re- examination of the witness is necessary. Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammeled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine."*

12. In view of the aforesaid exposition of law, it is clear that the Court at any stage of trial has every power to summon and examine or recall and re-examine any such person if his evidence appears to be essential to just decision of the case with the object of finding out the truth. It is for the Court to take into consideration the facts of each case and then decide whether the evidence sought to be recalled or produced by any party is necessary for the just decision of the case or not. In any case, the right of the objecting party can always be safeguarded by granting equal opportunity of not only cross-examining the witnesses but also by affording a right to lead evidence in accordance with law.

13. Bearing in mind the aforesaid exposition of law, a perusal of the impugned order would reveal that the learned Court below has completely misread the documents. The document contained in Ex.CW-1/B and signatures which have been exhibited as Ex.CW-2/A, Ex.CW-2/B, Ex.CW-4/A and Ex.CW-4/B have been executed on 6.6.2007 and 28.8.2008 respectively and would obviously therefore, not contain any reference to a document which was allegedly executed much later on 25.9.2008.

14. Insofar as the question of undue hardship is concerned, it would be evident from the contents of the certificate that it does prima-facie indicate that some sort of settlement may have been arrived at between Mamudeen and the petitioner. In case the same is established and proved in accordance with law, then it would change the entire complexion of the case and go a long way to meet the ends of justice and therefore cannot be discarded at this stage.

15. After all, every trial is a voyage of discovery in which the truth is the quest. It is therefore, the duty of the Court to ensure that the truth in a case comes up, the entire journey of a Judge to discern the truth from the pleadings, documents, evidence and arguments of the parties. The truth is the basis of justice delivery system. The truth should

be the guiding star in the entire judicial process and, therefore, the Court's serious endeavour has to be focused only to find out where in fact the truth lies. The Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty. Justice system will acquire credibility only when the people will be convinced that justice is based on the foundation of the truth.

16. Coming to the last ground for rejection that it has not been explained as to how the certificate is relevant to the case, I feel the learned Court below has completely erred in ignoring and overlooking the fact that the relevance of the certificate would only be determined at the stage of final hearing that too after the parties had led evidence regarding the same.

17. In view of the aforesaid discussion, I find merit in this petition and accordingly the impugned order dated 30.1.2015 passed by learned Judicial Magistrate 1st Class, Court No.2, Paonta Sahib is set-aside and the petitioner is permitted to lead evidence in order to prove the certificate dated 25.9.2008 as was prayed for in the application filed by him. At the same time, the respondent would not only be entitled to cross-examination the witnesses but would also be afforded an opportunity to lead rebuttal evidence.

18. Before parting, it may be observed that the proceedings in this case are pending before the learned trial Magistrate for the last more than seven years and it is high time that the same be concluded in a time bound manner. Accordingly, the learned Magistrate is directed to conclude the proceedings as expeditiously as possible and in no event later than **31st December, 2015.** The parties through their counsel are directed to appear before the learned Court below on ***27.7.2015***. The Registry is directed to send the record forthwith so as to reach well before the date fixed. Petition is disposed of in the foresaid terms, so also the pending application.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Harnek Singh (Dead), through LRs ....Appellant.
Versus
Varinder Singh and others ...Respondents.

FAO No.494 of 2008
Reserved on : 9.7.2015
Date of Decision: July 16, 2015.

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that driver did not possess a valid driving licence- driver produced a driving licence- Insurance Company did not get the authenticity of driving licence verified- a witness was produced who proved that another licence produced by the driver was fake – held that Tribunal had wrongly absolved liability of insurance company in these circumstances. (Para-4 to 11)

For the Appellants :Mr. Rakesh Bharti, Advocate.
For the Respondents : Mr. Bhupinder Pathania, Advocate, for respondents No.1 & 2.
Mr. Arun Kumr, Advocate, for respondent No.3.
Mr. Ashwani K. Sharma, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Owner of the vehicle has filed the instant appeal. The challenge, limited in nature, revolves around Issue No.4, so framed by the Tribunal, which reads as under:

> "4. Whether respondent No.1 was not having valid and effective driving licence to drive the vehicle involved in the accident, as alleged? OPR-3."

2. The vehicle in question met with an accident on 29.9.2005, as a result of which Vikrant (son of the claimants) expired. To settle the claim, driver of the vehicle, handed over a licence (Ex. RW-1/D) to the Insurer. The said licence was found to be fake. These facts are undisputed.

3. Written statement filed by the Driver is conspicuously silent with regard to the driver possessing a valid and effective driving licence. Though the Insurer pleaded the driver of the vehicle not holding a valid and effective driving licence, however, such averments are conspicuously unspecific, in fact vague.

4. It be only observed that on 10.12.2007, driver Dharamvir Singh (RW-1), stepped into the witness box and produced another driving licence (Ex.RW-1/A), which was duly taken on record and exhibited. Reason for not placing the same prior to his deposition stands satisfactorily and reasonably explained by him and the Tribunal accepted the same. It was placed on record in another case pending before Court No.1 at Dehra (H.P.). Significantly, no objection with regard to producing and placing of this licence on record was taken by the Insurer. Emphasis was only to establish that the licence, so handed over by him to the Insurer (Ex. RW-1/D), was fake. Licence (Ex. RW-1/A) stands validly issued and renewed by the Licencing Authority. Nothing to the contrary is on record.

5. Objection taken by the learned counsel for the Insurer that in view of non-compliance of provisions of Order 7 Rules 13 & 14 of the Code of Civil Procedure, this licence cannot be considered as evidence, is legally unsustainable. It is too late in the day to object for the same. It is a settled position of law that Rules of Procedure are handmaiden of justice. The Tribunal in its wisdom, in exercise of its discretionary power, permitted such document to be taken on record, and allowed it to be proved and exhibited, in accordance with law.

6. Significantly, the Insurer had sufficient occasion to check the veracity of statement of the driver and authenticity of this driving licence, but no such steps were taken in that regard, though it did produce its witness Shri Parimal Chander Ghose (RW-2), whose statement was recorded on 23.2.2008, after a gap of more than two months. The witness has only proved driving licence (Ex. RW-1/D) to be fake. He is silent with regard to licence (Ex. RW-1/A), as learned counsel for the parties jointly agree that reference thereof, in his testimony is only by way of a typographical mistake and words "Ex. RW-1/A", in the contextual background, have to be read as "Ex.RW-1/D".

7. In view of the aforesaid factual matrix, while relying upon the decisions rendered by this Court in *National Insurance Company v. Mast Ram and others,* Latest HLJ 2004 (HP) 461; and *Sukhbir Singh v. National Insurance Co. Ltd.,* Latest HLJ 2006 (HP) 1337, it is contended by Mr. Rakesh Bharti, learned counsel for the appellant, that the Tribunal

erred in answering Issue No.4 in favour of the Insurer by fixing the liability on the owner of the vehicle.

8. In *Mast Ram (supra)*, the Court had the occasion to deal with almost an identical situation, where two driving licences, one which was fake, were produced by the driver. The Court returned its findings holding that since one of the licences was fake, as such there was no bar either under the Motor Vehicles Act, 1988, or relevant Rules framed thereunder, for the driver to possess another licence so issued by the authority under the Act. The Court observed as under:

> "9. In this behalf, it may also be appropriate to note that it is not the case of the appellant that legal and valid license did not authorize the driver to have driven the vehicle in question at the time of accident. Thus, to say that he was holding two driving licences is not correct. For all purposes, licences issued by Licensing Authority, Suni Sub Division, is the only valid and legal authority where under Sher Singh driver could have driven the vehicle in question. On a reading of the provisions of law relied upon by Mr. Sharma, it is manifestly clear that it speaks of driving licence. This presupposes that it has to be a licnese under the provisions of the Act and not something that is not envisaged under the Act. Suffice it to say in this behalf that some other liability under law might have incurred by the person holding the license allegedly issued by the authority of Hyderabad that is proved to be fake in this case. But in the fact of the licence proved to be issued as per law, case of respondent No.1 cannot be rejected."

9. In the instant case, the driver has discharged the burden by producing and proving the original licence, authenticity of which was never in doubt.

10. That there is breach of condition of policy, relating to holding of a valid driving licence, is the onus which the Insurer has to discharge. Once licence was duly proved by the driver, the burden only rested upon the Insurer to prove the same.

11. In the instant case, the Tribunal erred in coming to the conclusion that the driver suppressed the factum of valid licence and consequently there was breach of condition of the policy. The driver has reasonably explained about the original licence having been placed in the judicial file, pertaining to the criminal proceedings initiated with respect to the very same accident, against the deriver, as this Court stands informed.

12. In this view of the matter, present appeal filed by the owner needs to be allowed. Consequently, findings on Issue No.4 are quashed and set aside. The issue is answered against the Insurer (respondent No.3 before the Tribunal) and the award to the extent it holds the owner liable for the amount is modified accordingly. It stands clarified that the liability to pay the amount is that of the Insurer. Appeal stands disposed of, so also the pending application(s), if any.

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

Mingchong Dorje alias Yab son of late Tashi ....Petitioner
Versus
State of H.P. and another ....Non-petitioners

Cr.MMO No. 1 of 2015
Order Reserved on 3rd July 2015
Date of Order 16th July, 2015

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420, 468, 471 and 120-B of Indian Penal Code read with Section 13(2) of Prevention of Corruption Act 1988- it was pleaded that petitioner was born and brought up in India- he was issued a passport by Government of India from Srinagar- an FIR was registered against the petitioner alleging that he is a Tibetan refugee who had got false certificate of Indian citizenship in connivance with the Tehsildar District Leh- this certificate was presented before Tehsildar Sadar for seeking permission under Section 118 of H.P. Tenancy and Land Reforms Act- permission was granted by the State- challan has not been filed before the Court- hence, it was prayed that FIR be quashed- held, that disputed questions of facts are raised by the parties which cannot be decided at this stage- documents cannot be released to the petitioner as they are stated to be forged- however, prosecution directed to complete investigation expeditiously.

(Para-5 to 7)

Cases referred:
Taramani Pharak vs. State of M.P. and others, JT 2015(3) SC 185
B.S. Joshi and others vs. State of Haryana and another, JT 2003(3) SC 277
Gian Singh vs. State of Punjab and another, JT 2012(9) SC 426
Ajit Singh and another vs. The State, AIR 1970 Delhi 154

For the Petitioner: Ms. Ruma Kaushik, Advocate.
For Non-petitioners: Mr. J.S. Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Section 482 Cr.P.C. for quashing FIR No. 21 dated 30.7.2011 registered with Police Station Anti Corruption Bureau at Mandi under Sections 420, 468, 471 and 120-B of Indian Penal Code read with Section 13(2) of Prevention of Corruption Act 1988. In alternative relief sought to expedite the investigation. Additional relief sought for release of original documents of petitioner i.e. passport and identity card which have been seized during investigation. It is pleaded that petitioner is a Tibetan but born and brought up in India and is an Indian citizen. It is pleaded that petitioner was issued valid and legal passport No. B0335715 on dated 3.1.2000 by Government of India from Srinagar (J&K) and father's name of petitioner has been shown as Tashi and mother's name of petitioner has been shown as Tsering and place of birth has been shown as Leh (J&K) and date of birth has been shown as 3.4.1960. It is pleaded that as per memorandum issued by Union Government of India No. 15013/29/83-F.IV any

Tibetan born in India after 26.1.1950 shall be deemed to be a citizen of India. It is further pleaded that on dated 30.7.2011 FIR No. 21 was filed with P.S. Mandi District Anti Corruption Bureau alleging that petitioner is a Tibetan refugee who in connivance with the then Tehsildar District Leh got prepared false certificate of Indian and thereafter presented the application before Tehsildar Sadar Mandi for permission from H.P. Government under Section 118 of H.P. Tenancy and Land Reforms Act 1972 for transferring the land in favour of the petitioner on the basis of Will executed by Kusub Kula. It is pleaded that thereafter permission was received from H.P. Government for transfer of land in favour of petitioner on the basis of Will under Section 118 of H.P. Tenancy and Land Reforms Act 1972 and land of Kusub Kula was illegally transferred in the name of petitioner Mingchong Dorje alias Yab. It is pleaded that after registration of FIR No. 21 dated 30.7.2011 petitioner approached the Hon'ble High Court of H.P. for grant of bail and same was rejected by Hon'ble High Court of H.P. in Cr.MP(M) No. 658 of 2011. It is pleaded that thereafter petitioner approached the Hon'ble Supreme Court of India by way of filing Special Leave to appeal i.e. SLP (Criminal) No. 7757 of 2011 and Hon'ble Supreme Court of India vide orders dated 4.11.2011 and 27.2.2012 granted protection to the petitioner. It is pleaded that even after lapse of more than three years investigating agency did not file challan before competent Court of law and original documents of petitioner are lying with investigating agency. Prayer for acceptance of petition sought.

2. Per contra response filed on behalf of the non-petitioners pleaded therein that petitioner is a Tibetan who was registered in India under R/C No. 3811/L/93/481-13 as a Tibetan refugee dated 20.9.1993. It is pleaded that petitioner had concealed his nationality as Tibetan and managed to procure the Indian passport. It is pleaded that investigating agency had collected the record from Delhi, District Collector office Mandi, Secretary Revenue Shimla, Riwalsar, Leh, Srinagar and Palampur and investigation is delayed keeping in view the seriousness of offence. It is pleaded that on account of fabricated documents petitioner got permission under Section 118 of H.P. Tenancy and Land Reforms Act 1972 from H.P. Government to transfer land at Rewalsar District Mandi (H.P.) in his name and also in name of another Tibetan national namely Sonam G. Hara by way of 'Will' executed by Kushok Bakulla who died on dated 4.11.2003. It is further pleaded that D.C. Mandi vide order dated 18.2.2014 ordered vestment of land in State of H.P. which was obtained by way of 'Will' by petitioner at Riwalsar through misrepresentation. Prayer for dismissal of petition sought.

3. Court heard learned counsel appearing for the petitioner and heard learned Assistant Advocate General appearing on behalf of non-petitioners and also perused the entire record carefully.

4. Following points arise for determination in present case:-

1. Whether petition filed by the petitioner under Section 482 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of petition?
2. Final Order.

Reasons for findings on Point No.1.

5. Submission of learned Advocate appearing on behalf of petitioner that FIR No. 21 dated 30.7.2011 registered with P.S. Mandi Anti Corruption Bureau under Sections 420, 468, 471 and 120-B IPC and 13(1)(d) read with Section 13 (2) of Prevention of Corruption Act 1988 be quashed is rejected being devoid of any force for the reasons

hereinafter mentioned. After carefully perusal of contents of petition and after carefully perusal of response filed by non-petitioners it is proved on record that material disputed question of facts are raised by parties in their pleading and same cannot be decided at this stage without giving due opportunity to both the parties to prove their case and without giving opportunity of cross examination to adverse party. ***(See JT 2015(3) SC 185 titled Taramani Pharak vs. State of M.P. and others. Also see JT 2003(3) SC 277 titled B.S. Joshi and others vs. State of Haryana and another. Also See JT 2012(9) SC 426 titled Gian Singh vs. State of Punjab and another.)***

6. Another submission of learned Advocate appearing on behalf of petitioner that non-petitioners be directed to release the original documents of petitioner i.e. passport and identity card of petitioner is also rejected being devoid of any force for the reasons hereinafter mentioned. It is the case of non-petitioners that petitioner had obtained passport and identity card on the basis of forged residential address. It is also prima facie proved on record that passport and identity card are case property and Court is of the opinion that it is not expedient in the ends of justice to release the passport and identity card to the petitioner till conclusion of trial by learned trial Court.

7. Another submission of learned Advocate appearing on behalf of petitioner that non-petitioners be directed to expedite the investigation and submit the report under Section 173 of Code of Criminal Procedure 1973 is accepted for the reasons hereinafter mentioned. As per Section 173 of Code of Criminal Procedure 1973 investigating agency is under legal obligation to complete the investigation without unnecessary delay. Slackness on the part of investigating agency could result in disappearance of material evidence which might be available. ***(See AIR 1970 Delhi 154 titled Ajit Singh and another vs. The State)*** It is well settled law that expeditious investigation does not only benefit the accused but also benefit the State. In present case it is proved on record that FIR No. 21 was registered on dated 30.7.2011 and it is proved on record that Hon'ble Supreme Court of India disposed of SLP (Criminal) No. 7757 of 2011 on dated 27.02.2012. In view of above stated facts it is expedient in the ends of justice to direct the investigating agency to expedite the investigation. Point No. 1 is partly answered in favour of the petitioner.

Point No. 2 (Final Order)

8. In view of findings on point No. 1 petition filed under Section 482 Cr.P.C. is partly allowed and non-petitioners are directed to submit report of investigation under Section 173 of Code of Criminal Procedure 1973 before the competent Court of law within two months from today. Other reliefs sought declined in the ends of justice. Petition is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Vijay Kumar son of Roop Lal ....Petitioner.

Vs.

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

Cr.MMO No. 231 of 2014.
Order reserved on:1.7.2015.
Date of Order: July 16,2015.

Code of Criminal Procedure, 1973- Section 482- JMIC Kandaghat declined the opportunity of the cross-examination of 'R'- 'R' had not appeared before the Court as he was suffering from cancer- he was ordered to be summoned on commission- statement of 'R' was not recorded by the commissioner on the ground that his statement had already been recorded when accused was declared proclaimed offender - when case was listed before the Court, Court held that 'R' had not appeared before the commissioner on several dates and the right of cross-examination of 'R' was closed by the order of the Court- held, that trial Court had not executed the direction of the Court but had given his findings that examination of 'R' was not necessary which was contrary to the order of the Court- once 'R' had appeared before the Commissioner, Commissioner was duty bound to record his statement- Court could not have reviewed its earlier order giving the opportunity to the petitioner- petition allowed. (Para-5 to 7)

For the petitioner: Mr.Kamlesh Saklani, Advocate.
For Non-petitioner: Mr.M.L.Chauhan, Addl. Advocate General with Mr.J.S.Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 482 Code of Criminal Procedure 1973 against the order dated 10.4.2014 passed by learned Commissioner and order dated 4.9.2014 passed by learned Judicial Magistrate Ist Class Kandaghat District Solan whereby opportunity of cross examination of PW3 Ram Singh investigating officer was declined. It is pleaded that on dated 10.8.2004 FIR was registered against petitioner under Section 61(1)(14) of the Punjab Excise Act 1914 and Sections 181, 190(2) of the Motor Vehicle Act 1988 at police station Kandaghat District Solan HP and case No. 48/3/2004 was registered in the Court of learned Judicial Magistrate Ist Class Kandaghat District Solan HP. It is further pleaded that case was listed before learned trial Court on dated 17.8.2013 and investigating officer PW3 Ram Singh was suffering from cancer and was not in a position to appear before the Court personally and thereafter commission was issued under Section 285 Cr. PC with direction to learned Commissioner for examination of PW3 Ram Singh who was investigating officer of the case. It is further pleaded that thereafter matter was listed before learned Commissioner for examination of PW3 I.O Ram Singh. On dated 13.9.2013 learned Commissioner issued notice to I.O Ram Singh through special messenger. Thereafter case was listed on dated 18.9.2013, 19.11.2013, 12.12.2013, 14.1.2014, 7.2.2014, 18.3.2014 and lastly on 10.4.2014 before learned Commissioner. It is further pleaded that thereafter learned Commissioner vide order dated 10.4.2014 did not record statement of witness Ram Singh despite presence of witness Ram Singh before Commissioner with observation that statement of PW3 Ram Singh was already recorded when accused was declared as proclaimed offender. It is further pleaded that learned Commissioner held that statement of PW3 I.O Ram Singh could be read as evidence under Section 299 Cr.PC. It is further pleaded that thereafter on dated 4.9.2014 case was listed before learned trial Court and petitioner appeared before learned trial Court i.e. Judicial Magistrate Ist Class Kandaghat District Solan HP and learned trial Court held that case pertains to year 2004 and case was listed before learned Commissioner but accused did not appear before learned Commissioner on several dates and learned trial Court closed right of cross examination of accused by order of court. Thereafter case was listed for recording statement of witness

under Section 313 Cr.PC. It is pleaded that right of cross examination is the basic right of the petitioner. Prayer for acceptance of petition sought.

2. Per contra response filed on behalf of non petitioner pleaded therein that case was listed before learned Commissioner for recording the statement of witness namely Ram Singh several times. It is further pleaded that petitioner or his Advocate did not appear before learned Commissioner for cross examination purpose. It is further pleaded that sufficient opportunities were granted to the petitioner to cross examine the witness. It is further pleaded that petitioner has voluntarily did not appear before learned Commissioner for the purpose of cross examination and learned trial Court had rightly closed right of cross examination of petitioner in accordance with law. Prayer for dismissal of petition sought.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Additional Advocate General appearing on behalf of non-petitioner and also perused the record carefully.

4. Following points arise for determination in the present petition.

(1) Whether petition filed under Section 482 of the Code of Criminal Procedure is liable to be accepted as mentioned in memorandum of grounds of petition.

(2) Final Order.

Findings upon point No.1.

5. Submission of learned Advocate appearing on behalf of petitioner that order of learned Commissioner dated 10.4.2014 is contrary to law and same be set aside is accepted for the reasons hereinafter mentioned. It is proved on record that case No. 48/3/2004 was registered under section 61(1)(14) of the Punjab Excise Act 1914 and under sections 181, 190(2) of the Motor Vehicle Act 1988 against the petitioner. It is proved on record that petitioner was declared as proclaimed offender by learned trial Court on dated 2.1.2009 and thereafter learned trial Court recorded statement of prosecution witnesses namely, Satish Kumar, Dinesh Kumar and Ram Singh. It is proved on record that thereafter on dated 25.6.2010 learned trial Court consigned file of the case to record room with direction that case would be revived as and when proclaimed offender i.e. petitioner would surrender before the Court or when proclaimed offender would be apprehended in accordance with law. It is proved on record that thereafter on dated 12.12.2011 present case was revived by learned trial Court and thereafter case was listed for prosecution evidence by learned trial Court. It is proved on record that thereafter on dated 17.8.2013 learned trial Court directed that the statement of prosecution witness namely ASI Ram Singh who was investigating officer would be recorded through commission as per provision of Section 285 Cr.PC because prosecution witness namely retired ASI Ram Singh was suffering from cancer and was residing within territorial jurisdiction of learned Chief Judicial Magistrate Sirmour District at Nahan. It is proved on record that on dated 17.8.2013 learned trial Court directed accused to submit interrogatory in writing so that same could be sent to learned Commissioner. It is proved on record that accused did not submit any interrogatory and thereafter learned Commissioner listed the case on dated 13.9.2013, 18.9.2013, 19.11.2013 12.12.2013, 14.1.2014, 7.2.2014, 18.3.2014 and 10.4.2014. It is proved on record that on dated 10.4.2014 witness Ram Singh appeared before learned Commissioner but learned Commissioner did not record the statement of prosecution witness namely Ram Singh on the ground that statement of PW3 Ram Singh was already stood recorded as PW3 when

accused was declared as proclaimed offender. Learned Commissioner held that since accused was not putting his appearance before Commissioner therefore learned Commissioner held that no further action was required in the present case. Learned Commissioner held that statement of PW3 Ram Singh could be read in evidence as mentioned under Section 299 Cr.PC. It is proved on record beyond reasonable doubt that learned Commissioner did not record statement of PW3 Ram Singh on dated 10.4.2014 despite presence of witness Ram Singh before learned Commissioner. It is held that learned Commissioner was under legal obligation to comply the direction of learned trial Court. It is proved on record that learned Commissioner did not execute the direction of learned trial Court but on the contrary learned Commissioner had given his own findings that examination of ASI Ram Singh was not essential in the present case and learned Commissioner has given his own finding contrary to direction of learned trial Court that statement of I.O Ram Singh could be read as per provision of Section 299 Cr.PC. It is held that learned commissioner had committed illegality by way of not complying direction of learned trial Court for recording the statement of I.O Ram Singh despite presence of Ram Singh before learned Commissioner on dated 10.4.2014. It is held that learned commissioner was under legal obligation to record the statement of I.O Ram Singh as directed by learned trial Court. It is held that learned Commissioner did not execute the order of learned trial Court as per requirement of Section 286 of the Code of Criminal Procedure 1973. In view of above stated facts it is held that order of learned commissioner dated 10.4.2014 is not sustainable as per law.

6. Another submission of learned Advocate appearing on behalf of petitioner that consequence order of learned trial Court i.e. Judicial Magistrate Ist Class Kandaghat dated 4.9.2014 is also contrary to law because learned Judicial Magistrate Ist Class Kandaghat was not legally competent to review its own order dated 17.8.2013 is also accepted for the reasons hereinafter mentioned. Court has carefully perused order dated 4.9.2014 passed by learned Judicial Magistrate Ist Class Kandaghat. Learned trial Court held that case pertains to the year 2004 and learned trial Court further held that case was listed before learned Commissioner on several dates but petitioner did not appear before learned Commissioner and thereafter learned trial Court closed the right of cross examination upon testimony of PW3 Ram Singh. Court is of the opinion that the order of learned trial Court dated 17.8.2013 had attained the stage of finality and order dated 17.8.2013 of learned trial Court was not assailed by the State of H.P before any competent authority of law. It is held that there is no provision of review of criminal order in the Code of Criminal Procedure 1973 in criminal case except for rectification of clerical error. Hence it is held that order of learned Judicial Magistrate Ist Class Kandaghat dated 4.9.2014 is also illegal and contrary to law relating to review of earlier order dated 17.8.2013. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final Order)

7. In view of my findings upon point No.1 petition is allowed and order of learned Commissioner dated 10.4.2014 is set aside in the ends of justice. Similarly order of learned trial Court dated 4.9.2014 is also partly set aside in the ends of justice relating to right of closing of cross examination only. Direction is issued to learned trial Court and learned Commissioner to strictly comply the order dated 17.8.2013 in accordance with law. Petitioner did not appear before learned Commissioner and petitioner also did not file interrogatories despite positive directions of learned trial Court hence costs to the tune of Rs.3,000/- (Three thousand) is also imposed upon petitioner. Present case is pending since 2004. Learned trial Court is directed to dispose of the case expeditiously within two months

after receipt of file. Parties are directed to appear before learned trial Court on 31st July 2015. File of learned trial Court along with certify copy of this order be sent back forthwith. Petition is disposed of. All pending application(s) if any are also disposed of.

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

Arjun alias Joun & ors. .....Appellants.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 83 of 2014.
Reserved on: July 16, 2015.
Decided on: July 20, 2015.

Indian Penal Code, 1860- Sections 376(D), 392 read with Section 34 of IPC- Prosecutrix had visited Vashisth to see her friend - when she was returning from Vashishth to old Manali, the accused offered her a lift in their truck – the prosecutrix accepted their offer- the truck was taken towards mountain side for about 20 minutes- the accused attacked the prosecutrix, took her belonging, raped her and thereafter dropped her at Manali- the Medical Officer had noticed the injuries which could have been caused within 6 to 10 hours- DNA profile of accused matched with DNA profile from the vaginal swabs of the victim and her clothes- held that mere failure to hold identification parade when the prosecution had an opportunity to see the accused is not fatal to the prosecution- the belongings of the prosecutrix were recovered from the accused and were duly identified by the prosecutrix- the statement of the prosecutrix has been duly supported by medical evidence- the prosecution has no reason to falsely implicate the accused- held that the accused were rightly convicted in these circumstances by the Court (Para-20-32)

Cases referred:
Kanta Prashad vrs. Delhi Administration, AIR 1958 SC 350
State of Madhya Pradesh vrs. Sunder Lal, 1992 Cri. L.J. 2519
Visveswaran vrs. State Rep. by S.D.M., AIR 2003 SC 2471
Dastagir Sab and another vrs. State of Karnataka, (2004) 3 SCC 106
Toorpati Majsaiah and another vrs. State of A.P., 2005 Cri. L.J. 568
Mohd. Jamil vrs. State of Madhya Pradesh, 2005 Cri. L.J. 1470

For the appellants: M/S G.R.Palsra and Ravinder Thakur, Advocates.
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 dated 17.12.2013, rendered by the learned Sessions Judge, Kullu, H.P. in Sessions Trial No. 112 of 2013, whereby the

appellants-accused (hereinafter referred to as the accused) who were charged with and tried for offences punishable under Sections 376-D and 392/34 IPC, were convicted and sentenced to undergo rigorous imprisonment for a period of 20 years each and to pay fine of Rs. 10,000/- each (30,000/- in all) for the commission of offence under Section 376 –D/34 IPC. They were further ordered to undergo rigorous imprisonment for a period of two years in case of default of payment of fine. The accused were also sentenced to undergo rigorous imprisonment of 5 years and to pay fine of Rs. 5,000/- each (15,000/- in all) for the commission of offence under Section 392/34 IPC and in default of payment of fine to further undergo rigorous imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that the prosecutrix, an American National, had come to Manali on 3.6.2013 and was staying in Sunrise Guest House, Manali. At 10:00 PM, she had gone to Vashishat to see her friends. In the intervening night of 3rd and 4th June, 2013, at about 1:00 AM, she was coming back from Vashishat to old Manali. She was looking for a taxi or auto rickshaw. All the three accused persons, namely, Arjun, Lucky and Som Bahdur were present on the spot. They offered lift to the prosecutrix in their truck. The prosecutrix accepted their offer and accused drove the truck towards mountain side for about 20 minutes. They attacked the prosecutrix and gave her beatings and took away Rs. 5000/-, I-phone, Nokia mobile, Nikon camera, 30 US dollars and about 1500 Thai currency. All the three accused persons committed sexual intercourse with the prosecutrix and dropped her at Manali bus stand at about 3:00 AM. Consequently, the prosecutrix reported the occurrence to the police. FIR was registered. The prosecutrix was medically examined. The recoveries were made. The Assistant Director from RFSL, Mandi also visited the spot. The truck was also taken into possession by the police. The prosecutrix told that she had kicked the left front of the wind screen of the truck which got cracked. The police lifted hair from the broken part of the speaker of the truck. Liquor bottle, wrapper and blood stains were also lifted. The police also took into possession seat cover, I-phone, two speakers and the aforesaid articles were sealed in parcel and sent for chemical examination. The accused persons were arrested and were medically examined. The matter was investigated and challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 17 witnesses to prove its case. The accused were also examined under Section 313 Cr.P.C to which they pleaded not guilty. They pleaded innocence and false implication. The learned Trial Court sentenced and convicted the accused on 17.12.2013. Hence, the present appeal.

4. M/S. G.R.Palsra and Ravinder Thakur, Advocates for the respective accused, have vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Ramesh Thakur, learned Asstt. Advocate General, appearing for the State has supported the judgment of the learned trial Court dated 17.12.2013.

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

6. PW-1, prosecutrix deposed that she came to India for second time on 16.5.2012. She reached Manali on 3.6.2013. She took room in Sunrise Guest House. On the same day, at about 10:00 PM, she took Auto from Old Manali and went to Vashishat to visit a friend. She left Maya Guest House at Vashishat at 1:00 AM in the midnight. She was looking for a taxi and auto to go back to old Manali. She saw all the three accused standing

behind the truck. She asked them for taxi or auto to old Manali. They offered her lift in their truck. She accepted their offer. They drove the truck towards mountain for 20 minutes. They stopped the truck and attacked her and they raped her one by one. They also gave beatings to her. They took away her I-phone, Nokia mobile, Nikon camera, sliver flash light torch, rupees 5000/- and 1500 Thai currency. They also took away her I-Phone and Nokia charger. They drove her back to Manali and dropped her near bus stand at about 3:00 AM. They told their names before they dropped her. They were in the age group of 19 to 25 years. She identified the accused in the Court. Lady Constable took her to hospital. She gave her consent and put her signature on the MLC Mark "A" with red circle. On 5th June, she was taken to hospital for second medical examination at 6:00 PM. The police prepared the spot map. She identified the case property in the Court. The Forensic Team had inspected her purse and from her purse, they had taken finger prints from one ten rupee note. She identified the truck. When she was raped, she kicked the left front of the window screen with her foot. The glass cracked. The sexual intercourse was committed upon her without her consent. Her hair were recovered from three places of the truck. She identified the truck Ext. P-28. In her cross-examination, she denied the suggestion that she was invited to Vashishat by her friends to attend a cocktail party. She had not consumed beer or some other drink. She denied the suggestion that nobody has committed rape with her. She could see the accused in the light of passer by vehicles. Volunteered that she had already seen accused at Vashishat where there was sufficient light. She also requested the accused to stop the vehicle. She also raised alarm. The rape was committed inside the vehicle. The vehicle was parked at the time of rape. She identified the accused in the Court. When one accused was raping her, the other had put his hand on her mouth and third one had caught hold of her. She narrated these details in her supplementary statement. She also resisted. All the three accused discharged their semen inside her vagina. She sustained injuries on her back, neck and forearm.

7. PW-2 Vinod Kumar deposed that the accused Arjun had come to his shop for hair cut. He cut the hair of the accused and charged rupees 30 for the same.

8. PW-3 Dr. Shashi Wapa, has examined the prosecutrix. She noticed the following injuries:

> " 1. There were multiple abrasions on a lower back ranging from 5cm x 3 cm to 7cm x 3 cm in size which were found to be red in colour;
>
> 2. Abrasion on both the elbows- 6cm x 4 cm in size with skin abrasion, simultaneously, seen around it and were red in colour;
>
> 3. A circular contusion on left forearm light blue in colour;
>
> 4. Two parallel contusion marks were seen on left side of neck about 4 cm from trachea blush in colour.
>
> Secondary sexual Characters were fully developed.
>
> On Local Examination:
>
> 1. No injury marks were seen on inner thigh or vaginal;
> 2. Redness of labia majora and labia minora were seen.
> 3. Introitus was allowing two fingers with ease;
> 4. Three vaginal swabs were taken from the introitus; pubic hair were shaved;
> 5. One vaginal swab was taken from the introitus. Patient was feeling pain during examination and was not very co-operative;

6. Inner Pajama was preserved for forensic examination; and
7. Person had passed urine before the examination."

She issued MLC Ext. PW-3/B. The duration of injuries were within 6 to 10 hours. The victim was exposed to coitus. She also took 5 ml. blood sample and hair and sealed the same and handed over to the police for the purpose of DNA examination. She gave her final opinion as under:

> "Human semen was detected from slacks (Payjama), vaginal smear and swab. According to final opinion, the victim has been exposed to coitus and according to FSL reports, DNA profile of Som Bahadur and Lucky matched with DNA profile from the vaginal swabs of the victim and her slacks. The final opinion is within red circle on the reverse of Ext. PW-3/B. The injuries mentioned in MLC Ext. PW-3/B are possible while a lady would try to save herself from being raped by three persons."

9. PW-4 Dr. Ashok Rana, has examined all the accused and issued MLCs Ext. PW-4/B, Ext. PW-4/C and PW-4/D.

10. PW-5 LC Harsh Latta, has taken the victim for medical examination.

11. PW-6 HC Rakesh Kumar, deposed that the prosecutrix had produced one black coloured T-shirt Ext. P-8 to the police which was taken into possession vide recovery memo Ext. PW-1/C.

12. PW-7 ASI Kamal Kant, deposed that in his presence, Forensic team had taken Rs. 10/- from the purse of the victim. It was sealed in a parcel Ext. P-10 with five seals of seal impression "S". Memo Ext. PW-1/D was prepared. The truck was recovered. The front window screen of the truck from the left side was cracked. The number of the truck was HP-58-3649 and the victim identified the truck. The Forensic team also examined the truck.

13. PW-10 Sanjeev Sharman, deposed about the recoveries made from the spot. On 6.6.2013, accused Arjun gave statement to the police that he had kept the articles of lady in his quarter and he could get the same recovered. He also gave statement to the effect that he could recover jacket, pant and T-shirt. Accused Lucky also gave statement that he has kept one camera, charger and torch in the dustbin of his house and he could get the same recovered. Accused Som Bahadur also deposed that he was having some foreign currency kept in his house with his wife. Thereafter, recoveries were effected. The recovery memos were prepared on 6.6.2013.

14. PW-11 Tek Chand has proved report Ext. PW-11/A.

15. PW-12 Dr. Vivek Sahajpal, has proved report Ext. P-50 (4 pages).

16. PW-13 Manoj Kumar deposed that he deployed John alias Arjun for two days as driver on his Tipper on daily wages.

17. PW-14 HC Sher Singh deposed that the case property was deposited with him. He made entries in the Register. He sent 12 sealed parcels and 4 sealed envelopes to FSL Junga on 9.6.2013 through Const. Sohan Singh.

18. PW-15 HC Sohan Singh deposed that he took the case property 12 sealed parcels and four sealed envelope vide RC No. 120/13 and one another sealed parcel alongwith documents vide RC No. 121/13 to FSL Junga.

19. PW-17 Insp. Neel Chand was the I.O. He got the site identified. He prepared spot map Ext. PW-17/B. The vehicle was recovered. It was got identified from the victim. RFSL team also inspected the vehicle. He prepared the spot map vide Ext. PW-17/B. The accused were arrested on 6.6.2013. The recoveries were got effected from the accused persons. He also obtained MLCs of the accused persons. He prepared the supplementary challan and report of FSL Junga is Ext. P-49 and Ext. PA-46.

20. The case of the prosecution, precisely, is that the prosecutrix was coming from Vashishat to old Manali. She was looking for taxi or auto to reach old Manali. The accused were present on the spot. They offered her lift in their truck. She accepted their offer. They drove the truck towards mountain for about 20 minutes. They stopped the truck and attacked her and they raped her one by one. She resisted their attempt. The window screen of the truck was also cracked in the process. Thereafter, they took her back to Manali and dropped her near bus stand at about 3:00 AM. She was medically examined. The doctor issued MLC and noticed the injuries on her person. The DNA profiling was also undertaken. The recoveries were got effected at the instance of accused persons.

21. PW-1, prosecutrix has deposed that she had gone to Vashishat to see her friends. She was coming back and looking for taxi or auto. The accused offered her lift in their truck. They drove the truck towards mountain for 20 minutes. They stopped the truck and attacked her and they raped her one by one. She had kicked the left front of the wind screen with her foot. The glass cracked. Thereafter, they drove her back to Manali and dropped her near bus stand at about 3:00 AM. In her cross-examination, she has categorically stated that the accused have ejaculated inside her vagina. She sustained injuries on her back, neck and forearm. The two accused persons took two minutes each, whereas the third one had taken about 5-10 minutes in raping her. She identified the accused due to light of passer by vehicles and also at Vashishat where there was sufficient light. She was raped one by one by the accused. The rape was committed inside the vehicle. Her belongings were also taken away by the accused. She identified the case property in the Court. The sexual intercourse was committed upon her without her consent. She also tried to raise alarm. When one accused was raping her, the other had put his hand on the mouth and the 3rd one caught hold of her.

22. PW-3 Dr. Shashi Wapa has noticed multiple abrasions on a lower back ranging from 5 cm x 3 cm to 7 cm x 3 cm in size. She also noticed abrasion on both the elbows 6 cm x 4 cm in size with skin abrasion. A circular contusion was also seen on left forearm, light blue in colour and two parallel contusion marks were seen on left side of neck about 4 cm from trachea blush in colour. Redness of labia major and labia minora was also seen and no injury marks were seen on her inner thigh or vagina. The duration of injuries was within 6 to 10 hours. According to her final opinion, human semen was detected from slacks (Payjama), vaginal smear and swab. According to the FSL reports, DNA profile of Som Bahadur and Lucky matched with DNA profile from the vaginal swabs of the victim and her slacks.

23. According to Ext. PW-11/A, duly proved by PW-11 Tek Chand, the occurrence of some incriminating act inside the vehicle could not be ruled out. According to Ext. P-50, the first profile matched with DNA profile obtained from Ext. 9b (blood sample of

Som Bahadur) and second DNA profile matched with the DNA profile obtained from Ext. 10b (blood sample of Lucky).

24. Mr. G.R. Palsra and Ravinder Thakur have vehemently argued that identification of the accused was doubtful since no identification parade has been held. PW-17 Inspector Neel Chand has categorically deposed that he had moved an application on 7.6.2013 before the Judicial Magistrate 1st Class, Manali to carry out identification parade of the accused persons, but they refused for identification parade. The non-examination of prosecutrix's friend to whom she had gone to see was not fatal to the case of prosecution.

25. Their lordships of the Hon'ble Supreme Court in the case of ***Kanta Prashad vrs. Delhi Administration,*** reported in ***AIR 1958 SC 350,*** and connected matters, have held that failure to hold an identification parade does not make inadmissible the evidence of identification in the Court. Their lordships have held as follows:

> "5. As for the test identification parade, it is true that no test identification parade was held. The appellants were known to the police officials who had deposed against the appellants and the only persons who did not know them before were the persons who gave evidence of association, to which the High Court did not attach much importance. It would no doubt have been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence, but failure to hold such a parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification would be a matter for the courts of fact and it is not for this Court to reassess the evidence unless exceptional grounds were established necessitating such a course."

26. In the instant case, the prosecutrix had the opportunity to see the accused in the light at Vashishta and thereafter in the light of passer by vehicles. She remained in the company of the accused persons for about half an hour.

27. In the case of ***State of Madhya Pradesh vrs. Sunder Lal,*** reported in ***1992 Cri. L.J. 2519,*** their lordships of the Hon'ble Supreme Court have held that the girl who was 13 years old could not have forgotten the face of a man who committed ghastly crime upon her. It has been held as follows:

> "3. We have perused the judgments of both the courts and also have evidence of PWs- 2 and 4. We are of the opinion that the High Court was in error in disbelieving the testimony of PW-2 with respect to the identity of the accused. The girl was 13 years' old and she could not have forgotten the fact of the man who committed such ghastly crime upon her. It is not the case of the defence that there was no light. On the contrary, the prosecution evidence is that accused himself made PW-4 prepare lamps, and light them, before taking away PW-2. It is not a case where PW-2 had a mere fleeting glimpse of the accused. We are, therefore, of the opinion that the identity of the accused has been amply established by the evidence of PWs- 2 and 4. Accordingly, we set aside the judgment of the High Court and restore that of the learned Trial Judge."

28. In the case of ***Visveswaran vrs. State Rep. by S.D.M.,*** reported in ***AIR 2003 SC 2471,*** their lordships of the Hon'ble Supreme Court have held that the approach required to be adopted by the Courts in rape cases has to be different. The ground realities

are to be kept in view. Moreover, their lordships have further held that the identification of accused either in Court or in test identification parade is not a *sine qua non* for conviction. In every case, the guilt can be proved from other circumstances. It has been held as follows:

> "11. It is unfortunate that despite the aforesaid facts, the test identification parade was not held. An important aspect of the case is that the appellant had beard and moustaches when PW1 and PW2 were examined as witnesses for the prosecution. It was not so at the time of the occurrence. PW1 and PW2, therefore, it is evident, could not identify him in Court and stated in their deposition that the said person is not in Court. It does not mean that the acquittal is to follow as a natural corroboratory from the statements of PW1 and PW2. The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a times, crimes are committed under cover of darkness when none is able to identify the accused. The commission of crime can be proved also by circumstantial evidence. In the present case, there are clinching circumstances unerringly pointing out the accusing finger towards the appellant beyond any reasonable doubt.
>
> 12. Before we notice the circumstances proving the case against the appellant and establishing his identity beyond reasonable doubt, it has to be borne in mind that approach required to be adopted by courts in such cases has to be different. The cases are required to be dealt with utmost sensitivity, courts have to show greater responsibility when trying an accused on charge of rape. In such cases, the broader probabilities are required to be examined and the courts are not to get swayed by minor contradictions or insignificant discrepancies which are not of substantial character. The evidence is required to be appreciated having regard to the background of the entire case and not in isolation. The ground realities are to be kept in view. It is also required to be kept in view that every defective investigation need not necessarily result in the acquittal. In defective investigation, the only requirement is of extra caution by Courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved."

29. In the case of ***Dastagir Sab and another vrs. State of Karnataka,*** reported in ***(2004) 3 SCC 106,*** their lordships of the Hon'ble Supreme Court have held that when the prosecutrix had the occasion to see the accused on three occasions, the non-holding of test identification parade was not fatal. It has been held as follows:

> "5. The prosecution in support of its case has examined as many as 26 witnesses. The prosecutrix Malleshwari examined herself as P.W. 1. She in her evidence detailed the circumstance in which the offence is said to have been committed. She also disclosed enough materials to show that she had the occasion to see the accused persons at least on three occasions almost immediately prior to the commission of offence and also when she was intercepted and forcibly committed sexual assault on her. It is further borne out from records that immediately upon hearing her cries when the appellants allegedly took to heels, her brother P.W. 6 Rambabu saw the appellants running away from the spot. The other witnesses including the

father of the prosecutrix, the other labourers who were working in the field i.e. Gobindamma w/o Malappa, resident of Athnoor Village, Kabir Jayamma w/o Gangappa Malad, Laxmi w/o Amaresh Malad, Nagaraj s/o Gangappa Malad, Viresh s/o Gangappa Malad, Subamma w/o Rahiman Choudhary of Solapur, Ramjanamma w/o Bhandenawaz, Hussain s/o Choudhary Abi Sab, Mohammed s/o Lal Sab came immediately to the place of occurrence. The father of the prosecutrix got hold of the accused persons and allegedly they confessed their guilt but they refused to come with him. When the incident was narrated to the labourers and others including the P.Ws. 2, 3, 6 and 14, they expressed their anguish and wanted the boys to be punished. One Subamma went to the village and assaulted the appellant No. 1 with her chappal.

9. No law states that non-holding of Test Identification Parade would by itself disprove the prosecution case. To what extent and if at all the same would adversely affect the prosecution case, would depend upon the facts and circumstances of each case.

10. In the facts of this case, holding of T.I. Parade was wholly unnecessary. Had such T.I. Parade been held, the propriety thereof itself would have been questioned before the Trial Court.

14. In the instant case, as noticed hereinbefore, PW 1 gave sufficient particulars of the persons committing the offence of criminal assault on her. They had been identified by their description by her brother. The appellants were chased and they were caught and allegedly they had made a confession of their guilt. The relatives of the prosecutrix and other persons had also approached Mahantesh Patil, PW 19 to see that the culprits are brought to book and assurance in that behalf had been given. It was only when despite repeated attempts their grievances were not met, the First Information Report was lodged. Furthermore, in this case the names of the appellants have been mentioned in the First Information Report."

30. In the case of ***Toorpati Majsaiah and another vrs. State of A.P.,*** reported in ***2005 Cri. L.J. 568,*** the learned Single Judge of the Andhra Pradesh High Court has held that identification of the accused in the open Court by the prosecutrix cannot be disbelieved on the ground of lapse of time and absence of identification parade. It has been held as follows:

"16. On the strength of this Ex. P-1, crime was registered and investigation was taken up, completed and the accused were charge-sheeted referred to supra. From the evidence available on record, there cannot be any doubt that the incident as such happened but the only question which had been elaborately argued by the learned counsel representing the appellants is that these accused cannot be connected with these offences unless there is legally acceptable evidence. The counsel would submit that it is highly improbable that after a long lapse of time in view of the fact that this incident had happened at odd hours, P.W. 5 could have identified A-1 and A-2. By mere lapse of time or by the mere fact that the test identification parade was not conducted so far it relates to P.W. 5 is concerned. The identification made by P.W. 5 in the open Court cannot be disbelieved. No doubt, she deposed that she had participated in the test identification parade but it appears to be not a fact. However, there was sufficient opportunity for P.W. 5 to identify the

accused since the switching off the light and the other aspects, they are of at the later point of time. The medical evidence clearly supports the prosecution version that the offence of rape had been perpetrated as against P.W. 5. It is no doubt true, as far as the seizure of other material objects is concerned the panch witnesses were declared hostile. But as far as the offence relating to Section 376(g), I.P.C. is concerned, the evidence is clear. The evidence of P.Ws. 5 and 6 is well corroborated by the medical evidence. Hence, there cannot be any doubt that the prosecution had established the guilt of the accused under Section 376(g) of I.P.C. As far as the seizure of M.Os. 1 to 3 is concerned, both the witnesses P.Ws. 3 and 4 were declared hostile. No doubt, the Investigating Officer had deposed about the seizure of M.Os. 1 to 3, in the light of the fact that there is acceptable evidence in relation to the incident in the light of the clear evidence of Investigating Officer relating to seizure of M.Os. 1 to 3. Merely because P.Ws. 3 and 4 were declared hostile, the aspect of seizure of M.Os. 1 to 3 also cannot be disbelieved and hence the learned Judge had arrived at the correct conclusion in recording the said findings."

31. In the case of ***Mohd. Jamil vrs. State of Madhya Pradesh,*** reported in ***2005 Cri. L.J. 1470,*** the learned Single Judge of the Madhya Pradesh High Court has held that the object of conducting the test identification parade is two folds. First is to enable the witness to satisfy themselves that the prisoner whom they suspect is real one who was seen by them in connection with commission of crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses have seen in connection with the said occurrence. Thus, merely because the test identification parade was not arranged by the Investigating Agency, would not discredit the clear, cogent and trustworthy evidence of the witness. It has been held as follows:

"17. We have discussed hereinabove the evidence of Vijay Kumar Shrivastava in its entirety and after appreciating the evidence we can say that his evidence is clear, cogent and trustworthy. It is no use to imagine and magnify theoretical possibility with regard to the state of mind of the witness and with regard to their power of memorizing the identity of the assailant. Power of perception and memorizing differs from man to man and also depends upon situation. It would also depend upon capacity to recapitulate what has been seen earlier. The Apex Court in the case of State of Maharashtra v. Suresh, (2000) 1 SCC 471, while considering the scope of test identification parade categorically held and laid down the law of land that identification parades are not primarily meant for the Court. They are meant for investigation purposes. The object of conducting test identification parade is two-fold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is real one who has seen by them in connection with commission of crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses have seen in connection with the said occurrence. Thus, merely because the test identification parade was not arranged by the Investigating Agency, would not discredit the clear, cogent and trustworthy evidence of Vijay Kumar Shrivastava who firmly said, that he had an occasion to see the accused for considerable time in broad day light he had also seen the accused/appellant who had fired by 'Katla' to the deceased. This witness had seen the entire act

of appellant right from very beginning. Thus, the argument in this regard advanced by learned Counsel for the appellant can not be accepted."

32. In the instant case, the accused persons have duly been identified by the prosecutrix in the Court. The prosecutrix has received the injuries. The accused had committed forcible intercourse with her without her consent. Her belongings, as noticed by us hereinabove, were also taken away by the accused during the course of commission of the crime. These belongings were recovered and identified by the prosecutrix. The statement of the prosecutrix has duly been supported by the medical evidence. There was no occasion for her to falsely implicate the accused. Thus, the prosecution has proved the case against the accused under Section 376-D/34 IPC as well as under Section 392/34 IPC.

33. The learned Advocates appearing on behalf of the accused persons have vehemently argued that lenient view be taken taking into consideration the young age of the accused. However, we are of the considered view, the manner in which the crime has been committed by the accused, no leniency can be shown towards them.

34. Accordingly, there is no merit in this appeal and the same is dismissed. There is no occasion for this Court to interfere with the well reasoned judgment of the learned trial Court dated 17.12.2013.

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

Asha Ram and another. ...Petitioners.

Versus

State of H.P. and others. ...Respondents.

CWP No. 2381 of 2015
Reserved on: 10.7.2015
Decided on: 20.7.2015

Constitution of India, 1950- Article 226- State Government took a decision to open eight colleges - however, the government changed and a decision was taken not to open these colleges- writ petitions were filed which were dismissed after making certain observations - new guide lines were framed by the government and decision to open 14 new colleges was taken- a college was proposed to be opened at Kotla Behar - however, this was not included in the new notification while seven out of eight colleges which were denotified earlier were included - the report submitted by the principal showed that sufficient land was available for construction of the college- adjacent area was thickly populated and a private college was running with 300 students – the college would cater to the needs of five constituencies- the nearest college is located at a distance of more than 40 k.ms. - the colleges de-notified earlier were again proposed to be opened except the college at Kotla Behar- held that a policy decision has to be applied uniformly and rationally – earlier decision was reversed in an arbitrary manner- mere change of government does not mean review of all the decisions taken by the previous government- the government has to continue and carry on the unfinished job of the previous government-writ petition allowed and the respondent directed to open government college at Kotla Behar (Para 7-27)

Cases referred:

Kumari Shrilekha Vidyarathi and others versus State of U.P. and others (1991) 1 SCC 212

Union of India and others versus Dinesh Engineering Corporation and another, (2001) 8 SCC 491

Bannari Amman Sugars Limited vs. Commercial Tax Officer and others, (2005) 1 SCC 625

Ganesh Bank of Kurundwad Limited and others versus Union of India and others, (2006) 10 SCC 645

Directorate of Film Festivals and others versus Gaurav Ashwin Jain and others, (2007) 4 SCC 737

Delhi Development Authority and another versus Joint Action Committee, Allotment of SFS Flats and others, (2008) 2 SCC 672

State of Uttar Pradesh and others versus Chaudhari Ran Beer Singh and another, (2008) 5 SCC 550

State of Karnataka and another versus All India Manufacturers Organization and others, (2006) 4 SCC 683

State of Tamil Nadu and others versus K. Shyam Sunder and others, (2011) 8 SCC 737

Andhra Pradesh Dairy Development Corporation Federation versus B. Narasimha Reddy and others, (2011) 9 SCC 286

For the Petitioners:	Mr. Vivek Singh Thakur, Advocate.
For the Respondents:	Mr. M.A. Khan, Addl. A.G. with Mr. Ramesh Thakur, Asstt. Advocate General.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge:

Petitioner No. 1 is a social activist and has remained Zila Parishad Member from Ridi Kuthera-48 in Zila Parishad, Kangra during 2005-2010. He also remained Pradhan Gram Panchayat, Kesba Kotla for two terms during 1985-1990 and 1995-2000. Petitioner No. 2 is also a social activist. He remained member of Zila Parishad, Kangra from Ridi Kuthera constituency during 2000-2005. Kotla Behr falls in Tehsil Jaswan, District Kangra.

2. The State Government has conducted survey twice for opening of Degree College in the area. The Principal, Government Degree College, Dhaliara, District Kangra vide letter dated 10.11.2003 has prepared the report. The State Government took a conscious decision to open new 8 Degree Colleges at Rewalsar, Nihri, Lad Bharol, Baldawara, Sarahan, Nankhari, Kasauli and Kotla Behr vide notifications dated 6.9.2012 and 20.12.2013. The respondent-State de-notified opening of 8 Government Degree Colleges vide notification dated 2.3.2013. Notification dated 2.3.2013 was assailed by filing various writ petitions, including CWP No. 1526 of 2013, titled as Harbans Lal Kalia vs. State of Himachal Pradesh pertaining to de-notifying of Government Degree College Kotla Behr. The writ petitions were dismissed on 18.6.2013 after making observations. In sequel to the observations made by the Division Bench of this Court in judgment dated 18.6.2013, new guidelines have been framed by the respondent-State governing opening of new Government Degree Colleges throughout the State of Himachal Pradesh dated 2.1.2014. The State Government again took a conscious decision whereby 14 new Government Degree Colleges were opened vide notifications dated 15.1.2014 and 24.2.2014, Annexures P-6 and P-7,

respectively, but College of Kotla Behr was not included in the new notifications Annexures P-6 and P-7. It would be pertinent to state that 7 colleges out of 8 colleges, which were de-notified, were included in the notifications dated 15.1.2014 and 24.2.2014, respectively.

3. Mr. Vivek Singh Thakur, learned counsel for the petitioners, has vehemently argued that respondent-State has arbitrarily de-notified the College of Kotla Behr on 2.3.2013. He then contended that new College of Kotla Behr was required to be established as per the report, Annexure P-1 submitted by the Principal, Government Degree College, Dhaliara and also on the basis of new guidelines framed on 2.1.2014. He lastly contended that respondent-State has opened new Degree College at Rewalsar in District Mandi, which was one of the eight de-notified colleges. This college was also de-notified on the three grounds, i.e low enrolment of students, lack of infrastructures and availability of other colleges in close proximity. In other words, his submission is that respondents have not followed uniform policy for opening of new Degree Colleges in the State of Himachal Pradesh.

4. Mr. M.A. Khan, learned Additional Advocate General and Mr. Ramesh Thakur, learned Assistant Advocate General have strenuously argued that not to open Degree College at Kotla Behr is a "policy decision".

5. We have heard the learned counsel for the parties and have gone through the pleadings carefully.

6. It would be evident from the report furnished by the Principal, Government P.G. College, Dhaliara dated 10.11.2003 that 104 kanals of land was available for opening of the college. Kotla Behr, as per the report, was 42 KMs, 41 KMs and 45 KMs from Government Post Graduate College Dhaliara, Government College Amb and Government College, Dehri, respectively. The land was available for the purpose from allotable pool of the Gram Panchayat. The feeding area was thickly populated. The total population was about one lakh. A private college was also being run in the name of S.R.D.A.V. College, Kotla Behr having strength of 300 students. There were six government run senior secondary schools. The college was to cater the educational need of five Vidhan Sabha constituencies i.e. Jaswan, Chintpurni, Gagret, Jwali and Dasuya of Punjab. The "no objection certificate" from the Principal Government Senior Secondary School Kotla Behr for the purpose of temporary accommodation was also enclosed with the report. It would also be apt at this stage to take stock of notification dated 2.1.2014 issued by the state government pursuant to judgment rendered by this Court in CWP No. 1468 of 2013 and analogous matters dated 18.6.2013. There are 10 norms prescribed as per notification dated 2.1.2014. These read as under:

1. The distance of existing nearby college to proposed college shall not be usually less than 25 KM. The distance condition can be relaxed depending upon the need of the area/towns where the existing colleges are overcrowded and having the enrolment of students more than 300.

2 In thickly populated cities like Shimla, Mandi, Solan, Dharamshala, Una etc., where, there is huge rush of students and it is becoming increasingly difficult to run all the three streams in the presently available infrastructure, the matter to shift some streams like Arts/Commerce, which don't require laboratory/etc. to out side the cities for quality education, instead of starting new college shall be considered.

3 For opening of new colleges, the availability of students in the feeder institutions also need to be kept in view. If feeder institutions have sufficient enrolment in 10+2 class i.e. 400 or more preferably in the schools within 10-12 KM radius, the matter for opening of new college may be considered subject to meeting of other parameters and keeping in view the geographical conditions of the area.

4 For establishing of new Govt. Degree Colleges, normally land measuring 35 bighas is required. The requirement will be sufficient for providing Arts, Commerce, Science Blocks and Administrative Block as well as residential/hostels. But, since only Arts stream classes will be started in the beginning, this condition could be relaxed, keeping in view the local conditions. The total land requirement shall be earmarked as under:-

a) 10 bighas for construction of Teaching Blocks (Administrative, Arts & Science Blocks) as detailed above.

b) 10 bighas for play ground and stadium etc. for sports and other open-air-co-curricular activities.

c) 5 bighas for constructing hostels for boys and girls.

d) 5 bighas for the construction of residential accommodation for the staff.

e) 5 bighas for further expansion as per future requirements.

5 For opening of new government colleges, adequate budget provision for non-recurring and recurring expenditure shall be made. Initially the Government will start only Arts Stream in the first phase, thus, around rupees five crore in non-recurring and one crore rupees for recurring expenditure shall be made available. Thereafter, while considering the matter of starting of Commerce and Science Stream, the additional budget will be made available. These budget estimates are on the basis of the present prices and will be suitable enhanced in due course of time. The new college may only be started after ensuring availability of sufficient accommodation. The adequate budget provision of Hostels as per requirement and staff quarters shall also be separately made available in the following years.

6. In the beginning, new Colleges will be started with English, History, Pol. Science, Hindi, Sociology, Economics, Maths, Sanskrit, Computer Application and Physical Education subjects. However, other subjects like Geography, Music, Pub. Administration, Philosophy, Psychology, Painting, Dance, J & MC, could be considered on demand basis from the students and keeping in view the availability of faculty/infrastructure. The Commerce stream in the college will be started after enrolment reaches around 400 students in all the three classes i.e. B.A. -1, II & III year, whereas starting of the science stream would be considered after the total enrolment of around 500 students. This will, however, be subject to meeting of the other parameters and keeping in view the availability of faculty/infrastructure.

7 It may not be possible to start all the subjects in all the colleges in the beginning. Therefore, it has been decided to start all the

subjects, where the students enrolment in Arts stream is more than 1000. However, the permission of starting of all the subjects will be granted by the Government after considering the detailed proposal from the Principal through Director of Higher Education, keeping in view the availability of infrastructure etc.

8 The classes in new colleges shall be treated when at least once post of Principal, one post of Asstt. Professor in each subject, one librarian (College Cadre) and non-teaching i.e. one Superintendent Gr-II, one Sr. Asstt., two clerks, three peons and two chowkidars are created and filled up to look after the Administrative, Academic & other College developmental activities.

9 Preference shall be given to open at least one new college in every Revenue Sub-Division subject to the fulfillment of all other requirements/conditions as repeated above.

10 The provisions contained above may be considered for relaxation by the State Govt. keeping in view the unique geographical social or demographic conditions in order to improve access, equity and excellence in higher education.

7. According to parameter-1, the distance of nearby college to proposed college should not be less than 25 kms. However, the distance condition could be relaxed depending upon the need of the area/town where the existing colleges are over crowded and having the enrollment of students more than 3000. The nearest college available to the students from Kotla Behr was Government College Dhaliara at a distance of 42 kms, Government College Amb at a distance of 41 Kms and Government College Dehri at a distance of 45 kms. However, according to the reply, the government has notified a new government degree college at Dada Siba which is at a distance of 25 kms from Kotla Behr. Dada Siba College has been opened only on 8.4.2015. There are eight Government Senior Secondary Schools, namely, Dada Siba, Terrace, Kotla Behr, Bathu Tipri, Bathra, Kahanpur, Seul and Ghamror in tehsil Jaswan of District Kangra. The total strength of the students in these schools is more than 1000. This fact has also been highlighted in Annexure P-1 with the report which was submitted to the state government by the Principal Government P.G. College, Dhaliara. The requirement of the land as per new norms is 35 bighas. It has come in the report Annexure P-1 that the land available for the purpose of opening of college was about 104 kanals, a plain area. The land was also available as per the report from the concerned Gram Panchayat and the no objection certificate was also issued by the Gram Panchayat to this effect. This condition could also be relaxed, since fresh classes were to be started in the beginning keeping in view the local conditions. The Principal, Government Senior Secondary School, Kotla Behr has also issued “no objection certificate” for providing temporary accommodation for opening the college. Guideline No. 9 of letter dated 2.1.2014 provides that preference shall be given to open at least 1 new college in every revenue sub-division, subject to the fulfillment of all other requirements. The degree college in Kotla Behr would cater to five legislative assemblies and there is no college in legislative assembly Jaswan, in which Kotla Behr is situated.

8. Mr. M.A. Khan, learned Additional Advocate Genera has argued that now after opening of new college at Dada Siba, Kotla Behr was not qualified. However, fact of the matter is that the distance between two colleges from Nagrota Surian and Haripur is less than 12 kms. This aspect has been overlooked by the state government. The justification for

the two colleges i.e. Nagrota Surian and Haripur within the radius of 12 kms is that in Jawali Revenue Sub-Division, there was no degree college and thus there was justification to open two colleges in Nagrota Surian and Haripur. There has to be uniformity in decision making process by the state government. It has come in the reply that Government College Dada Siba has been opened for revenue sub division Kotla Behr. If the government college Dada Siba was to be opened on the same parameter, there is no justification why the college should not have been opened at Kotla Behr instead of Dada Siba. The State government has opened eight new degree colleges as per notification dated 6.9.2012 and 20.12.2013. These were de-notified on 2.3.2013 on the following grounds:

(a) Low enrollment of students;
(b) Lack of infrastructures; and
(c) availability of other colleges in close proximity.

9. We have already discussed that during the pendency of CWP No. 1468 of 2013 and analogous matters, the reply was filed by the state government that Government Degree College Rewalsar did not fulfill the norms, as discussed hereinabove. However, fact of the matter is that Hon'ble Chief Minister made announcement for opening of Government Degree College, Rewalsar, though it was de-notified on 2.3.2013. All the Government Degree Colleges were de-notified since according to the respondents, they did not qualify the three norms prescribed i.e. a) low enrollment of students; b) lack of infrastructure and c) availability of other colleges in close proximity.

10. The respondent-State has re-opened the seven colleges except at Kotla Behar on the same terms and conditions. These colleges initially did not fulfill the norms as there was low enrollment of students, lack of infrastructures and availability of the colleges in close proximity. No justification has been given why seven colleges were re-opened on the same facts which were applicable to college at Kotla Behr. Thus, there is arbitrariness and unreasonableness in the decision making process for opening of new college at Kotla Behr. All the colleges were similarly situated and were to be treated equally while taking a decision to reopen the colleges, which were de-notified on 2.3.2013.

11. Petitioners have also placed on record the strength of students in some colleges during 2014-15, which reads as under:

i.	Government College Kumarsain District Shimla	72
ii.	Government College Kiarkoti District Shimla	38
iii.	Government College Dharmpur, District Solan	20
iv	Government College Nankhari District Shimla	16
v.	Government College Diggal District Solan	32
vi.	Govt. College Nagrota Surian District Shimla	117

12. The Court can take judicial notice of the fact that initially students' strength would be low but with the passage of time, the strength is bound to increase in Govt. Colleges. There are 11 Government Senior Secondary Schools feeding Kotla Behr. The respondent-State has not taken into consideration the report furnished by the Principal, Government P.G. College, Dhaliara and comparing the same with the new guidelines laid down on 2.1.2014. The guidelines prescribed on 2.1.2014 are fulfilled for opening degree college at Kotla Behr, more particularly when 14 new degree colleges are re-opened including seven colleges which were de-notified on 2.3.2013 on the same parameters.

13. Mr. M.A. Khan submits that Rs. 5 crores is required for opening a new degree college. This would apply to all. When the government degree colleges can be opened with the strength, as notified hereinabove, for six colleges, there was justification for opening college at Kotla Behr as well.

14. Mr. M.A. Khan has also argued that it is a policy decision where the new degree college has to be opened. It is true that it is a policy decision but policy decision must also conform to Article 14 of the Constitution of India. In this case, the policy decision, which has led to issuance of new guidelines on 2.1.2014, is to be applied uniformly and not arbitrarily.

15. Their Lordships of the Hon'ble Supreme Court in ***Kumari Shrilekha Vidyarathi and others*** **versus** ***State of U.P. and others*** **(1991) 1 SCC 212** have held that Article 14 applies also to matters of governmental policy and if the policy or any action of the Government, even on contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. Their Lordships have held as under:

> **"It can no longer be doubted at this point of time that Art. 14 of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. (See Ramana Dayaram, Shetty v. The International Airport Authority of India (1979) 3 SCR 1014: (AIR 1979 SC 1628) and Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir (1980) 3 SCR 1338: (AIR 1980 SC 1992)). In Col. A. S. Sangwan v. Union of India, 1980 (Supp) SCC 559: (AIR 1981 SC 1545), while the discretion to change the policy in exercise of the executive power, when not trammelled by the statute or rule, was held to be wide, it was emphasised as imperative and implicit in Art. 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Art. 14 and the requirement of every State action qualifying for its validity on this touch-stone, irrespective of the field of activity of the State, has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose.**
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> **In Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay (1989) 3 SCC 293 : (AIR 1989 SC 1642), the matter was re-examined in relation to an instrumentality of the State for applicability of Art. 14 to all its actions. Referring to the earlier decisions of this Court and examining the argument for applicability of Art. 14, even in contractual matters, Sabyasachi Mukharji, J. (as the learned Chief Justice then was) ' speaking for himself and Kania, J., reiterated that every action of the State or an instrumentality of the State must be informed by reason..... actions uninformed by reason may be questioned as arbitrary in proceedings under Art. 226 or Art. 32 of the Constitution. Ranganathan, J. did not express any opinion on this point but agreed with the conclusion of the other learned Judges on the facts of the case. It is obvious that the conclusion on the facts of the case could not be reached by Ranganathan, J. without examining them and**

this could be done only on the basis that it was permissible to make the judicial review. Thus, Ranganathan, J. also applied that principle without saying so. In view of the wide-ranging and, in essence, all pervading sphere of State activity in discharge of its welfare functions, the question assumes considerable importance and cannot be shelved. The basic requirement of Art. 14 is fairness in action by the State and we find it difficult to accept that the State can be permitted to act otherwise in any field of its activity, irrespective of the nature of its function, when it has the uppermost duty to be governed by the rule of law. Non-arbitrariness, in substance, is only fair play in action. We have no doubt that this obvious requirement must be satisfied by every action of the State or its instrumentality in order to satisfy the test of validity."

16. Their Lordships of the Hon'ble Supreme Court in ***Union of India and others*** **versus** ***Dinesh Engineering Corporation and another*****, (2001) 8 SCC 491** have held that the Courts can scrutinize whether the policy in question is formulated keeping in mind all the relevant facts and whether the said policy can be held to be beyond the pale of discrimination or unreasonableness on the basis of the material on record. Their Lordships have held as under:

"A perusal of the said letters shows that the Board adopted this policy keeping in mind the need to assure reliability and quality performance of the governors and its spare parts in the context of sophistication, complexity and high degree of precision associated with governors. It is in this background that in para (i) the letter states that the spares should be procured on proprietary basis from EDC. This policy proceeds on the hypothesis that there is no other supplier in the country who is competent enough to supply the spares required for the governors used by the Indian Railways without taking into consideration the fact that the writ petitioner has been supplying these spare parts for the last over 17 years to various Divisions of the Indian Railways which fact has been established by the writ petitioner from the material produced with both before the High Court and this Court and which fact has been accepted by the High Court. This clearly establishes the fact that the decision of the Board as found in the letter dated 23-10-1992 suffers from the vice of non-application of mind. On behalf of the appellants, it has been very seriously contended before us that the decision vide letter dated 23-10-1992 being in the nature of a policy decision, it is not open to Courts to interfere since policies are normally formulated by experts on the subjects and the Courts not being in a position to step into the shoes of the experts, cannot interfere with such policy matters. There is no doubt that this Court has held in more than one case that where the decision of the authority is in regard to a policy matter, this Court will not ordinarily interfere since these policy matters are taken based on expert knowledge of the persons concerned and Courts are normally not equipped to question the correctness of a policy decision. But then this does not mean that the Courts have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts and the said policy

can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record. It is with this limited object if we scrutinise the policy reflected in the letter dated 23-10-1992, it is seen that the Railways took the decision to create a monopoly on proprietary basis on EDC on the ground that the spares required by it for replacement in the governors used by the Railways required a high degree of sophistication, complexity and precision, and in the background of the fact that there was no party other than EDC which could supply such spares. There can be no doubt that an equipment of the nature of a spare part of a governor which is used to control the speed in a diesel locomotive should be a quality product which can adhere to the strict scrutiny/standards of the Railways, but then the pertinent question is: has the Board taken into consideration the availability or non-availability of such characteristics in the spare parts supplied by the writ petitioner or, for that matter, was the Board alive to the fact that like EDC the writ petitioner was also supplying the spare parts as the replacement parts for the GE governors for the last over 17 years to the various Divisions of the Railways. A perusal of the letter dated 23-10-1992 does not show that the Board was either aware of the existence of the writ petitioner or its capacity or otherwise to supply the spare parts required by the Railways for replacement in the governors used by it, an ignorance which is fatal to its policy decision. Any decision be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. If it is so then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution."

17. Their Lordships of the Hon'ble Supreme Court in ***Bannari Amman Sugars Limited*** **versus** ***Commercial Tax Officer and others*****, (2005) 1 SCC 625** have held that opportunity of hearing to affected persons is not necessary if a policy decision is changed, however, the same should be made fairly, non-arbitrarily and should disclose a discernible principle which should satisfy the test of reasonableness. Their Lordships have held as under:

"While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. 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. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for discernible reasons, not whimsically for any ulterior purpose. The meaning" and true import and concept of arbitrariness is more easily visualised than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the

facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.

Where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, the deviation to act in different manner which does not disclose any discernible principle which is reasonable itself shall be labelled as arbitrary. Every State action must be informed by reason and it follows that an act uninformed by reason is per se arbitrary."

18. Their Lordships of the Hon'ble Supreme Court in ***Ganesh Bank of Kurundwad Limited and others*** **versus** ***Union of India and others*****, (2006) 10 SCC 645** have succinctly explained the grounds of judicial review as under:

"The scope of Judicial review in administrative matters has been the subject matter of consideration before this Court in several cases.

There should be judicial restraint while making judicial review in administrative matters. Where irrelevant aspects have been eschewed from consideration and no relevant aspect has been ignored and the administrative decisions have nexus with the facts on record, there is no scope for interference. The duty of the court is (a) to confine itself to the question of legality; (b) to decide whether the decision making authority exceeded its powers (c) committed an error of law (d) committed breach of the rules of natural justice and (e) reached a decision which no reasonable Tribunal would have reached or (f) abused its powers. Administrative action is subject to control by judicial review in the following manner:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) (iii) Procedural impropriety.

One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary (See State of U.P. and Ors. v. Renusagar Power Co. and Ors. (AIR 1988 SC 1737). At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classical work "Judicial Review of Administrative Action" 4th Edition at pages 285-287 states the legal position in his own terse language that the relevant principles formulated by the Courts may be

broadly summarized as follows. The authority in which discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess orabuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires. administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. (See commissioner of Income-tax v. Mahindra and Mahindra Ltd. (AIR 1984 SC 1182) . The effect of several decisions on the question of jurisdiction has been summed up by Grahame Aldous and John Alder in their book "Applications for Judicial Review, Law and Practice" thus:

> **"There is a general presumption against ousting the jurisdiction of the courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradig, which the courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in council of civil Service Unions v. Minister for the civil Service this is doubtful.Lords Diplock, Scaman and. Roskili appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject matter of a particular power, in that case national security. May prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some**

are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non_justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest."

(Also see Padfield v. Minister of Agriculture, Fisheries and Food (LR (1968) AC 997).

The court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability enumerated above; like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient.

The famous case commonly known as "The Wednesbury's case" is treated as the landmark so far as laying down various basic principles relating to judicial review of administrative or statutory direction.

Before summarizing the substance of the principles laid down therein we shall refer to the passage from the judgment of Lord Greene in Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. (KB at p. 229: All ER p. 682). It reads as follows:

"It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably' . Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers the authority. . . . In another, it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another."

Lord Greene also observed (KB p.230: All ER p.683)

"..it must be proved to be unreasonable in the sense that the court consider s it to be a decision that no reasonable body can come to. It is not what the court considers unreasonable The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another." (emphasis supplied)

Therefore, to arrive at a decision on "reasonableness" the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably

arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the Court to substitute its view.

The principles of judicial review of administrative action were further summarized in 1985 by Lord Diplock in CCSU case as illegality, procedural impropriety and irrationality. He said more grounds could in future become available, including the doctrine of proportionality which was a principle followed by certain other members of the European Economic Community. Lord Diplock observed in that case as follows:

> **".Judicial review has I think, developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case_by_case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognized in the administrative law of several of our fellow members of the European Economic Community."**
>
> **Lord Diplock explained "irrationality" as follows:**
>
> **"By 'irrationality' I mean what can by now be succinctly referred to as Wednesbury unreasonableness'. It applies to a decision which is to outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."**
>
> **In other words, to characterize a decision of the administrator as "irrational" the Court has to hold, on material, that it is a decision "so outrageous" as to be in total defiance of logic or moral standards. Adoption of "proportionality" into administrative law was left for the future.**
>
> **These principles have been noted in aforesaid terms in Union of India and Anr. v. C. Ganayutham (1997 [7] SCC 463). In essence, the test is to see whether there is any infirmity in the decision making process and not in the decision itself. (See Indian Railwa ys Construction Co. Ltd. v. Ajay Kumar (2003 (4) SCC 579).**

19. Their Lordships of the Hon'ble Supreme Court in **Directorate of Film Festivals and others versus Gaurav Ashwin Jain and others, (2007) 4 SCC 737** have held that Courts do not and cannot act as Appellate Authorities examining the correctness,

suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. Their Lordships have succinctly explained that the scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Their Lordships have held as under:

> **"The scope of judicial review of governmental policy is now well defined. Courts do not and cannot act as Appellate Authorities examining the correctness, suitability and appropriateness of a policy. Nor are courts Advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available.**
>
> **Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review [vide : Asif Hameed v. State of J&K - 1989 Supp (2) SCC 364; Shri Sitaram Sugar Co. Ltd., v. Union of India - 1990 (3) SCC 223; Khoday Distilleries v. State of Karnataka - 1996 (10) SCC 304, Balco Employees Union v. Union of India - 2002 (2) SCC 333), State of Orissa vs. Gopinath Dash - 2005 (13) SCC 495 and Akhil Bharat Goseva Sangh vs. State of Andhra Pradesh - 2006 (4) SCC 162]."**

20. Their Lordships of the Hon'ble Supreme Court in ***Delhi Development Authority and another*** versus ***Joint Action Committee, Allotment of SFS Flats and others***, (2008) 2 SCC 672 have held that an executive order termed as a policy decision is not beyond the pale of judicial review. Their Lordships have further laid down four tests to which a policy decision is subject to judicial review. Their Lordships have held as under:

> **"An executive order termed as a policy decision is not beyond the pale of judicial review. Whereas the superior courts may not interfere with the nitty gritty of the policy, or substitute one by the other but it will not be correct to contend that the court shall like its judicial hands off, when a plea is raised that the impugned decision is a policy decision. Interference therewith on the part of the superior court would not be without jurisdiction as it is subject to judicial review.**
>
> **Broadly, a policy decision is subject to judicial review on the following grounds:**
>
> **(a) if it is unconstitutional;**
>
> **(b) if it is dehors the provisions of the Act and the Regulations;**
>
> **(c) if the delegatee has acted beyond its power of delegation;**
>
> **(d) (d) if the executive policy is contrary to the statutory or a larger policy."**

21. Their Lordships of the Hon'ble Supreme Court in ***State of Uttar Pradesh and others versus Chaudhari Ran Beer Singh and another***, (2008) 5 SCC 550 have held that policy decision cannot be interfered so long the infringement of fundamental right is shown. Their Lordships have held as under:

> **"Cabinet's decision was taken nearly eight years back and appears to be operative. That being so there is no scope for directing reconsideration as was done in Ram Milan's case, though learned counsel for the respondents prayed that such a direction should be given. As rightly contended by learned counsel for the State, in matters of policy decisions, the scope of interference is extremely limited. The policy decision must be left to the Government as it alone can decide which policy should be adopted after considering all relevant aspects from different angles. In matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown, Courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the government the Court cannot interfere even if a second view is possible from that of the Government."**

22. In the instant case, the decision has been taken by the previous Government and the same has been reversed by the new Government in arbitrary manner.

23. This Court while disposing of CWP No. 1468/2013 and analogous matters has specifically held that authorities must be guided by the policy articulated by the government and not resort to *ad hoc* decisions much less disregarding more acute requirement of other areas of the State. A holistic macro as well as micro level perspective plan for higher education for the entire state on need based basis must be prepared by the department at the earliest. The Division Bench has further held that it must be remembered that setting up of a new degree college should be in conformity with the state's obligation to secure equitable distribution of resources and funds across the state and not create cluster of colleges in one district which would be antithesis to good governance and observance of Rule of law. The attempt of the succeeding government should not be to march over the decisions taken by the outgoing ruling party, but must be guided by sound policies and doctrine of good governance for the State. The vesting of executive power in the new government does not warrant reversal of all the decisions of the outgoing ruling party. Such act cannot be passed off in the name of Public Interest and policy decisions of the new government. The Principles of governance has to be tested on the touchstone of justice, equity and fair play. The decision may look legitimate, but as a matter of fact if the reasons are not based on values, but to achieve popular accolade, that decision cannot be allowed to operate. A caveat was put by this Court while deciding the writ petitions that the state government should not resort to pick and choose.

24. Their Lordships of the Hon'ble Supreme Court in ***State of Karnataka and another*** **versus** ***All India Manufacturers Organization and others***, **(2006) 4 SCC 683** have held that merely there was a change in the Government, there was no necessity for reviewing all decisions taken by the previous Government, which is what appears to have happened. Their Lordships have held as under:

> **"66. Taking an overall view of the matter, it appears that there could hardly be a dispute that the Project is a mega project which is in the**

larger public interest of the State of Karnataka and merely because there was a change in the Government, there was no necessity for reviewing all decisions taken by the previous Government, which is what appears to have happened. That such an action cannot be taken every time there is a change of Government has been clearly laid down in State of U.P. and Anr. v. Johri Mal and in State of Haryana v. State of Punjab and Anr. where this court observed thus:

> **"in the matter of governance of a State or in the matter of execution of a decision taken by a previous Government, on the basis of a consensus arrived at, which does not involve any political philosophy, the succeeding Government must be held duty-bound to continue and carry on the unfinished job rather than putting a stop to the same."**

25. Their Lordships of the Hon'ble Supreme Court in ***State of Tamil Nadu and others*** **versus** ***K. Shyam Sunder and others*****, (2011) 8 SCC 737** have held that the Government has to rise above the nexus of vested interests and nepotism. Their Lordships have held as under:

> **"31. The Government has to rise above the nexus of vested interests and nepotism and eschew window-dressing.**
>
> > **"The principles of governance have to be tested on the touchstone of justice, equity, fair play and if a decision is not based on justice, equity and fair play and has taken into consideration other matters, though on the face of it, the decision may look legitimate but as a matter of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate". (Vide: Onkar Lal Bajaj etc. etc. v. Union of India & Anr. etc. etc., AIR 2003 SC 2562).**
>
> **32. In State of Karnataka & Anr. v. All India Manufacturers Organisation & Ors., AIR 2006 SC 1846, this Court examined under what circumstances the government should revoke a decision taken by an earlier Government. The Court held that an instrumentality of the State cannot have a case to plead contrary from that of the State and the policy in respect of a particular project adopted by the State Government should not be changed with the change of the government. The Court further held as under:-**
>
> > **"It is trite law that when one of the contracting parties is State within the meaning of Article 12 of the Constitution, it does not cease to enjoy the character of "State" and, therefore, it is subjected to all the obligations that "State" has under the Constitution. When the State's acts of omission or commission are tainted with extreme arbitrariness and with mala fides, it is certainly subject to interference by the Constitutional Courts."**
>
> **(Emphasis added)**
>
> **35. Thus, it is clear from the above, that unless it is found that act done by the authority earlier in existence is either contrary to statutory provisions, is unreasonable, or is against public interest, the State should not change its stand merely because the other political**

party has come into power. Political agenda of an individual or a political party should not be subversive of rule of law."

26. Their Lordships of the Hon'ble Supreme Court in ***Andhra Pradesh Dairy Development Corporation Federation*** **versus** ***B. Narasimha Reddy and others*****, (2011) 9 SCC 286** have held that in the matter of Government of a State, the succeeding Government is duty bound to continue and carry on the unfinished job of the previous Government. Their Lordships have further held that unless the act done by the previous Government is found contrary to statutory provisions, unreasonable or against policy, State should not change its stand merely because another political party has come into power. Their Lordships have held as under:

> **"40. In the matter of Government of a State, the succeeding Government is duty bound to continue and carry on the unfinished job of the previous Government, for the reason that the action is that of the "State", within the meaning of Article 12 of the Constitution, which continues to subsist and therefore, it is not required that the new Government can plead contrary from the State action taken by the previous Government in respect of a particular subject. The State, being a continuing body can be stopped from changing its stand in a given case, but where after holding enquiry it came to the conclusion that action was not in conformity with law, the doctrine of estoppel would not apply. Thus, unless the act done by the previous Government is found to be contrary to the statutory provisions, unreasonable or against policy, the State should not change its stand merely because the other political party has come into power. "Political agenda of an individual or a political party should not be subversive of rule of law". The Government has to rise above the nexus of vested interest and nepotism etc. as the principles of governance have to be tested on the touchstone of justice, equity and fair play. The decision must be taken in good faith and must be legitimate. [Vide: Onkar Lal Bajaj etc. etc. v. Union of India & Anr. etc. etc. AIR 2003 SC 2562; State of Karnataka & Anr. v. All India Manufacturers Organization & Ors. AIR 2006 SC 1846; and State of Tamil Nadu & Ors. v. K. Shyam Sunder & Ors. (Supra)]."**

27. The respondent-State has resorted to a pick and choose policy by opening new 14 Government Degree Colleges, including seven degree colleges, which were de-notified on 2.3.2013, but excluding Kotla Behr.

28. Accordingly, in view of the analysis and discussion made hereinabove, the writ petition is allowed. The decision dated 2.3.2013 de-notifying degree college at Kotla Behr is quashed and set aside. The respondents are directed to re-open government degree college Kotla Behr, as per notification dated 23.6.2012 and to make the college functional for the academic session 2015-16 not later than 15.8.2015. Pending application(s), if any, also stands disposed of. No costs.

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

Bharat Sanchar Nigam Ltd. & Ors. ..Petitioners.

Vs.

Vinod Lakhanpal ..Respondent.

Civil Revision No.163 of 2014.
Reserved on: 08.07.2015.
Date of Decision: 20th July, 2015.

H.P. Urban Rent Control Act, 1987– Section 14- Rent Controller found that tenant had fallen into arrears of rent and allowed a period of 30 days to deposit the amount–the amount was not deposited by the defendant-it was contended that Rent Controller had determined the arrears of rent w.e.f. August, 2007 till 2012 where as the tenant was in arrears of rent w.e.f. August, 2008 - this amount was rectified in appeal- held that the tenant was required to file an application for rectification of arrears - instead of filing such application, he filed an appeal- the period of 30 days of deposit of the amount cannot be counted from the date of the order passed by the Appellate Authority but has to be counted from the date of the order passed by the Rent Controller (Para 3-4)

For the Petitioners: Mr.Ashok Sharma, Sr.Advocate with Mr.Angrez Kapoor, Advocate.

For the Respondent: Mr.Bhupinder Gupta, Sr.Advocate with Ms.Charu Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant revision petition has arisen against the impugned order rendered by the learned Rent Controller (1) Shimla in case No.7-10 of 2013 on 11.9.2014 whereby it dismissed the objections instituted by the petitioner herein/judgment debtor/ tenant against the execution of the order of the Rent Controller (1), Shimla of 10.1.2013 which stood modified on 26.8.2013 by the learned Appellate Authority.

2. A perusal of the order of the learned Rent Controller modified in appeal by the Appellate Authority discloses that the findings on Issue No.(i) were rendered in favour of the landlord-respondent herein/decree holder. However, on issues No.(ii) & (iii), the learned Rent Controller recorded findings against the decree holder/respondent herein. The issues as well as the findings recorded thereon stand extracted hereinafter:-

I. Whether the respondent is in arrears of rent w.e.f. 22.7.2008, as alleged? OPP

II. Whether the demised premises is bonafide required by the petitioner for raising building which cannot be carried out without the premises being vacated? OPP

III. Whether the petition has been filed with malafide intention, as alleged, if so its effect? OPR

IV. Whether the petition is bad for mis-joinder of parties? OPR

V. Whether the petition is not maintainable? OPR

VI. Relief.

Issue-wise findings:

i. Yes.
ii. No
iii. Yes
iv. No
v. No
vi. The petition partly allowed as per operative part of the order.

3. The learned Rent Controller had on a perusal of evidence adduced before it, concluded that the Judgment Debtor/petitioner herein/tenant had fallen into arrears of rent w.e.f. August 2007 to 31.12.2012 @ Rs.6000/- per month, which amount was computed by it to be a sum of Rs.3,24,000/-. The petitioner herein/judgment debtor to escape eviction from the demised premises on the score of its having fallen into arrears of rent, was liable to, within 30 days from the date of rendition of the order by the Rent Controller defray to the respondent herein/decree holder the aforesaid amount by the legally permissible mode. However, the judgment debtor/petitioner herein omitted to do so. It is beaten law of the land that the statutory period of 30 days within which the liability of rent as determined against judgment debtor/petitioner herein by the learned Rent Controller is enjoined to be defrayable to the decree holder/respondent herein by the legally permissible mode, is neither extendable nor enlargeable. Consequently, the judgment debtor/petitioner herein having omitted to by the legally permissible mode defray its determined liability towards arrears of rent for the demised premises to the decree holder/respondent herein, within a period of 30 days from the date of rendition of an order by the learned Rent Controller, was beset with the ensuing legal consequence of its suffering eviction from the demised premises. The learned counsel appearing for the petitioner herein has sought to contend that the period of 30 days as mandated by the order of the Rent Controller in tandem with the statutory prescription cast in the relevant statute for a tenant/judgment debtor/petitioner herein to defray its liability towards arrears of rent qua the demised premises to the decree holder/respondent stood enlarged or extended in the face of there existing an error constituted by the fact, of the operative portion of the order of the Rent Controller displaying that the judgment debtor/petitioner herein fell into arrears of rent qua the demised premises w.e.f. August, 2007 to 31.12.2012, whereas the accurate depiction therein qua the period for which the petitioner herein fell into arrears of rent was to have been w.e.f. August, 2008. The existence of the said error in the operative part of the order of the Rent Controller fastening a liability upon the petitioner herein to deposit the determined arrears of rent qua the demised premises within 30 days thereto, justifiably precluded and prevented the petitioner herein to comply with the aforesaid orders within the statutorily mandated period of 30 days. Besides, the counsel contends that with the Appellate Authority while disposing of Rent Appeal No. 67-S/14 of 2013 had while countenancing the submission of the learned counsel for the petitioner therein had permitted the carrying out of a necessary correction in the operative part of the order of the Rent Controller, inasmuch as, the period for which the judgment debtor/petitioner herein was held to have fallen into arrears of rent qua the demised premises being reckonable not from August, 2007 but from August, 2008. In aftermath, it is contended before this Court that the rectification aforesaid by the Appellate Authority while being seized of an appeal against the order of the Rent Controller inasmuch as its directing the judgment debtor/petitioner herein to defray its liability towards arrears of rent qua the demised premises to the decree holder from August,

2008 to 31.12.20012 @ Rs.6000/- per month also connotes enlargement or extension of period, to the judgment debtor/petitioner herein to deposit the arrears of rent as erroneously determined by the learned Rent Controller. Besides, it is contended that the period of 30 days for the petitioner herein to defray the arrears of rent qua the demised premises in the legally permissible mode to the respondent herein is to be computed there-from.

4. The above argument which is with great force canvassed before this Court staggers and falls apart in the face of an averment in the petition magnifyingly displaying the fact that the petitioner herein fell into arrears of rent qua the demised premises w.e.f. August, 2008 to 31.12.2012 @ Rs.6000/- per month. Moreover, the petitioner does not controvert the said fact while proceeding to file a reply thereto. Consequently, when hence the judgment debtor/petitioner herein was equipped with the necessary knowledge of it being in arrears of rent qua the demised premises w.e.f. August, 2008 to 31st December, 2012 @ Rs.6000/- per month it ought to have rather proceeded to at the initial stage inasmuch as at the time contemporaneous to the rendition of the order of eviction of the petitioner from the demised premises on the ground of its having fallen into arrears of rent, deposit the amount constituting its accepted liability towards arrears of rent qua the demised premises by adopting the legally permissible mode. Besides preceding the deposit of its accepted liability towards arrears of rent qua the demised premises, it could well have when the narration or recital in the operative part of the order of the Rent Controller qua commencement of the period from which the petitioner herein fell into arrears of rent was inadvertently displayed therein to be commencing from August, 2007 instituted an appropriate application before the Rent Controller for rectifying the occurrence by way of inadvertence arising from a typographical/clerical mistake, the recital therein of the judgment debtor/petitioner herein having fallen into arrears of rent w.e.f. August, 2007, whereas the commencement of its liability towards arrears of rent qua the demised premises towards the judgment debtor/petitioner herein was rather to be computed from August, 2008. Even when the judgment debtor/petitioner herein had conceded to the factum of it being in arrears of rent qua the demised premises from August, 2008 to 31st December, 2012 @ Rs.6000/- per month, its acquiescence to the said period constituting the time for which its liability towards arrears of rent was rather by way of a typographical/clerical error occurring in the operative part of the order of the Rent Controller inadvertently not determined rather was erroneously determined to be commencing from August, 2007, all the more enjoined upon the judgment debtor/petitioner herein, for escaping eviction from the demised premises, to move an application promptly before the Rent Controller for rectifying the existence of the aforesaid typographical mistake in the operative part of the order of the Rent Controller. The judgment debtor/petitioner herein omitted to do so, rather even when it proceeded to institute an appeal before the Appellate Authority against the impugned order of the Rent Controller it merely projected the existence of the aforesaid typographical error occurring in the operative part of the order of the Rent Controller, to be a ground for interfering with the impugned order. However, a perusal of the order, rendered on 26.8.2013 by the Appellate Authority on an appeal preferred before it against the order of the Rent Controller, displays that the learned counsel appearing for the judgment debtor/petitioner herein had constrained the Appellate Authority while being seized of an appeal against the orders of the Rent Controller to dispose it of after carrying out a rectification of the typographical/clerical mistake occurring in the relief clause of the operative part of the order of the Rent Controller, inasmuch as there being mis-computation of liability of the judgment debtor/petitioner herein towards arrears of rent qua the demised premises arising from a mis-reflection qua the commencement of period from which the judgment debtor/petitioner herein fell into arrears of rent. The submission made by the

learned counsel for the petitioner herein was accepted by the Appellate Authority and the typographical mistake occurring in the operative part of the order of the Rent Controller inasmuch as the reflection therein of the judgment debtor/petitioner herein being in arrears of rent towards the decree holder/respondent herein qua the demised premises w.e.f. August, 2007 to 31.12.2012 @ Rs.6000/- per month was corrected to be commencing from August, 2008 to 31.12.2012 @ 6000/- per month. The submission addressed by the learned counsel for the judgment debtor/petitioner before the Appellate Authority while arguing on an appeal preferred by it against the order of the Rent Controller per se magnifies the fact that apart from the occurrence of a typographical/clerical mistake in the order of the Rent Controller constituted by the fact their arising from a clerical mistake a mis-reflection of the period from which the judgment debtor/petitioner herein fell into arrears of rent qua the demised premises, no other submission was addressed before the learned appellate authority. The submission addressed by the learned counsel for the judgment debtor/petitioner before the Appellate Authority and the orders rendered thereupon concomitantly display knowledge or the awareness of the judgment debtor/petitioner qua the mis-computation of liability of the judgment debtor/petitioner herein towards arrears of rent qua the demised premises in the orders of the Rent Controller and such purported mis-computation arising from a typographical mistake inasmuch as there being a mis-reflection therein qua the commencement of the period from which the judgment debtor/petitioner fell into arrears of rent towards respondent/decree holder qua the demised premises. Obviously, when the petitioner is to be construed to be aware of the existence of a clerical error in the operative part of the order of the Rent Controller, the appropriate mode available to the judgment debtor/petitioner was to at the first instance before the learned Rent Controller move an application for correction of the typographical mistake. It having omitted to do so rather having concerted to institute an appeal before the Appellate Authority on the score of their existing a typographical mistake in the operative part of the order of the Rent Controller portrays indiligence besides a deliberate procrastination on the part of the judgment debtor/petitioner herein to escape its admitted liability of defraying the entire arrears of rent qua the demised premises portrayed in its reply to the rent petition to be computable from August, 2008 to 31st December, 2012 @ Rs.6000/- per month. Consequently, given the awareness of the judgment debtor/petitioner qua its liability to the respondent/decree holder towards arrears of rent qua the demised premises and its having omitted to at the earliest before the learned Rent Controller when there is a sheer mis-reflection in the order of the Rent Controller qua the commencement of the period from which computation of liability of arrears of rent of the judgment debtor/petitioner qua the demised premises to the decree holder/respondent herein, get it rectified obviously then no leverage or sinew can be imputed to the contention of the learned counsel for the petitioner that the date when the said typographical mistake stood belatedly rectified by the appellate authority, the period of 30 days within which the judgment debtor/petitioner herein was obliged to defray its liability towards the arrears of rent qua the demised premises for escaping eviction is to be reckoned there-from. In accepting the above submission it would tantamount to an impermissible enlargement or extending the period of time within which the judgment debtor/petitioner herein was obliged to defray its liability towards arrears of rent to the decree holder/respondent herein qua the demised premises.

5. In view of the above discussion, the petition is dismissed, so also the pending application(s), if any. No costs.

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

Brig. J.K. Narang & anr. ..... Petitioners.

Vs.

Central Bureau of Investigation ..... Respondent

Cr.MMO No. 106 of 2015.
Judgement reserved on: 9.7.2015.
Date of decision: 20.7.2015.

Code of Criminal Procedure, 1973- Section 482- Petitioners were members of the Armed Forces - an FIR was registered against them for purchasing EPABX on exorbitant prices-court of inquiry concluded that there was no financial irregularity and no loss was caused-the C.B.I. had ignored the documents produced by the petitioners and the report of the court of inquiry - a charge sheet was filed against the petitioners before the court-the petitioners filed an application seeking their discharge on the ground of want of proper sanction, which was dismissed- held that the petitioners had filed the application for discharge prior to the framing of charge – court had not recorded any specific findings regarding Section 19 (b) (3) & (4) of Prevention of Corruption Act-the order passed by trial court set-aside with a direction to record the findings at the appropriate stage of the trial.

(Para 8 to 14)

Case referred:
C.B.I. vs. Ashok Kumar Aggarwal AIR 2014 SC 827

For the petitioners : Mr. Pramod Kohli, Senior Advocate with Mr. Atul Jhingan, Advocate.

For the respondent : Mr. Sandeep Sharma, Senior Advocate with Mr. Pankaj Negi, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

By medium of this petition, filed under section 482 of the Code of Criminal Procedure (for short, the Code), the petitioners seek setting aside the judgement/ order dated 26.3.2015 passed by the learned Special Judge (CBI), Shimla, H.P. in Cr. MP No. 43-S/4 of 2014 and Cr.M.P. No. 42-S/4 of 2014, whereby the applications filed by them for their discharge with a further prayer to dismiss the charge-sheet for want of valid prosecution sanction has been ordered to be dismissed.

The facts in brief as pleaded are that:

2. (a) petitioner No. 1 had joined Indian Army as Lieutenant in Corps of Engineers (Bombay Sappers) on 14.3.1981 and earned promotions from time to time on the basis of his performance, integrity and seniority and rose to the rank of Brigadier on being promoted on 6.6.2007. He was deputed to Border Roads Organisation and was posted as Chief Engineer Project Deepak BRO, Shimla (H.P.), where he served from 6.6.2007 to 12.2.2009.

(b) The petitioner No. 2 had also joined the Indian Army as Lieutenant in Corps of Engineers (Bombay Sappers) on 20.12.1986 and earned promotions from time to time on

the basis of his performance, integrity and seniority and rose to the rank of Lt. Colonel on being promoted in December 2005 and to the Rank of Colonel in December 2010. He was deputed to Border Roads Organisation and was posted as Staff Officer Grade-I, HQ. CE, (P) Deepak BRO, Shimla (H.P.) where he served from 31.3.2007 to 6.11.2009.

(c) While posted as Chief Engineer and Staff Officer respectively, the petitioners in discharge of their regular and normal duties made purchases of fully digital IP Based EPABX Exchanges as sanctioned by Ministry of Defence for the various units of Project Deepak located at far flung places in the State of Himachal Pradesh and Uttarakhand from a well known and reputed concern M/s Siemens Enterprise Communications Pvt. Ltd. New Delhi. An FIR bearing No. RC09602120004 came to be registered on 23.2.2012 against the petitioners and M/s Siemens Enterprise Communications Pvt. Ltd. allegedly for purchasing the above mentioned EPABXs on exorbitant rates. During the course of investigation, the petitioners as also M/s Siemens Enterprise Communications Pvt. Ltd. produced various documents before the Investigating Agency to establish that there has been no financial irregularities/ illegality nor there has been any loss to the State Exchequer. Similar purchases were made by various formations of Army/ Air Force/ Navy/ BRO throughout the country from the same suppliers and the rates at which these exchanges were bought through limited tender inquiry were much lower than similar purchases made elsewhere in the country by Armed Forces Formations. Number of documents relating thereto were produced by the petitioners to the investigating agency, during the course of investigation, which also included a copy of the Staff Court of Inquiry earlier ordered by the Ministry of Defence in respect of these purchases. The Court of Inquiry Committee comprised of Sr. officers of Government of the Rank of Lieutenant General as the Presiding Officer, Major General and equivalent Govt. officials (I.e. Joint Secretary and above) as members.

(d) It was pleaded that on the basis of the evidence, the Court of Inquiry returned clear and categorical findings to the effect that there has been no financial bunglings in these purchases and resultantly no loss has been caused to the State Exchequer. Even though, this Court of inquiry and other relevant documents were tendered by the petitioners and their co-accused to the Investigating Agency, same were alleged to be not taken note of and in fact returned to the petitioners. These documents according to the petitioners were sufficient to demolish the allegations contained in the FIR and clearly established the innocence and non-culpability of the petitioners. It was also alleged that the Investigating Agency despite having examined these documents, deliberately ignored the same and produced the charge sheet No. 06/2013 dated 15.10.2013 in the court of Learned Special Judge (CBI), Shimla (HP) for commission of offence under Section 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988 (for short, the Act) and under Section 120-B read with Section 420 and 471 of Indian Penal Code (for short, the Code).

3. The petitioners and the Supplier M/s Siemens Enterprise Communications Pvt. Ltd. were summoned in the aforesaid charge-sheet/ challan by the Special Judge (CBI), Shimla. On being served with the copy of challan and examination of allegations and the documents produced by the CBI under Section 173 (2) Cr.P.C., it is alleged that all the relevant documents particularly those produced by the accused persons to the Investigating Agency during the course of investigation which documents are the official record and of unimpeachable character were not placed by the Investigating Agency before the sanctioning authority. It was also alleged that the CBI procured the sanction from the Sanctioning Authority by active concealment of the facts/record material to the investigation.

4. Petitioner No.1 filed an application dated 2nd April, 2014 seeking direction to the CBI for production of documents being 09 in number. In reply to the said application, the CBI admitted having received the XEROX copies of the above mentioned documents from the accused persons during the course of investigation, but submitted that the same were not relied upon for the purposes of establishing the allegations against the accused. The prosecution had produced the copies of the documents mentioned hereinabove and listed in the application dated 2nd April, 2014 before the Special Judge, CBI, and had sought permission of the learned Court to return the said documents to the petitioners.

5. The petitioners thereafter filed two separate applications dated 24.12.2014 seeking their discharge and dismissal of the case for want of valid prosecution sanction. It was inter alia pleaded that the orders sanctioning prosecution passed in respect of the petitioners are invalid and illegal and suffer from non-application of mind on account of non-consideration of material documents/facts not produced by the investigating agency to the sanctioning authority at the time of grant of sanction though admitted official record.

6. The applications preferred by petitioners were dismissed by the learned Special Judge, CBI, Shimla vide impugned order dated 26.3.2015, which order has been assailed on various grounds by the petitioners as taken in the memo of petition.

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

7. Sh. Pramod Kohli, learned Senior Advocate for the petitioners has strenuously argued that though the learned trial court has given findings to uphold the order of sanction, but it has given no specific findings in terms of sub-sections (3) and (4) of Section 19 of the Act.

8. In order to appreciate this argument, it is apt to reproduce the provision of sub-section (3) of section 19 of the Act, which reads as follows:-

> "(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—
>
> (a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;
>
> (b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;
>
> (c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings."

9. At this stage, it is also necessary that the provisions of sub-section (4) and explanation thereto be also reproduced:-

> "(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether

the objection could and should have been raised at any earlier stage in the proceedings.

Explanation.—For the purposes of this section,—

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."

10. The learned trial court has upheld the sanction order by according the following reasons:-

"9. Similarly in the case of **State of Maharashtra v. Mahesh G. Jain (2013) 8 SCC 119** Hon"ble Supreme Court clearly opined that the adequacy of material placed before the sanctioning authority cannot be gone into by the Court, it was observed as under:-

> "The adequacy of material placed before the sanctioning authority cannot be gone into the court as it does not sit in appeal over the sanction order. An order of sanction should not be construed in a pedantic manner and there should not be a hypertechnical approach to test its validity. When there is an order of sanction by the competent authority indicating application of mind, the same should not be lightly dealt with. The flimsy technicalities cannot be allowed to become tools in the hands of an accused."

10. In **Superintendent of Police (C.B.I.) v. Deepak Chowdhary and others (1995) 6 SCC 225**

> "It has been ruled that the grant of sanction is only an administrative function, though it is true that the accused may be saddled with the liability to be prosecuted in a court of law. What is material at that time is that the necessary facts collected during investigation constituting the offence have to be placed before the sanctioning authority and it has to consider the material. Prima facie, the authority is required to reach the satisfaction that the relevant facts would constitute the offence and then either grant or refuse to grant sanction."

11. **In C.S. Krishnamurthy v. State of Karnataka (2005) 4 SCC 81** it has been held as follows:-

> **"...**.sanction order should speak for itself and in case the facts do not so appear, it should be proved by leading evidence that all the particulars were placed before the sanctioning authority for due application of mind. In case the sanction speaks for itself then the satisfaction of the sanctioning authority is apparent by reading the order."

12. **R. Sundararajan v. State by DSP, SPE, CBI, Chennai (2006) 12 SCC 749**, while dealing with the validity of the order of sanction, the two learned Judges have expressed thus:-

> "It may be mentioned that we cannot look into the adequacy or inadequacy of the material before the sanctioning authority and we cannot sit as a court of appeal over the sanction order. The order

granting sanction shows that all the available materials were placed before the sanctioning authority who considered the same in great detail. Only because some of the said materials could not be proved, the same by itself, in our opinion, would not vitiate the order of sanction. In fact in this case there was abundant material before the sanctioning authority, and hence we do not agree that the sanction order was in any way vitiated."

13. In **State of Karnataka v. Ameerjan (2007) 11 SCC 273**

"it has been opined that an order of sanction should not be construed in a pedantic manner. But, it also well settled that the purpose for which an order of sanction is required to be passed should always be borne in mind. Ordinarily, the sanctioning authority is the best person to judge as to whether the public servant concerned should receive the protection under the Act by refusing to accord sanction for his prosecution or not."

14. In **Kootha Perumal v. State through Inspector of Police, Vigilance and Anti-Corruption (2011) 1 SCC 491**

" it has been opined that the sanctioning authority when grants sanction on an examination of the statements of the witnesses as also the material on record, it can safely be concluded that the sanctioning authority has duly recorded its satisfaction and, therefore, the sanction order is valid."

15. From the aforesaid authorities the following principles can be culled out:-

a) It is incumbent on the prosecution to prove that the valid sanction has been granted by the sanctioning authority after being satisfied that a case for sanction has been made out.

b) The sanction order may expressly show that the sanctioning authority has perused the material placed before him and, after consideration of the circumstances, has granted sanction for prosecution.

c) The prosecution may prove by adducing the evidence that the material was placed before the sanctioning authority and his satisfaction was arrived at upon perusal of the material placed before him.

d) Grant of sanction is only an administrative function and the sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence.

e) The adequacy of material placed before the sanctioning authority cannot be gone into by the court as it does not sit in appeal over the sanction order.

f) If the sanctioning authority has perused all the materials placed before him and some of them have not been proved that would not vitiate the order of sanction.

g) The order of sanction is pre-requisite as it is intended to provide a safeguard to public servant against frivolous and vexatious litigants, but simultaneously an order of sanction should not be

construed in a pedantic manner and there should not be a hyper-technical approach to test its validity.

16. True it is, grant of sanction is a sacrosanct and sacred act and is intended to provide a safeguard to the public servant against vexatious litigation but simultaneously when there is an order of sanction by the competent authority indicating application of mind, the same should not be lightly dealt with. The flimsy technicalities cannot be allowed to become tools in the hands of an accused.

17. At this stage, I think it apposite to state that while sanctity attached to an order of sanction should never be forgotten but simultaneously the rampant corruption in society has to be kept in view. It has come to the notice of this Court how adjournments are sought in a maladroit manner to linger the trial and how at every stage ingenious efforts are made to assail every interim order. It is the duty of the court that the matters are appropriately dealt with on proper understanding of law of the land. Minor irregularities or technicalities are not to be given Everstine status. It should be borne in mind that historically corruption is a disquiet disease for healthy governance. It has the potentiality to stifle the progress of a civilized society. It ushers in an atmosphere of distrust. Corruption fundamentally is perversion and infectious and an individual perversity can become a social evil. This court is of the convinced view that in these kind of matters there has to be reflection of promptitude, abhorrence for procrastination, real understanding of the law and to further remain alive to differentiate between hyper-technical contentions and the acceptable legal pronouncement.

18. Since the competent Authority has granted the sanction and in view of the law laid down by Hon'ble Supreme Court in 2013 SCC-119, 2006 SCC 749 and 2007 SCC 273, this court cannot sit over the sanction order as appellate Authority. The present applications for discharge of accused on the ground of invalid sanction are not sustainable and maintainable. Moreso, no sanction is required on behalf of the Accused/applicant No. 3, as he is not public servant. Hence in view of the above discussion all the three applications are dismissed."

11. It is evident from the aforesaid findings that though an elaborate discussion has been made to uphold the order of sanction, but the order does not specifically record any findings in terms of clause (b) of sub-sections (3) and (4) of section 19 of the Act that non-production of the relevant material before the sanctioning authority at the time of grant of sanction has not resulted in a failure of justice.

12. Undoubtedly, it was on account of the petitioners own overzealousness whereby they had raised objection to the validity of the sanction order at the very initial stage i.e. even before arguments on charge could be advanced that the impugned findings were rendered. But then these findings cannot foreclose this question for all times to come since it was not the proper stage to have raised or even examined the issue of sanction as relating to the applicability of provisions of sections 19(3) (b) and 19(4) of the Act. This was so held by the Hon'ble Supreme Court in **C.B.I.** vs. **Ashok Kumar Aggarwal AIR 2014 SC 827** in the following terms:-

"46. The most relevant issue involved herein is as at what stage the validity of sanction order can be raised. The issue is no more res- integra. In

Dinesh Kumar v. Chairman Airport Authority of India & Anr., AIR 2012 SC 858, this Court dealt with an issue and placing reliance upon the judgment in Parkash Singh Badal & Anr. v. State of Punjab & Ors., AIR 2007 SC 1274, came to the conclusion as under:

> *"13. In our view, having regard to the facts of the present case, now since cognizance has already been taken against the appellant by the trial Judge, the High Court cannot be said to have erred in leaving the question of validity of sanction open for consideration by the trial court and giving liberty to the appellant to raise the issue concerning validity of sanction order in the course of trial. Such course is in accord with the decision of this Court in Parkash Singh Badal..."*

47. Undoubtedly, the stage of examining the validity of sanction is during the trial and we do not propose to say that the validity should be examined during the stage of inquiry or at pretrial stage."

13. Moreover, this legal position has not even been disputed by the respondents as is clear from the replies filed by it to the application preferred by the petitioners for their discharge, wherein the respondents themselves have conceded that it was not the stage where the sanction order could be questioned. It shall be profitable to reproduce paras-6 and 7 of the reply, which reads thus:-

> "6. That the prosecution had forwarded a CBI report alongwith all relied upon documents and statement of relied upon witnesses, on the basis of which the allegations leveled in the charge sheet against accused public servants were proposed to be sustained, to the competent Sanctioning Authority for according sanction of prosecution. The competent authority after careful consideration of material evidence including statements of witnesses and relied upon documents placed before it, accorded the sanction of prosecution against accused applicant.
>
> 7. That sanction of prosecution is just a prerequisite for the Trial Court to take cognizance against accused persons charge sheeted after investigation of the case. The trial against accused persons has to be conducted as per the procedure laid down under law and they will have each and every opportunity to rebut the allegations including sanction of prosecution during trial. They will also have the opportunity to cross examine the competent authority who accorded the sanction of prosecution against accused public servants. The accused applicant is also at liberty to bring the alleged documents mentioned in his application, in his defence during trial."

14. In view of the aforesaid discussion, this petition is allowed and the impugned order passed by the learned Special Judge is set-aside with a direction to the learned trial court to record a finding in terms of clause (b) of sub-sections (3) and (4) of section 19 of the Act at the appropriate stage of the trial. All pending applications are also disposed of.

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

Hari Singh. ...Appellant

Versus

Himachal Road Transport Corporation and others. ...Respondents

LPA No. 429 of 2012
Reserved on 15.7.2015
Date of decision: 20.07.2015

Constitution of India, 1950- Article 226- Petitioner was engaged as a driver on a contract basis for a period of one year- the bus being driven by the petitioner met with a fatal accident- criminal proceedings were initiated against the petitioner- a show cause notice was issued to the petitioner but was withdrawn –the proceedings terminated in favour of the petitioner and he was acquitted of the charges framed against him- he made a representation for regularization of his service- the representation was rejected – respondent stated that the contract of the petitioner came to an end, when the services of the petitioner were automatically terminated – mere acquittal in a criminal case will not result in automatic renewal of the contract- the petitioner contended that 12 other persons were similarly situated and their services were continued- a finding was recorded by the Court that accident had taken place due to sinking of the road and not due to negligence of the driver - held that concept of equality can be applied amongst the equal- nothing was brought on record to show that the cases of other persons were similar to the case of the petitioner - the decision making authority was entitled to take the factum of accident into consideration - the show cause notice was withdrawn as there was no relationship of master and servant- the petitioner had failed to show that his services were dependent upon the outcome of the criminal case - hence, mere acquittal will not help the petitioner - Petition dismissed. (Para 6-12)

Cases referred:

Union of India and another Vs. Bihari Lal Sidhana (1997) 4 SCC 385
Divisional Controller, Karnataka State Road Transport Corporation Vs. M.G. Vittal Rao (2012) 1 SCC 442
Deputy Inspector General of Police and another Vs. S. Samuthiram (2013) 1 SCC 598
Commissioner of Police, New Delhi and another Vs. Mehar Singh (2013) 7 SCC 685
State of West Bengal and others Vs. Sankar Ghosh (2014) 3 SCC 610

For the Appellant: Mr.M.L. Sharma, Advocate.
For the Respondents: Mr.Adarsh Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

The appellant is the writ petitioner, who in his petition has claimed the following reliefs:-

"1. To quash the impugned order dated 21-06-2011 ANNEXURE-P/10 being contrary to the facts on record and therefore arbitrary and illegal.

2. To direct the respondent to regularize the services of the petitioner w.e.f. 29-06-2000 like other similarly situated persons with all consequential benefits with 12% interest."

2. The brief facts of the case are that the appellant was engaged as driver on contract basis for a period of one year w.e.f. 29.6.1999, however, before the contract period could come to an end, the bus being driven by the petitioner on 21.6.2000 met with a fatal accident, resulting in death of five passengers and injuries to fifteen others. FIR in relation to the said accident was registered by the police, as a result whereof criminal proceedings came to be initiated against him. Simultaneously, the respondent Corporation initially issued a show cause notice dated 4.7.2000 upon the appellant, however, the same was withdrawn vide office order dated 15.7.2000. The appellant challenged this action by filing Original Application before the State Administrative Tribunal. In the criminal proceedings the appellant stood acquitted by the Court of learned Additional Chief Judicial Magistrate, Sarkaghat and immediately thereafter he made a representation for regularization of his services on the basis that his counter parts have already been regularized.

3. However, before the representation could be decided, the Original Application preferred by the appellant on abolition of the Tribunal stood transferred to this Court and came up for consideration and vide order dated 1.12.2010, the same was disposed of by directing the first respondent to decide the representation of the appellant in light of the judgment passed by learned Additional Chief Judicial Magistrate on 17.11.2008. This representation was however rejected by the competent authority, constraining the appellant to file the aforesaid writ petition.

4. In reply to the writ petition, the respondents in their reply had contended that since the agreement between the parties had come to an end on 28.6.2000, therefore, the services of the appellant stood automatically terminated. It was further averred that the mere acquittal of the appellant in the criminal case would not result in automatically renewed his contract.

5. The learned writ Court agreed with the contentions of the respondents and held that the consequences and affect of accident resulting in fatal injuries and deaths was a matter to be considered solely by the competent authority and the Court could not sit in judgment over such decision, unless the same was arbitrary, illegal, whimsical or capricious.

6. The writ petitioner has questioned the judgment on the ground that the writ Court had failed to appreciate that there were twelve other persons who were similarly situate like the appellant, who too had been appointed on the contract basis w.e.f. 29.6.1999, yet on expiry of contract period, the services of these persons was not only continued but had also been regularized, therefore, he has been discriminated against. It is further contended that the learned writ Court did not properly gauge the cumulative effect of a combination of factors such as withdrawal of show cause notice by the respondents, acquittal of the appellant in criminal trial with a categoric finding of the Court that the accident occurred due to the sinking of road and there was no finding that the accident had occurred due to rash and negligent driving of the appellant.

We have given a deep and thoughtful consideration to the submissions made by the appellant and are of the considered opinion that the order passed by the learned writ Court calls for no interference.

7. It is not in dispute that the appointment of the appellant was on contract basis for one year w.e.f. 29.6.1999 and before the expiry of this period the bus being driven by the appellant on 21.6.2000 met with fatal accident, resulting in five casualties and injuries to fifteen other passengers, which in itself was a valid consideration for not renewing the contract.

8. The appellant would however argue that once the twelve other persons who were similarly situate and had been appointed for one year on contract basis w.e.f. 29.6.1999 along with the appellant were not only continued, but thereafter even their services regularized, the appellant cannot, therefore, be discriminated against.

9. It is more then settled that discrimination is a concept which only applies to equals. The concept of equality before law means that among equals the law should be equal and should be equally administered and that alike must be treated as alike. There must not be discrimination among equals unless there is a reasonable classification. In case the order passed is discriminatory, the same must reflect rule of reason and justice and therefore, should not be arbitrary, capricious, whimsical, discriminatory etc.

10. Tested on the above principles, it would be seen that there is nothing on record to suggest even remotely that the twelve other persons whose services had been ordered to be regularized were similarly situated like the appellant. Although like the appellant they were also appointed on one year contract basis, but that in itself cannot be considered to be a factor to establish equality, because admittedly the appellant before completion of his service of contract had caused a fatal accident as a result of which his services were dispensed with, while this is not the case with the other aforesaid twelve persons. The consequences and affect of the accident, that too before the expiry of contract, was a matter which was required to be considered by the competent authority, that too after taking into consideration several factors and if it then choose to dispense with the services of the appellant, then the said decision cannot in any manner be termed to be discriminatory or arbitrary.

11. Coming to the second contention of the appellant, it would be seen that though the show cause notice was served upon the appellant on 4.7.2000, but the same stood withdrawn on 15.7.2000 and the reason for the same was obvious as the contract of the appellant had come to an end on 28.6.2000 and because of this there was no legal or fiduciary relationship whatsoever between the appellant and the respondents. Therefore, in such circumstances the show cause notice had lost its efficacy. It is more than settled that mere acquittal does not automatically give right to be reinstated in service (refer ***Union of India and another Vs. Bihari Lal Sidhana (1997) 4 SCC 385, Divisional Controller, Karnataka State Road Transport Corporation Vs. M.G. Vittal Rao (2012) 1 SCC 442, Deputy Inspector General of Police and another Vs. S. Samuthiram (2013) 1 SCC 598, Commissioner of Police, New Delhi and another Vs. Mehar Singh (2013) 7 SCC 685 and State of West Bengal and others Vs. Sankar Ghosh (2014) 3 SCC 610).***

12. That apart, there is no other material placed by the petitioner on record, whereby it could be gathered that his service has been dispensed with and would be abide by the outcome of the criminal case. Rather, the record reveals that his services had been

dispensed with strictly in accordance with the contract and therefore, in such circumstances even his acquittal in the criminal case is of no avail. In view of aforesaid discussion, we find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their costs.

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

Cr. Appeal No. 4256 of 2013 a/w
Cr. Appeal No. 4258 of 2013, Cr. Appeal No. 4263 of 2013 and Cr. Appeal No. 24 of 2014
Reserved on: 15.07.2015
Date of decision: 20.07.2015

Cr. Appeal No. 4256 of 2013	
Neelam Kumari	....Appellant
Vs.	
State of Himachal Pradesh	.....Respondent.
Cr. Appeal No. 4258 of 2013	
Navdeep	....Appellant.
Vs.	
State of Himachal Pradesh.	....Respondent.
Cr. Appeal No. 4263 of 2013	
Ramandeep	....Appellant
Vs.	
State of Himachal Pradesh	.....Respondent.
Cr. Appeal No. 24 of 2014	
Vikasdeep	....Appellant
Vs.	
State of Himachal Pradesh	.....Respondent.

Indian Penal Code, 1860- Section 302 and 120-B- Accused 'V' asked the deceased 'S' to mop up the floor- accused 'V' was not satisfied with the work of 'S'- he slapped her, picked up a stick and gave beatings to 'S' - she became unconscious and died subsequently- accused in connivance with other accused buried her dead body - accused did not inform her brother about her death and made him to understand that deceased was missing and she would be recovered- stick and mattresses were recovered- the place from where dead body was recovered was also identified- statements of witnesses are trustworthy- deceased was with accused 'V' prior to her death and no explanation was given as to what had happened to her- held, that in these circumstances, guilt of the accused was proved and accused were rightly convicted. (Para-52 to 63)

Cases referred:

Pawan Kumar Vs. State of Haryana (2001) 3 Supreme Court Cases 628
Dhanajaya Reddy Vs. State of Karnataka (2001) 4 Supreme Court Cases 9
Ravinder Kumar and another Vs. State of Punjab (2001) 7 Supreme Court Cases 690

Vilas Pandurang Patil Vs. State of Maharashtra (2004) 6 Supreme Court Cases 158
Gagan Kanojia and another Vs. State of Punjab (2006) 13 Supreme Court Cases 516
Ujjagar Singh Vs. State of Punjab (2007) 13 Supreme Court Cases 90
Tulshiram Sahadu Suryawanshi and another Vs. State of Maharashtra (2012) 10 Supreme Court Cases 373
Arvind Kumar Anupalal Poddar Vs. State of Maharashtra (2012) 11 SCC 172
Babu alias Balasubramaniam and another Vs. State of Tamil Nadu (2013) 8 SCC 60
Ramesh Vithal Patil Vs. State of Karnataka and others (2014) 11 Supreme Court Cases 516
State of Rajasthan Vs. Thakur Singh (2014) 12 Supreme Court Cases 211

For the appellant(s): Mr. Anup Chitkara, Advocate, for the appellants in Cr. Appeal No. 4256 of 2013 and in Cr. Appeal No. 24 of 2014.
Mr. Atul Jhingal, Advocate, for the appellant in Cr. Appeal No. 4258 of 2013.
Mr. Vijay Chaudhary, Advocate, for the appellant in Cr. Appeal No. 4263 of 2013.

For the respondent(s): Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

Since all these appeals have arisen out of the judgment and order, dated 30.11.2013, the same were taken up together for hearing and are being disposed of by this common judgment.

2. These appeals are instituted against the judgment and order, dated 30.11.2013, rendered by the learned Additional Sessions Judge (1), Una, District Una, H.P. in Sessions Case No. 18/2010, whereby the appellant/accused Vikasdeep was charged with and tried for an offence punishable under Section 302 of the Indian Penal Code, whereas the remaining three accused, namely, Navdeep, Ramendeep and Neelam Kumari were charged with and tried for offences punishable under Sections 201read with Section 120-B of the Indian Penal Code. Appellant/accused Vikasdeep was convicted and sentenced to undergo life imprisonment for the commission of an offence under Section 302 of the Indian Penal Code and was ordered to pay a fine of Rs.25000/-. He was ordered not to be released from the prison till his death. Appellants/accused Navdeep, Ramandeep and Neelam Kumari were convicted and sentenced to undergo simple imprisonment for a period of two years with fine of Rs.5000/- each for the commission of offence under Section 201 of the Indian Penal Code and in case of default of payment of fine, to undergo simple imprisonment for a period of one year each.

3. Case of the prosecution, in a nut-shell, is that on 16.06.2010, Vikasdeep dropped Neelam Kumari at her School at 7:00 a.m. in a car and then returned to his house. Sarita (deceased) and Vikasdeep took breakfast at 8:00 a.m. and thereafter Vikasdeep asked Sarita to mop up the floor. Vikasdeep was not satisfied with the work of Sarita. He slapped her and picked up a stick and gave beatings to Sarita. She became unconscious. Vikasdeep picked Sarita from courtyard and put her on a mattress placed on the floor. The girl succumbed to injuries. Vikasdeep thereafter brought Neelam back from her School at 1:30 p.m. and told her about the girl. Vikasdeep also consulted his elder brother Ramandeep and

younger brother Navdeep. They all conspired together and buried the dead body of deceased in Jhola Khad by taking assistance of Vikram @ Vikku to whom they have called with his tractor and spade at Jhola bridge during the night time. They told Vikram that they have to bury the ashes of *havan* at a sacred and holy place. When the local inhabitant did not see Sarita for 2-3 days and the accused failed to give satisfactory answer to their queries then they suspected some foul play. The accused conspired and lodged false report at Shahpur Police Station. The local inhabitants also made complaint to the police and the police started investigation. The accused tried to satisfy the police with the false report lodged by them. The police also tried to contact the brother of the deceased. Then, Neelam alongwith Vikram Singh and one driver went to Chamba and brought the brother of Sarita to Pandoga. The brother of Sarita made statement to the police, on the basis of which, an FIR was registered. A disclosure statement was made by accused Vikasdeep regarding the dead body of Sarita. The body of deceased was exhumed from an isolated area in the *Khad* in the presence of witnesses and doctors. The general condition of the body was assessed by the team of doctors at the spot and thereafter, the same was sent to IGMC, Shimla for post mortem as the body had putrefied due to the passage of time. The police had taken into possession the weapon of offence, mattresses, tractor, spade etc. The birth certificate of deceased was also obtained. The statement of Vikram @ Vikku was also recorded under Section 164 Cr. P.C before the Judicial Magistrate 1st Class-2, Una. The case was converted into murder. The matter was investigated and the challan was put up after completing all the codal formalities.

4. The prosecution has examined as many as 43 witnesses to support its case. The accused were also examined under Section 313 of the Cr. P.C. Accused have denied the prosecution story. The accused have also examined five witnesses. The accused were convicted and sentenced, as noticed hereinabove. Hence this appeal.

5. Mr. Anup Chitkara, Mr. Atul Jhingan and Mr. Vijay Chaudhary, Advocates have vehemently argued that the prosecution has failed to prove its case against the appellants/accused.

6. Mr. Ramesh Thakur, learned Assistant Advocate General has supported the judgment and order, dated 30.11.2013.

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

8. PW-1 Sh. Sardari Lal deposed that Madam Babita was posted in the School in their village Kathyadi. Accused Neelam was also posted there. Madam Babita had told them that accused Neelam needs a girl child. Kumari Sarita was brought to village Tikri by her mother and handed over to accused Neelam. Accused Neelam firstly took Kumari Sarita to her village Samot. From Samot, accused Neelam brought Sarita to her village Pandoga. Accused Neelam telephoned Madam Babita requesting her to send him to Shahpur in District Kangra to see his sister. He also talked on telephone with Neelam. He inquired from accused Neelam how would he come to Shahpur. On this, accused Neelam told him that she had already sent a vehicle to fetch him. A white coloured car belonging to the accused came there. Two persons were travelling in that car. He boarded the car from Tikri and came to Shahpur. At Shahpur, accused Vikasdeep and accused Neelam met him. He inquired from them about the whereabouts of his sister. They told that Kumari Sarita had been lost at Shahpur. Accused Vikasdeep and Neelam went to Police Post, Sihunta. Police told them that the report should be lodged at the place where Kumari Sarita went missing. Accused told the

Police that Sarita went missing near Draman. Police told them to go to Police Station, Shahpur. The went to Police Station Shahpur on the same night. He lodged a report in Police Station, Shahpur to the effect that Kumari Sarita was missing vide Ex. PW1/A. He went back to his village Kathyadi. Accused Neelam asked him to come back to Pandoga. Again, the vehicle was sent by the accused. At Shahpur, accused Vikasdeep and Neelam met him. He accompanied them in the car and came to Pandoga. He kept on inquiring from the accused about the whereabouts of Sarita. They remarked that he should not worry and she will be traced out. Sarita could not be traced. They went to Police Post Pandoga. The police conducted the inquiry. The accused were insisting that he should tell Pandoga Police that Kumari Sarita was lost when she was with him. He made the statement Ex. PW1/B before the police at Pandoga. After 2-3 days, the dead body of Sarita was recovered from the Khad. It was kept in a jute bag tied with a red coloured string. It was opened. He identified the dead body. The bag and the dead body were taken into possession by the police vide memo Ex. PW1/C. In his cross-examination, he denied the suggestion that when he came to Pandoga, he noticed that many people were inimical to accused Vikasdeep and Neelam. He also denied the suggestion that at the instance of those persons and the police, he made a wrong statement Ex. PW1/B. He identified the dead body of Kumari Sarita from her cheeks and forehead. He denied the suggestion that the dead body was not of Kumari Sarita.

9. PW-2 Smt. Bimla Devi testified that during the summer season, she heard the cries of a child coming from the house of the two accused. She was spreading the washed clothes on the roof of her house. On the same day, during the night, at about 10—11 p.m., there was power failure. She and her children started moving in the courtyard of their house as they were unable to sleep due to the hot weather and power failure. She heard the noise of the shutter of the house of the accused. A car went towards the bridge with the head lights off. The car belonged to the accused. In her cross-examination, she denied the suggestion that her family has ever raised loan from Pandoga Society.

10. PW-3 Smt. Naresh Kumari deposed that accused Vikasdeep and Neelam were Government servants. Once she had gone to the house of accused Vikasdeep and Neelam. At that time, Sarita met her. On 16.06.2010, at about 1-1:30 a.m., she saw the car of accused Vikasdeep. It came from the side of the bridge to the house of the accused.

11. PW-4 Smt. Raksha Devi deposed that on 16.06.2010 at about 9-10:00 a.m., she was going to fetch the grass. Cement blocks were lying outside the house of the accused Vikasdeep. Accused Vikasdeep was forcing Kumari Sarita to lift the blocks. She was unable to lift the blocks. On this, she asked accused Vikasdeep why he was forcing Sarita to lift the blocks. Accused Vikasdeep stared at him. She went to the fields. Accused Vikasdeep had slapped and kicked Kumari Sarita in her presence and she was unable to lift the block. She has denied the suggestion that she never spotted accused Vikasdeep forcing Sarita to lift the blocks.

12. PW-5 Sh. Sat Pal Saini deposed that accused made a disclosure statement that he could identify the place where the dead body was kept. He put his signatures on Ex. PW5/A.

13. PW-6 Sh. Santokh Singh deposed that accused Vikasdeep and Ramandeep identified the place where the dead body was concealed. The dead body was dug out from the pit firstly with a spade (Kassi) and thereafter with the hands. It was in a gunny bag. The dead body was identified to be of Kumari Sarita by her brother. Memo Ex. PW1/C was prepared to this effect.

14. PW-7 Smt. Babita Kumari deposed that Neelam Kumari was posted as a teacher in the School from where she used to get the pay, i.e., Government Primary School, Tikri. From Tikri School, accused Neelam was transferred to Una. Accused Neelam asked her to inquire about some female child to be taken to Una. Accused Neelam remarked that she will educate that child and even get her married. Smt. Brahmo Devi, the mother of Kumari Sarita met her. She had a talk with Smt. Brahmo Devi and coveyed to her the requirement and feelings of accused Neelam Kumari. She told Smt. Brahmo Devi that she should personally meet accused Neelam and decide about sending Kumari Sarita after consulting her family members. After that, Kumari Sarita stopped coming to Kathyadi School. Her mother Smt. Brahmo Devi approached her for issuance of the school leaving certificate. The copy of the certificate is Ex. PW7/A. On 22.06.2010 at about 11:00 -11:30 a.m., accused Neelam Kumari rang her up on her mobile phone number 94186-06935. Accused Neelam Kumari told her that she wanted to talk to Sh. Sardari Lal, the brother of Kumari Sarita. She sent that student alongwith another student to call Sh. Sardari Lal. She told accused Neelam Kumari that she should call her again after about 20 minutes. She again received a call from accused Neelam Kumari after 20-25 minutes. Accused Neelam Kumari then had a talk with Sh. Sardari Lal on her mobile phone.

15. PW-8 Sh. Satnam Singh deposed that accused Vikasdeep disclosed before the police that he could get the *danda* and the mattress recovered from his house. Accused Vikasdeep told the police that the *danda* had been concealed in the grass of the kitchen garden, whereas the mattress had been washed and kept in the upper floor of the house. The statement was recorded vide Ex. PW8/A.

16. PW-9 Sh. Harbhajan Singh deposed that the *danda* was handed over by accused Vikasdeep to the police, which was concealed near a mango tree. Accused Vikasdeep then got recovered a mattress from the bed box lying in the upper storey of his house. The same was handed over to the police.

17. PW-10 Sh. Vikram Singh @ Vikku is the material witness. According to him, he received a phone call on his mobile phone No. 98161-63714 from accused Navdeep. His mobile phone number was 98050-33390. Accused Navdeep told him that he needs his tractor-trolley during the night. Again, around 10:30 p.m., accused Navdeep rang him up and asked him as to whether he was free. He conveyed to accused Navdeep that he was free. Accused asked him to come to Jhola Khad alongwith the tractor and a spade (Kassi). He reached the bridge of Jhola Khad at about 11:30 p.m. alongwith his tractor and *Kassi.* A white coloured maruti car was standing on the bridge. Its registration No. was HP-39A-3379. Accused Vikasdeep, Navdeep and Ramandeep were sitting in the car. Accused Navdeep came out of the car and remarked that *havan samgri* was to be dumped. He asked the accused to dump the *havan samgri* at that place only. On this, accused Vikasdeep came out of the car and remarked that the same was to be dumped somewhere near to the water. Accused Vikasdeep even remarked that the Car cannot go to that place and only the tractor can go there. Accused Navdeep then remarked that he will stay back, whereas, the other two accused would accompany him on his tractor. Thereafter, accused Vikasdeep opened the dickey of his car and took out a gunny bag which was tied. Accused Vikasdeep then kept that gunny bag on the hook of the tractor and boarded the same. Accused Ramandeep boarded the tractor carrying a torch. He started the tractor. They went to a place near the water in the *kahd.* Since the way for going towards the water was in a bad condition, accused Vikasdeep asked him to stop the tractor. He stopped the same. Then, accused Vikasdeep got down from the tractor, picked up the gunny bag and started moving on foot.

Accused Ramendeep took the spade from him. He also got down from the tractor and started walking with the *kassi* and torch in his hands. The accused asked him to switch off the lights of the tractor. Both the accused walked for about 60-70 meters. They switched off the torch and came back after about 25 minutes after dumping the gunny bag. He turned the tractor. Then, he, accused Vikasdeep and Ramandeep came on the tractor up to the bridge where the car was parked. Both the accused alighted from the tractor near the car. Thereafter, accused Vikasdeep, Ramandeep and Navdeep went away in the Car and he returned to his house alongwith the tractor and *Kassi* which was returned by the accused. On 21.06.2010, when he went to Petrol Pump, Bhadsali to get the diesel filled in the tractor, he noticed that a lot of villagers had assembled near to the barrier. Accused Navdeep was present there. He stopped the tractor. He went to inquire from the villagers as to why they had assembled. The villagers remarked that Kumari Sarita was missing. She might have been killed. Accused Navdeep was saying to the villagers that the girl would be traced out. He was taken to a side by accused Navdeep. He remarked that Kumari Sarita, who had been kept by his brother accused Vikasdeep, was murdered by him. Accused Navdeep even told him that during the night of 16.06.2010, they did not carry the *havan samgri* in the bag on his tractor. He told that actually the dead body of Sarita was there in the bag. Accused Navdeep even threatened him not to disclose the same to anyone. On 24.06.2010, accused Navdeep again rang him up and asked him to come so as to drive the Car for going to Shahpur. He told him, that he could not drive the car. He engaged one Sh. Sonu to drive the car. When he and Sonu were standing on a shop near the house of accused Navdeep, he came there in a Car. Accused Neelam Kumari was sitting on the rear seat of the car. Accused Navdeep got down from the car. Sh. Sonu then started driving the car. He sat with him on the front seat of the car. Accused Neelam Kumari kept on sitting on the back seat of the car. When they reached Shahpur, accused Neelam Kumari asked them to stop the car. The car was stopped by the side of the road in Shahpur near to a house. Accused Neelam Kumari got down from the car and went inside the house. Next day, around 6:00 a.m., one boy came out of that house. He asked him and Sonu to sleep and remarked that he will drive the car for going towards Draman. The boy drove the car for some distance and then stopped it on a bridge. The boy got down and made a phone call. After 10-15 minutes, Sh. Sardari Lal came on the spot. They came to Shahpur to the house in which accused Neelam Kumari had gone. After some time, he, Sh. Sonu, accused Neelam Kumari and Sh. Sardari Lal started back for Pandoga. His tractor and car were taken into possession vide memo Ex. PW10/A.

18. PW-11 Sh. Charan Singh deposed that accused Ramandeep had identified the place from where the dead body was recovered. Accused Vikasdeep had also identified that place. PW-12 Sh. Man Singh deposed that the dead body of a girl was recovered. He accompanied the police to the residence of accused Vikasdeep. Accused Vikasdeep was also with them. A white coloured maruti car was standing outside the gate of the house of accused Vikasdeep. The white coloured car and documents were taken into possession by the police vide memo Ex. PW12/A.

19. PW-13, Sh. Arjun Singh is not a material witness. PW-14 Sh. Vijay Singh deposed that the mat and cardboard were taken into possession vide memo Ex. PW14/A. PW-15 H.C. Harish Chander proved Ex. PW15/A as well as copy of Parivar register Ex. PW13/B. On 3.8.2010, Smt. Brahmo Devi, the mother of the deceased came to Government Medical College and Hospital, Tanda for DNA test. Application Ex. PW15/B was moved by him before Dr. Imran Sabri, DNA expert.

20. PW-16, Lady Constable Promila Devi deposed that on 23.06.2010, report No. 13-A was entered by her. Sh. Sardari Lal as well as the accused namely Vikas Deep and Neelam had come to the Police Station to lodge the report. She proved copy of *rapat rojnamcha* register Ex. PW16/A

21. PW-17 Smt. Bramo Devi is the mother of the deceased. She deposed that one teacher of the School told her that her daughter was to be given to accused Neelam. Accused Neelam was also teaching in the School. Accused Neelam told her that she would bring up, teach and thereafter marry her daughter. On this, she handed over the custody of Kumari Sarita to accused Neelam at Village Tikri. She brought the School certificate of Kumari Sarita from the School.

22. PW-18 ASI Harnarayan Singh deposed that two males and a female came to the Police Post, Sihunta, District Chamba on 22.6.2010. The males disclosed their names as Sh. Sardari Lal and Sh. Vikas Deep. The female disclosed her name as Smt. Neelam. Accused Vikasdeep told him that they had taken the sister of Sh. Sardari Lal for bringing her up and educating her to Una, since his wife was transferred to Una. Accused Vikasdeep even told him that on 20.6.2010, he and his wife had brought Kumari Sarita in their Car and handed her over to his brother Sh. Sardari Lal at Kangra. He advised the accused to go to Police Station, Shahpur, since Draman Bus Stand, where Kumari Sarita reportedly went missing falls within the jurisdiction of the said Police Station. Accused Vikasdeep and Neelam were perplexed. They and Sh. Sardari Lal could not satisfy her and left Police Post, Sihunta.

23. PW-19 Head Constable Ashok Kumar has proved CD Ex. PW19/A. PW-20, Sh. Manwinder Singh deposed that at the instance of Sh. Charanjit Singh, he handed over SIM Card No. 98050-33390 to accused Navdeep. PW-21 Smt. Kaushalya Devi deposed that accused Vikasdeep had submitted his proposed tour programme in the office vide Ex. PW21/C. Accused Vikasdeep had submitted an application for the grant of casual leave from 22.06.2010 to 24.06.2010 vide Ex. PW21/F

24. PW-22 Smt. Sudarshana Kumari deposed that the casual leave application of accused Vikasdeep was received by her on 24.6.2010 vide Ex. PW21/F. On 22.6.2010, accused Vikasdeep telephoned him and informed that he wanted to avail the leave from 22.06.2010 to 24.6.2010.

25. PW-23 Sh. Sandeep Singh deposed that Sh. Vikram alias Vikku telephoned him and told him that he had to drive a car towards Chamba. He went to the shop/karyana store in the village around 11-11:30 p.m.. Accused Navdeep came there in a car. Accused Neelam was also there in the Car. He started driving the same. They went in the Car to Shahpur. Accused Neelam went inside a house. He remained sitting in the car. One person came from the house and asked him to come inside to have the tea. After he consumed the tea, that person took the keys of the car from him and remarked that now he would drive the Car. From Shahpur, he alongwith Vikram and the person who drove the car went towards Draman. They travelled for about 15-20 kms. They came back to Shahpur with the boy who had boarded the car around 6-6:30 a.m. Thereafter, they came back to Pandoga.

26. PW-24 Smt. Saroj Kumari has proved the admission form Ex. PW-24/A. It was filled up by Neelam Kumari as guardian of Kumari Sarita. Kumari Sarita did not come to the School after the day of her admission to the School, i.e., 11.06.2010. On 22.06.2010, she was taking the class. Accused Neelam Kumari approached her and remarked that she

has to go back to her house. However, accused Neelam Kumari did not return to the School, as promised.

27. PW-25 Sh. Om Raj Kanwar deposed that on 19.06.2010, accused Ramandeep moved an application for the grant of casual leave for 21.06.2010 vide Ex. PW25/A. After 25.06.2010, accused Ramandeep did not come to the School.

28. PW-26 Sh. Dev Raj is a formal witness. PW-27, HHC Hoshiar Singh testified that accused Vikasdeep produced the Car No. HP-39-3379, its key and the registeration certificate before the Investigating Officer as per memo Ex. PW12/A. On 6.7.2010, MHC Vipin Kumar handed over the sealed parcels and the sample seals to him vide RC No. 163/2010. All the parcels, sample seals and envelopes were deposited by him in FSL, Junga.

29. PW-28 HC Dev Raj deposed that he has taken the dead body of Sarita to IGMC on 28.6.2010. PW-29 HHC Dharam Pal has proved the call details of mobile No. 98161-63714 and 98050-33390 vide Ex. PW29/A and Ex. PW29/B.

30. PW 30 HHC Dharam Pal has taken the parcels to FSL, Junga as per the details given in RC No. 188/2010. PW-31, HC Prem Singh deposed that on 8.6.2010, ASI Gian Chand, Incharge Police Post, Pandoga has deposited with him the articles mentioned in his statement. Other articles were also deposited with him on 2.7.2010 by ASI Gian Chand. On 3.7.2010, SI/SHO Shakti Singh Pathania deposited the articles with him. On 6.8.2010 SI/SHO Shakti Singh Pathania deposited with him one *Kassi* with wooden handle. On 10.07.2010, SI/SHO Shakti Singh Pathania deposited with him one tractor bearing No. HP-36A-9305 blue coloured which he entered at Sr. No. 599/10 in the *malkhana* register.

31. PW-31 HC Prem Singh deposed that on 10.2.2011, vide DDR No. 12, he handed over one parcel containing *danda* which was duly sealed with seal impression 'A' alongwith specimen seal 'A' to ASI Prem Lal for obtaining opinion of Forensic Expert. On 12.2.2011, he deposited with him said parcel containing *danda* which was sealed with 7 seals of 'DKG' alongwith specimen seals of 'A' and 'DKJ' qua which he made an entry in the *malkhana* register at Sr. No. 386. He proved the copy of *malkhana* register Ex. PW31-A.

32. PW-32 HC Vipin deposed that during his absence, HC Prem Singh had been looking after his work. HC Prem Singh handed over to him the case property which had been deposited with him by the Investigating Officers, which were entered at Sr. Nos. 587, 589, 590 and 599 of the *malkhana* register. He sent the articles to FSL, Junga through HC Hoshiar Singh No. 330 vide RC No. 163/10, dated 6.7.2010.

33. PW-33 Dr. Mukesh Sharma deposed that he alongwith Dr. S.K. Bansal and Dr. D.K. Shar went to conduct post mortem at the spot. Inquest report Ex. PW1/D was also annexed with the docket for conducting post mortem. The probable time which had elapsed between the death and post mortem was more than three days, however, final opinion was deferred till the receipt of Forensic Experts at IGMC, Shimla.

34. PW-34 HC Vikram Singh is a formal witness. PW-35 ASI Prem Lal Sharma, deposed that on 04.09.2010, SHO, P.S. Haroli had given to him report of FSL and post mortem report for obtaining opinion of Forensic Science Expert from IGMC, Shimla. Accordingly, he took the aforesaid two documents to Dr. Piyush Kapila at IGMC on 03.09.2010 and produced the same before Dr. Kapila on 4.9.2010. Dr. Piyush Kapila gave his opinion on the basis of said documents and he handed over the same to SHO on return.

35. PW-36 Dr. Piyush Kapila deposed that he conducted the post mortem at 10:45 a.m. on 29.6.2010. The body was allegedly recovered from three and half feet deep buried sand filled Nallah. Gunny bag was lying besides the body in the coffin. The skin was blackened. First generation maggots were present near the natural orifices. He made following observations of head and neck:

> *"**Head:** Scalp hair as described 2 to 3 inches in length present in patches were easily pluckable. Eyes were found normal, sunken, sclera whitish, with no injuries on them. Blackish discolouration of the forehead was present. Nose was flattened but no fracture underneath was found. Upper lip had torn mucosa on apposing surface of upper incisors alongwith both central incisors fractured in round shape, recent. Mandible was fractured, ante mortem in between lateral incisor and canine of right side through and through with adherent clots of blood. The teeth were diagrammatically depicted in the post mortem report. A wound was present corresponding to the fracture mandible.*
>
> ***Neck:** No ligature mark could be appreciated on the dead body. On dissection of the neck tissues, no underlying extravasation of the blood could be appreciated. All cervical vertebrae were intact and normal. On both arms no fresh injury could be appreciated; however nodular swellings were present on both humeri in lower one third, which could have been caused by old heeled fractures. No significant finding was observed in head and intracranial contents but it is pertinent to mention here that due to decomposition the brain had liquefied to a grayish mass. In the ribs no recent fractures were found; however, nodularity was present in midaxilarry line on 6th, 7th, 8th, 9th on right side and rib No. 8 on left side. On right side ribs were thickened as above over the certerbral end. Lungs and heart were present but flabby and in a state of decomposition. Around 20 ml of digested food was present in the stomach without any congestion or peculiar smell. Liver, spleen and kidneys were flabby and genitals; however the swab was taken from vagina for biological examination. 39 photographs were taken by the digital camera duly written unedited on a compact disc (CD) and was handed over to police for the purpose of exhibition in the Court. The same CD is Ex. PW36/A."*

According to him, in the presence of ante mortem fracture of mandible and teeth, the possibility of blunt trauma could not be ruled out, however the exact cause of death could not be ascertained in the background of moderate decomposition. The probable time which had elapsed between death and post mortem was opined to be around two weeks. He issued post mortem report Ex. PW36/B. He released the final opinion report after receipt of the chemical examination report vide Ex. PW36/G. On 11.02.2011, an application Ex. PW35/A was received in his office from Police Station, Haroli regarding the opinion as to the weapon of offence vis-à-vis injuries on the body. The weapon was examined by him. He stated that the injuries in Ex. PW36/B were possible with *danda* Ex. P-4.

36. PW-37 Davinder Verma has proved Ex. PW37/A, on the basis of a request through e-mail received from S.P., Una for supplying information of call details and name and address of the subscriber of mobile phone No. 98161-63714. He has also proved form Ex. PW37/B of mobile No. 98161-63714 of Bikram which was Ex. PW37/C and detail of tower location of mobile No. 98050-33390 and 98161-63714 Ex. PW37/E & E, respectively. He also proved the call details of mobile No. 9816163714 Ex. PW29/B and call detail of mobile No. 98050-33390 Ex. PW37/F. According to him, at 1:53:17 hrs, the aforesaid mobile was in the tower range of Una (Jhalehra) and at 02:06:18 hrs, the same was at the

range of Una (near DAV school). At 02:39:18 hrs, the same was at tower of Kasba VPO Basal and at 04:09:37 hrs, it was in the range of Ispur, Tehsil & District Una.

37. PW-41 Dr. Arun Sharma has proved report Ex. PW41/A. PW-42 SI Gian Chand has investigated the matter. He recorded the statement of Sardari Lal vide Ex. PW1/B under Section 154 Cr. P.C. The recoveries were effected, photographs were taken, the dead body was sent for post mortem examination to IGMC and the weapon of offence was also taken into possession.

38. PW-43 SI Shakti Singh Pathania deposed that FIR Ex. PW43/A was registered . On 3.7.2010, accused Vikasdeep made a disclosure statement Ex. PW8/A in the presence of witnesses that he could get the *danda* and mattress recovered. Thereafter, accused Vikasdeep led the police to his house at Pandoga and on reaching there, he got recovered one mattress from a steel trunk kept in the upper storey of the house. Thereafter, he got recovered a *danda* from the kitchen garden of the house, which had been kept on the grass. These were duly sealed and the demarcation report was obtained. On 10.07.2010, tractor No. HP-36-A-9305 was produced by Vikram to him at Police Station which was taken into possession vide memo Ex. PW-10/A. He has also taken into possession the copy of *parivar* register Ex. PW13/B. Kassi Ex. P6 was also recovered. The documents were obtained from the office of the Assistant Registrar, Co-operative Societies pertaining to the tour programme and leave record of accused Vikasdeep. The details of two Schools about the admission of the deceased were also taken into possession from the Schools.

39. DW-1 Sh. Ramesh Jaswal had deposed that the Secretary, Pandoga Cooperative Society sent a proposal for waiving of the loans worth Rs.1,37,25,508/- vide Ex. DW1/A1 to Ex. DW-1/A19. The accused Vikasdeep after conducting the audit reduced this amount to Rs.19,34,705/-. However, in his cross-examination, he has admitted that the file which he had brought starts from page No. 275. He also admitted that no date had been mentioned on any document proved by him.

40. DW-2 Sh. Susheel Pundeer had proved the reports Ex. DW2/A-1 and Ex. DW2/A-2. In his cross-examination, he had categorically admitted that he did not find any irregularity in the attendance register. DW-3 Sh. Sanjeev Kumar had merely proved challan Ex. DW3/B.

41. DW-4 Sh. Anil Kumar had proved MLCs. Ex. DW4/A-1 to Ex. DW4/A-4 and application of the police Ex. DW4/A-5. DW-5 Constable Ram Pal had proved logbook Ex. PW5/A and Ex. PW5/B.

42. Case of the prosecution, in a nut-shell, is that accused Neelam was posted in a School in village Kathyadi. Madam Babita (PW-7) was also posted in a School in Village Kathyadi. Neelam requested Babita to arrange a girl. Thereafter, Babita talked with the mother of the deceased. The custody of the deceased was handed over to Neelam. The deceased was brought to the village. The deceased went missing on 16.06.2010. PW-1 Sh. Sardari Lal was called by the accused Vikasdeep and Neelam Kumari. He was made to understand that his sister had gone missing. They went to various Police Stations, including Police Post, Sihunta and Police Station, Shahpur. However, the fact of the matter is that when the villagers raised hue and cry, an FIR was registered. The matter was investigated. Deceased Sarita was given beatings by accused Vikasdeep. Accused Neelam Kumari came from the school. Thereafter, the body was disposed of with active connivance of accused Navdeep, Ramandeep and Neelam Kumari. The body was packed in a gunny bag, which was

taken on tractor from bridge. A pit was dug. The body was dumped in the same. It was got recovered by the accused from the pit. The body was sent for post mortem examination to IGMC, Shimla. Post mortem examination was conducted by Dr. Piyush Kapila (PW-36). The post mortem report is Ex. PW36/B and the final report is Ex. PW36/G. According to PW-36 Piyush Kapila, the injuries could be caused with *danda* Ex. P-4. PW-1 Sh. Sardari Lal had testified the manner in which his sister Sarita was brought by accused Neelam Kumari to her house. Neelam telephoned Madam Babita. Madam Babita handed over the telephone to him. Neelam had a talk with him and asked him to come to Shahpur. He was told by the accused that Kumari Sarita was lost at Shahpur. They went to Police Post, Sihunta. From Police Post, Sihunta, they were sent to Police Station, Shahpur. He made statement Ex. PW1/B before the Police at Pandoga. The body of Kumari Sarita was recovered from the Khad.

43. PW-17 Smt. Brahmo Devi deposed that she handed over the custody of her daughter to Neelam. Neelam had assured that she would be given education and she would also arrange for her marriage. It is apparent that Kumari Sarita was used as a domestic help by accused Vikasdeep and Neelam. PW-3 Smt. Bimla Devi had testified categorically that she heard the cries of child from the house of the accused. She also heard the noise of the shutter of the house of the accused. A car went towards the bridge with the head lights off. She denied the suggestion that they raised any loan from Pandoga Society. PW-3 Smt. Naresh Kumari saw the car on 16.06.2010 at about 1-1:30 a.m. coming from the side of bridge to the house of the accused. She had not seen Sarita after 16.06.2010. PW-4 Smt. Raksha Devi deposed that accused Vikasdeep was forcing Kumari Sarita to lift the blocks. She was unable to lift the block. Accused Vikasdeep had slapped and kicked Kumari Sarita in her presence as she was unable to lift the block. It is proved from the statement of PW-2 Smt. Bimla Devi, PW-3 Smt. Naresh Kumari and PW-4 Smt. Raksha Devi that the accused were maltreating the deceased. They have seen the car going out of the garage and coming back at odd hours. Accused Vikasdeep had made a disclosure statement vide Ex. PW5/A that he could get the place identified where the dead body was placed. PW-6 Sh. Santokh Singh deposed that accused Vikasdeep got the place identified where the body was kept. The accused have dug out the earth from the pit and the dead body was recovered from the pit. It was identified by her brother and a memo Ex. PW1/C was prepared to this effect. PW-7 Smt. Babita Kumari had deposed the manner in which Kumari Sarita Devi was brought by Neelam from the village. She testified that on 22.06.2010 at about 11:00-11:30 a.m,, accused Neelam Kumari rang her up on mobile phone No. 94186-06935. She told her that she wanted to talk to Sh. Sardari Lal, the brother of deceased Sarita. She arranged to talk with accused Sardari Lal. Accused Vikasdeep also made a disclosure statement that he could get the *danda and* mattress recovered vide memo Ex. PW8/A. The recovery of *danda* and mattress was made in the presence of PW-9 Sh. Harbhajan Singh.

44. PW-10 Sh. Vikram Singh @ Vikku is the most material witness. According to him, he was approached by accused Vikasdeep to come to bridge with his tractor. He came to bridge with his tractor. He was told that some *havan samagri* was to be dumped. He drove the tractor alongwith spade (Kassi). Navdeep stayed back on the spot from where the tractor has started. However accused Ramandeep and Vikasdeep went on the tractor and they came back after 25 minutes. They were carrying a gunny bag. The accused had asked him to switch off the lights of the tractor. He also deposed the manner, he was asked to manage a driver to go to various places and they came back to Pandoga with the boy.

45. PW-11 Sh. Charan Singh deposed that accused Vikasdeep and Ramandeep have dug up the pit. When the dead body was taken out of the bag, one person was weeping. The car was taken into possession in the presence of PW-12 Sh. Man Singh vide memo Ex. PW12/A. PW-14 Sh. Vijay Singh has proved the memo Ex. PW14/A qua the blood stains found on the mat. PW-15 HC Harish Chander had p[roved that the mother of the deceased came to Government Medical College and Hospital, Tanda for DNA test. PW-22 Smt. Sudarshana Kumari has proved the casual leave application of accused Vikasdeep. PW-24 Smt. Saroj Kumari had deposed that on 22.06.2010, she was taking the class. Accused Neelam Kumari approached her and remarked that she had to go back to her house. The accused remarked that she would come to the School after some time. However, accused Neelam Kumari did not return to the School. PW-23 Sh. Sandeep Singh had driven the vehicle at the instance of Vikram @ Vikku.

46. The conduct of the accused was unusual. They had never told the brother of deceased PW-1 Sh. Sardari Lal about the death of Saroj Kumari. They were making him to understand that Sarita Kumari (deceased) had gone missing and she would be recovered. In fact, Sarita was killed by accused Vikasdeep and other accused had conspired in disposing of the body and disappearance of the material evidence. The recovery of *danda* and mattress had been duly proved. The car was also recovered. The place from where the dead body was recovered was identified by the accused. It has come in the statement of PW-36, Dr. Piyush Kapila that mandible was fractured, ante mortem in between lateral incisor and canine of right side through and through with adherent clots of blood. A wound was present corresponding to the fracture of mandible. According to his opinion, due to fracture of mandible injuries, the possibility of blunt trauma could not be ruled out. It proves the case of the prosecution that the deceased was beaten up with *danda*, which was recovered at the instance of accused Vikasdeep.

47. Mr. Atul Jhingan, learned counsel for the appellant in Cr. Appeal No.4258 of 2013 has vehemently argued that his client was not present on the spot. But, it is apparent from the statement of PW-37 Davinder Verma that on the fateful date, the mobile was in the tower range in District Una.

48. Mr. Anup Chitkara, learned counsel for the appellants in Cr. Appeal No. 4256 of 2013 and Cr. Appeal No. 24 of 2014 has argued that there was no motive and it is a case of circumstantial evidence. It is settled law by now that if the prosecution has proved the case and the chain is complete, the motive is not relevant. In this case , the chain is complete. The prosecution has proved that accused Vikasdeep had murdered Sarita.

49. Learned counsel appearing on behalf of appellant Neelam Kumari has vehemently argued that she is not connected with the case. However, the fact of the matter is that as per the evidence brought on record, she had actively conspired with her husband by destroying the evidence.

50. PW-24 Smt. Saroj Kumari had deposed clearly that Neelam Kumari had approached her on 22.6.2010 and remarked that she had to go back to her house and the she would come to School after some time, however, she did not come. Neelam Kumari knew about the death of Saroj Kumari (deceased), but helped her husband to destroy the vital evidence and also mis-represented PW-1 Sh. Sardari Lal that his sister had only gone missing and she would be recovered soon, knowing fully that the girl was already dead.

51. Mr. Anup Chitkara, learned counsel for the appellants in Cr. Appeal No. 4256 of 2013 and Cr. Appeal No. 24 of 2014 has vehemently argued that the witnesses who have deposed against his clients were inimical, since his client Vikasdeep had refused to release loans in their favour, but it has come in evidence that none of the witnesses had ever applied for loan to Vikasdeep. The statements of neighbourers are natural and trustworthy. Accused Navdeep, Ramandeep and Neelam Kumari had conspired to destroy the evidence.

52. Their Lordships of the Hon'ble Supreme Court in **Pawan Kumar** Vs. **State of Haryana** (2001) 3 Supreme Court Cases 628 have held that some of the links in the chain of circumstances may be inferred from the proven facts. Their Lordships have held as under:

> *"2. Before adverting to the rival contentions, be it noted that the entire matter hinges on circumstantial evidence. There is also however existing on record, a dying declaration, but its effect on the matter, shall be discussed shortly hereafter in this judgment. Incidentally success of the prosecution on the basis of circumstantial evidence will however depend on the availability of a complete chain of events so as not to leave any doubt for the conclusion that the act must have been done by the accused person. While however, it is true that there should be no missing links, in the chain of events so as far as the prosecution is concerned, but it is not that every one of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts. Circumstances of strong suspicion without however any conclusive evidence are not sufficient to justify the conviction and it is on this score that great care must be taken in evaluating the circumstantial evidence. In any event, on the availability of two inferences, the one in favour of the accused must be accepted and the law is well settled on this score, as such we need not dilate much in that regard excepting however, noting the observations of this Court in the case of State of U.P. v. Ashok Kumar Srivastava, AIR 1992 SC 840 : (1992 AIR SCW 640 : 1992 Cri LJ 1104 : 1992 All LJ 115) wherein this Court in paragraph 9 of the report observed:-*
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> *"The Court has, time out of number, observed that while appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negatived on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubts is reasonable and not otherwise....."*
>
> *3. The other aspect of the issue is that the evidence on record, ascribed to be circumstantial, ought to justify the inferences of the guilt from the incriminating facts and circumstances which are incompatible with the innocence of the accused or guilt of any other person. The observations of this Court in the case of Balwinder Singh v. State of Punjab, AIR 1987 SC 350 : (1987 Cri LJ 330) lends concurrence to the above."*

53. Their Lordships of the Hon'ble Supreme Court in **Dhanajaya Reddy** Vs. **State of Karnataka** (2001) 4 Supreme Court Cases 9 have held that in a case based upon circumstantial evidence, the prosecution is under a legal obligation to prove, firstly on facts the existence of such circumstances and secondly, that the circumstances form a complete chain which lead to the irresistible conclusion that the accused are guilty and such circumstances are inconsistent with their innocence. On proof of the aforesaid conditions, the Court can convict the accused of the charges framed against them. Their Lordships have held as under:

> *"40. In a case based upon circumstantial evidence, the prosecution is under a legal obligation to prove, firstly on facts the existence of such circumstances and secondly that the circumstances form a complete chain which lead to the irresistible conclusion that the accused are guilty and such circumstances are inconsistent with their innocence. On proof of the aforesaid conditions, the court can convict the accused of the charges framed against them. It is rightly said that witnesses may lie but the circumstances cannot.*

54. Their Lordships of the Hon'ble Supreme Court in **Ravinder Kumar and another** Vs. **State of Punjab** (2001) 7 Supreme Court Cases 690 have held that it is generally an impossible task for the prosecution to prove what precisely would have impelled the murderers to kill a particular person. All that the prosecution in many cases could point to is the possible mental element which could have been the cause for the murder. Motive need not be established precisely. Their Lordships have held as under:

> *"18. The third contention is that the motive alleged by the prosecution was not established and hence the area remains gray as to what would have impelled them to liquidate the broker. No doubt it is the allegation of the prosecution that appellants owed a sum of Rs. one lakh to the deceased and it might not have been possible for the prosecution to prove that aspect to the hilt. Nonetheless some materials were produced for showing that there were transactions between the appellants and the deceased and that they had some account to be settled. Only thus far could be established but not further. It is generally an impossible task for the prosecution to prove what precisely would have impelled the murderers to kill a particular person. All that prosecution in many cases could point to is the possible mental element which could have been the cause for the murder. In this connection we deem it useful to refer to the observations of this Court in State of Himachal Pradesh vs. Jeet Singh {1999 (4) SCC 370}:*
>
> *"No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended."*
>
> *19. An earlier decision of this Court in Nathuni Yadav vs. State of Bihar {1998 (9) SCC 238}, which dealt with the same aspect, has been referred to therein and a passage therefrom has been extracted. We are,*

therefore, not persuaded to change the tide on account of the inability of the prosecution to prove the motive aspect to the hilt."

55. Their Lordships of the Hon'ble Supreme Court in **Vilas Pandurang Patil** Vs. **State of Maharashtra** (2004) 6 Supreme Court Cases 158 have held that Circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue, which taken together form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed. It is not necessary that the crime must be seen to have been committed and must, in all circumstances, be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. Their Lordships have held as under:

"9. Before analysing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue which taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed."

56. Their Lordships of the Hon'ble Supreme Court in **Gagan Kanojia and another** Vs. **State of Punjab** (2006) 13 Supreme Court Cases 516 have held that the Court should use the yardstick of probability and appreciate the intrinsic value of the evidence brought on record and analyse and assess the same objectively. Their Lordships have held as under:

"9. The prosecution case is based on circumstantial evidence. Indisputably, charges can be proved on the basis of the circumstantial evidence, when direct evidence is not available. It is well-settled that in a case based on a circumstantial evidence, the prosecution must prove that within all human probabilities, the act must have been done by the accused. It is, however, necessary for the courts to remember that there is a long gap between 'may be true' and 'must be true'. Prosecution case is required to be covered by leading cogent, believable and credible evidence. Whereas the court must raise a presumption that the accused is innocent and in the event two views are possible, one indicating to his guilt of the accused and the other to his innocence, the defence available to the accused should be accepted, but at the same time, the court must not reject the evidence of the prosecution, proceeding on the basis that they are false, not trustworthy, unreliable and made on flimsy grounds or only on the basis of surmises and conjectures. The prosecution case, thus, must be judged in its entirety having regard to the totality of the circumstances. The approach of the court should be an integrated one and not truncated or isolated. The court should use the yardstick of probability and appreciate the intrinsic value of the evidence brought on records and analyze and assess the same objectively."

57. Their Lordships of the Honble Supreme Court in **Ujjagar Singh** Vs. **State of Punjab** (2007) 13 Supreme Court Cases 90 have held that while evaluating circumstantial evidence, whether a chain of evidence is complete or not would depend on the facts of each case emanating from the evidence and no universal yardstick should ever be attempted. Their Lordships have held as under:

> *"12 We have considered their arguments very carefully. In Mahmood v. State of U.P. (1976) 1 SCC 542 it has been observed that in a case dependent wholly on circumstantial evidence the court must be satisfied*
>
> *(a) that the circumstances from which the inference of guilt is to be drawn, have been fully established by unimpeachable evidence beyond a shadow of doubt;*
>
> *(b) that the circumstances are of a determinative tendency unerringly pointing towards the guilt of the accused; and*
>
> *(c) that the circumstances, taken collectively, are incapable of explanation on any reasonable hypothesis save that of the guilt sought to be proved against him.*
>
> *In this case this Court held that the omission of the prosecution, inter-alia, to have the finger prints found on the alleged murder weapon was fatal to the prosecution story.*
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> *13. In 1984 (4) SCC 116 Sharad Birdhichand Sarda v. State of Maharashtra, this Court discussed the ratio of the judgments in Hanumant v. State of M.P. AIR 1952 SC 343, Tufail (Alias) Simmi v. State of U.P. (1969) 3 SCC 198 and Ramgopal v. State of Maharashtra (1972) 4 SCC 625 and Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793 and observed thus:*
>
> *"A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*
>
> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
>
> *It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the following observations were made : [SCC para 19,p.807 : SCC (cri) p.1047]*
>
> *Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" is long and divides vague conjectures from sure conclusions.*
>
> *(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
>
> *(3) the circumstances should be of a conclusive nature and tendency,*
>
> *(4) they should exclude every possible hypothesis except the one to be proved, and*

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

In the instant case, deceased Sarita was with the appellant-accused Vikasdeep. However, he has not given any explanation what has happened to her. He was bound to explain how the girl had disappeared. This fact was within his special knowledge. All the incriminating circumstances, discussed hereinabove, form a complete chain to prove the guilt of accused Vikasdeep.

58. Their Lordships of the Hon'ble Supreme Court in **Tulshiram Sahadu Suryawanshi and another** Vs. **State of Maharashtra** (2012) 10 Supreme Court Cases 373 have held that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the Court exercises a process of reasoning and reaches a logical conclusion as to the most probable position. The principles embodied in Section 106 of the Evidence Act can also be utilized. 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, has offered an explanation which might drive the Court to draw a different inference. Their Lordships have held as under:

"23. It is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the Court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above position is strengthened in view of Section 114 of the Evidence Act, 1872. It empowers the Court to presume the existence of any fact which it thinks likely to have happened. In that process, the Courts shall have regard to the common course of natural events, human conduct etc in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilized. We make it clear that this Section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it 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 15 Page 16 facts, failed to offer any explanation which might drive the Court to draw a different inference. It is useful to quote the following observation in State of West Bengal vs. Mir Mohammed Omar, (2000) 8 SCC 382: "38. Vivian Bose, J., had observed that 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. In Shambhu Nath Mehra v. State of Ajmer the learned Judge has stated the legal principle thus: "This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience. The

word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."

59. Their Lordships of the Hon'ble Supreme Court in **Arvind Kumar Anupalal Poddar** Vs. **State of Maharashtra** (2012) 11 Supreme Court Cases 172 have held that if a fact is especially in knowledge of any person, then burden of proving that fact is upon him. Their Lordships have held as under:

"14. We are in full agreement with the above conclusions of the High Court and we find no good grounds to interfere with the same. As rightly argued by learned counsel for the respondent the appellant did not dispute the identity of the body at any point of time, that he did not state anything in the course of 313 questioning about the running away of his wife and that there was no missing link in the chain of circumstances demonstrated before the Courts below. If according to the appellant the deceased ran away from the matrimonial home he should have established the said fact to the satisfaction of the Court as it was within his special knowledge. In this context it will be worthwhile to refer to the recent decision of this Court reported as Prithipal Singh & Ors v. State of Punjab - 2012 (1) SCC 10. In para 53, it has been held that a fact which is especially in the knowledge of any person then the burden of proving that fact is upon him and that it is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused."

60. Their Lordships of the Hon'ble Supreme Court in **Babu alias Balasubramaniam and another** Vs. **State of Tamil Nadu** (2013) 8 Supreme Court Cases 60 have held that when the incident is especially within the knowledge of accused, the burden of proof is on the accused. This circumstance would add up to other proved circumstances which substantiate prosecution case against the accused. Their Lordships have held as under:

"21. It is also pertinent to note that PW-5 Dr. Rajabalan stated that the injuries sustained by the deceased could have been caused 10 to 12 hours prior to the post-mortem. We have already stated that the post-mortem was conducted at 5.00 p.m. Thus, the death occurred around 6.00 a.m. The death occurred in the house where the deceased resided with A1-Babu. Presence of the accused at 6.00 a.m. in the house is natural. Besides, it is not contended by A1-Babu that he was not present in the house when the incident occurred. To this fact situation, Section 106 of the Evidence Act is attracted. As to how the deceased received injuries to her head and how she died must be within the exclusive personal knowledge of A1-Babu. It was for him to explain how the death occurred. He has not given any plausible explanation for the death of the deceased in such suspicious circumstances in the house in which he resided with her and when he was admittedly present in the house at the material time. This circumstance must be kept in mind while dealing with this case. We are mindful of the fact that this would not relieve the prosecution of its burden of proving its case. But, it 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, has offered an explanation which might drive the court to draw a different inference. In this case, in our opinion, the prosecution has succeeded in proving facts from which reasonable inference can be drawn that the death of the deceased was

homicidal and A1-Babu was responsible for it. A1-Babu could have by virtue of his special knowledge regarding the said facts offered an explanation from which a different inference could have been drawn. Since he has not done so, this circumstance adds up to other circumstances which substantiate the prosecution case."

61. Their Lordships of the Hon'ble Supreme Court in **Ramesh Vithal Patil** Vs. **State of Karnataka and others** (2014) 11 Supreme Court Cases 516 have held that when facts are especially within the knowledge of the accused, the burden of proof lies on the accused. Their Lordships have held as under:

"21. There is also another angle to this case. The prosecution has succeeded in proving facts from which a reasonable inference can be drawn that the deceased committed suicide by jumping in the river along with her daughter. The deceased was in the custody of the appellant. She left the appellant's house with the small child. Admittedly, neither the appellant nor any member of his family lodged any missing complaint. The appellant straightway went to the house of the deceased to enquire about her. This conduct is strange. When his wife and small child had left the house and were not traceable the appellant was expected to move heaven and earth to trace them. As to when and why the deceased left the house and how she died in suspicious circumstances was within the special knowledge of the appellant. When the prosecution established facts from which reasonable inference can be drawn that the deceased committed suicide, the appellant should have, by virtue of his special knowledge regarding those facts, offered an explanation which might drive the court to draw a different inference. The burden of proving those facts was on the appellant as per Section 106 of the Evidence Act but the appellant has not discharged the same leading to an adverse inference being drawn against him (See: Tulshiram Sahadu Suryawanshi & Anr. v. State of Maharashtra[9] and Babu alias Balasubramaniam)."

62. Their Lordships of the Hon'ble Supreme Court in **State of Rajasthan** Vs. **Thakur Singh** (2014) 12 Supreme Court Cases 211 have held that in a case of unnatural death of wife of accused in a room occupied only by both of them, when there was no evidence of anybody else entering the room and the accused has not explained the circumstances about unnatural death of his wife, the principle under Section 106 of the Evidence Act, 1872 was clearly applicable. Their Lordships have held as under:

"15. We find that the High Court has not at all considered the provisions of Section 106 of the Evidence Act, 1872. This section provides, inter alia, that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him.

16. Way back in Shambhu Nath Mehra v. State of Ajmer, 1956 SCR 199 this Court dealt with the interpretation of Section 106 of the Evidence Act and held that the section is not intended to shift the burden of proof (in respect of a crime) on the accused but to take care of a situation where a fact is known only to the accused and it is well nigh impossible or extremely difficult for the prosecution to prove that fact. It was said:

"11. This [Section 101] lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is

designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not."

17. In a specific instance in Trimukh Maroti Kirkan v. State of Maharashtra, 2006 10 SCC 681 this Court held that when the wife is injured in the dwelling home where the husband ordinarily resides, and the husband offers no explanation for the injuries to his wife, then the circumstances would indicate that the husband is responsible for the injuries. It was said:

"22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

18. Reliance was placed by this Court on Ganeshlal v. State of Maharashtra, 1992 3 SCC 106 in which case the appellant was prosecuted for the murder of his wife inside his house. Since the death had occurred in his custody, it was held that the appellant was under an obligation to give an explanation for the cause of death in his statement under Section 313 of the Code of Criminal Procedure. A denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant was a prime accused in the commission of murder of his wife.

19. Similarly, in Dnyaneshwar v. State of Maharashtra, 2007 10 SCC 445 this Court observed that since the deceased was murdered in her matrimonial home and the appellant had not set up a case that the offence was committed by somebody else or that there was a possibility of an outsider committing the offence, it was for the husband to explain the grounds for the unnatural death of his wife.

20. In Jagdish v. State of Madhya Pradesh, 2009 9 SCC 495 this Court observed as follows:

"22. It bears repetition that the appellant and the deceased family members were the only occupants of the room and it was therefore incumbent on the appellant to have tendered some explanation in order to avoid any suspicion as to his guilt."

21. More recently, in Gian Chand v. State of Haryana, 2013 14 SCC 420 a large number of decisions of this Court were referred to and the interpretation given to Section 106 of the Evidence Act in Shambhu Nath Mehra

was reiterated. One of the decisions cited in Gian Chand is that of State of West Bengal v. Mir Mohammad Omar, 2000 8 SCC 382 which gives a rather telling example explaining the principle behind Section 106 of the Evidence Act in the following words:

"35. During arguments we put a question to learned Senior Counsel for the respondents based on a hypothetical illustration. If a boy is kidnapped from the lawful custody of his guardian in the sight of his people and the kidnappers disappeared with the prey, what would be the normal inference if the mangled dead body of the boy is recovered within a couple of hours from elsewhere. The query was made whether upon proof of the above facts an inference could be drawn that the kidnappers would have killed the boy. Learned Senior Counsel finally conceded that in such a case the inference is reasonably certain that the boy was killed by the kidnappers unless they explain otherwise."

22. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts.

23. Applying this principle to the facts of the case, since Dhapu Kunwar died an unnatural death in the room occupied by her and Thakur Singh, the cause of the unnatural death was known to Thakur Singh. There is no evidence that anybody else had entered their room or could have entered their room. Thakur Singh did not set up any case that he was not in their room or not in the vicinity of their room while the incident occurred nor did he set up any case that some other person entered the room and caused the unnatural death of his wife. The facts relevant to the cause of Dhapu Kunwar's death being known only to Thakur Singh, yet he chose not to disclose them or to explain them. The principle laid down in Section 106 of the Evidence Act is clearly applicable to the facts of the case and there is, therefore, a very strong presumption that Dhapu Kunwar was murdered by Thakur Singh.

24. It is not that Thakur Singh was obliged to prove his innocence or prove that he had not committed any offence. All that was required of Thakur Singh was to explain the unusual situation, namely, of the unnatural death of his wife in their room, but he made no attempt to do this.

25. Learned counsel for Thakur Singh referred to Mahendra Pratap Singh v. State of Uttar Pradesh, 2009 11 SCC 334 to contend that where two views are possible, one held by the Trial Court for acquitting the accused and the other held by the High Court for convicting the accused, the rule of prudence should guide the High Court not to disturb the order of acquittal made by the Trial Court. This decision is not at all apposite.

26 In our opinion, the High Court has very cursorily dealt with the evidence on record and has upset a finding of guilt by the Trial Court in a situation where Thakur Singh failed to give any explanation whatsoever for the death of his wife by asphyxia in his room. Moreover, the very fact that all the relatives of Thakur Singh turned hostile clearly gives room for suspicion and an impression that there is much more to the case than meets the eye.

Even the complainant, Himmat Singh who squarely blamed Thakur Singh (in the FIR) for the murder of his wife, turned hostile to the extent of denying his relationship with Thakur Singh.

27. The High Court expressed the view that since the prosecution did not produce Gotu Singh as its witness, its case ought to fail. In our opinion, Gotu Singh could not have added to the case of the prosecution. He had arrived on the fateful day after Thakur Singh had locked himself, Dhapu Kunwar and their child in their room. He did not even meet them on the fateful day and was oblivious of the events that had taken place that day. Therefore, producing him in the witness box would not have been of any consequence.

28. On a consideration of the facts of the case we are of the opinion that the approach arrived at by the Trial Court was the correct approach under the law and the High Court was completely in error in relying primarily on the fact that since most of the material prosecution witnesses (all of whom were relatives of Thakur Singh) had turned hostile, the prosecution was unable to prove its case. The position in law, particularly Section 106 of the Evidence Act was completely overlooked by the High Court making it arrive at a perverse conclusion in law.

Conclusion

29. The judgment and order passed by the High Court is set aside and that of the Trial Judge restored. The State should take the necessary steps to apprehend Thakur Singh so that he can serve out the sentence awarded to him by the Trial Court."

63. Accordingly, there is no merit in these appeals and the same are dismissed. The appellants/accused in Criminal Appeal No. 4256 of 2013, Criminal Appeal No. 4258 of 2013 and Criminal Appeal No. 4263 of 2013 are ordered to surrender before the learned Trial Court to undergo the sentences imposed upon them by the learned Trial Court within a period of three weeks from today.

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

Chain Singh ...Petitioner.

VERSUS

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

CWP No. 4404 of 2012.

Date of Decision : 21st July, 2015.

Industrial Disputes Act, 1947- Section 25- Petitioner had not led the evidence to show that he was not gainfully employed during the period of his retrenchment therefore, the respondent had no opportunity to contest this fact or to lead evidence that he was gainfully employed- the petitioner was rightly denied the relief of back wages in these circumstances. (Para 2)

Case referred:

Deepali Gundu Surwase versus Karanti Junior Adhyapak Mahavidyalaya (D.Ed.) and others (2013)10 SCC 324

For the petitioner: Mr. Onkar Jairath, Advocate.
For the respondents: Mr. Vivek Singh Attri, Dy. Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral).

The petitioner is aggrieved by the award rendered by the learned Presiding Judge, Industrial Tribunal-cum Labour Court, Dharamshala, H.P., wherein it while having answered the hereinafter extracted reference in favour of the workman/petitioner herein qua his being entitled to reengagement in service yet the relief of back wages was declined to him. Reference reads as under:-

> "Whether the action of the Executive Engineer, HPPWD Division, Killar, Tehsil Pangi, District Chamba, H.P., to terminate the services of Shri Chain Singh S/o Shri Heer Chand workman w.e.f. 4.12.2001 and finally w.e.f. 20.5.2002 and not allowing seniority for the period of disengagement and reengagement as per orders of Hon'ble Administrative Tribunal, H.P., Shimla is legal and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to."

2. I have heard the learned counsel appearing for the parties at length. A perusal of the claim petition instituted by the petitioner before the learned Industrial Tribunal-cum-Labour Court, Dharmashala unveils the fact that the workman/petitioner herein had not spelt out therein with specificity the fact of since his purported illegal disengagement from service at the instance of the respondents till his being ordered to be reengaged in service, his having remained not gainfully employed. Obviously, then the workman/petitioner herein had omitted to lead evidence magnifying the fact that since his illegal disengagement from service at the instance of the respondents herein till his reengagement, he remained not gainfully employed. Necessarily then omissions in the above regard both in the claim petition as well as in the evidence adduced by the petitioner constitutes acquiescence by the petitioner herein/workman qua the factum of his having been gainfully employed since his illegal disengagement from service till his reengagement in pursuance to the award rendered by the learned Industrial Tribunal-cum-Labour Court. The petitioner/workman hence having acquiesced, for the reasons aforestated, to the factum of his having remained gainfully employed since his illegal disengagement till his reinstatement in pursuance to the impugned award, as a concomitant, he is estopped from agitating before this Court that the award of the learned Industrial Tribunal-cum-Labour Court whereby it declined to the petitioner the relief of back wages since his disengagement from service at the instance of the respondents till his reinstatement, suffers from any infirmity or illegality. Even though, the learned counsel appearing for the petitioner herein has contended before this Court while relying upon a judgment of the Hon'ble Apex Court reported in ***Deepali Gundu Surwase versus Karanti Junior Adhyapak Mahavidyalaya (D.Ed.) and others (2013)10 SCC 324***, the relevant paragraph No.22 whereof stands extracted hereinafter, yet the underlying principle as postulated therein is comprised in the factum of the employer being permitted to plead denial of back wages to the employee or his/its having a right to contest his entitlement to get consequential benefits besides the onus of proving the factum

of the employee being gainfully employed in the interregnum since his disengagement from service till his reengagement being cast upon the employer, yet the essence of the aforesaid underlying principle for awarding or declining of back wages to the employee, is constituted in the fact that the employer would proceed to contest or agitate the claim of the workman for grant of back wages to him only in the face of there occurring in the apposite pleadings constituted in the claim petition of the employee/workman, a claim for back wages by him since his illegal retrenchment from service till his reinstatement/reengagement and the claim aforesaid being entrenched in or harboured upon the factum that since his illegal termination/retrenchment from service till his reinstatement, he remained not gainfully employed. Relevant paragraph No.22 of the aforesaid judgment reads as under:-

> "22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer-employee relationship, the latter's source of income gets dried up. Not only the employee concerned, but his entire family suffers grave adversities. They are deprived of source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi-judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments."

However, the claim petition instituted by the petitioner herein before the learned Industrial Tribunal-cum-Labour Court, Dharamshala, omits to portray that the workman/petitioner herein had averred therein the prima donna fact that since his illegal termination/retrenchment from service till his reinstatement his having remained not gainfully employed and hence his being entitled to stake a claim for back wages from the respondents/employer. Consequently, with the aforesaid omission on the part of the petitioner herein tantamounting to abandonment on the part of the petitioner herein to lay a foundation in the claim petition for the according of the relief of back wages to him, there was obviously no opportunity for the respondents herein to contest the said factum or to deny the said claim besides also there was no occasion for the respondents/employer to be enjoined to adduce evidence qua the factum of the workman/petitioner herein since his

retrenchment till his reinstatement having remained gainfully employed. Per se the acquiescence of the petitioner/workman connoted by his omitting to cast or constitute apposite pleadings in the claim petition for succoring a claim for back wages besides, as a corollary adduce evidence in support thereto also obviously did not spurt any occasion for the respondents to contest the said fact. Accordingly, this Court is constrained not to interfere with the impugned award. Therefore, there is no merit in this petition which is accordingly dismissed and the impugned award is affirmed and maintained. All pending applications also stand disposed of.

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

Jagat Singh ..... Petitioner

Vs.

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

CWP No. 2205 of 2015
Judgment reserved on: 16.07.2015
Date of decision: July 21, 2015.

Constitution of India, 1950- Article 226- Petitioner was elected as Pradhan – a show cause notice was issued to him–the petitioner filed a reply - however, the petitioner was ordered to be placed under suspension- the petitioner contended that the reply filed by him was not taken into consideration-held that the order of suspension should disclose the application of mind on the part of the authority to the facts of the case- authority is required to give the reasons leading to suspension– the allegations and the reply should be mentioned in the order asking to show cause or the notice- in the present case, the reply submitted by the petitioner was not mentioned in the order–the order does not deal with the contentions raised by the petitioner-the provisions of natural justice although shown to have been complied with were not complied with in reality–the petition allowed and show cause notice set aside with liberty to pass a detailed order after dealing with the reply of the petitioner.

(Para 5-11)

Case referred:

Kranti Associates Private Limited and another vs. Masood Ahmed Khan and others (2010) 9 SCC 496

For the petitioner	:	Ms. Jyotsna Rewal Dua, Senior Advocate with Ms. Amrita Massey, Advocate.
For the respondents	:	Ms. Meenakshi Sharma and Mr. Rupinder Singh, Additional Advocate Generals with Ms. Parul Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

By medium of this writ petition, the following relief has been claimed:-

(i) For issuing a writ of certiorari or any other appropriate writ for quashing the annexure P-4 dated 26.3.2015 and annexure P-2 dated 18.2.2015 having been issued in violation of principles of natural justice.

2. The facts, in brief, are that the petitioner in December, 2010 was elected unopposed as Pradhan of Gram Panchayat, Dahan, Block Rajgarh, District Sirmaur and his term was to come to an end in December, 2015. On the basis of some complaints, the petitioner was served with a show cause notice dated 18.2.2015 which in turn appears to be based upon some preliminary inquiry initiated by the respondents. A detailed reply was filed to the same on 18.3.2015. However, vide order dated 26.3.2015 the petitioner was ordered to be placed under suspension.

3. The petitioner has taken exception to the suspension order and challenged the same mainly on the ground that the respondents have not applied their mind to the reply filed to the show cause notice and, therefore, the entire action stands vitiated.

4. The respondents have contested the petition by filing reply wherein it has been averred that the petitioner was duly associated in the preliminary inquiry and even the copy of the inquiry report and other documents were supplied to him. He was further afforded an opportunity of being heard and was properly associated in the inquiry and it is only after receipt of the reply to the show cause notice that he was placed under suspension as the reply was not found satisfactory.

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

5. What factors should be considered before placing a Pradhan under suspension and what weight should be attached to the reply filed to the show cause notice issued under the Panchayati Raj Act, has been subject matter of discussion in number of judgments delivered by this Court, some of which are discussed herein below -

(i) In ***Sarv Dayal*** vs. ***State of Himachal Pradesh and others, ILR 1989 (HP) 163***, this Court held that the order of suspension should disclose, ex-facie, application of mind on the part of the authority, directing the suspension of a Pradhan to the facts of the case on the basis whereof the conclusion of placing the Pradhan under suspension is arrived at. It is apt to reproduce paras 3 to 6 of the judgment, which reads thus:

> *"3. Section 54(1) of the Act enables the Deputy Commissioner to place a Pradhan under suspension during an inquiry for any reason to be recorded in writing. We had an occasion to deal with this provision in Civil Writ Petition No. 84 of 1989, Parkash Chand vs. State of Himachal Pradesh and another. We have explained the scope of the provision by saying that an order of suspension must contain 'reasons' as known to law. Our decision lays down that the order should disclose, ex-facie, application of mind on the part of the authority, directing the suspension of a Pradhan to the facts of the case on the basis whereof the conclusion of placing the Pradhan under suspension is arrived at.*
>
> *4. As in the case of Parkash Chand, so also in the present case, all that has been said in the impugned order, by way of recording reasons, is that the explanation offered by the Pradhan was not found satisfactory. This is nothing more than recording of the conclusion by the Deputy Commissioner.*

5. In addition to what we have already said in our judgment in Parkash Chand's case, we would like to say that when an explanation is called for from the Pradhan, and is offered by him, the order of suspension should disclose, ex-facie, that the authority directing the suspension of the Pradhan had applied its mind to the circumstances pointed out by the Pradhan against an order of proposed suspension. There need not be an elaborate discussion in the order of the various points raised by the Pradhan, who is given notice to show cause why he should not be placed under suspension. However, some discussion should be there about the defence taken by the Pradhan so as to show that the facts brought by him to the notice of the authority had received consideration at the hands of the authority. The order need not as it were, come in close quarters with the various defences put forward by the Pradhan, yet, it should indicate that the relevant defences were kept in mind by the authority before directing the suspension of the Pradhan.

6. The order dated April 26, 1988 (Annexure P-5) is liable to be quashed on the ground that it does not contain any reason for placing the petitioner, Sarv Dayal, under suspension and we quash the same. The writ petition shall stand allowed though we would leave the parties to bear their own costs."

(ii). In ***Prakash Chand*** vs. ***State of Himachal Pradesh and others AIR 1990 Himachal Pradesh 88***, it was held that when the Pradhan of a Gram Panchayat was served with a show cause notice for alleged irregularities in his functioning as a Pradhan to which a reply had been given by him by way of an explanation, the suspension order passed by the Deputy Commissioner without giving any reasons to be recorded in writing and without application of mind in considering the explanation offered by him is in contravention of mandatory provisions of the Himachal Pradesh Panchayati Raj Act and hence such a suspension order is invalid. It is apt to reproduce paras 3, 5 and 7 of the judgment, which reads thus:

"3. The first fourteen paragraphs of the office order of January 19, 1989 are just a reproduction of the corresponding paragraphs of the show cause notice. By way of consideration of the explanation, we find the sentence, extracted above, in the impugned office order dated January 19, 1989, in paragraph 15 thereof. It is quite clear that the order dated January 19, 1989 does not disclose any application of mind on the part of the Deputy Commissioner when he purports to have considered the explanation of the petitioner. The order of suspension, to our mind, was passed mechanically without any consideration of the explanation offered by the petitioner. Such an order cannot be upheld.

5. Section 54 (1) contains a mandate for recording reasons before a Panch can be placed under suspension. Failure to record reasons, as known to law, would make it difficult for a Court to find out whether the discretionary power given under S. 54 (1) has been exercised properly or not. As observed by D. Smith in Judicial Review of Administratie Action (4th Edition at page 149):

> *"……In the absence of reasons, however, it will often be difficult to establish a prima facie case that a wide discretionary power has been improperly exercised."*

7. We are not inclined to uphold the order dated January 19, 1989 (Annexure PD), in so far as it places the petitioner under suspension. For the

reasons mentioned earlier, we quash it to that extent, though we leave it open to the appropriate authority to proceed against the petitioner in accordance with law."

(iii). In ***Avinash Chand*** vs. ***The State of Himachal Pradesh ILR 1990 (HP) 995***, while dealing with a case regarding removal of the Pradhan it was held that unless the State Government concludes, on the basis of the material before it and giving reasons therefor, that any of the grounds envisaged by the various clauses of Section 54(2) of the Himachal Pradesh Panchayati Raj Act, 1968 is found established against a Pradhan, it cannot pass an order of his removal under that provision. It is apt to reproduce paras 6 to 10 of the judgment which reads thus:

"6. Unless the State Government concludes, on the basis of the material before it and giving reasons therefor, that any of the grounds envisaged by the various clauses of Section 54(2) of the Himachal Pradesh Panchayati Raj Act, 1968 is found established against a Pradhan, it cannot pass an order of his removal under that provision.

7. The fact that the State Government has found one or more of the factors envisaged by Clause (a) to (d) established in a case should appear from the order which it passes. The order, therefore, should not only contain enumeration of the accusation against the Pradhan but should also contain reasons, as known to law, for the conclusion arrived at by the State Government on the basis of the material on the record of the case before it.

8. 'Reasons', to borrow the words of the Supreme Court in Union of India vs. M.L. Kapoor and others (AIR 1974 S.C. 87):

> *"....are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable..."*

9. The requirement for giving of reasons by the State Government, for an order of removal under Section 54 (2), becomes all the more necessary because the order can visit the Pradhan not only with the penalty of losing his elective office for the term for which he is elected but may also visit him with a more drastic consequence of being disqualified for re-election for such period, not exceeding five years, as the Government may fix as is evident from Section 54 (3).

10. Where, as in the case of an order under Section 54(2), the exercise of power is made dependent upon existence of certain exigencies alone, it is all the more necessary that the order should disclose application of mind on the part of the authority concerned to the relevant factors, ex-facie. The principle in this regard is hardly in doubt. Reference need only be made to the decisions of the Supreme Court in R.P. Bhatt vs. Union of India and others (AIR 1986 SC 1040) and Ram Chander vs. Union of India and others (AIR 1986 SC 1173)."

No doubt, in ***Avinash Chand*** case (supra), the Court was dealing with the provisions of the Himachal Pradesh Panchayati Raj Act, 1968, which have now been substituted by 1994, but the principles of law as applied yet remain the same.

(iv) A Division Bench of this Court in ***Jaram Singh*** vs***. The State of Himachal Pradesh and others, Latest HLJ 2006(1) 28***, was dealing with the matter under the Himachal Pradesh Panchayati Raj Act, 1994 and while testing the order passed by the competent authority under Section 146(1) and (2) of the Act dealing with the removal of the Pradhan, it was held that the same was bad in law as there was no objective consideration to the reply filed by the petitioner therein. It shall be apt to reproduce para-5 o the judgment, which reads thus:

> *"5. A perusal of the order noticed above, clearly shows that there is no discussion regarding the submissions made by the petitioner in his reply. There is nothing in the order which may indicate that there was any objective consideration of the reply filed by the petitioner. What the order noticed is that the reply filed by the petitioner was not satisfactory as it was not based upon facts. There is no indication as to which facts, relied upon by the petitioner in his reply were incorrect. The order being bereft of reasons, is not sustainable in law."*

(v). In ***Baldev Singh*** vs. ***State of Himachal Pradesh and Others,*** CWP No. 100 of 2013, decided on April 9, 2013, a Division Bench of this Court was dealing with a case where the petitioner therein had been called upon to offer explanation by issuance of show cause notice as to why he should not be placed under suspension with regard to the matters, referred to in the show cause notice. But despite having filed a detailed reply and annexing voluminous documents the petitioner was placed under suspension and no reference was found in the suspension order to those documents nor to the defence taken by the petitioner in the reply filed to the show cause notice and it was held :

> *"3. The principal grievance of the petitioner, is that, the petitioner was called upon to offer explanation by issuance of show cause notice as to why the petitioner should not be placed under suspension with regard to the matters, referred to in the show cause notice. In response thereto, the petitioner filed his reply. Notably, the copy of the complaint nor the inquiry report of the Audit Accounts Officer (Panchayat), on the basis of which the action was initiated by the Competent Authority, was furnished to the petitioner. Further, no reference is found in the suspension order to those documents nor to the defence taken by the petitioner in the reply-affidavit. It is the case of the petitioner that the inquiry has been initiated as a consequence of suspension order dated 6.12.2012 and for that reason even the said inquiry proceeding should suffer the same consequence upon setting aside of the suspension order dated 6.12.2012.*
>
> *4. The respondents have filed reply-affidavit. We find that a curious stand has been taken in the reply-affidavit. In that, the petitioner was shown complaint along with documents against him during the preliminary inquiry. Further, the petitioner was aware about the contents of the said documents. In other words, the fact that the copy of the complaint as well as the inquiry report, referred to above, was not furnished to the petitioner along with the show cause notice is indisputable. In that case, it would necessarily follow that process of consideration of response of the petitioner and including the*

show cause notice itself is vitiated. Section 145(2)(A) of the Himachal Pradesh Panchayati Raj Act, 1994 postulates that no office bearer shall be placed under suspension unless he has been given an opportunity of being heard. That opportunity would have been meaningful only if the petitioner was to be furnished with copy of the complaint and the inquiry report, on which, reliance has been placed by the department and being the fulcrum of the proceedings initiated by the department. As a result, we are inclined to set aside the order of suspension while making it clear that this order would not come in the way of the department to consider the reply of the petitioner already filed in response to the show cause notice and giving him liberty to file further reply after copy of the complaint and the inquiry report is furnished to him. After considering all those documents and including the further reply to be filed by the petitioner, the department is free to take appropriate decision, as may be advised, in accordance with law to issue fresh order of suspension."

6. Now reverting to the facts of this case, it would be seen that the petitioner had been served with a show cause notice spelling out six separate and distinct charges which were duly replied to in detail by the petitioner by elaborating and offering explanation to each of the charges independently. However, in the order of suspension, save and except for reproducing the charge and thereafter making reference to the preliminary inquiry, it has been held that the reply was not satisfactory.

7. A further perusal of the impugned order would reveal that the same is non-speaking in the sense that it does not at all deal with the contentions raised by the petitioner. The self contained reply submitted by the petitioner has virtually not been considered and, therefore, the impugned order can definitely be held to have been passed as a result of non-application of mind.

8. On the basis of the aforesaid observations, it can safely be concluded that the show cause notice in the instant case has been issued only to show that principles of natural justice were complied with, but as a matter of fact, that proved to be a farce and an empty formality, because the reply filed by the petitioner was neither considered nor appreciated. There is no discussion, even brief, to reflect consideration of the cause shown.

9. The necessity of assigning reason has been repeatedly emphasized by the Hon'ble Supreme Court and reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***Kranti Associates Private Limited and another*** vs**.** ***Masood Ahmed Khan and others (2010) 9 SCC 496*** wherein it was held as under:

"47.(*a). In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.*

(b). A quasi-judicial authority must record reasons in support of its conclusions.

(c).. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d). Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e). Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

(f). Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g). Reasons facilitate the process of judicial review by superior Courts.

(h). The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.

(i). Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j). Insistence on reason is a requirement for both judicial accountability and transparency.

(k). If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l). Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or `rubber-stamp reasons' is not to be equated with a valid decision making process.

(m). It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-737).

(n). Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See (1994) 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford, 2001 EWCA Civ 405 (CA), wherein the Court referred to Article 6 of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

(o). In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".

10. Judged in the light of the aforesaid discussion, the impugned order cannot be permitted to stand. The decision making process and the decision is totally vitiated and cannot withstand judicial scrutiny. It is settled law that reasons are heartbeat of conclusion. Therefore, in absence of reasons, even the conclusion cannot be permitted to stand.

11. Resultantly, the writ petition is allowed and the impugned order is set-aside. However, liberty is reserved to the respondents to pass an appropriate order after dealing with the reply of the petitioner in accordance with law. Pending application, if any, stands disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Sonali Purewal ...Petitioner

Versus

State of H.P and others. ...Respondents.

CWPIL No. 3 of 2015
Decided on: 21st July, 2015

Constitution of India, 1950- Article 226- Petitioner claimed that bull fightings were being held in different parts of the State contrary to the provision of Prevention of Cruelty to Animals Act- respondent pleaded that animal fighting has been completely banned – held, that bulls cannot be used for entertainment and sports purpose- Supreme Court has already issued a direction to prevent the use of animal for entertainment purpose- further, direction issued to ensure the implementation of the judgment of the Supreme Court as well as the provision of Prevention of Cruelty to Animals Act. (Para-2 to 8)

Case referred:
Animal Welfare Board of India versus Nagaraja and others, (2014) 7 Supreme Court Cases, 547

For the petitioner: Ms. Vandana Misra Panta, Advocate.

For the respondents: Mr. Shrawan Dogra, A.G with Mr. Romesh Verma, Mr. Anup Rattan, Addl. A.Gs and Mr. J.K. Verma, Dy. A.G for respondents No. 1 to 5.
Mr. Ashok Sharma, ASGI for respondent No. 6.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge. (Oral)

The writ petition has been filed with the following prayers:

(a) This Hon'ble Court may ban the practice of bull fights/animal versus animal fights/human versus animal fights/birds fights across the State of Himachal Pradesh and direct the State Government and concerned officials like the Deputy Commissioner, Superintendent of Police, SDO and other officials to implement the said ban accordingly.

(b) That there should also be a complete ban on the illegal betting that goes on during the event of bill fighting/animal versus animal fights/human versus animal fights/birds fights.

(c) That any person organizing, abetting, inciting, betting and being willing spectators in the event of bull fights/animal versus animal fights/human versus animal fights/birds fights should be dealt with most strictly in accordance with the law.

(d) There should be a direction that the general public should be made aware and sensitized against the practice of bull fights/animal versus animal fights/human fights/bird fights through media both print and electronic."

2. The petitioner claims herself to be an animal rights activist and has been working for animal rights for the last 10 years. The complaint is that in different parts of the State of Himachal Pradesh, bulls fights are being held contrary to the provisions contained under Sections 3 and 11 of the Prevention of Cruelty to Animals Act, 1960 (hereinafter referred to as the 'Act' in short), enacted with the sole object to prevent the animals from infliction of unnecessary pain and suffering or cruelty on animals to prohibit the incidents like animal fights. News items Annexure P-1 (Colly.) published in the issues of Punjab Kesari, a Hindi daily dated 13.10.2014 and 17.11.2014 have been pressed into service to substantiate the relief sought in the writ petition.

3. The respondents in reply to the writ petition have come forward with the version that the activities like bull fights have already been banned and as per information collected from the District Superintendent of Police, no incident of bulls fights, animal versus animals fight, human versus animal fights and birds fights has been reported in Bilaspur, Chamba, Kinnaur, Kangra, Kullu, Lahaul & Spiti, Shimla, Solan, Sirmour and Una Districts. In the cases reported in Districts Hamirpur and Mandi, appropriate action as per the provisions contained under the Act has been taken. Nothing, however, has been said in the reply qua the correctness or otherwise of the news items Annexure P-1 (Colly.).

4. We need not to go to every factual details and also legal aspect because the points raised in this writ petition are squarely covered by the judgment of the Hon'ble Apex Court in **Animal Welfare Board of India** versus **Nagaraja and others, (2014) 7 Supreme Court Cases, 547**. The apex Court while interpreting the object and scope of the Act and what should be the role and duty of the Court has observed as under:

> "33. The PCA Act is a welfare legislation which has to be construed bearing in mind the purpose and object of the Act and the Directive Principles of State Policy. It is trite law that, in the matters of welfare legislation, the provisions of law should be liberally construed in favour of the weak and infirm. Court also should be vigilant to see that benefits conferred by such remedial and welfare legislation are not defeated by subtle devices. Court has got the duty that, in every case, where ingenuity is expanded to avoid welfare legislations, to get behind the smoke-screen and discover the true state of affairs. Court can go behind the form and see the substance of the devise for which it has to pierce the veil and examine whether the guidelines or the regulations are framed so as to achieve some other purpose than the welfare of the animals. Regulations or guidelines, whether statutory or otherwise, if they purport to dilute or defeat the welfare legislation and the constitutional principles, Court should not hesitate to strike them down so as to achieve the ultimate object and purpose of the welfare legislation. Court has also a duty under the doctrine of parents patriae to take care of the rights of animals, since they are unable to take care of themselves as against human beings.
>
> 34. The PCA Act, as already indicated, was enacted to prevent the infliction of unnecessary pain, suffering or cruelty on animals.

> Section 3 of the Act deals with duties of persons having charge of animals, which is mandatory in nature and hence confer corresponding rights on animals. Rights so conferred on animals are thus the antithesis of a duty and if those rights are violated, law will enforce those rights with legal sanction."

5. Similarly, while discussing the right of life enshrined under Section 21 of the Constitution of India and the provisions contained under Sections 3 and 11 of the Act read with Article 51-A(g) of the Constitution, which recognizes well being and welfare of animals, the apex Court has further observed as follows:-

> "72. Every species has a right to life and security, subject to the law of the land, which includes depriving its life, out of human necessity. Article 21 of the Constitution, while safeguarding the rights of humans, protects life and the word "life" has been given an expanded definition and any disturbance from the basic environment which includes all forms of life, including animal life, which are necessary for human life, fall within the meaning of Article 21 of the Constitution. So far as animals are concerned, in our view, "life" means something more than mere survival or existence or instrumental value for human-beings, but to lead a life with some intrinsic worth, honour and dignity. Animals' well-being and welfare have been statutorily recognised under Sections 3 and 11 of the Act and the rights framed under the Act. Right to live in a healthy and clean atmosphere and right to get protection from human beings against inflicting unnecessary pain or suffering is a right guaranteed to the animals under Sections 3 and 11 of the PCA Act read with Article 51A(g) of the Constitution. Right to get food, shelter is also a guaranteed right under Sections 3 and 11 of the PCA Act and the Rules framed thereunder, especially when they are domesticated. Right to dignity and fair treatment is, therefore, not confined to human beings alone, but to animals as well. Right, not to be beaten, kicked, over-ridden, over-loaded is also a right recognized by Section 11 read with Section 3 of the PCA Act. Animals have also a right against the human beings not to be tortured and against infliction of unnecessary pain or suffering. Penalty for violation of those rights are insignificant, since laws are made by humans. Punishment prescribed in Section 11(1) is not commensurate with the gravity of the offence, hence being violated with impunity defeating the very object and purpose of the Act, hence the necessity of taking disciplinary action against those officers who fail to discharge their duties to safeguard the statutory rights of animals under the PCA Act."

6. It is after taking note of the above legal provisions, the apex Court has held that the bulls cannot be used for performing 'Jallikatu' and bullock cart race being conducted for entertainment and as a sports event in Tamilnadu. This part of the judgment of the apex Court reads as follows:

> "73. Jallikattu and other forms of Bulls race, as the various reports indicate, causes considerable pain, stress and strain on the bulls.

> Bulls, in such events, not only do move their head showing that they do not want to go to the arena but, as pain inflicted in the vadi vasal is so much, they have no other go but to flee to a situation which is adverse to them. Bulls, in that situation, are stressed, exhausted, injured and humiliated. Frustration of the Bulls is noticeable in their vocalization and, looking at the facial expression of the bulls, ethologist or an ordinary man can easily sense their suffering. Bulls, otherwise are very peaceful animals dedicating their life for human use and requirement, but they are subjected to such an ordeal that not only inflicts serious suffering on them but also forces them to behave in ways, namely, they do not behave, force them into the event which does not like and, in that process, they are being tortured to the hilt. Bulls cannot carry the so-called performance without being exhausted, injured, tortured or humiliated. Bulls are also intentionally subjected to fear, injury – both mentally and physically – and put to unnecessary stress and strain for human pleasure and enjoyment, that too, a species which has totally dedicated its life for human benefit, out of necessity.
>
> 74. We are, therefore, of the view that Sections 21, 22 of the PCA Act and the relevant provisions have to be understood in the light of the rights conferred on animals under Section 3, read with Sections 11(1)(a) & (o) and Articles 51A(g) and (h) of the Constitution, and if so read, in our view, Bulls cannot be used as a Performing Animals for Jallikattu and Bullock-cart Race, since they are basically draught and pack animals, not anatomically designed for such performances."

7. Therefore, in order to prevent the infliction of unnecessary pain, suffering or cruelty on animals, the Apex Court has held and directed the Animal Welfare Board of India (AWBI) and also the Government as under:-

> "90. We, therefore, hold that AWBI is right in its stand that Jallikattu, Bullock-cart Race and such events per se violate Sections 3, 11(1)(a) and 11(1)(m)(ii) of the PCA Act and hence we uphold the Notification dated 11.7.2011 issued by the Central Government. Consequently, bulls cannot be used as performing animals, either for the Jallikattu events or Bullock- cart races in the State of Tamil Nadu, Maharashtra or elsewhere in the country.
>
> 91. We, therefore, make the following declarations and directions:
>
> 91.1. We declare that the rights guaranteed to the bulls under Sections 3 and 11 of the PCA Act read with Articles 51A(g) & (h) of the Constitution cannot be taken away or curtailed, except under Sections 11(3) and 28 of the PCA Act.
>
> 91.2. We declare that the five freedoms, referred to earlier be read into Sections 3 and 11 of the PCA Act, be protected and safeguarded by the States, Central Government, Union Territories (in short "Governments"), MoEF and AWBI.

91.3. AWBI and Governments are directed to take appropriate steps to see that the persons in-charge or care of animals, take reasonable measures to ensure the well-being of animals.

91.4. AWBI and the Governments are directed to take steps to prevent the infliction of unnecessary pain or suffering on the animals, since their rights have been statutorily protected under Sections 3 and 11 of the PCA Act.

91.5. AWBI is also directed to ensure that the provisions of Section 11(1)(m)(ii) scrupulously followed, meaning thereby, that the person-in-charge or care of the animal shall not incite any animal to fight against a human being or another animal.

91.6. AWBI and the Governments would also see that even in cases where Section 11(3) is involved, the animals be not put to unnecessary pain and suffering and adequate and scientific methods be adopted to achieve the same.

91.7. AWBI and the Governments should take steps to impart education in relation to human treatment of animals in accordance with Section 9(k) inculcating the spirit of Articles 51A(g) & (h) of the Constitution.

91.8. Parliament is expected to make proper amendment of the PCA Act to provide an effective deterrent to achieve the object and purpose of the Act and for violation of Section 11, adequate penalties and punishments should be imposed.

91.9. Parliament, it is expected, would elevate rights of animals to that of constitutional rights, as done by many of the countries around the world, so as to protect their dignity and honour.

91.10. The Governments would see that if the provisions of the PCA Act and the declarations and the directions issued by this Court are not properly and effectively complied with, disciplinary action be taken against the erring officials so that the purpose and object of the PCA Act could be achieved.

91.11. TNRJ Act is found repugnant to the PCA Act, which is a welfare legislation, hence held constitutionally void, being violative or Article 254(1) of the Constitution of India.

91.12. AWBI is directed to take effective and speedy steps to implement the provisions of the PCA Act in consultation with SPCA and make periodical reports to the Governments and if any violation is noticed, the Governments should take steps to remedy the same, including appropriate follow-up action."

8. In view of the law laid down by the apex Court in the judgment supra, no other and further order except for a direction to the respondents to ensure the implementation of the judgment in *mutatis mutandis* and also observe compliance to the provisions contained under the Act, particularly under Sections 3 and 11, is warranted. Ordered accordingly.

9. With these observations, the writ petition is disposed of so also the pending application(s), if any.

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

CWP No. 586 of 2015 a/w
connected matter.
Decided on : 21.7.2015

CWP No. 586 of 2015
Vinod Thakur .....Petitioner.
Versus
State of H.P & others. ....Respondents.

CWP No. 577 of 2015
Bhupender Singh Thakur .....Petitioner.
Versus
State of H.P & others. ....Respondents.

Constitution of India, 1950- Article 226- Petitioner filed nomination paper for the election to the office of Board of Directors which was rejected on the ground that he had not maintained a credit balance of not less than Rs. 5000/- for a continuous period of two years-it was contended that this bye-law is in derogation and in conflict with clause 2 of appendix "A" of HP Cooperative Societies Rules- held that it was permissible for the bank to lay down the qualification to contest election to the office of Board of Directors-petition dismissed. (Para 3-8)

For the Petitioner(s): Mr. Anshul Bansal, Advocate.
For the Respondent: Mr. Sharwan Dogra, Advocate General with mr. Anup Rattan and Mr. Vivek Singh Attri, Deputy Advocate General for respondents No. 1,2,4 and 5 (in both petitions).
Mr. Narender Sharma, Advocate for respondent No.3 in both petitions.
Mr. Ajay Sharma, Advocate for respondent No.6 in CWP No. 586 of 2015.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Both these petitions pertain to a common subject matter, hence can be disposed of by a common order.

2. In both petitions the petitioners are un-controvertedly members of respondent No.3. They aspired to seek election to the office of Board of Directors in the respondent No.3-Bank. For fructifying their endeavor, they filed nomination papers before the Returning Officer (respondent No.4). The respondent No.4 rejected their nominations/candidatures constituted by her omission to display, in the final list of the contesting candidates for election of Board of Directors of respondent No.3/Bank, comprised in Annexure P-8, the names of the petitioners herein. Hence, they preferred an appeal before the Additional Registrar (Admn), Cooperative Societies, H.P. The latter on being seized of the appeal as preferred before him against Annexure P-8 affirmed the orders

comprised in Annexure P-8. In consequence thereto the petitioners were debarred from contesting election for the Board of Directors of respondent No.3-Bank. Hence, the present petitions.

3. The stumbling block to the aspiration of the petitioners to contest elections of Board of Directors of respondent No.3-Bank, is constituted in the fact of the petitioners herein having not satiated the parameters enshrined in amended bye-law No. 31 comprised in Annexure P-4, in as much as theirs in compliance thereto having not maintained for a continuous period of two years with respondent No. 3, a credit balance of not less than Rs. 5000/-.

4. The learned counsel for the petitioners has with much sinew and vigor contended before this Court that the criterion as referred to hereinabove comprised in amended bye-law No. 31 as stands extracted hereinafter, is in derogation besides in conflict with clause 2 of Appendix A of the H.P Cooperative Societies Rules. In sequel he has contended that its invocation at the instance of the respondent for debarring the petitioners to contest elections of Board of Directors of respondent No.3/Bank, is flawed besides unwarranted.

> "**Amended bye-law No. 31**
>
> **Eligibility for election as Director:-**
>
> *A shareholder member shall not be eligible to be elected as director unless he is a shareholder member of the Bank for at least two continuous year prior to the date of election and should have maintained a deposit account with that Bank for a continuous period of 2 years with a credit balance of not less than Rs. 5000/-."*

5. For determining the tenacity of his arguments it is deemed apt to also extract hereinafter the aforesaid clause 2 of Appendix A of the H.P Cooperative Societies Rules.

> *2.* ***Qualification of candidates****- No person shall be eligible for election as a member of the committee if he is subject to any disqualification mentioned in Rule 41.*

6. A reading of clause 2 palpably voices the fact that it mandates, the disqualifications with which a person aspiring to contest elections of Board of Directors of respondent No.3-Bank ought not to be gripped with. The apposite disqualifications stand voiced in Rule 41 of the Himachal Pradesh Cooperative Societies Rules. However, the learned counsel for the petitioners has contended that since the disqualifications mandated in Rule 41 of the Himachal Pradesh Cooperative Societies Rules do not bespeak of any necessity for a member aspiring to contest elections of Board of Directors of respondent No.3-Bank, maintaining with it for a continuous period of two years a credit balance of not less than Rs.5000/-. Consequently, he contends that the amended bye-law No. 31 casting an obligation aforesaid or mandating an obligation as bespoken therein is in conflict with Rule 41 of the H.P Cooperative Societies Rules, which stands extracted hereinafter.

> *"41. Disqualification for membership of committee-(1) No person shall be eligible for appointment, or election as member of the committee of any society, if he:-*
>
> *(a) is an applicant to be adjudicated a bankrupt or is an insolvent or an uncertificated bankrupt or an undischarged insolvent; or*

(b) has been sentenced for any offence other than an offence of a political character or an offence not involving moral delinquency, such sentence not having been reserved or the offence pardoned; or

(c) is of unsound mind; or

(d) a paid employee of the society or of any other Co-operative Society ; or

(e) is in the same line of business as conducted by the society ; provided that if any question arises whether a person is or is not in the same line of business, the question shall be referred to the Registrar and his decision shall be final; or

(f) is concerned with the profits of any contract entered with the society except in transactions made with the society as a member in accordance with the objects of the society as stated in the bye-laws, provided that if any question arises whether a person is or is not so concerned with the profits of any contract the question shall be referred to the Registrar and his decision shall be final; or

(g) is, except with the sanction of the Registrar, already the member of the committee of any other society of the same type; or

(h) has been sued in arbitration in a society, and award given against him stands unsatisfied wholly or partially ; or

1 (i) is a near relation of paid employee of the society, provided that if any question arises whether a person " has associated himself with the appointment of a near relation in the services of the society concerned," the question shall be referred to the Registrar and his decision shall be final; or*

2 (ii) "the society, of which he is a representative becomes defaulter; or"*

(v) is a defaulter of any society; or

3 (jj) "is a representative of a defaulter society; or"*

(vi) has been debarred from becoming an officer of any society under Rule 58; or

(vii) is under 21 years of age.

(2) A member of the committee of any society shall cease to hold office as such if he:-

a. applies to be adjudicated, or is adjudicated a bankrupt or an insolvent ; or.

b. Is sentenced for any such offence as is described in clause (b) of sub-rule (1) ; or

c. Becomes of unsound mind; or

d. Becomes a paid employee of the society or any other society; or

e. Enters on the same line of business as conducted by the society; or

f. Becomes concerned with profits of any contract entered into by the society except transactions made with society as a member, in accordance with the objects of the society as stated in the bye-laws; or

g. Becomes a member of the committee of any other society of the same type, except with the sanction in writing of the Registrar; or

h. Becomes a near relation of the paid employee of the society; or

i. Becomes a defaulter of any debt or dues directly, or indirectly of his society or of any other society; or

j. Is debarred from becoming an officer of any society under Rule 58; or

k. Ceases to be a member of the society; or

l. *Is found to be under 21 years of age."*

7. However, the aforesaid contention is shorn off its sheen and vigor especially when as adverted to hereinabove clause 2 of Appendix A, as stands extracted hereinabove merely voices the apposite prohibitions which further stand communicated in Rule 41 of the Himachal Pradesh Cooperative Societies Rules and whose inherence in a member trammels or fetters his right to contest elections of Board of Directors of respondent No.3-Bank. The prohibitions exhaustively or ad-nauseam enunciated therein are obviously a mere enumeration of disqualifications which ought not to be besetting or gripping or inhering in any member aspiring to contest elections of Board of Directors of respondent No.3-Bank, yet there is no exhaustive articulation in either the H.P Cooperative Societies Act or the Rules framed thereunder of the qualifications which are necessarily enjoined to be possessed by a member aspiring to contest elections to the office of Director of respondent No.3-Bank, as a natural corollary then, given the reticence in the Act aforesaid and the Rules framed thereunder qua the qualifications which empower a member to contest elections to the office of Board of Directors of respondent No.3-Bank, necessarily then, enough room was left for the respondent No.3-Bank a duly constituted society under the Cooperative Societies Act, to on the anvil of Section 11 proceed to incorporate an amendment in the bye-laws of respondent No.3 with a prescription therein of the apposite qualifications, peremptorily to be possessed by a member aspiring to contest elections of the Board of Directors of respondent No.3-Bank. In sequel, the prescription in amended bye-law No. 31 qua a member aspiring to contest elections to the office of Board of Directors of respondent No.3-Bank being necessarily possessed with a credit balance therein of not less than five thousand for a continuous period of two years is a tenable prescription. Moreso, for reiteration when Rule 41 omits to prescribe or enunciate the qualifications with which a member aspiring to contest elections of Board of Directors of respondent No.3-Bank, is to be empowered with rather when it merely bespeaks of prohibitions or disqualifications which preclude a member from contesting elections to the office of Board of Directors of respondent No.3-Bank, now when the amended by-law No. 31 merely fills in the aforesaid gaping hole and hiatus left in the Act aforesaid and the Rules framed thereunder, as such, when then it hence amplifies the necessity of compliance, by an member aspiring to contest elections to the office of Board of Directors of respondent No.3-Bank, with a holistic criterion besides when, the prescription enjoined therein to be possessed by a member is neither out side the ambit nor beyond the purview of the spirit of the H.P Cooperative Societies Act or Rules framed thereunder, rather when the provisions of Section 11 of the H.P Cooperative Societies Act authorize respondent No.3 to frame bye-laws or carry out amendments in the bye-laws, it is to be firmly concluded that the amended bye-law No. 31,is hence within the domain of Section 11 or carries with it a statutory leverage. Moreover, an advertence to the provisions of Section 34 of H.P Cooperative Societies Act which stands extracted hereinafter contemplates an enshrined mandate of the management of a cooperative society vesting in the managing committee constituted in accordance with law and bye-laws. The import of

the existence of the aforesaid phraseology in Section 34 of the Act aforesaid is that it bestows a statutory legal pedestal to the bye-laws which stand framed by respondent No.3 unless it is contended and substantiated which however has not been done by the learned counsel for the petitioner, that the bye-laws as have come into existence and stand nomenlatured as amended bye-law No. 31 are in dire transgression with the mandate of section 11. In aftermath it appears that there is no conflict inter-se the provisions of clause 2 of Appendix A of the H.P Cooperative Societies Rules besides rule 41 thereof and amended bye-law No.31 of respondent No.3-Bank with an incorporation therein of the aforesaid sine-qua-non with which a member is enjoined to be empowered with, to aspire to contest elections of the Board of Directors of respondent No.3-Bank nor it stands afflicted with any legal malady ensuing from the fact of its having come into existence in transgression of the mandate of Section 11 of the H.P Cooperative Societies Act which stands extracted hereinafter:-

34. ***Managing Committee:-*** *The management of every society shall vest in a managing committee constituted in accordance with the rules and the bye-laws, which shall exercise such powers and perform such duties as may be conferred or imposed respectively, by this Act, the rules and the bye-laws*

"11. ***Amendment of bye-laws of a co-operative society:-***

(1) *No amendment of any by-laws of a co-operative society shall be valid unless approved by the resolution of a general meeting and registered under this Act for which purpose three copies of the amendment shall be forwarded to the Registrar as prescribed.*

(2) *If the Registrar is satisfied that the proposed amendment-*

(i) *is not contrary to the provisions of this Act and the Rules.*

(ii) *does not conflict with co-operative principles,*

(iii) *will promote the economic or social interest of the members of the society,*

(iv) *is not inconsistent with the principles of social justice,*

He may register the amendment.

(3) *When the Registrar registers an amendment, he shall forward to the society a copy of the registered amendment together with a certificate signed by him and such certificate shall be conclusive evidence that the amendment has been duly registered.*

(4) *Where the Registrar refuses to register an amendment of the bye-laws, of a co-operative society, thereof he shall communicate the order of refusal together with the reason to the society.*

(5) *Any amendment which is not disposed of by the Registrar within 90 days of its receipt shall be deemed to have been registered under this Act and the provisions of Sub-Section (3) of this Section shall apply to such amendment.*

(6) *An amendment of the bye-laws of a cooperative society shall, unless it is expressed to come into operation on a particular day, come into force on the day on which it is registered."*

8. However when as such bye-law No. 31 of respondent No.3-Bank has come into existence in consonance with the mandate of Section 11 of the H.P Cooperative

Societies Act, besides when there is no conflict of bye-law No. 31 for the reasons afore-stated with either clause 2 of Appendix A of H.P Cooperative Societies Rules or with its Rule 41, consequently this Court does not deem it fit and appropriate to interfere with the impugned orders. The result thereof is that the election held, to the office of its Board of Directors be declared forthwith and the participation of the petitioners in the election to the office of Board of Directors of Respondent No.3 would, in view of the aforesaid discussion, not taken into account. However in future if the petitioners attain the eligibility criteria, they shall be necessarily empowered to contest election for the Board of Directors of respondent No.3-Bank. In view of above, the present petitions are dismissed and the Annexures impugned before this Court are upheld. All pending applications stand disposed of accordingly.

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

Cr. Appeal No. 13 of 2010 along with
Cr. Appeal No. 206 of 2010
Reserved on: 10.07.2015
Decided on : 22nd July, 2015

1. Criminal Appeal No. 13 of 2010

Harinder	.....Appellant.
Versus	
State of H.P.	.....Respondent.

2. Criminal Appeal No. 206 of 2010

State of H.P.	.....Appellant.
Versus	
Mohit Sharma and others	.....Respondents.

Indian Penal code, 1860- Sections 147, 148, 149, 302 and 307 and Arms Act- Section 29- The accused had gone to Shoolini fair at Thodo ground Solan-the accused hit the complainant party who was also present in the fair-accused person picked up quarrels with the complainant party- accused H gave a knife blow to complainant on the left side of his abdomen and two knife blows to deceased S - he also gave knife blows to V and P - other accused gave beatings to the complainant party with fist and kick blows- the testimonies of the prosecution witnesses were consistent and corroborated each other-PW 1, 2 and 4 had suffered injuries and had identified the accused in the Court-they knew the accused previously-their testimonies were corroborated by the medical evidence-the knife was got recovered by the accused pursuant to disclosure statement-held that in these circumstances the accused were rightly convicted. (Para 12-22)

For the Appellant(s):	Mr. Anup Chitkara, Advocate for appellant in Cr. Appeal No.13 of 2010 and Mr. M.A. Khan, Addl. Advocate General for the appellant in Cr. Appeal No. 206 of 2010.
For the Respondent(s):	Mr. M.A. Khan, Addl. A.G. for the respondent in Cr. Appeal No. 13 of 2010 and Mr.Vivek Sharma, Advocate, for the respondents in Cr. Appeal No.206 of 2010.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Since, both these appeals arise from a common judgment rendered on 10-9-2009/11-9-2009 in Sessions Trial No. 3-S/7 of 2008 by the learned Sessions Judge, Solan, hence, they are proposed to be decided by a common judgment.

2. Criminal Appeal No. 206 of 2010 has been instituted by the State of H.P. It stands aggrieved by the judgment of the learned trial Court, whereby the learned trial Court recorded findings of acquittal against accused/respondents Mohit Sharma, Abhishek and Pawan Kumar qua charges framed against them under Sections 147, 148, 149, 302 read with Section 149, 307 read with Section 149, 201 read with Section 149 of the Indian Penal Code and under Section 27 of the Arms Act read with Section 149 of the Indian Penal Code. On the other hand, Criminal appeal No.13 of 2010 has been instituted before this Court at the instance of accused Harinder, who stands aggrieved by the findings of conviction recorded against him for his having committed offences punishable under Sections 302, 307, 324 and 201 of the IPC and under Section 27(1) of the Arms Act.

3. Briefly stated the facts of the case are that on the night of 21.6.2008 accused Harinder alias Monti, Abhishek, Mohit Sharma, Pawan Kumar and one Ankush Bharatwal had come to Shoolini Fair at Thodo ground Solan and accused Harinder was possessing a knife. The complainant party consisting of Vikas Thakur, Kamal son of Nand Lal, Kamal Thakur, Pawan Kumar and deceased Sanju alias Sanjay were also present in Shoolini Fair in the night on 21/22.6.2008. The said fair concluded by 12-30 on the intervening night of 21/22-6-2008 and when complainant party and deceased Sanju started going towards their homes, the accused persons picked up quarrel with them and accused Harinder gave a knife blow to Kamal Kumar on the left side of his abdomen and two knife blows to deceased Sanjay. He also gave knife blows to Vikas Thakur and Pawan Kumar and the other accused gave beatings to the complainant party with fist and kick blows. Upon this the aforesaid injured ran and scattered. In the meantime police came there and took Sanju to hospital and the remaining injured were also taken to Solan Hospital. In the hospital Dy.S.P. N.S.Rathor recorded the statement of Vikas Thakur. He sent the said statement to police station for registration of F.I.R. PW-14 made an application to the M.O. for medical examination of the injured and pursuant to which PW-7 conducted medical examination of all the injured. Sanju alias Sanjay was declared dead. Injured Vikas was referred to PGI, Chandigarh and Kamal Kumar to IGMC whereas Pawan Kumar was referred to PGI Chandigarh. After giving knife blows and beating to the complainant party and deceased all the accused had run away from the spot and they were apprehended by the police after knowing the particulars of the accused. The spot map of the place where the deceased Sanju was lifted by the police was prepared, besides controlled sample of the earth, blood stained earth, blood of the deceased were lifted. Specimen of seal impressions were taken on a piece of cloth. Thereafter, Dy.S.P made application for the post mortem examination of deceased and obtained post mortem report vide which Dr. Rajan Sood, Medical Officer, R.H.Solan found three clean incised wounds of size of 4x2 c.m. i.e. one on left lumber region, the other near left iliac crest and the third on dorsal spine and all the three wounds were with fresh ooze of blood. Doctor opined that Sanju deceased died due to hemorrhagic shock because of injury to kidney, spleen tail of pancreas and blood vessels in the spleno renal ligament due to wound No.1 and further opined that the duration between the injury and death was less than one hour and between death and post mortem was less than 15

hours. The doctor took into possession the clothes worn by the deceased and sealed the same and thereafter handed over to police. Parcel containing pants of the accused was deposited in the Malkhana with MHC who made entry thereof in the Malkhana register. Injured Pawan Kumar produced his blood stained pants which was sealed with seal H and taken into possession through a memo in the presence of witnesses Satinder Thakur and H.C. Yadav Chand, etc. The police also took into possession the blood stained clothes of Vikas Thakir, ie. Baniyan, T-shirt through a memo after sealing the same in a cloth parcel. Injured Kamal Kumar also produced his clothes i.e. pants, kameez and nikkar stained with blood to the police which were wrapped in cloth parcel and sealed. MHC Hardev Singh sent some parcels containing clothes of the deceased, injured and accused and viscera of the deceased to FSL Junga through HHC Ram Lal. From the FSL report, no alcohol or poison was found in the viscera of the deceased. On 18.08.2008 an application was made to M.O. of the Solan hospital for giving opinion about the nature of the injuries shown in MLCs of Kamal, Vikas and Pawan Kumar. The case summary issued by doctors of IGMC and PGI Chandigarh disclosed an opinion that the stab injury of Kamal was dangerous to life whereas the injury to Pawan Kumar was not dangerous to life.

4. Accused Harinder during interrogation made a disclosure statement on the basis of which the knife was recovered which was taken into possession after measuring it and a sketch thereof was prepared in the presence of the witnesses. The site plan of the place of recovery of knife was prepared. Accused Abhishek Thapa on 22.6.2008 identified the place of incident in the Thodo ground.

5. On conclusion of the investigation, into the offences, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and presented in the Court.

6. The accused were charged for theirs having committed offences punishable under Sections 147, 148, 149, 302 read with Section 149, 307 read with Section 149, 201 read with Section 149 of the Indian Penal Code and under Section 27 of the Arms Act read with Section 149 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

7. In order to prove its case, the prosecution examined 15 witnesses. On closure of prosecution evidence, the statements of accused, under Section 313 of the Code of Criminal Procedure, were recorded, in, which they pleaded innocence and claimed false implication. In defence, the accused had examined three witnesses.

8. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused namely Harinder for his having committed offence punishable under Sections 302, 307, 324 and 201 of the IPC and under Section 27(1) of the Arms Act. However, it acquitted accused, Mohit Sharma, Abhishek and Pawan Kumar for the offences for which they stood charged.

9. The learned counsel appearing for the appellant/accused/Harinder has concertedly and vigorously contended that the findings of conviction 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 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.

10. The learned Additional Advocate General appearing for the State has with considerable force and vigour, contended that the findings of conviction recorded by the Court below qua accused Harinder are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication. The learned Additional Advocate General further contends that the findings of acquittal recorded in favour of respondents Mohit Sharma, Abhishek and Pawan Kumar be reversed by this Court in exercise of its appellate jurisdiction and be replaced by findings of conviction. On the other hand, learned counsel appearing for the respondents submits that the findings of acquittal recorded by the learned trial Court in favour of the respondents aforesaid are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

11. 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.

12. The prosecution case is harbored upon statements of injured witnesses PW-1 Vikas Thakur, PW-2 Kamal Kumar and PW-4 Pawan Kumar. PW-1 recorded his statement under Section 154 Cr.P.C comprised in Ext.PW-1/A. He in his deposition deposed that on 21.06.2008 he alongwith Sanju, Kamal and Pawan was attending Mata Shoolni Devi Ji fair in Thodo Ground, Solan. The fair ended at 12.05 at mid night. In the meantime, he and Pawan went towards the Jhulla and when they returned they noticed that some boys were arguing with Sanju and Kamal was a little behind. Thereafter, he and Pawan went to Sanju. Consequently, when they were seeking an explanation as to what was going on, some scuffle ensued. In the scuffle a person gave a knife blow to Pawan. He deposes that Pawan caught hold of him and told him that some one had given him a knife blow. He further deposes that when he turned back Nishu was standing a little behind. He continues to depose that when he proceeded to disclose to Nishu that some one had given knife blow to Pawan Kumar, Monti, who was standing alongwith Pawan Kumar and without saying anything gave a knife blow to him. This witness has identified Monti in Court. Besides this witness has also identified Nishu in Court. He continues to depose that immediately thereafter, he put his hand on his abdomen where the knife blow was given and ran backwards. He proceeds to depose that blood started oozing from his wounds and smeared his pants as well as spilled on the ground. He deposes that he immediately ran away. He deposes that he cannot disclose who else was injured at that time. He has proven his statement Ext.PW-1/A. Permission was granted to the learned Public Prosecutor to put a leading question to PW-1. On permission being granted to the learned Public Prosecutor to do so, the learned Public Prosecutor put a question to PW-1 whether Harinder/Monti had attacked Sanju in the fair. His answer to the aforesaid question put to him by the learned Public Prosecutor was in the affirmative. He continues to depose that he had handed over the blood smeared pants to the police and also the t-shirt and Banyan, which he was wearing at the time of occurrence. The police packed these clothes in a parcel and sealed them with seal impression 'K' and took them into possession vide memo Ext.PW-1/B. Parcel has been deposed by this witness to be bearing his signatures. The learned Public Prosecutor with the permission of the Court produced a parcel containing the clothes of this witness. Seals borne on the parcel were intact. The parcel contained the seal of FSL. On opening the parcel, it was found to be containing Pant Ext.P-1, T-shirt Ext.P-2 and Banyan Ext.P-3. Banyan and T-shirt carrying the cut of knife and bearing blood stains were both deposed by this witness to be the same. In his cross-examination he has deposed that he was conversant with the name of accused Harinder as Monti only.

13. The other injured eye witness to the occurrence is PW-2 Kamal Kumar. He has on oath deposed that on 21/22nd June, 2008 he attended the fair of Shri Mata Shoolini Devi ji at Thodo Ground, Solan alongwith Sanjay Thakur, Vikas Thakur and Pawan Thakur. The fair concluded at 12.30 at midnight. Thereafter when they started towards their home, Vikas met them in the ground. Monti has been deposed by him to have given a knife blow to him and thereafter to Sanju. Billa was alongwith Monti. Sanju has been deposed by this witness to have been given two knife blows by Monti. He further deposes that one blow was given on the side of abdomen and the other was given near the centre of the abdomen. He deposes that he received injury on the left side of his abdomen owing to the blow of knife given by accused Monti. He proceeds to depose that owing to knife blow blood started oozing from his injuries. Blood has been deposed by this witness to have smeared his shirt, pants, Nikker and shoes. He further deposes that Vikas Thakur and Pawan Kumar did not receive injuries in his presence but received injuries lateron. He was taken to hospital in the vehicle. Sanju ran towards the stair after receiving injuries and tried to block the blood and was also taken to hospital. He deposes that Sanju succumbed to his injuries. He continues to depose that he was thereafter referred to Shimla and was medically examined by the doctor. He further deposes that he remained admitted in the IGMC for 9 days and that he handed over to the police discharge slip Mark-A and also handed over his clothes, i.e. Shirt, Pants and Nikker, which were taken into possession and put in a parcel by the police and sealed with seal. These items have been deposed to be taken into possession by the police vide memo Ext.PW-2/A, which has been deposed to be signed by him and his father. The learned Public Prosecutor produced the parcel. The seals thereon were found intact besides it bore the seal of FSL. With the permission of the Court the parcel was opened and on opening the parcel it was found to be containing Pant, Shirt and Nikker. Pant Ext.P-4, Shirt Ext.P-5 and Nikker Ext.P-6 have been deposed by this witness to be belonging to him and he further deposes that he was wearing these clothes at the time of incident. Another parcel sealed with seal of the FSL was produced in Court by the learned Public Prosecutor and with the permission of the Court it was opened. On the opening of the parcel, it was found to contain dagger type knife Ext.P-7, which on being shown to this witness was identified by him to be the same knife with which Monti gave knife blows to this witness and to Sanju. He identified Monti in Court. In his cross-examination he has deposed that he has no acquaintance with Monti but has seen him earlier once or twice. He has in his cross-examination deposed that he does not know Harinder yet he has deposed that Monti is the person who is present in Court.

14. PW-3 Kamal Thakur has deposed that on 21.6.2008 he had come to Thodo Ground to attend Shri Mata Shoolini Devi fair. The fair has been deposed by this witness to have concluded at 12-15/12-30 midnight. He continues to depose that when he was going towards main gate for going home, Sanjay, Vikas, Pawan and Kamal met him. Subsequently, accused persons present in the Court arrived there and a scuffle occurred between the accused persons present in Court and Ankush, Sanjay, Vikas, Pawan and Kamal. Fists and kicks blows have been deposed to be delivered by the accused and thereafter Monti took out his knife and delivered a blow with it on Vikas. Vikas received injuries on his abdomen and blood started oozing out. Subsequently, Monti has been deposed to have also given a knife blow to Pawan on the back of the lateral side wherefrom blood started oozing. Thereafter, Monti has been deposed to have given a knife blow to Sanjay. Subsequently he deposes that one more blow was given to Sanjay by Monti on the stomach and the other on the back. In sequel to the knife blows he deposes that blood started oozing from the wounds of Sanjay and thereafter Sanjay fled away. Thereafter, accused Monti has been deposed to have delivered a knife blow on the stomach of Kamal.

Blood started oozing from the wound of Kamal. On seeing that accused Monti was wielding knife, they fled from the site. He deposes that police carried injured Sanjay to hospital in a Tata Mobile and then they proceeded to hospital and reached there at about 1.30 a.m they were apprised that Sanjay had expired. He has proceeded to depose that on 22nd in the morning they went to police station and that the police brought the accused persons in the police station at 9/9.30 a.m. This witness was taken to Thodo Ground by the police. The police party inspected the place where Sanjay was lying after receiving injuries. Blood has been deposed by this witness to have been scattered at the site of occurrence. A maize corn without maize (Gulla) which was stained with blood was lying there. He further deposes that police took into possession blood smeared earth, blood smeared Gulla, blood stained polythene envelopes. All these items were taken into possession from the place where Sanjay was lying after receiving injuries. The aforesaid items were wrapped in three cloth parcels separately and sealed with seal and taken into possession vide recovery memo Ext.PW-3/A, which has been deposed to be bearing his signatures. He has proceeded to depose that he had gone to Kotla Nala for the repair of the vehicle. He also deposed that he went to the police station to enquire about the case as the police station was nearby. In the police station SHO was interrogating accused Monti. Monti in his presence has been deposed to have recorded a disclosure statement that he could get the knife recovered with which he had attacked the injured and the deceased in the fair. He deposes that Monti had disclosed to the police that the knife had been concealed by him below the railway track in the bushes at place known as Dohri Diwar. The disclosure statement made by the accused Monti to the police has been deposed by him to have been reduced into writing and signed by the accused. He deposes that he also signed disclosure statement Ext.PW-3/B. He proceeds to depose that they went to Dohri Diwar. Accused Monti has been deposed by this witness to have led them to the place where he had concealed the knife and got it recovered. The sketch of the knife has been deposed to be comprised in Ext.PW-3/C and to be bearing his signatures. The police also took photographs of accused with knife which are mark 1 to mark 4. The knife has been deposed to have been thereafter wrapped in a parcel and sealed with a seal and taken into possession vide memo Ext.PW-3/D, which has been deposed to be bearing his signatures and the signatures of accused Monti. Knife Ext.P-7 has been deposed to be the same which was got recovered by the accused. He identified his signatures on parcels Ext.P-8, P-9 and P-10. In cross-examination he deposes that he knows Abhishek and Monti accused as he had seen Monti once or twice before the incident and Abhishek having visited his house. He has denied the suggestion that the name of Monti was disclosed to him by the police and he is not present in Court, rather during the course of cross-examination this witness pointed towards accused Harinder and stated that he is Monti. He has also denied the suggestion that there is no link between Harinder and Monti.

15. PW-4 is also an injured witness. He deposes that on 21.6.2008 he had gone to the fair of Shri Shoolini Mata at Thodo Ground. Vikas has been deposed by him to have accompanied him to the fair. Sanjay deceased and Kamal met them there. He continues to depose that the fair concluded at about 12-15 mid night. He deposes that when they were returning after the fair, Sanju and Kamal met them near the main gate. He deposes that when they were shaking hands accused Monti alongwith 5-6 more persons came and Monti gave a blow with knife on his back and when he turned back Monti ran away. Blood has been deposed by this witness to have started oozing from his wounds. Thereafter he deposes that he came to the side and sat on the stairs meant for sitting alongwith the gate. Thereafter, a boy named Satinder came to him and he told him about the injury and requested to take him to the hospital. On his being taken to hospital, he deposes that the

doctor examined him and referred him to PGI. He deposes that he remained in PGI from the night intervening 21/22 June, 2008 to 24th June, 2008. On 25.6.2008 he handed over his pants and shirt to the police which he was wearing on the date of occurrence and which were smeared with blood. The police wrapped the pants and shirt in a cloth parcel and sealed the same, which was taken into possession vide memo Ext.PW-4/A, which has been deposed to be bearing his signatures and signatures of Satinder Singh. He deposes that he had handed over discharge slip Ext.PW-4/B to the police. During the course of his examination in chief this witness has identified accused Monti in Court. With the permission of the Court the learned Public Prosecutor produced one sealed parcel containing Pants and shirt of the witness. The seals were found to be intact. With the permission of the Court the parcel was opened. This witness identified Pants Ext.P-11 to be the same which he was wearing at the time of incident, besides he identified the Knife Ext.P-7 with which accused Monti attacked him.

16. PW-1, PW-2 and PW-4 all were recipients of injuries inflicted with a knife upon their respective persons by accused Monti. All the injured witnesses have identified accused Monti in Court. PW-1 has deposed in his cross-examination that he was familiar with the name of accused Harinder as Monti. Even PW-2 in his cross-examination has deposed that he was knowing accused Monti. Given the occurrence in the depositions of PW-1 and PW-2 of theirs being familiar with the name of accused Harinder as Monti, and theirs having identified Monti in Court, firmly establishes the factum of accused Harinder also carrying the alias of Monti, in sequel, a firm conclusion which emanates is that accused Harinder bore the alias of Monti, with which alias both PW-1 and PW-2 were familiar, especially when the defence has not concerted to by adducing cogent evidence communicate that accused Harinder did not bear the alias of Monti. Given the previous familiarity of PWs aforesaid with the alias of Monti carried by accused Harinder and theirs having identified Monti in Court to be the person who perpetrated an assault on their persons as well as on the person of deceased Sanjay. In aftermath, the deposition on oath of PW-1 and PW-2 more pointedly of PW-2 who has emphatically attributed to accused Monti, an incriminatory role of his having delivered blows with knife upon the injured witnesses respectively, inasmuch as on PW-1, PW-2 and PW-4, leads to a concomitant conclusion that the prosecution has adduced cogent ocular proof qua the factum of accused Monti having inflicted injuries with knife Ext.P-7 upon PW-1, PW-2 and PW-4. Corroboration to the ocular version qua the occurrence rendered by PW-1, PW-2, PW-3 and PW-4 is lent by the factum of PW-1 having in his deposition proved Ext.P-1 T-shirt, Ext.P-2 Banyan and Ext.P-3 Shirt being his clothes which he was wearing at the time of occurrence and theirs containing the cut of knife besides carrying blood stains, which all were taken into possession vide memo Ext.PW-1/B, PW-2 has proved the factum of Ext.P-4 Pants, Ext.P-5 Shirt Ext.P-6 Nikkar, being his clothes which he was wearing at the time of incident and theirs carrying blood stains and which were taken into possession vide Memo Ext.PW-2/A, and PW-4 has proved Ext.P-11 Pants, which he was wearing at the time of occurrence and its carrying blood stains and which were taken into possession vide Memo Ext.PW-4/A. Proof of exhibits aforesaid by PWs aforesaid lend fortifying vigour to the factum of theirs at the site of incident having been subjected to an assault with a knife Ext.P-7 by accused Monti.

17. MLC of PW-2 Kamal Kumar is comprised in Ext.PW-7/C. The following injuries have been noticed to be occurring on his person by the doctor who conducted medical examination on his person and prepared MLC:

> *"There is a clean incised wound of size 4x2x4 cm on left upper lumber region below 12th rip with fresh ooze of blood.*

PW-7 has also deposed in his examination in chief that the kind of weapon used for causing the injuries aforesaid was sharp. In his examination in chief he has deposed that injuries underscored in Ext.PW-7/C are possible with knife Ext.P-7, shown to this witness in Court. Similarly, on the same day, he also medically examined Pawan Kumar PW-4 and issued MLC comprised in Ext.PW-7/D and has recorded therein the existence of the following injuries on his person:-

> *Clean incised wound 4x2x3 cm at the level of L-1 and L-2 vertebra on left side with fresh ooze of blood.*

In his examination in chief he has deposed that the injuries underscored in Ext.PW-7/D are possible with user of knife Ext.P-7, shown to this witness in Court. On the same day, he also medically examined Vikas Thakur PW-1 and found the following injuries comprised in Ext.PW-7/E existing on his person:-

> *"Clean incised wound of size of 4x2x6 cm on left Hypochondrium with fresh ooze of blood.*

He has deposed in his examination in chief that the kind of weapon used for causing the injuries aforesaid was sharp. He in his examination in chief has deposed that he conducted the postmortem of deceased Sanjeev Kumar @ Sanju alongwith Dr. Raj Kumar Dharoch and Dr. Savita Aggarwal. He has proved post mortem report Ext.PW-7/L. The post mortem report records the existence of the hereinafter extracted injuries on the person of deceased Sanju:-

> "Abdomen Part:
>
> In walls wound No.1 as shown in the post mortem report:- there was a penetrating wound measuring 4x2 cm in the left upper lumber region. It was elliptical in shape with shart angles at two extremities. There was no bruise/raggedness. Clotted blood was present in and around the wound. No foreign material found in the wound. On probing the directions of the wound was upwards, inwards and towards the right, communicating with the peritonical cavity as shown in the diagram.
>
> Wound No.2.
>
> There was a penetrating wound measuring 4x2 cm about 4 cm above the right iliac crest. It was elliptical in shape with sharp angles at two extremeties. There was no bruising/raggedness. Clotted blood was present in and around the wound. No foreign material around the wound. On probing the direction of wound was upward, inward and towards the right but was not communicating with the peritoneal cavity as shown in the diagram.
>
> Wound No.3.
>
> There was a penetrating wound measuring 4x2 cm about 3 cm laterail to vertebral column found on left at the level of about D-12 to L-2. It was elliptical in shape with sharp angles at two extremeties. There was no brosing/raggedness. Clotted blood was present in and around the wound. No foreign material was found in the wound. On probing the direction of the wound was slightly upward and inwards. It was not communicating with the abdomen.
>
> Peritoneum:
>
> Peritoneum cavity was filled with blood (about four liters) and clots were also present. Peritoneum was pale and there was a rent in the left lumber region measuring 2x1 cm. In mouth and Oesophague blood stained fuild was present.
>
> Stomach wall and mucosa of stomach were normal and it was partially empty.

Spleen.

There was a tear of the capsule of the lower pose of the spleen, with partial cut of the slpeeno-renal (Lieno-renal) Ligament and including vessels and some tear further existing up to thetale of the pancreas which was partially cut. Spleen was shrunken. Right kindely was pale but normal in structure. Lift kidney there was tear in the capsule of convex surface of the left kidney."

During the course of examination in chief of PW-7, Ext.P-7 was shown to this witness its production before him unearthed the factum of the injures occurring on the person of the deceased, as enunciated in the post mortem report Ext.PW-7/L being sequelable by user of knife Ext.P-7.

18. MLCs of PW-1, PW-2 and PW-4 comprised in Ext.PW-7/C, Ext.PW-7/D, Ext.PW-7/E proved by PW-7 emphatically upsurge a communication that the injuries noticed by him on the person of each of the injured and the deceased being sequelable by user of knife Ext.P-7 as shown in Court to this witness. Obviously, his testimony is consistent with and in harmony with the depositions of PW-2 and PW-4 both of whom in their respective depositions have deposed in intra se corroboration qua the factum of knife Ext.P-7 shown to them in Court being the one which was carried by accused Monti and its having been used by him for delivering blows on the person of each of the injured and deceased Sanjay Kumar. Consequently, for reiteration, MLCs Ext.PW-7/C, Ext.PW-7/D, Ext.PW-7/E are in tandem with and in harmony with the ocular version qua the incident rendered by PW-1, PW-2 and PW-4. Preeminently, the recovery of knife Ext.P-7 under recovery memo Ext. PW-3/D preceded by a disclosure statement of accused comprised in Ext.PW-3/B stands proved by the unshattered testimony rendered by PW-3. Consequently, the recovery of knife attains vigorous conclusiveness besides its efficacy or probative worth stands undenuded. As a corollary, it hence fortifyingly establishes the guilt of accused Harinder alias Monti.

19. In aftermath there is mutually inter connectivity qua the ocular version qua the incident, medical evidence besides the recovery of weapon of offence Ext.P-7 under memo Ext.PW-3/B. Hence, the firm inter connectivity or harmony interse the ocular version qua the incident, medical evidence and the efficacious and untainted recovery of knife at the instance of the accused Monti, unflinchingly proves the guilt of the accused Monti in the commission of the offences for which he stood charged, tried and convicted by the learned trial Court.

20. For reiteration, deceased Sanjay has been deposed by PW-2 in his examination in chief to have been delivered two blows with knife by accused Monti. The deposition of PW-2 underscoring the aforesaid incriminatory role to accused Monti has come to be corroborated by the deposition of PW-3. Both the aforesaid are eye witnesses to the occurrence and their testimonies in attributing an incriminatory role to accused Monti inasmuch as his having struck blows with knife on Sanju which sequelled his demise, when have remained unshattered during the course of their respective cross-examinations by the learned defence counsel, in sequel, they acquire an aura of truth.

21. The learned trial Court has rendered findings of acquittal qua accused Mohit Sharma, Abhishek and Pawan Kumar. The prosecution witnesses PW-1 and PW-4 have denied the presence of the aforesaid accused at the site of occurrence. Even though the injured PW-2 has named Abhishek to be present at the site of occurrence nonetheless he has denied his participation in the scuffle or his having caused injuries upon him or upon

any other eye witnesses, besides the deceased. Moreover, the injured witnesses have specifically denied the factum of accused Mohit Sharma, Abhishek and Pawan Kumar being members of the unlawful assembly or theirs having perpetrated an assault on the person of the injured persons as well as on the deceased. Consequently, with their being firm evidence qua the factum of accused Mohit Sharma, Abhishek and Pawan Kumar having not formed any unlawful assembly alongwith accused Monti, necessarily then the disimputation of an incriminatory role to them by the learned trial Court with accused Monti, the principal accused or the principal in the first degree, inasmuch as theirs having formed an unlawful assembly alongwith Monti cannot suffer reversal by this Court. Reinforcingly, there being also no firm and formidable evidence qua the aforesaid accused qua whom findings of acquittal have been rendered by the learned trial Court, while theirs purportedly joining the company of accused Monti theirs having the knowledge qua his carrying a knife with which he struck blows on the person of deceased Sanjay as well as on the injured, fosters an apt conclusion that the acquitted accused Mohit Sharma, Abhishek and Pawan Kumar were merely bystanders and had not shared with accused Monti, his intention of perpetrating an assault on the person of injured PWs or a lethal attack on the deceased, besides, were wholly unaware of the aforesaid discreet object carried in the mind of accused Monti @ Harinder.

22. The learned trial Court has appreciated the evidence in a balanced and fair manner and the findings recorded by the learned trial Court hence do not merit any interference, in sequel, both the appeals are dismissed. In aftermath, the conviction and sentence imposed upon accused/appellant Harinder @ Monti under Sections 302, 307, 324 and 201 of the IPC and under Section 27(1) of the Arms Act is maintained and affirmed besides his acquittal under Sections 147, 148, 149 IPC is too maintained and affirmed. Moreover, the findings of acquittal qua accused Mohit Sharma, Abhishek and Pawan Kumar are also maintained and affirmed. Records of the learned trial Court be sent back forthwith.

****

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

Oriental Insurance Company Ltd. Through
its Divisional Manager & others ....Applicants

Versus

Rajesh Kumar son of Sh.Vidya Dutt and others ....Non-applicants

CMP(M) No. 543 of 2015
Order Reserved on 2nd Jly 2015
Date of Order 22nd July 2015

Limitation Act, 1963- Section 5- An application for condonation of delay in filing an appeal was filed pleading that earlier applicant had filed a CMPMO before the High Court-the High Court held that no order was required to be passed on the same– the matter was again listed before the Court and the court passed an order that the petition was wrongly listed as it had already been disposed by the High Court- an appeal was filed immediately thereafter – it was pleaded that the delay had occurred due to filing of the application earlier and the same be condoned - held that earlier CMPMO was dismissed by High Court and this order was not challenged by the applicant- no permission was sought to file an appeal on the same cause of action- the applicant had engaged Law Officers to advise it- the condonation

of delay is a matter of concession and cannot be claimed as a matter of right - if an experienced counsel gives an opinion contrary to latest law, the mistake cannot be stated to be bonafide-these circumstances did not establish any sufficient cause for the condonation of delay- application dismissed. (Para 8)

Cases referred:
United India Insurance Co. Ltd. vs. Shila Datta and others reported in 2011 ACJ 2729
Ramlal and others vs. Rewa Coalfields Ltd. , AIR 1962 SC 361
Banwarilal and Sons Pvt. Ltd. vs. Union of India and another, AIR 1973 Delhi 24 (DB)
M.P. titled Uttam Singh vs. National Insurance Company Limited, 1989 ACJ 38
Nasiruddin vs. Sita Ram Aggarwal, (2003)2 SCC 577
Rangammal vs. Kuppuswami, AIR 2011 SC 2344

For the Applicants:	Mr. Deepak Bhasin, Advocate.
For Non-applicant No.1:	Mr. Anirudh Sharma, Advocate.
For Non-applicant No.2:	Mr. P.S. Goverdhan, Advocate.
For Non-applicant No.3:	Ex-parte.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Applicants filed application under Section 5 of Limitation Act for condonation of delay in filing the appeal under Section 173 of Motor Vehicles Act relating to award passed by Motor Accident Claims Tribunal-II Solan announced in Petition No. 13-S/2 of 2008 decided on dated 4.12.2008 titled Rajesh Kumar vs. Jagdish Chand and others. Award was passed on dated 4.12.2008 and present appeal filed on dated 4.10.2013. Appeal was returned with objections and thereafter same was filed on dated 16.04.2014. It is pleaded that CMPMO No. 355 of 2009 titled Oriental Insurance Company Ltd. and others vs. Motor Accident Claims Tribunal-II Solan was filed before Hon'ble High Court of H.P. and Hon'ble High Court of H.P. vide order dated 26.4.2012 held that no order was required to be passed in view of decision of Hon'ble Supreme Court in United India Insurance Co. Ltd. vs. Shila Datta and others reported in 2011 ACJ 2729. It is pleaded that thereafter again the matter was listed before Hon'ble High Court of H.P. on dated 11.6.2013 and Hon'ble High Court of H.P. had passed the order that case was wrongly listed because petition already decided by Hon'ble High Court of H.P. on dated 26.4.2012. It is pleaded that after seeking requisite approval from higher authorities the case was recommended for filing the appeal and immediately thereafter present appeal was filed. Prayer for condonation of delay sought.

2. Per contra response filed on behalf of non-applicants pleaded therein that applicants are estopped from filing the present application on account of the fact that matter already stood decided by Hon'ble High Court in CMPMO No. 355 of 2009 on dated 26.4.2012 and 11.06.2013. It is further pleaded that on dated 26.4.2012 and 11.6.2013 case was decided by Hon'ble High Court of H.P. in presence of learned Advocate appearing on behalf of Oriental Insurance Company and further pleaded that Hon'ble High Court of H.P. did not grant any liberty to applicants to file fresh appeal on same cause of action. It is also pleaded that in view of above stated facts application filed under Section 5 of Limitation Act be dismissed.

3. On dated 9.1.2015 following issues were framed:-

1. Whether there are sufficient grounds to condone the delay as alleged? ....Onus upon applicants.
2. Whether applicants have no cause of action to file the application under Section 5 of Limitation Act as alleged? ....Onus upon non-applicants
3. Relief.

4. Applicants examined following oral witnesses:-

Sr. No.	Name of the witness
1.	Ms. Monika Saini
2	Sh.V.S. Dadwal

4.1 Applicants tendered following documentary evidence:-

Exhibit	Description of exhibit
Ext.AW1/A	Copy of CMPMO No. 355 of 2009 filed under Article 227 of Constitution of India.
Ext.AW1/B	Copy of order dated 26.4.2012 passed in CMPMO No. 355 of 2009 passed by H.P. High Court.
Ext.AW1/C	Copy of order dated 11.6.2013 passed in CMPMO No. 355 of 2009 by H.P. High Court.
Ext.AW2/A	Authorization letter.
Ext.AW2/B	Copy of letter dt. 12.9.2013
Ext.AW2/C	Copy of letter dated 22.3.2014.
Ext.AW2/D	Copy of letter dt. 24.3.2014
Ext.AW2/E	Copy of letter dt. 1.4.2014.

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

6. Testimonies of oral witnesses:-

6.1 AW1 Ms. Monika Saini Junior Assistant in High Court of H.P. has stated that she has brought record of CMPMO No. 355 of 2009 titled Oriental Insurance Company Ltd. vs. MACT-II Solan and this petition was instituted on dated 27.4.2009. She has stated that certified copy of petition is Ext.AW1/A which is correct as per record. She has stated that copy of order dated 26.4.2012 is Ext.AW1/B which is correct as per original record. She has stated that copy of order dated 11.6.2013 is Ext.AW1/C which is also correct as per original record. She has stated that on dated 21.3.2014 last order was passed and certified copy of award was declined on the ground that same had formed the part of petition.

6.2 AW2 Shri V.S. Dadwal Assistant Manager Oriental Insurance Company has stated that he is duly authorized by the company vide authorization letter Ext.AW2/A. He has stated that he has brought record pertaining to case CMPMO No. 355 of 2009 titled

Oriental Insurance Company Ltd. vs. MACT-II Solan. He has stated that applicants have filed petition under Article 227 of Constitution of India challenging the award passed by MACT-II Solan titled Rajesh Kumar vs. Jagdish Chand and others. He has stated that company received a letter on dated 12.9.2013 informing that case was decided on dated 26.4.2012. He has stated that company was advised to file fresh appeal. He has stated that after seeking permission from higher authorities he instructed the Advocate to file appeal. He has stated that thereafter again on dated 22.3.2014 he received communication from Advocate that certified copy could not be available from High Court. He has stated that Advocate advised them to obtain another certified copy of award from MACT-II Solan itself. He has stated that on dated 24.3.2014 he wrote to Advocate Shri Ravinder Tikku at Solan to obtain certified copy of award which was received by company on dated 4.4.2014. He has stated that immediately he advised the Advocate to file appeal. He has stated that delay on the part of company is not intentional but due to above stated facts. He has stated that copy of letter dated 12.9.2013 is Ext.AW2/B, letter dated 22.3.2014 is Ext.AW2/C, letter dated 24.3.2014 is Ext.AW2/D and letter dated 1.4.2014 is Ext.AW2/E. He has stated that these letters are true and correct as per official record. He has denied suggestion that he did not mention the correct facts in application and also denied suggestion that he has filed the wrong application under Section 5 of Limitation Act.

7. Non-applicants did not adduce any oral evidence in rebuttal.

Findings on issue No.1

8. Submission of learned Advocate appearing on behalf of applicants that there are sufficient grounds for condonation of delay under Section 5 of Limitation Act is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that Oriental Insurance Company had filed CMPMO No. 355 of 2009 before Hon'ble High Court of H.P. against award passed by MACT-II Solan in petition No. 13-S/2 of 2008 titled Rajesh Kumar vs. Jagdish Chand and others which was decided on dated 4.12.2008. It is proved on record that Hon'ble High Court vide order dated 26.4.2012 dismissed CMPMO No. 355 of 2009 in view of decision of Hon'ble Apex Court of India announced in United India Insurance Company Ltd. vs. Shila Datta and others reported in 2011 ACJ 2729. It is also proved on record that thereafter CMPMO No. 355 of 2009 was again listed before Hon'ble High Court on dated 11.6.2013 and Hon'ble High Court of H.P. has held that petition already stood decided vide order dated 26.4.2012 and dismissed the petition. Oriental Insurance Company did not challenge the orders of Hon'ble High Court of H.P. dated 26.4.2012 and dated 11.6.2013 announced in CMPMO No. 355 of 2009. Order dated 26.4.2012 and order dated 11.6.2013 passed by Hon'ble High Court of H.P. announced in CMPMO No. 355 of 2009 have attained the stage of finality. No permission sought by applicants to file appeal on same cause of action. As per Section 173 of Motor Vehicles Act 1988 any person aggrieved by an award of Claims Tribunal may within 90 days from the date of award can prefer appeal before Hon'ble High Court. Oriental Insurance Company had employed well educated staff who is well equipped with law. Oriental Insurance Company has also engaged law officers for guidance relating to Court matters. It is proved on record that petitioner had sustained 35% permanent disability of upper left limb. It was held in case reported in ***AIR 1962 SC 361 titled Ramlal and others vs. Rewa Coalfields Ltd.*** that extension of time is a matter of concession to the applicant and could not be claimed by applicant as a matter of absolute right. It was held in case reported in ***AIR 1973 Delhi 24 (DB) titled Banwarilal and Sons Pvt. Ltd. vs. Union of India and another*** that if an experienced and very able counsel of long standing gives an opinion contrary to latest and widely law announced by the Supreme Court and High Courts then that mistake could not be stated to be bonafide

mistake. In present case order passed by Hon'ble High Court of H.P. on dated 26.4.2012 and 11.6.2013 in CMPMO No. 355 of 2009 are quoted in toto:-

"26.4.2012

Present: Mr.Deepak Bhasin, Advocate for the petitioner.

Mr.Satish Sharma, Advocate vice Mr. Bimal Gupta Advocate, for respondent No.2.

No order is required to be passed in view of the decision of Supreme Court in United India Insurance Co. Ltd. vs. Shila Datta and others, 2011 ACJ 2729.

Sd/-

26th April,2012. Judge
H.P. High Court

11.6.2013

Present:-Mr.Deepak Bhasin Advocate for petitioner.
Mr. Bimal Gupta Advocate for respondent.

Case has been wrongly listed. The petition already stand decided by order of this Court on 26th April 2012.

Sd/-

June 11,2013. Judge H.P. High Court"

Order was announced by Hon'ble High Court of H.P. in presence of learned Advocate appearing on behalf of Oriental Insurance Company. Thereafter w.e.f. 26.4.2012 Oriental Insurance Company did not file any appeal under Section 173 of Motor Vehicles Act 1988 but filed the appeal in H.P. High Court on dated 4.10.2013. Thereafter objections were raised by H.P. High Court and appeal was returned. Thereafter again appeal was filed on dated 16.4.2014. It is proved on record that CMPMO was finally disposed of on dated 26.4.2012. There is no satisfactory explanation as to why again CMPMO No. 355 of 2009 was listed before Hon'ble High Court of H.P. on dated 11.6.2013 after expiry of about one year and two months without any review petition filed by Oriental Insurance Company. Insurance Company did not examine learned Advocate who had given legal advise in order to prove sufficient cause for not preferring appeal within time under Section 173 of Motor Vehicles Act 1988. It was held in case reported in ***1989 ACJ 38 M.P. titled Uttam Singh vs. National Insurance Company Limited*** that High Court can be approached only once and if remedy is exhausted in High Court once then thereafter High Court cannot be approached. Even Insurance Company did not file any application under Section 14 of Limitation Act 1963. It was held in case reported in ***(2003)2 SCC 577 titled Nasiruddin vs. Sita Ram Aggarwal*** that provision of Section 5 of Limitation Act must be construed having regard to Section 3 of Limitation Act 1963. In view of above stated facts it is held that applicants did not prove sufficient cause for condonation of delay. Issue No.1 is decided against applicants.

Findings on issue No.2.

9. Submission of learned Advocates appearing on behalf of the non-applicants that applicants have no cause of action to file application under Section 5 of Limitation Act is accepted for the reasons hereinafter mentioned. It is well settled law that cause of action should be proved by way of positive oral or documentary evidence. It is well settled law that under Section 101 of Indian Evidence Act 1872 burden of proof of facts is upon party who asserts facts. ***(See AIR 2011 SC 2344 titled Rangammal vs. Kuppuswami)*** In view of above stated facts it is held that applicants did not prove any sufficient cause of delay. Issue No. 2 is decided in favour of non-applicants.

Relief

10. In view of findings on issues Nos. 1 and 2 application filed under Section 5 of Limitation Act is dismissed. Consequently appeal is not admitted. All pending miscellaneous application(s) if any also disposed of.

****

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

LPA No.411 of 2012 alongwith
LPAs No.412 & 413 of 2012.
Judgment reserved on : 07.07.2015.
Date of decision: July 22,2015.

1. LPA No.411 of 2012.

Regional Provident Fund Commissioner
Employee's Provident Fund Organization .....Appellant.
Versus
R.C. Gupta and others .....Respondents.

2. LPA No.412 of 2012.

Regional Provident Fund Commissioner
Employee's Provident Fund Organization .....Appellant.
Versus
HPTDC Employees Union and others. .....Respondents.

3. LPA No.413 of 2012.

Regional Provident Fund Commissioner
Employee's Provident Fund Organization ....Appellant.
Versus
Himachal Pradesh Paryatan Vikas Nigam
Karmchari Sangh and others .....Respondents.

Constitution of India, 1950- Article 226- Earlier a scheme was framed by the government of India providing pension on retirement – this scheme was modified- the petitioner contended that the amendment in the scheme was not duly notified and the petitioners were not aware of the same - the petitioner got no opportunity to switch over to the amended scheme due to lack of wide publicity- Writ court held that the petitioner had contributed the full share of the salary - employees provident fund organization had not invited the revised option after the amendment and directed it to recalculate and redeposit the already deposited amount- held that the scheme was published in the Official Gazette- individual

service of notification was not required – the publication in the official gazette is a publication to the public and the writ petition based on the fact that petitioners were not aware of the amendment in the scheme had no basis- the court cannot make out a new case which was not pleaded by the parties- the writ court had fallen into error while allowing the writ appeal - Writ petition dismissed. (Para 18-30)

Cases referred:
Union of India and others versus Ganesh Das Bhoj Raj (2000) 9 SCC 461
State of J.&K. & Anr. versus Ajay Dogra AIR 2011 SC 1830
Bachhaj Nahar versus Nilima Mandal & Ors. AIR 2009 SC 1103

For the Appellant(s)	:	Mr.Navlesh Verma, Advocate, in all the appeals.
For the Respondents	:	Mr.Subhash Sharma, Advocate, for respondents No.1 to 6 in LPA No.411 of 2012 and for respondents No.1 and 2 in LPAs No.412 and 413 of 2012. Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Angrej Kapoor, Advocate, for respondents No.7 and 8 in LPA No.411 of 2012 and for respondents No.3 and 4 in LPAs No.412 and 413 of 2012. Mr.Shivank Singh Panta, Advocate, for respondent No.9 in LPA No.411 of 2012 and for respondent No.5 in LPAs No.412 and 413 of 2012.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

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

2. The writ petitioners, who are the respondents herein, filed petitions before this Court on the ground that they have illegally been denied pensionable rights under the Employees' Pension Scheme, 1995, which scheme had subsequently been amended vide amendment dated 28.02.1996.

3. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 was made applicable to the HPTDC Corporation w.e.f. 1st September, 1974 which covered all the employees of the Corporation under the Employees' Pension Scheme, 1995. Insofar as the Employees Provident Fund is concerned, it provided for a system of provident fund compulsorily on contribution basis by the Employer and employees jointly. The rate of contribution as on 16.11.1995 was 10% of salary, which was raised to 12% in the year 1997. The Employer who has been arrayed as respondent No.9 was contributing the employers' share at the rate on total salary which constituted of not only the basic pay but even the dearness allowance w.e.f. 16.11.1995. Equal contribution was also made from the salary of the writ petitioners as employees' share.

4. The aforesaid Act came to be amended vide Act No.25 of 1996 by making provisions for pension after the retirement of employees covered under the Act. The amendment was constituted in terms of Section 6-A and 6-B of the Principal Act authorizing

the Central Government to frame Employees' Pension Scheme for providing superannuation or retiring pension etc.

5. Vide notification dated 16.11.1995, the Central Government notified the Employees' Pension Scheme, 1995 and vide Sub-para 3 of Para-7 of the scheme all the employees were required to exercise their options to join the scheme within a period of six months from 16.11.1995 i.e. upto 15.05.1996. However, before the expiry of the aforesaid option period, the Employees' Pension Scheme was amended w.e.f. 16th March, 1996 vide GSR No.748 (E) dated 16.11.1995. The condition to exercise the option within six months as had been notified in the original scheme was done away and that apart certain other amendments were also carried out.

6. In the scheme that was originally notified on 16.11.1995, the wage ceiling was Rs.5,000/- for determining the pensionable salary and the same was raised to Rs.6,500/- per month w.e.f.01.06.2001. The original scheme of 1995 envisaged two kinds of pension patterns which are as follows:-

a) One based on the wage ceiling of Rs.6,500/- per month; and

b) Another based on the higher salary exceeding the wage limit of Rs.6,500/- per month for which the contribution of higher salary exceeding the wage ceiling were to be made in the pension fund on 16.11.1995.

It is not in dispute that the amended scheme guaranteed the pension benefits to the employees already covered under the original scheme.

7. The basis of claim of the writ petitioners was that insofar as the original scheme is concerned, the same was given wide publicity and was circulated by the Provident Fund Organization, but when the amendment was carried out in the original scheme, it was neither published nor the writ petitioners were aware of it.

8. After learning about the amended scheme, representation was made by the 9th respondent to the appellants, but the same was rejected vide letter dated 10th January, 2006 which reads thus:-

"**EMPLOYEES' PROVIDENT FUND ORGANIZATION**
Regional Office:
Block No.34, I & II Floor, SDA Complex, Kasumpti, Shimla-9 (H.P.)
No.Pension Cell/Ro/HP/HPTDC/EPS-95-16360 Dated: 10 JAN 2006.
To
The Managing Director
Himachal Pradesh Tourism Dev. Corp. Ltd.
Ritz Annexe, Shimla- 171001.

Sub:- Implementation of the Employees' Pension Scheme 1995 regarding.

Sir,

This is with reference to your letter No.ACCtts./67-10/82-TDC dated 22.03.2005 regarding to contribute the pension contribution on higher rate from retrospective date.

In this connection, the matter was referred to Head Office and it has been clarified that Employer and Employee can exercise option to contribute on salary exceeding the wage ceiling on two occasion:-

1. Immediately on and from the date of commencement of the scheme, i.e. 16.11.1995.
2. Immediately on and from the date the salary exceed the statutory limit (Rs.6500/- at present.)

From the above provisions, it is clear that the establishment is required to remit the contribution on the salary over and above the statutory from the month in which the salary crossed that limit and not from any later date. Since your establishment wants to contribute on higher wages at present which is not within the provisions of EPS' 95, hence the permission to contribute on higher wages is hereby rejected.

Yours faithfully,
Sd/-10/1/06
(J.R. Sharma)
Regional P.F. Commissioner/H/OIC."

9. It was also contended that 9th respondent on the basis of original scheme, 1995 deposited 8.33% subject to wage limit of Rs.6,500/- (which was Rs.5,000/- upto 30.04.2001) out of total 12% of Employer's share into the "Pension Fund Account" and remaining 3.67% was remitted in the "Provident Fund" of the concerned employees. Therefore, consequent to the amendment in the scheme, 8.33% on full salary beyond the wage limit of Rs.6,500/- should have been deposited in the "Pension Fund Account" and balance in the "Provident Fund Account" of the employees. It was further contended that the 9th respondent had been contributing on full salary exceeding the wage ceiling i.e. Rs.6,500/- from the very commencement of the Employees' Pension Scheme that was floated in the year 1995. But, since the amendment remained un-noticed for no fault of the writ petitioners, they got no opportunity to switch over to the amended scheme which resulted in 8.33% of the employees' contribution remitted in the pension fund being limited to the wage salary, whereas, the only procedural requirement was the bifurcation of the already deposited amount under the appropriate heads of accounts of "Pension Fund Account" and "Employees Provident Fund Account" which should have been done by the respondents.

10. It was thereafter contended that 9th respondent vide letter dated 22nd March, 2005 had represented to the appellants and informed it that the Employer had been contributing its share at the rate of 12% of the basic pay plus ADA. The amount so remitted in the "Employees' Pension Fund" under the "Employees' Pension Scheme, 1995" was 8.33% of the employees' share limited to Rs.5,000/- per month of pensionable salary which limit was later increased to Rs.6,500/- per month w.e.f. 01.06.2001. The net result of this was that the employees, who had retired were given pension by taking the limit of pensionable salary of Rs.6,500/-. But, had the remittance in the Employees' Pension Fund at the rate of 8.33% been made without the limit of Rs.6,500/- out of 12% of the Employer's share, the retirees would have got much higher pension based upon the average of basic pay plus ADA drawn by them during the preceding 12 months of their retirement.

11. On the basis of the aforesaid pleadings, the writ petitioners claimed various reliefs. However, at the time of final hearing, the writ petitioners did not press the entire reliefs and restricted the prayer only to the relief that the already deposited amount of employees'

share of contribution under the appropriate heads of accounts of "Pension Fund Account" and "Provident Fund Account" beyond the wage limit from the date of enforcement of the Employees' Pension Scheme, 1995, i.e. 16.11.1995 as per the amendment dated 28.02.1996 of the said scheme be got recalculated and readjusted from the appellants and proforma respondents.

12. The appellants contested the petition by filing reply wherein it had been averred that the writ petition was not competent and maintainable as the appellants were required to act within the four corners of the Act and the Scheme, and whereas the writ petitioners were seeking a relief which was contrary to both the Act and the Scheme and, therefore, the petition deserved to be dismissed.

13. On the other hand, the Employer filed its reply supporting the claim of the writ petitioners and it was submitted that the amendment dated 28.02.1996 to the Employees' Pension Scheme, 1995 remained unnoticed by it and even the Employees' Provident Organization, who had been administering the scheme had also not invited the revised options for contribution on full salary beyond the wage limit from the employees through the Employer Corporation consequent to the said amendment. However, subsequently when it was brought to the notice of the Employer, the matter was taken up with the Employees Provident Organization for allowing the contribution on the full salary beyond the wage limit out of the Employer's share which had already been deposited from the very inception of the scheme i.e. 16.11.1995 and required only the bifurcation of proportionate amounts under the proper heads of accounts of Provident Fund and Pension Fund for which the Employer was ready and willing in the best interest of its employees as had already been consented vide letter dated 22.03.2005.

14. The learned writ Court concluded that the writ petitioners' right from the very inception had been contributing on the full salary at that time which fact was also admitted by the proforma respondent. But, the Employees Provident Organization, who was administering this scheme did not invite the revised options for contribution on full salary beyond the wage limit from the employees through their Employer-Corporation consequent to the amendment carried out in the scheme vide amendment dated 28.02.1996. However, subsequently when it was brought to the notice of the writ petitioners, they took up the matter with the Employees' Provident Organization for allowing the contribution on the full salary beyond the wage limit which was deposited from the very inception of the scheme i.e. 16.11.1995.

15. After making these observations, the learned writ Court allowed the writ petitions by holding that no fault can be found with the writ petitioners because of the fault or inaction on the part of the appellants or any other instrumentality of the State because as soon as the Employer came to know about the amendment in the scheme, it deposited its share right from the inception of the scheme and it was observed:-

> "7.....Therefore, the lapse of the respondents would cost dearer to its employees covered under the benevolent legislation without any lapse on their part. Therefore, the respondents are hereby directed to re-calculate and re-adjust the already deposited amount of employers' share contribution under the appropriate Head of Accounts of 'Pension Fund Account' and Provident Fund Account' from the wage limit from the date of enforcement of the Pension Scheme in the year 1995, as per the subsequent amendment carried out in the year 1996 (Annexure P-2 referred above). However, it is made clear that these directions are only for the benefits of the petitioners in the above mentioned

petition in peculiar facts and circumstances and shall not be treated as a precedent."

16. The appellants have taken exception and questioned these findings on the ground that once the writ petitioners have failed to make remittances through their Employer on the higher wages being drawn by them, they could not be allowed to retrospectively contribute on the higher wage in order to increase the payable pension amount. It is further argued that it was only the employees, who had contributed as per the 1995 scheme, who alone could be permitted the benefit of the said scheme and the benefit could not be extended to the employees, who had not opted or contributed under this scheme. It is also argued that the writ petitioners could not have filed the writ petitions by pleading ignorance of law.

17. On the other hand, Shri Subhash Sharma, learned counsel for the respondents has vehemently argued that no fault can be found with the judgment rendered by the learned writ Court as the same is just, legal and equitable and it is the appellants, who have drawn cut-off date only to deny the writ petitioners their due.

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

18. From the perusal of the pleadings of the writ petitions, the first and foremost question which, according to us, was required to be determined by the learned writ Court was as to whether the writ petitioners could plead and base their entire claim on ignorance of the scheme of 1996.

19. The Employees' Provident Funds and Miscellaneous Provisions (Amendment) Act, 1996 came into force on 16th November, 1995 and certain changes in the Employees Provident Funds and Miscellaneous Act, 1952 were brought about. Section 6A provided for Employees' Pension Scheme and reads thus:-

> "6A. Employees' pension Scheme. (1) The Central Government may, by notification in the Official Gazette, frame a scheme to be called the Employees' Pension Scheme for the purpose of providing for-
>
> (a) superannuation pension, retiring pension or permanent total disablement pension to the employees of any establishment or class of establishments to which this Act applies; and
>
> (b) widow or widower's pension, children pension or orphan pension payable to the beneficiaries of such employees.
>
> (2) Notwithstanding anything contained in section 6, there shall be established, as soon as may be after framing of the Pension Scheme, a Pension Fund into which there shall be paid, from time to time, in respect of every employee who is a member of the Pension Scheme,-
>
> (a) such sums from the employer's contribution under section 6, not exceeding eight and one- third per cent, of the basic wages, dearness allowance and retaining allowance, it any, of the concerned employees, as may be specified in the Pension Scheme;
>
> (b) such sums as are payable by the employers of exempted establishments under sub- section (6) of section 17;
>
> (c) the net assets of the Employees' Family Pension Fund as on the date of the establishment of the Pension Fund;

(d) such sums as the Central Government may, after due appropriation by Parliament by law in this behalf, specify.

(3) On the establishment of the Pension Fund, the Family Pension Scheme (hereinafter referred to as the ceased scheme) shall cease to operate and all assets of the ceased scheme shall vest in and shall stand transferred to, and all liabilities under the ceased scheme shall be enforceable against, the Pension Fund and the beneficiaries under the ceased scheme shall be entitled to draw the benefits, not less than the benefits they were entitled to under the ceased scheme from the Pension Fund.

(4) The Pension Fund shall vest in and be administered by the Central Board in such manner as may be specified in the Pension Scheme.

(5) Subject to the provisions of this Act, the Pension Scheme may provide for all or any of the matters specified in Schedule III.

(6) The Pension Scheme may provide that all or any of its provisions shall take effect either prospectively or retrospectively on such date as may be specified in that benefit in that scheme.

(7) A Pension Scheme, framed under sub-section (1), shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the scheme or both Houses agree that the scheme should not be made, the scheme shall thereafter have effect only in such modified form or be no effect, as the case may be; so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that scheme."

20. It was pursuant to the provisions of Section 6A of the Amendment Act, 1996 that the Employees' Pension Scheme, 1995 was introduced and published in the gazette of India on 16th November, 1995. It is not in dispute that this scheme was amended w.e.f. 16th March, 1996 vide GSR (General Statutory Rules) No.134 dated 28.02.1996 w.e.f. 16.03.1996.

21. In this background, the question then arises as to what would be the effect of the publication of the scheme by way of notification in the official gazette. This question need not detain us any longer in view of three Judges Bench decision of the Hon'ble Supreme Court in ***Union of India and others*** *versus* ***Ganesh Das Bhoj Raj (2000) 9 SCC 461,*** wherein the Hon'ble Supreme Court held that it was an established practice that the publication in the official gazette was an ordinary method of bringing a rule or subordinate legislation to the notice of the people concerned and individual service of a general notification on every member of the public was not required and the interested person could acquaint himself with the contents of the notification published in the gazette. This was the usual method followed since years and there was no other mode prescribed and, therefore, the notification would come into operation as soon as it is published in the gazette. It is apt to reproduce the following observations:-

"11. In our view, as noted above, in Pankaj Jain Agencies versus Union of India (1994) 5 SCC 198 the Court directly dealt with a similar contention and after relying upon the decision in the case of State of Maharashtra versus Mayer Hans George AIR 1965 SC 722 rejected the same. That decision is

followed in I.T.C. Ltd. versus CCE (1996) 5 SCC 538 and other matters. Hence, it is difficult to agree that the decision in Pankaj Jain Agencies case was not helpful in deciding the question dealt with by the Court. Section 25 of the Customs Act empowers the Central Government to exempt either absolutely or subject to such conditions, from the whole or any part of the duty of customs leviable thereon by a notification in Official Gazette. The said notification can be modified or cancelled. The method and mode provided for grant of exemption or withdrawal of exemption is issuance of notification in the Official Gazette. For bringing Notification into operation, the only requirement of the section is its publication in the Official Gazette and no further publication is contemplated. Additional requirement is that under Section 159 such notification is required to be laid before each House of Parliament for a period of thirty days as prescribed therein. Hence, in our view Mayer Hans George (supra) which is followed in the Pankaj Jain Agencies case represents the correct exposition of law and the Notification under Section 25 of the Customs Act would come into operation as soon as it is published in the Gazette of India i.e. the date of publication of the Gazette. Apart from prescribed requirement under Section 25, usual mode of bringing into operation such notification followed since years in this country is its publication in the Official Gazette and there is no reason to depart from the same by laying down additional requirement.

12. In the case of Mayer Hans George, it was contended that the notification under Section 8 of the Foreign Exchange Regulation Act, 1947 of the Reserve Bank of India could not be deemed to have been in force and operation merely from the date of issue or publication in Gazette. It would have effect only from the date on which the person against whom it is sought to be enforced had knowledge of its making. A contention was raised as regards the precise point of time when a piece of delegated legislation like exemption notification by the Reserve Bank would in law take effect. In support of that contention reliance was placed on the decision of Privy Council in Lim Chin Aik v. R.1963 AC 160. The Court negatived the said contention by holding that in the first place the order of Minister dealt with by the Privy Council was never published since admittedly it was transmitted to the Immigration official who kept it with himself. The Court observed: -

> "But in the case on hand, the notification by the Reserve Bank varying the scope of the exemption, was admittedly 'published' in the Official Gazette-- the usual mode of publication in India, and it was so published long before the respondent landed in Bombay. The question, therefore, is not whether it was published or not, for in truth it was published, but whether it is necessary that the publication should be proved to have been brought to the knowledge of the accused.... Lastly, the order made by the Minister in the Singapore case, was one with respect to a single individual, not a general order, whereas what we have before us is a general rule applicable to every person who passes through India. In the first case, it would be reasonable to expect that the proper method of acquainting a person with an order which he is directed to obey is to serve it on him, or so publish it that he would certainly know of it, but there would be no question of individual service of a general

> notification on every member of the public, and all that the subordinate law-making body can or need do, would be to publish it in such a manner that persons can, if they are interested, acquaint themselves with its contents."

13. The Court further referred to the judgment of Bailhache J. in Johnson V. Sargant & Sons (1918) 1 KB 101 and did not approve the observation made therein to the effect that the order was not known until the morning of May 17 but it came into operation before it was made known. On the contrary, Court held that there was great force in learned authors (Prof. C.K. Allen) following comment on reasoning in Sargant case:

> "This was a bold example of judge-made law. There was no precedent for it, and indeed a decision, Jones v. Robson (1901) 1 KB 673 which, though not on all fours, militated strongly against the judges conclusion, was not cited; nor did the judge attempt to define how and when delegated legislation became known. Both arguments and judgment are very brief. The decision has always been regarded as very doubtful, but it never came under review by a higher court."

The Court also held that:

> "It is obvious that for an Indian law to operate and be effective in the territory where it operates viz., the territory of India it is not necessary that it should either be published or be made known outside the country. Even if, therefore, the view enunciated by Bailhache, J. is taken to be correct, it would be apparent that the test to find out effective publication would be publication in India, not outside India so as to bring it to the notice of everyone who intends to pass through India. It was published and made known in India by publication in the Gazette on the 24th November and the ignorance of it by the respondent who is a foreigner is, in our opinion, wholly irrelevant."

The Court further observed: -

> " [B]ut where there is no statutory requirement we conceive the rule to be that it is necessary that it should be published in the usual form i.e., by publication within the country in such media as generally adopted to notify to all the persons concerned in the making of rules. In most of the Indian statutes, including the Act now under consideration, there is provision for the rules made being published in the Official Gazette. It therefore stands to reason that publication in the Official Gazette viz., the Gazette of India is the ordinary method of bringing a rule or subordinate legislation to the notice of the persons concerned."

14. From the aforesaid judgment it can be stated that it is established practice that the publication in the official gazette, that is, Gazette of India is ordinary method of bringing a rule or subordinate legislation to the notice of the persons concerned. Individual service of a general notification on every member of the public is not required and the interested person can acquaint himself with the contents of the notification published in the gazette. It is the usual mode followed since years and there is no other mode prescribed

under the present statute except by the amendment in the year 1998 by Bill 21 of 1998."

22. A similar issue came up before this Court in a batch of appeals, the lead whereof was ***LPA No.89 of 2012***, titled ***Sainik Schools Society and anr.*** *versus* ***R.C.Sharma***, decided on 17th June, 2014, where the teachers of the Sainik School had approached this Court and claimed that they were though entitled to pension under the CPF Scheme w.e.f. 01.04.1988, however, being unaware of the scheme, they could not apply within the stipulated time. This Court held that there was no requirement of the scheme that the school was under any obligation calling upon them (petitioners therein) for exercising their options under the scheme. This Court observed as under:-

"**22.** Once it is not disputed that the writ petitioners were in service at the time when the relevant SRO had been issued then there was no requirement of the scheme that the school would be required to give individual notices to the writ petitioners for exercising their option for the pension scheme and also for asking the writ petitioners to refund the employees contribution of CPF at that stage. Moreover, when the notice or knowledge of the pension scheme can be reasonably inferred or gathered from the conduct of the writ petitioners in the ordinary course of business and from surrounding circumstances, then it would constitute sufficient notice in the eyes of law. Reliance in this behalf can conveniently be placed upon the judgment of the Hon'ble Supreme Court in ***Pepsu Road Transport Corporation, Patiala vs. Mangal Singh and Others (2011) 11 SCC 702*** wherein it has been held as follows:

"52. The respondents in all these appeals, before us, have made a claim for pensionary benefits under the Pension Scheme for the first time only after their retirement with an unreasonable delay of more than 8 years. It is not in dispute, in some appeals, that the respondents never opted for the Pension Scheme for their alleged want of knowledge for non-service of individual notices. In other appeals, although respondents applied for the option of the Pension Scheme but indisputably never fulfilled the quintessential conditions envisaged by the Regulations which are statutory in nature.

53. The learned counsel for the respondents in support of their contention for want of knowledge of the Pension Scheme due to non-service of individual notices relied on the decision of this Court in Dakshin Haryana Bijli Vitran Nigam v. Bachan Singh, (2009) 14 SCC 793. The said decision is clearly distinguishable on facts. In that case, the appellant, Haryana State Electricity Board, had issued instructions dated 23.06.1993 and circular dated 09.08.1994 in order to provide an option to the employees for pensionary benefits in lieu of their work charged service with an express condition of noting of instructions from all the employees and acknowledging the receipt of the letter. In these appeals, before us, there is no such condition of noting from the employees or serving individual notices in the Pension Scheme or Regulations. Therefore, in our opinion, Bachan Singh's decision will not assist the respondents.

54. In our view, in the facts and circumstances of the present case and in view of absence of such condition in the scheme, it is not necessary for the Corporation to give an individual notice to respondents

for exercising of option for pension Scheme and also for asking respondent to refund the employers contribution of C.P.F. at each stage. Furthermore, when notice or knowledge of the Pension Scheme can be reasonably inferred or gathered from the conduct of the respondents in their ordinary course of business and from surrounding circumstances, then, it will constitute a sufficient notice in the eyes of law.

55. In Union of India v. M.K. Sarkar, (2010) 2 SCC 59, this Court has held: (SCC p.68, paras 21-23)

> *"21. The Tribunal in this case has assumed that being "aware" of the scheme was not sufficient notice to a retiree to exercise the option and individual written communication was mandatory. The Tribunal was of the view that as the Railways remained unrepresented and failed to prove by positive evidence, that the respondent was informed of the availability of the option, it should be assumed that there was non-compliance with the requirements relating to notice. The High Court has impliedly accepted and affirmed this view. The assumption is not sound.*
>
> *22. The Tribunal was examining the issue with reference to a case where there was a delay of 22 years. A person, who is aware of the availability of option, cannot contend that he was not served a written notice of the availability of the option after 22 years. In such a case, even if Railway Administration was represented, it was not reasonable to expect the department to maintain the records of such intimation(s) of individual notice to each employee after 22 years. In fact by the time the matter was considered more than nearly 27 years had elapsed. Further when notice or knowledge of the availability of the option was clearly inferable, the employee cannot after a long time (in this case 22 years) be heard to contend that in the absence of written intimation of the option, he is still entitled to exercise the option.*
>
> *23. This Court considered the meaning of "notice" in Nilkantha Sidramappa Ningashetti v. Kashinath Somanna Ningashetti, AIR 1962 SC 666. This Court held: (AIR p. 669, para 10)*
>
> *"10. We see no ground to construe the expression `date of service of notice' in Column 3 of Article 158 of the Limitation Act to mean only a notice in writing served in a formal manner. When the legislature used the word `notice' it must be presumed to have borne in mind that it means not only a formal intimation but also an informal one. Similarly, it must be deemed to have in mind the fact that service of a notice would include constructive or informal notice. If its intention were to exclude the latter sense of the words `notice' and `service' it would have said so explicitly."*

> *56. Regulation 4 (iii) of the Regulations is a deeming provision to the effect: firstly, if an employee fails to exercise his option within a period of 6 months from the date of issue of these Regulations and; secondly, even on exercise of option, if an employee fails to refund the amount of advance taken from employers contribution of the C.P.F. within 6 months from the date of issue of these Regulations, then it shall be deemed that employee has opted to continue for the existing C.P.F. benefit. Therefore, the failure on the part of the respondents to opt for the Pension Scheme and refund the advance taken from the employer's contribution of C.P.F. will disentitle them from claiming any benefit under the Pension Scheme. Therefore, we cannot sustain the Judgment and order passed by the High Court."*

23. It was further held that it cannot be laid down as a general rule that each and every circular/instruction issued by the Employer giving additional monetary benefits to the retired employees must be published in newspaper and that in the absence of such publication or personal communication to the retired employee would entitle him to seek intervention of the Court after lapse of many years.

24. In view of the aforesaid exposition of law, it can safely be concluded that once the notification is published in the official gazette, then the same is a notice to all the persons concerned and, therefore, there is no further requirement of individual service of a general notification on every member of the public and interested person(s) can acquaint himself with the contents of the notification published in the gazette.

25. Therefore, we have no hesitation in concluding that the petitions filed by the writ petitioners were itself not maintainable as the same were entirely based on the plea of ignorance of the scheme 1996 which admittedly had been published in the gazette in accordance with law. We further conclude that once the notification had been published in the official gazette there was no further requirement of individual service of a general notification on the writ petitioners.

26. The learned counsel for the writ petitioners would, however, argue that the cut-off date of the amended scheme was itself ultravires and reliance in this behalf has been placed upon the judgment of the Division Bench of the Kerala High Court in ***The Union of India and another*** *versus* ***A.K.Jayappan and others***, decided on 05.03.2013, whereby the Division Bench upheld the findings of the learned writ Court and held that proviso to Clause 11(3) of the scheme that had been added by GSR No.134 dated 28.02.1996 with effect from 16.03.1996 was only prospective in nature. It was further pointed out by the learned counsel for the respondents that the aforesaid judgment is now pending consideration before the Hon'ble Supreme Court.

27. Indisputably, the writ petitioners have not challenged the cut-off date, therefore, the question arises as to whether the writ petitioners can derive any benefit on the basis of the aforesaid judgment without there being any specific pleading or relief sought in this behalf in the petition.

28. It is more than settled that the Court cannot travel beyond the pleadings and relief sought. This view of ours is fortified by the judgment of the Hon'ble Supreme Court in

State of J.&K. & Anr. *versus* ***Ajay Dogra AIR 2011 SC 1830***. It is apt to reproduce paras 14, 15, 16, 22 and 23 of the judgment herein:-

> *"14. A perusal of the writ petitions would prove and establish that the only prayer made in those writ petitions was to grant relaxation to the criteria and standard of physical conditions prescribed for and required to be fulfilled. In aforesaid writ petitions, neither the validity of Rule 176 with regard to physical conditions were challenged nor such conditions prescribed in the advertisement were challenged on the ground of its validity contending inter alia that there is no nexus of the said conditions with the object sought to be achieved. We find that the physical conditions prescribed in the advertisement are in consonance with Rule 176 of the Police Rules which are statutory Rules. No where in the pleadings, it is stated that such conditions prescribed are illegal or invalid. Constitutional validity of the aforesaid Rule was never challenged in any of the writ petitions.*
>
> *15. The High Court, however, without there being any pleading in that regard went beyond the pleadings and held that such physical conditions laid down are bad and arbitrary as what has been prescribed have no nexus with the object sought to be achieved.*
>
> *16. The aforesaid decision rendered by the High Court is contrary to and inconsistent with the law laid down by this Court in the case of V.K. Majotra v. Union of India & Ors., reported in (2003) 8 SCC 40 : (AIR 2003 SC 3909 : 2003 AIR SCW 4504). In the said decision also what was urged before this Court was neither raised in the pleadings nor it was urged before the High Court by any of the parties to the writ petition. In the said case, the issue was as to whether a person not having judicial experience could be appointed as Vice Chairman of the Central Administrative Tribunal. This Court found that the aforesaid issue was not raised in the writ petition and similarly, vires of the section was also not challenged. This Court in the aforesaid context, held as follows:-*
>
> > *8. .....It is also correct that vires of Sections 6(2)(b), (bb) and (c) of the Act were not challenged in the writ petition. The effect of the direction issued by the High Court that henceforth the appointment to the post of Vice Chairman be made only from amongst the sitting or retired High Court judge or an advocate qualified to be appointed as a judge of the High Court would be that Sections 6(2)(b), (bb) and (c) of the Act providing for recruitment to the post of Vice Chairman from amongst the administrative services have been put to naught/obliterated from the statute book without striking them down as no appointment from amongst the categories mentioned in clauses (b), (bb) and (c) could now be made. So long as Sections 6(2)(b), (bb) and (c) remain on the statute book such a direction could not be issued by the High Court....."*
>
> *In paragraph 9 of the said decision, this Court has discussed the issues in the following terms:-*
>
> > *"9. We are also in agreement with the submissions made by the counsel for the appellants that the High Court exceeded its jurisdiction in issuing further directions to the Secretary, Law Department, Union of India, the*

Secretary, Personnel and Appointment Department, Union of India, the Cabinet Secretary of the Union of India and to the Chief Secretary of the U.P. Government as also to the Chairman of CAT and other appropriate authorities that henceforth the appointment to the post of presiding officer of various other Tribunals such as CEGAT, Board of Revenue, Income Tax Appellate Tribunal etc. should be from amongst the judicial members alone. Such a finding could not be recorded without appropriate pleadings and notifying the concerned and affected parties."

17 to 21. .....

22. In our considered opinion, the ratio of the aforesaid decisions of this Court are squarely applicable to the facts of the present case. There was no challenge to the constitutional validity of Rule 176 of the Police Rules so far as it relates to prescribing physical conditions regarding the height and the chest. The stipulations in the advertisement regarding standard of physical condition was also not challenged in the Writ Petition. The High Court was not justified in going into the validity of the aforesaid criterion in absence of any such challenge. The High Court also has not specifically declared the Rule prescribing minimum height standard and chest standard ultra vires and, therefore, so long as that Rule exists in the statute book, no such direction as issued by the High Court could be issued. Consequently, the directions issued by the High Court in the present case are required to be set aside.

23. We, therefore, hold that the High Court was not justified to decide the validity of the aforesaid Rule and the advertisement without there being any challenge to the same. We also hold that it was not appropriate for the High Court to set aside the said conditions which are mandatory in nature."

29. The Hon'ble Supreme Court in ***Bachhaj Nahar*** *versus* ***Nilima Mandal & Ors. AIR 2009 SC 1103*** held that the Court cannot make out a case not pleaded and grant relief not sought for. It is apt to reproduce para 12 of the judgment herein:-

"12. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in Bhagwati Prasad and Ram Sarup Gupta (supra) referred to above and several other decisions of this Court following the same cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that

basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo motu."

30. The aforesaid being the settled position of law, it can safely be concluded that this Court cannot travel beyond the pleadings and relief and cannot therefore grant relief which has neither been pleaded nor claimed in the writ petitions.

31. Having observed so, we find merit in these appeals and the same are accordingly allowed and the judgment passed by the learned writ Court is set aside, leaving the parties to bear their own costs. Pending application (s), also stand disposed of. The Registry is directed to place a copy of this judgment on the files of connected matters.

****

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

Shanti Niketan College of Pharmacy ...Petitione

Versus

State of H.P. and others ....Respondents.

CWP No. 2042 of 2014
Judgment reserved on: 07.07.2015
Date of Decision : July 22, 2015.

Constitution of India, 1950- Article 226- AICTE had approved the institute of the petitioner for running two years pharmacy course- affiliation was granted to the petitioner with Himachal Pradesh Takniki Shiksha Board-extension was granted to run the course- a fact finding report was prepared by Director Technical Education on which the approval was withdrawn- an expert visit committee (E.V.C) was constituted, which conducted the inspection – a show cause notice was issued to the petitioner- the petitioner pleaded that it came to know about the withdrawal of the approval after the receipt of show cause notice- held that the college was running pharmacy course since, 2005- the extension was granted on the basis of infrastructure available with the college- the show cause notice was issued on the basis of deficiencies pointed out in E.V.C. report- a reply pointing out the compliance was not taken into consideration- the deficiencies pointed out are not such in whose absence the institution cannot be run – petition allowed and six months time granted to the petitioner to remove the deficiencies (Para 15-26)

For the Petitioner : Mr. B.C. Negi, Senior Advocate, with Mr. Pranay Pratap Singh, Advocate.

For the respondents :Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr. Romesh Verma, Addl. Advocate Generals and Mr. J.K.Verma, Dy. Advocate General, for respondents No. 1 and 2.
Mr. Surender Sharma, Advocate, for respondent No.3.
Mr. Vijay Arora, Advocate, for respondent No.4.
Mr. Tara Singh Chauhan, Advocate, for respondent No.5.
Ms. Suman Thakur, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This writ petition has been filed with the following reliefs:

(i) Issue a writ of certiorari to quash Annexure P-17 i.e. order dated 10.03.2014 and withdrawal of approval for the session 2013-14 dated 29.04.2013.

(ii) Issue a writ of mandamus directing the respondent authorities not to give effect to Annexure P-17 i.e order 10.03.2014 and withdrawal of approval for the session 2013-14 dated 29.04.2013.

(iii) Issue a writ of mandamus directing the respondent authorities to place on record withdrawal of approval for the session 2013-14 dated 29.04.2013.

2. It is not in dispute that the relief's as sought for have in fact with the passage of time been rendered academic, however, there are certain lis-pendence issues which still require our consideration.

The brief facts as are necessary for the adjudication of this case may be noticed.

3. In the year 2005, the AICTE (respondent No.4) approved the institute of the petitioner for running two years Pharmacy course with an annual intake capacity of 40 students.

4. The petitioner vide notification dated 26.4.2007 was granted affiliation with the Himachal Pradesh Takniki Shiksha Board with the condition that the examination would be conducted by the Board if the course sought to be taught is approved by the Pharmacy Council of India.

5. It is not in dispute that ever-since from the year 2005 the petitioner-institute was, from time to time, granted extension of approvals to run the courses on the basis of which the petitioner continued to run the courses. However, a fact finding report dated 4.3.2013 was prepared by the Director (Technical Education), Government of Himachal Pradesh and based on that the approval for the session 2013-14 was withdrawn vide letter dated 29.4.2013.

6. Pursuant to the aforesaid report, an expert visit committee was constituted to verify the facts, which conducted its inspection on 19.11.2013, on the basis of which the respondent No.4 issued a show cause notice dated 13.12.2013 to the petitioner. It is after receipt of this show cause notice that the petitioner alleged that it came to know for the first time that the affiliation has been withdrawn by the respondent No.4 vide letter dated 29.4.2013.

7. Based upon the withdrawal of approval dated 29.4.2013 and the show cause notice dated 13.12.2013, the respondent No.4 vide its order dated 10.3.2014 directed the maintenance of status quo, which constrained the petitioner to file the instant writ petition.

8. For completion of facts, it may be mentioned that the order dated 10.3.2014 (Annexure P-17) was kept under eclipse by this Court vide its order dated 3.4.2014.

9. The only defence taken by respondents No. 1 and 2 in their reply to the petition is that the matter with regard to AICTE/PCI approvals in respect of the petitioner College is already subjudice before this Court in CWP No. 5600 of 2011 and CWP No. 2042 of 2014 and, therefore, the admission to Diploma Pharmacy course for the year 2014-15 shall be subject to the approval/affiliation of AICTE/PCI/Board and orders of this Court.

10. The respondent No.3 in its reply has highlighted certain acts of omissions on behalf of Shakti Chand (Ex-Chairman of the petitioner-Society) and has averred that there is a family dispute regarding the petitioner No.1 which is subjudice in the Court of Civil Judge, Senior Division, Court No.2, Mandi.

11. The respondent No.4 in its reply has raised certain preliminary objections. However, the main thrust of this respondent is that it is a statutory body and has passed the orders regarding the withdrawal of approval on the basis of the report submitted by the Himachal Pradesh State Board of Technical Education (respondent No.3) wherein it had recommended the cancellation of the approval of the petitioner society vide letter dated 4.3.2013 informing that a litigation regarding the management of the society was subjudice and there is membership and land related disputes and financial irregularities committed in the society.

12. The respondent No.5 which is the H.P. Technical University has filed its reply wherein it has been stated that since no action of this respondent was under challenge, therefore, the writ petition was not maintainable.

13. During the pendency of the petition, one Jitender Kumar moved an application for impleadment and vide order dated 16.12.2014 he was ordered to be impleaded as party respondent No.6 subject to all just exceptions.

14. The respondent No.6 has filed reply to the writ petition and it appears that this respondent has his own axe to grind as he is claiming interest in the administration of the society rather then having anything to do with the present lis. He has in fact questioned the locus of the administrator to represent the society and would claim that it was high time that the administrator is removed as his appointment was only for a period of six months.

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

15. The relevant portion of the order dated 10.3.2014 whereby status quo was ordered to be maintained by respondent No.3 reads thus:

> *"7. The institute was issued Show Cause Notice vide letter dated 13/12/2013 and the institute submitted its reply vide letter dated 23.12.2013. The matter was placed before the Standing Committee for decision and 25.2.2014.*
>
> *8. The Committee recommended as "Present Status quo to be maintained "**Withdrawn" and set to "0" zero intake**" for **Shanti Niketan College of Pharmacy, Malther, P.O. Ratti, Distt. Mandi (H.P.)***
>
> *9. In view of the report of the HP State Board of Technical Education and in view of the observation/recommendation of SCC dated 25.2.2014, the entire matter in the facts and circumstances mentioned hereinabove has been considered and it has been decided to maintain*

status quo of NO EOA 2013-14 to ***Shanti Niketan College of Pharmacy, Malther, P.O. Ratti, Distt. Mandi (H.P.).***"

16. It is evident from a bare perusal of the impugned order aforesaid that it is devoid of any reason and yet the respondent No.4 based on the report of respondent No.3 has directed the maintenance of status quo. At this stage, we may now take note of the reply of respondent No.3, who in the preliminary submissions has categorically stated as follows:

> *"5. That the Pharmacy Council of India vide letter dated 12.02.2014 (Annexed at Annexure R-3/D) had informed that the inspection of the institution of the petitioner was carried out by the Council and as per the inspection report dated 13th and 14th December, 2013 the academic and infrastructural facilities, available in the institution are adequate for extension of approval and had decided to recommend to the council to extend the approval for D. Pharm course and examination upto the academic session 2014-15 for 60 admissions subject to the outcome of CWP No. 5600/2011, which is pending in this Hon'ble Court."*

From the above, it is apparent that the stand of the respondent No.4 is irreconcilable with that of respondent No.3. Therefore, in such circumstances, it is difficult to appreciate as to on what basis the respondent No.4 directed to maintain the status quo and further on what basis the affiliation was withdrawn.

17. As observed earlier, the impugned order dated 10.3.2014 was already kept under eclipse, but then the difficulty arose when the respondent No.4 vide letter dated 30.4.2015 again rejected the request of the petitioner for extension of approval for the session 2014-15. Even here the only apparent reason for rejecting the extension of approval was the earlier order passed by it on 10.3.2014. This Court, therefore, vide its order dated 27.5.2015 stayed the operation of the order passed by respondent No.4 dated 30.4.2015 (Annexure P-22).

18. The petitioner thereafter moved another application being CMP No. 6807 of 2015 seeking directions to respondent No.3 to grant provisional affiliation for the academic session 2015-16. Though, this application has not been contested by respondent No.3, however, respondent No.4 has filed its reply wherein it is alleged that an Expert Visiting Committee (for short 'EVC') visited the petitioner institute on 23.4.2015 and pointed out several deficiencies and some of which are of mandatory and essential requirements. A copy of the report has also been appended with the reply as Annexure R-3. It is alleged that the matter was placed before the Standing Appellate Committee on 30.4.2015 which was attended by the representatives i.e. Director and Principal of the petitioner-college and after considering all the facts and deficiencies pointed out by the restoration EVC, the Standing Appellate Committee had decided not to issue letter of approval to the petitioner college and recommended the issuance of letter of rejection for the year 2015.

19. Indisputably, the College has been running two years Pharmacy course for the last one decade from the year 2005. It is also not in dispute that ever since the year 2005 the respondent No.4 had of its own and after taking into consideration the infrastructure available with the petitioner granted extension after extension of approval to run the courses for nearly a decade. Even at the time when it directed maintenance of status quo of withdrawal of affiliation, it had not acted of its own but had acted on the so called recommendations of the inquiry reports submitted by the Himachal Pradesh Takniki

Shiksha Board. The comments of EVC even at that stage on the points reported by the Director Himachal Pradesh State Board of Technical Education Department were as follows:

> *"**A.** **Land related documents**:*
>
> *All land related documents are seen and verified w.r.t. that mentioned in EVC report. The land dispute is under legal process.*
>
> ***B.** **Actual location of the Institute:***
>
> *The Institute is located as mentioned in EVC report.*
>
> ***C.** **Admission during last three years:***
>
> *The students admitted are 58, 61 and 59 during 2011-12, 12-13 and 13-14, respectively.*
>
> ***D.** **Existence of Society:***
>
> *The Society has been established and registered (document attached). However, Governing body is not in existence. It is run by the administrator appointed by Government."*

20. Notably, the respondent No.4 while filing its reply to the writ petition had also enclosed a copy of EVC report dated 19.11.2013 as Annexure R-1 on the basis of which it issued show cause notice dated 13.12.2013 and the only deficiencies noted at the relevant time were as follows:

"S.No.	**Deficiency reported by EVC dated 19/11/2013.**
1.	Availability of Language Laboratory (Mandatory as per AICTE Norms) **Not presented – Required Software Not procured**.
2.	Provision of backup power supply **Not presented – Not backup available.**
3.	Barrier free environment and toilets created for physically challenged. (Ramp or Working Lift etc.) **Not available.**
4.	Legal Application S/W – Not ready/Not accepted – **Not available.**
5.	Legal System S/W – Not ready/Not accepted – **Not available.**
6.	Language Laboratory – Not ready/Not accepted – **Not available.**
7.	Library Management Software – **Not ready/Not accepted.**
8.	Office All Inclusive – Not ready/Not accepted – **Area inadequate.**
9.	Cafeteria – Not ready/Not accepted – **Not available.**
10.	Laboratory total Area required Sqm 675 Not ready/Not accepted – **Less number than required.**
11.	Animal House – Not ready/Not accepted – **Not available.**
12.	Seminar Hall – Not ready/Not accepted – **Not available."**

21. Here it may be noted that it was not on account of any serious deficiency in infrastructure that the show cause notice had been issued, but the reasons for issuance of the show cause notice were as follows:

> *"10. In view of the facts and circumstances mentioned above, you are hereby directed to Show Cause as to why:*
>
> *i. It should not be considered that the Institute has failed to disclose factual information and/or suppressed/misrepresented the information under Clause 4.28 of AICTE Regulations 2011 in the application submitted on line on AICTE Web Portal.*
>
> *ii. It should not be considered as violation of the terms and conditions contained in the letter of approval and relevant provisions of AICTE Regulations.*
>
> *iii. Appropriate action should not be initiated against the institution including withdrawal of Approval for non-observance of the terms and conditions of approval process."*

22. In reply to the show cause notice dated 13.12.2013 the petitioner had submitted a detailed reply which reads thus:

> **"<u>Compliance of Deficiency Reported by EVC dated 19/11/2013.</u>**
>
> **1. Availability of Language Laboratory***:*
>
> **Compliance***:-* As this was mandatory since two years and since more than two years society dispute is subjudise in High Court of H.P. Till now we were sharing the computer lab as language laboratory, but now we have given the order for set up of language laboratory with required softwares as per the AICTE Norms. (**Ann.-1**).
>
> ***2.*** **Provision of backup power supply:**
>
> **Compliance:** As the case of Himachal Pradesh State, there is rare power cut. But now we have purchased a genset. Copy of purchase invoice is attached. (**Ann.-2**)
>
> **3. Barrier free environment and toilets created for physically challenged.(Ramp or working lift etc.)**
>
> **Compliance:** As the matter of land is subjudised in court and court has given status quo. So we cannot do any new construction without prior permission of the Court. So in next hearing date we will put this matter before the court to seek permission for construction of ramp or working lift and toilet for physically challenged. So far the now we are not having any admission of the physically challenged.
>
> **4. Legal Application software:**
>
> **Compliance:** We are having maintenance contract of the computer laboratory. So required softwares were provided by the concern firm. Now we have purchased legal application softwares. Purchase invoice is attached. (**Ann.-3).**
>
> **5. Legal System Software:**
>
> **Compliance:** Likewise application software, system software is also provided by the concerned firm. But now we have purchased legal system software. Purchase invoice is attached.(**Ann.-4**).

6. Language Laboratory:

Compliance: At present we are sharing computer lab with language laboratory. We have already marked space for the construction of language laboratory. But as the matter of land is subjudised in court and court given status quo on the land. So we can not do any new construction without prior permission of court. In next hearing date we will put this point before the court to seek permission for construction of language laboratory.

7. Library Management Software:

Compliance: At present we are using a free software namely Library Manager v7.9.1, which was downloaded from net. But now we have given a request to purchase library Management software.(**Ann.-5).**

8. Office all inclusive:

Compliance: At present we are having a sufficient space for extension of the existing office. Previously we had planned of construction, but as the matter of land is subjudised in the court and court have given status quo on the land, so we can not do any new construction without prior permission of court. In next court hearing we will put this matter also to seek permission for the construction of office all inclusive as per the AICTE Norms.

9. Cafeteria:

Compliance: At present we are having a small canteen but the area is not as per AICTE Norms. Likewise status quo order of the court, we will put this matter also to seek the permission for the construction of the cafeteria as per the AICTE Norms.

10. Laboratory total area:

Compliance: As the college is running since 2006 and the construction of building was done as per the Pharmacy Council India Norms. As per the PCI norms we are having the sufficient number of laboratory with adequate area. In future, we can expand the number of laboratory after permission of court. (**Ann.-6**).

11. Animal House:

Compliance: As per the Pharmacy Council of India animal study is banned in the D-Pharmacy course and the practicals are done with the help of software.

12. Seminar Hall:

Compliance: At present we use classrooms as seminar hall whenever required. Previously, provision was made for construction of seminar hall but due to status quo order of the court, construction could not be done. Now we will put this matter also before the court to seek permission for construction of Seminar Hall. (**Ann.-7**)."

23. The deficiencies as are now sought to be pointed out are the same which had earlier been pointed out in the EVC report dated 19.11.2013 and prior to that a detailed reply to the deficiencies pointed out had already been submitted by the petitioner on

4.3.2013, which reply till date does not appear to have been taken into consideration or else the approval would not have been withdrawn.

24. Though, as observed earlier, the original cause of action whereby the petitioner had challenged the orders dated 10.3.2014 and 29.4.2013 has with afflux of time rendered been academic but then the respondent No.4 during the pendency of the petition has again withdrawn the affiliation. The action of respondent No.4 is hit by the doctrine of lis-pendence and cannot be sustained for the reasons already set out hereinabove.

25. Before parting, it may be observed that the so called deficiencies as pointed out by the respondents are not such in whose absence the institute cannot run. After all, the same is successfully being run for the last more than one decade and, therefore, in such circumstances, the refusal on the part of respondent No.4 to extend the approval cannot be countenanced.

26. But at the same time even the petitioner cannot be permitted to run the institute without satisfying atleast those conditions as are absolutely necessary for running the institute. Therefore, in the given facts and circumstances, we grant the petitioner six months' time to remove the deficiencies as are absolutely necessary for establishing and running the institution, failing which, the respondents shall be at liberty to withdraw the approval. However, till such time the petitioner shall be permitted to run the course.

27. We may, however, hasten to clarify that before any adverse action like withdrawal of the approval is taken, the respondents shall take into consideration the explanation already offered by the petitioner to the show cause notice dated 13.12.2013 and any other explanation which it may offer, in a logical and rational manner. The respondents would further take into consideration the constraints of the petitioner which have arisen due to pendency of various litigations and would therefore not expect the petitioner to perform what is reasonably not possible.

28. As a sequel to the aforesaid discussion, the present petition is partly allowed in the aforesaid terms and the orders passed by the respondents on 29.4.2013, 10.3.2014 and 30.4.2015 are quashed and set-aside, leaving the parties to bear their own costs. Pending applications, if any, stand disposed of.

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

Subhash Singla son of Shri Jagannath & others ....Petitioners

Versus

State of H.P. and another ....Non-petitioners

Cr.MMO No. 55 of 2015
Order Reserved on 9th July, 2015
Date of Order 22nd July, 2015

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 368, 384, 342, 506 read with Section 34 of IPC- it was pleaded that an affidavit was given by the complainant and the matter has been compromised between the complainant and the accused-held that once charge sheet has been filed in a Court of law, FIR cannot be quashed by the High Court in

exercise of the inherent powers- High court cannot prejudge the issue and cannot conduct a trial -mere settlement between the parties is no ground to quash the proceedings under Section 482 of Cr.P.C.- the petitioner can approach the Magistrate for the discharge - Petition dismissed (Para 5 to 6)

Cases referred:

Nancy Bhatt and another vs. State of H.P. and another, 2015(2) Him.L.R. 1095
P.Susheela vs. University Grant Commission, AIR 2015 SC 1976
State of Punjab vs. Dharam Vir Singh Jethi, 1994 SCC (Cri.) 500
Vineet Narain and others vs. Union of India, (1996)2 SCC 199
Chandra Pradhan vs. Union of India and others, (1996)6 SCC 354
Jakia Nasim Ahesan and another vs. State of Gujarat and others, 2011)12 SCC 302
Narinder Singh and others vs. State of Punjab, JT 2014(4) SC 573
Monica Kumar vs. U.P, (2008)8 SCC 781
Kavita vs. State (Delhi), 2000 Criminal Law Journal 315
Basudev Bhai vs. Bipada Bhajan Puhan, 1997(2) Crimes 331

For the Petitioners:	Mr. Anand Sharma, Advocate.
For Non-petitioner No.1:	Mr. M.L. Chauhan Additional Advocate General with Mr.J.S.Rana, Assistant Advocate General.
For Non-petitioner No.2:	Mr. J.P. Sharma, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Section 482 Cr.P.C. read with Article 227 of Constitution of India for quashing FIR No. 182 dated 4.9.2013 and for quashing consequential criminal proceedings pending before learned Chief Judicial Magistrate Solan H.P. in criminal case titled State of H.P. vs. Subhash Singh Singla and others registered under Sections 368, 384, 342, 506 and 34 IPC.

Brief facts of case

2. Ashok Kumar complainant filed criminal complaint before Incharge P.P. Solan. There is recital in complaint that on dated 3.9.2013 at 10 PM the complainant was standing nearby his vehicle. There is recital in complaint that one car came from vegetable market and stopped nearby the vehicle of complainant. There is recital in complaint that Anita and her son Vishal and 3-4 boys were sitting in the vehicle. There is recital in complaint that thereafter Smt. Anita boarded down from vehicle and threatened the complainant and inquired from complainant as to when complainant would pay her money and money of Balaji. There is further recital in complaint that thereafter Anita told the complainant to sit in her vehicle. There is further recital in complaint that thereafter complainant sat in the vehicle and vehicle was brought to Kandaghat. There is recital in complaint that thereafter complainant was brought in the hotel and he was threatened to withdraw criminal case. There is further recital in complaint that accused are residents of Punjab and they would lift the complainant from hardened criminals. There is also recital in complaint that complainant had filed the criminal complaint against Balaji Finance Company. There is further recital in complaint that thereafter accused at 11.30 night dropped the complainant at Chambaghat and thereafter FIR No. 182 dated 14.9.2013 was

registered and investigation was conducted. After investigation, criminal challan was filed against accused persons under Sections 368, 384, 342, 506 and 34 IPC before learned Chief Judicial Magistrate, Solan on dated 15.1.2014.

3. Court heard learned counsel appearing for the petitioners and learned Additional Advocate General appearing on behalf of non-petitioner No.1 and also heard learned Advocate appearing on behalf of non-petitioner No.2 and also perused the entire record carefully.

4. Following points arise for determination in present case:-

1. Whether FIR No. 182 of 2013 dated 4.9.2013 and consequential criminal proceedings are liable to be quashed after filing report of police officer under Section 173 of Code of Criminal Procedure 1973 on completion of investigation in the competent Court of law in view of ruling of H.P. High Court reported in 2015(2) Him.L.R. 1095 titled Nancy Bhatt and another vs. State of H.P. and another?
2. Final Order.

Reasons for findings on Point No.1.

5. Submission of learned Advocate appearing on behalf of petitioners that FIR No. 182 of 2013 dated 4.9.2013 registered under Sections 368, 384, 342 and 506 read with Section 34 of Indian Penal Code registered in P.S. Sadar Solan be quashed in view of affidavit given by complainant and in view of compromise deed executed between the complainant and accused placed on record is rejected being devoid of any force for the reasons hereinafter mentioned. Hon'ble High Court of H.P. in case reported in ***2015(2) Him.L.R. 1095 titled Nancy Bhatt and another vs. State of H.P. and another*** held that after filing of charge sheet in the competent Court of law FIR could not be quashed by the High Court while exercising the powers under Section 482 Cr.P.C. Petitioners did not place on record any evidence in order to prove that ruling given by Hon'ble High Court of H.P. cited supra was set aside by any competent Court of law. It is well settled law that single bench of same High Court cannot over rule prior ruling given by another single bench of same High Court and it is also well settled law that former ruling of single bench of same High Court is binding upon another single bench of same High Court in subsequent proceedings of same nature. ***(Also see AIR 2015 SC 1976 titled P.Susheela vs. University Grant Commission)*** It is well settled law that FIR is the sheet anchor on the basis of which investigation ensued and once FIR on the basis of which investigation was initiated is culminated into the charge sheet then FIR does not remain the sheet anchor because same alone could not be read and FIR has to be read along with material covered by investigating agency during the course of investigation. It is well settled law that Court in exercise of jurisdiction under Section 482 Cr.P.C. could not undertake pre-trial of criminal case. ***(See 1994 SCC (Cri.) 500 titled State of Punjab vs. Dharam Vir Singh Jethi. See (1996)2 SCC 199 titled Vineet Narain and others vs. Union of India. See (1996)6 SCC 354 titled Chandra Pradhan vs. Union of India and others. Also see (2011)12 SCC 302 titled Jakia Nasim Ahesan and another vs. State of Gujarat and others.)*** It was held in case reported in ***JT 2014(4) SC 573 titled Narinder Singh and others vs. State of Punjab*** that mere settlement between parties would not be ground to quash proceedings under Section 482 of Code of Criminal Procedure. Even criminal offences under Section 368 IPC and under Section 384 IPC are non-compoundable criminal offences as per Section 320 of Code of Criminal Procedure 1973.

6. Another submission of learned Advocate appearing on behalf of the petitioners that criminal proceedings pending before learned Chief Judicial Magistrate Solan be quashed is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that learned Chief Judicial Magistrate Solan on dated 18.2.2014 held that after going through police challan and documents filed therewith there are sufficient materials on record to proceed against accused persons for commission of offence punishable under Sections 368, 384, 342 and 506 read with Section 34 IPC. Court is of the opinion that petitioners have alternative efficacious remedy to plead for discharge of accused under section 239 of Code of Criminal Procedure 1973. It is also well settled law that when alternative efficacious remedy is available then power under Section 482 Cr.P.C. should not be exercised. Power under Section 482 Cr.P.C. is extra ordinary power and it has to be exercised sparingly carefully and with caution. ***(See (2008)8 SCC 781 titled Monica Kumar vs. U.P. See 2000 Criminal Law Journal 315 titled Kavita vs. State (Delhi). See 1997(2) Crimes 331 titled Basudev Bhai vs. Bipada Bhajan Puhan.)*** In view of above stated facts point No. 1 is answered in negative.

Point No. 2 (Final Order)

7. In view of above stated facts petition filed under Section 482 Cr.P.C. is dismissed. However petitioners will be at liberty to raise the plea of discharge before learned trial Court under Section 239 of Code of Criminal Procedure 1973 in accordance with law. Observations made in this order will not effect merits of case in any manner and will be strictly confine for the disposal of petition filed under Section 482 Cr.P.C. File of learned trial Court along with certified copy of order be sent back forthwith. Parties are directed to appear before learned trial Court on date 20.8.2015. Learned Registrar (Judicial) will ensure transmission of file of learned trial Court on date 20.8.2015. Petition is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Chetan Kumar .....Appellant.

Versus

State of H.P. .....Respondent.

Cr. Appeal No. 4203 of 2013.
Reserved on: 08.07.2015.
Date of Decision: 23rd July, 2015.

Indian Penal Code, 1860- Sections 376, 302 and 34- the prosecutrix was found missing- subsequently her dead body was found in half naked condition-the accused were also found missing- accused "C" was arrested and he made a disclosure statement that he could show the place where the dead body was thrown-the cause of death was found to be asphyxia due to hanging-it was also found in postmortem examination that the deceased had suffered multiple injuries - her hymen was found ruptured and vaginal tear was present at the external orifice- it was specifically found by the report of the F.S.L. that blood stains on the clothes of the deceased belonged to the accused-PW-18 also deposed that she had seen the accused in the company of the deceased- disclosure statement made by the accused

completes the chain of the circumstances- held that accused was rightly convicted by the trial Court. (Para 11-15)

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

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

The instant appeal is directed by the accused/appellant against the impugned judgment rendered on 15.10.2013 by the learned Sessions Judge, Solan, District Solan, H.P., in Session Trial No. 11-NL/7 of 2011, whereby, the learned trial Court convicted and sentenced the accused/appellant for his having allegedly committed offences punishable under Sections 376 and 302 read with Section 34 of the IPC.

2. The brief facts of the case are that the complainant Sanarul Sheikh is resident of West Bengal. He is presently working in PNG Sarvotam Company at Baddi and is residing in a Jhuggi at Judi Kalan with his wife and daughter Sarjina Khatun. His wife is also working in a company and likewise, his daughter Sarjina Khatun was also working in a Jeep factory which manufactures Torches. On 10.2.2011, he and his wife had gone to the place of their service but their daughter did not go to work as she was not feeling well. In the evening hours, Sahib Ali and Mithu Munshi came to the complainant, Sanarul Sheikh, where he was working and they told him that his daughter Sarjina Khatun, had been seen by one Kolina with Munirul Sheikh and Chetan Kumar on which he came back to his Jhuggi and found Sarjina Khatun missing. They went in search of her, but could not find her during whole night and day. They had also gone to the rooms of Munirul Sheikh and Chetan Kumar, and they were also found missing. The said Munirul Sheikh was residing in the vicinity of the complainant in a Jhuggi, who is also hailing from West Bengal, whereas Chetan Kumar is a resident of Uttarakhand and both of them were good friends. On 11.2.2011, the police received information through telephone from some unknown person about one dead body of a girl in Balad Khad above the depot of timber and that information was reduced into writing comprised in Ex.PW15/F. On the basis of this information, the SHO, ASI Kalyan Singh, ASI Tapender Singh, HHC Jasbir Singh, C. Sher Singh, Lady constable Leela Devi went to that place in a government vehicle No. HP-12-C-5442 and information about it had also been telephonically given to Dy. Superintendent of Police and Superintendent of Police, Baddi. When they reached the spot they found a dead body of a girl aged about 15 years, which was lying in half naked position near the river. The face of the dead body was towards the ground. Her salwar and underwear had been placed in between her both legs and were entangled in between her thighs and knees. Her neck had been tied with Dupatta and blood was oozing from her mouth and was also lying on the earth. HHC Jasbir Singh was sent to nearby huts to call the persons from there so as to identify the dead body. Many people came from the hut colony and Suresh Kumar from Gram Panchayat had also come there. The information about the dead body had also reached the complainant Sanarul Sheikh, on which he and Sahib Ali, had also visited the spot. The complainant, Sanarul Sheikh, identified the dead body of his daughter Sarjina Khatun, who had then recorded his statement Ex.PW1/A to the police which was reduced into writing and was attested by Inspector/SHO Hem Raj. This statement, Ex.PW1/A was sent to the police station, Barotiwala for registration of the FIR through H.C. Kuldeep Singh

and on receipt of this statement Ex.PW1/A, the FIR Ex.PW7/A was registered in the police station. The police conducted the investigation into the case and during the course of investigation, lifted the blood stained earth and grass from the spot and preserved it in a plastic container and the same was packed in a piece of cloth and was sealed with six seals of seal impression "Y" and was taken into possession vide memo Ex.PW1/B in the presence of Sanaul Sheikh and Suresh Kumar. Controlled sample of soil from some distance had also been lifted and similarly, the same had also been preserved in a similar plastic container and was sealed with six seals of seal impression M and was taken into possession vide memo Ex.PW1/C in presence of witnesses. A pair of lady/s chappal was lying at a distance of about 30-=35 feet away from the dead body which were identified by the complainant Sanarul Sheikh to be of his daughter and the same were also lifted from there and were sealed in a piece of cloth with 7 seals bearing seal impression 'R' and were taken into possession vide memo Ex.PW1/D in the presence of witnesses. The police prepared inquest report and also took the photographs of the dead body with the digital camera. Site plan of the place from where the dead body was recovered had been prepared. The dead body was sent for postmortem examination. During the course of post mortem examination of the deceased seven injuries were found on the body of the deceased. Multiple abrasions and bruise marks were found on her face. Ligature marks extending all around the neck were found therein. Bilateral hyoid bone suffered fracture. Occurrence therein of nasal and oral bleeding was observed. Laceration in anterior part of the tongue had also been detected. Her hymen was found ruptured and vaginal tear was present at the external orifice. Heart, lungs of the deceased had been preserved in a jar. Similarly, the kidney, liver and spleen of the deceased were preserved in a separate jar and her stomach, small intestine, large intestine and uterus were preserved in a separate jar. Her pubic hair and blood sample from her heart were also been preserved. For DNA profiling samples were taken from the skull hair, lips, and skull bone of the deceased. Swabs were also taken from the posterior vaginal wall, cervical swab and from the introtitus of the deceased. All the samples were packed in a cloth and were sealed with seal impression MO CH, Nalagarh and had been handed over to the police for the purpose of chemical anaylsis. The clothes of the deceased and Dupatta had also been sealed separately and were handed over to the police. After post mortem examination, the dead body had been handed over to the complainant vide separate memo. The case property had been deposited with MHC, P.S., Barotiwala. The search for the accused also started. Accused Chetan Kumar was residing in the house of Mahinder Singh, therefore, the said house and the room in which accused Chetan Kumar was residing was searched by the police in the presence of Mahinder Singh and Sahib Ali but the accused Chetan Kumar was found missing and from his room an identity card and a registration letter had been recovered which were taken into possession by the police vide separate memo in presence of the witnesses.

3. During the course of the investigation, it had been found that on 10.2.2011, accused Munirul Sheikh had taken Sarjina Khatun to the room of accused Chetan Kumar. They stayed there for 30 minutes and went away. Accused Chetan Kumar had also followed them and after the occurrence they had run away from Judi-Kalan. Many attempts were made by the police for their search but accused Munirul Sheikh could not be found anywhere. He could not even be found in his home State West Bengal but accused Chetan Kumar had been found in his home town Rampur and was brought to police station, Barotiwala on 10.03.2011 for interrogation and was accordingly arrested. During the course of his interrogation, he had made disclosure statement Ex.PW4/A to the police in the presence of Shri Achhar Pal Kaushal, Pradhan, Gram Panchayat, Batauli Kalan and ASI Kalyan Singh to the effect that he could show and identify the place where the dead body of

Sarjina Khatun had been thrown and on the basis of this statement, he led the police to the place in Balad Khad near Timber Depot and shown the place where he had thrown the dead body of Sarjina Khatun and to this effect the police prepared the identification memo in the presence of witnesses Achhar Pal Kaushal and Suresh Kumar and also prepared the site Plan Ex.PW15/E. It was the same place from where the dead body had been recovered as reflected in the earlier site plan Ex.PW15/B. The accused Chetan Kumar was got medically examined from Dr. Rajinder Kumar and he was found capable of doing sexual intercourse. His pubic hair, semen and blood samples had been preserved for the purpose of DNA profiling and his underwear had also been sealed separately and were handed over to the police and same had been deposited by the police with MHC, P.S., Barotiwala. The different case properties deposited with MHC were sent by him to FSL Junga for chemical analysis vide road certificates through constables Chander Shekhar and Balvinder Singh, who deposited these articles with FSL, Junga in the same condition in which they were handed over to them. FSL, Junga had sent the reports Ex.PW10/B to Ex.PW10/H and Ex.PW10/J. The reports of the FSL, Junga were shown to the doctor, who had conducted postmortem of the deceased and then the doctor had given final opinion that human blood and semen had been detected on vaginal swab of Sarjina Khatun and that she was subjected to sexual intercourse before her death. The cause of death was opined to be asphyxia owing to hanging and duration between the injury and death being immediately within few minutes and between death and post mortem the duration being 12 to 48 hours.

4. 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 Court against accused Chetan Kumar only since other co-accused Munirul Sheikh could not be arrested despite best efforts put in by the police and he stood declared as proclaimed offender.

5. Accused/appellant Chetan Kumar was charged for his having committed offences punishable under Sections 376, 302 read with Section 34 of the IPC by the learned trial Court to which he pleaded not guilty and claimed trial.

6. In order to prove its case, the prosecution examined 20 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 in defence examined one witness.

7. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant.

8. The accused/appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. The learned counsel appearing for the appellant has concertedly and vigorously contended that the findings of conviction 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 conviction be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

9. On the other hand, the learned Assistant Advocate General has with considerable force and vigour, contended that the findings of conviction 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.

10. 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.

11. Both, accused/appellant Chetan Kumar and accused Munirul Sheikh, were good friends. Accused Chetan Kumar faced trial for his having committed offences punishable under Sections 376, 302 read with Section 34 of the IPC. He stood convicted and sentenced by the learned trial Court. However, co-accused Munirul Sheikh remained under absconsion throughout the period accused Chetan Kumar faced trial. A complaint qua the factum of minor Sarjina Khatun having been subjected to forcible sexual intercourse by both the accused and thereafter hers having come to be put to death by hanging, was lodged by PW-1 Shri Sanarul Sheikh, the father of the deceased Sarjina Khatun. The entire edifice of the prosecution case rests upon circumstantial evidence, hence, entailing the prosecution to prove each of the links in the chain of circumstances. The primary link in the entire chain of circumstances against the accused is harboured upon the motive of both the accused. The motive of both the accused is founded upon theirs having enticed or allured deceased minor Sarjina Khatun with the motive of subjecting her to forcible sexual intercourse. The factum of both having subjected the deceased minor Sarjina Khatun to forcible sexual intercourse stands proved by the testimonies of PW-10 Dr.Jyotsna Gupta and PW-11 Dr. Gagan Jain, who proved postmortem report Ex.PW10/A. They while having conducted the post mortem examination on the body of deceased minor Sarjina Khatun on consummation whereto they prepared Ex.PW10/A, have enunciated therein the factum of occurrence of vaginal injuries on the body of deceased subjected to postmortem besides, they have spelt out in Ex.PW10/A, the factum of the hymen of the deceased minor Sarjina Khatun having stood ruptured as also have pronounced therein the factum of existence of vaginal tear at the external orifice. Moreover, they during the course of their examinations-in-chief have deposed that after receiving the report from the FSL and its unveiling the factum that human blood and semen was detected on exhibit-10 (vaginal swabs of deceased minor Sarjina Khatun), they hence were prodded to conclude that sexual intercourse had taken place. Now, when apart from the factum of formidable opinion having been recorded in Ex.PW10/A qua the deceased having been subjected to forcible sexual intercourse, both PW-10 and PW-11 in Ex.PW10/A have, recorded therein the existence of the following injuries on her person:-

> "1. Bruises and abrasions present on the back of both the shoulders and lumbar region.
>
> 2. Dark brown coloured grazed abrasions present on the scapular area of the back.
>
> 3. Multiple linear abrasions on the back of left upper thigh.
>
> 4. Anteriorly bruises present on the right shoulder.
>
> 5. Multiple bruise marks and abrasions on both arms.
>
> 6. A single dark brown bruise on the right ingunal region.
>
> 7. Bruises also present on the areola of the left nipple (Breast)
>
> Face Injury:- Multiple abrasions and bruise marks on the face.
>
> Neck Injuries:- Ligature mark extending all around the neck.
>
> Bilateral hyoid bone fracture.
>
> Nasal and Oral bleed.
>
> Tongue protrusion.
>
> Laceration in anterior apart of the tongue."

They have deposed that ligature mark was found all around the neck with bilateral hyoid bone fracture. In sequel they have deposed that the cause of demise of deceased minor Sarjina Khatun was asphyxia owing to hanging. The opinion of PW-10 and PW-11 qua the deceased minor having been subjected to forcible sexual inter course besides, thereafter hers having come to be hanged leading to asphyxia has not been shred apart by the defence counsel on his subjecting these witnesses to cross-examination. In sequel, the opinion rendered by PW-10 and PW-11 qua the cause of demise of minor Sarjina Khatun acquires force and vigour. Dupatta, Ex.PW10/5 was tied by the accused around the neck of the deceased minor Sarjina Khatun for hers being hanged with it. Ex.PW10/B, records the fact that the Dupatta used by the accused to hang the deceased minor Sarjina Khatun would beget the ligature marks as found occurring, as spelt out in Ex.PW10/A, all around the neck of the deceased besides, would beget the fracture of her hyoid bone sequelling asphyxia which led to her demise. Besides, with Ex.PW10/B pronouncing the fact that the weight bearing capacity of Dupatta Ex.PW10/5 is 100 kg, consequently, it can be formidably concluded that hence it was the item or the material used by both the accused to hang the deceased minor Sarjina Khatun sequelling asphyxia which begot her demise.

12. The further link evidence which connects the accused/appellant in the commission of the offence for which he stood charged and tried by the learned trial Court, is constituted or comprised in the report of FSL Ex.PW10/F whereunder the Assistant Director, DNA Division, State Forensic Science Laboratory, Junga on analyzing/comparing the blood existing on the clothes {P-12a (shirt) and P1-12b (salwar)} of the deceased with the blood sample of accused Chetan Kumar (Ex.P-3) also sent for analysis to it, has recorded therein a formidable and conclusive opinion that blood stains or smears of blood existing on the clothes of the deceased i.e. shirt and salwar of the deceased belong to the accused. The aforesaid opinion of the FSL comprised in Ex.PW10/F accentuates an inference that the accused was hence last in the company of the deceased especially when the blood stains or blood smears found on the clothes of the deceased which she was last wearing at the time of occurrence, on comparison with the blood sample of accused Chetan Kumar has been opined by the Assistant Director, DNA Division, FSL, Junga to be belonging to the accused Chetan Kumar. The evidence conveying the aforesaid factum constituted in Ex.PW10/F comprises proof of a formidable or potent link in the chain of circumstances for concluding that hence the deceased minor Sarjina Khatun as portrayed by the depositions of PW-10 Dr. Jyotsna Gupta and PW-11 Dr. Gagan Jain, was subjected by the accused to forcible sexual intercourse besides, hanged with Dupatta Ex.PW10/5 begetting asphyxia sequelling her demise.

13. The factum of both the accused having been last seen in the company of deceased Sarjina Khatun for empowering this Court to conclude that the aforesaid factum while comprising also an important link in the chain of circumstances for fostering a deduction that hence the guilt of the accused stands unflinchingly substantiated, is embedded in the testimony of PW-18 Kumari Kolina. She in her deposition recorded on oath is firm and categorical that in the morning of 10.02.2011, she had seen both the accused in the company of deceased minor Sarjina Khatun while they were proceeding towards Wooden bridge. She has continued to depose that when in the afternoon she had gone to bring rice from the shop then accused Chetan met her on the way and when she enquired from him as to where co-accused and Sarjina Khatun were, the accused responded by saying that she had nothing to do with them. She has also deposed that accused Chetan had threatened to kill her, in case, she discloses it to any other person. Furthermore, she has also deposed that Sahib and Mithu met her while they were sitting in a tea shop when she was returning

home and she narrated the entire incident to them, whereafter both of them went to the father of Sarjina Khatun and apprised him. The deposition of PW-18 stands corroborated by the deposition of PW-19 qua the factum of hers having disclosed to him and Sahib the fact of hers having last seen the deceased in the company of the accused. The depositions of both the aforesaid prosecution witnesses do not portray that they bear any animosity towards the accused for hence being constrained to depose against them besides, when their depositions portray a ring of naturalness, obviously then credibility is to be imputed to their testimonies. Moreover, when their testimonies have remained unshred during the course of their exacting cross-examination by the defence counsel, consequently, they reinforcingly acquired a hue of truth or veracity. In aftermath, the factum of the deceased minor Sarjina Khatun having been last seen in the company of the accused stand fortifyingly substantiated. On substantiation of the factum of the accused having been last seen in the company of the deceased, a crucial and formidable link in the chain of circumstances when hence stands convincingly proved by potent evidence necessarily then it is an invincible pointer towards the guilt of the accused.

14. Preponderantly, the accused/appellant during his interrogation recorded a disclosure statement comprised in Ex.PW4/A in presence of PW-4 Achhar Pal Kaushal, Pradhan, Gram Panchayat, Bhatoli Kalan, and ASI Kalyan Singh qua the place where the dead body of deceased minor Sarjina Khatun had been thrown by him. The witnesses to the disclosure statement of accused Chetan Kumar, comprised in Ex.PW4/A, wherein he unveiled his knowledge qua the place where the dead body of the deceased had been thrown by him, in their depositions recorded on oath have proved the factum of the disclosure statement of the accused comprised in Ex.PW4/A having been volitionally made by him besides when thereto the accused led the police accompanied by PW-4 Achhar Pal Kaushal, in consonance with the recitals in the disclosure statement comprised in Ex.PW4/A, to the place where the dead body of the deceased minor Sarjina Khatun was thrown by him, qua which memo Ex.PW2/A was prepared, underscores the fact that the accused hence was in the know of the place where he had thrown the dead body of the deceased after perpetration of forcible sexual intercourse upon her, whereafter, he by hanging her with Duptatta murdered her. In sequel, when the accused was in the know of the place where he had thrown the body of the deceased constituted by the factum of his having unveiled in his disclosure statement comprised in Ex.PW4/A its location, in pursuance whereto he led the police and PW-4 to the place where he had thrown the dead body of the deceased and its sequelling the preparation of Ex.PW2/A, foments an obvious conclusion that the dead body of Sarjina Khatun was hence dispensed with by the accused at the location denoted in Ex.PW2/A. As a natural corollary then it has to be concluded with aplomb that the aforesaid proof fillips an inference of the accused having committed the offences for which he stood charged, tried and convicted by the learned trial Court.

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 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. Hence, the appeal is dismissed and the impugned judgment of the learned trial Court is affirmed and maintained. Records be sent back.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Himachal Pradesh State Electricity Board Limited .....Appellant
Versus
Surinder Pal Sharma & others ....Respondents

LPA No. 208 of 2014
Decided on : 23.07.2015

Constitution of India, 1950- Article 226- Writ petitioners claimed that the department had not granted them the revised pay scale as per the fitment table – Writ court quashed the annexure, which was not impugned in the writ petition - held that it was not permissible to grant a relief to the petitioners by quashing the annexure, which was not impugned in the writ petition - case remanded with the request to decide the same afresh. (Para 2-5)

For the Appellant : Mr. Vinay Kuthiala, Senior Advocate with Mr. Raj Pal Thakur, Advocate.

For the Respondents: Mr. M.L. Sharma, Advocate, for respondents No. 1 to 3.
Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Additional Advocate General, Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocate Generals, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This Letters Patent Appeal is directed against the judgment dated 19th June, 2014, passed by the learned Single Judge in CWP No. 5508 of 2011, titled as ***Surender Pal Sharma & others*** *versus* ***H.P. State Electricity Board and another***, whereby the writ respondents-appellant and proforma respondent No. 4 herein, were directed to grant revised pay scale to the writ petitioners-respondents No. 1 to 3 herein, as given in the Fitment Table No. 21, for short "the impugned judgment".

2. By the medium of the writ petition, the writ petitioners had sought quashment of order dated 28th January,2011, (Annexure P-10), impugned in the writ petition, for the reason that the Department has not granted them the revised pay scale as per the Fitment Table No. 21.

3. Learned Counsel for the writ petitioners was asked how the revised pay scale can be granted to the writ petitioners without quashing Annexure P-10. He frankly conceded that the impugned judgment be set-aside and the writ petition be remanded to the Writ Court, with a request to decide the same in a time bound manner.

4. It is a beaten law of the land that when no relief is granted, it is deemed to have been refused.

5. In the given circumstances, we deem it proper to set aside the impugned judgment and remand the writ petition to the Writ Court with a request to decide the same within a period of two weeks from today. Ordered accordingly.

6. List the writ petition before the learned Single Judge having the roster on **28.07.2015.** The parties are directed to cause appearance before the learned Single Judge, on the said date.

7. The appeal stands disposed of, as indicated hereinabove, alongwith pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Sh. Suman Kumar Sharma & others ...Petitioners.

Versus

Smt. Salochna & others. .....Respondents.

Civil Revision No. 46 of 2004
Judgment reserved on: 09.07.2015
Date of Decision: July 23, 2015

Code of Civil Procedure, **1908**- Sections 152, 153 and 154- Plaintiff filed an application for incorporating two khasra numbers in the decree sheet stating that these khasra nos. were left due to typographical mistake/clerical error–the application was rejected on the ground that no appeal against the decree was preferred, the applicants failed to get the judgment reviewed and it was not apparent from the operative portion of the judgment and decree whether the Trial Court had decreed the suit regarding these khasra numbers or not-held that Section 152 of the C.P.C. empowers the Court to correct any error in a judgment, decree or order arising from any accidental slip or omission–a party should not be prejudiced by an act of Court- the courts have a duty to see that records are true and present the actual state of affairs- the power cannot be exercised to review judgment- the Court had found the possession of the plaintiff on the suit land to be adverse- Khasra numbers sought to be incorporated in the judgment and the decree were mentioned in the plaint as suit land, therefore, the Court below had erred in dismissing the application.

(Para- 11 to 22)

Cases referred:

Jayalakshmi Coelho Versus Oswald Joseph Coelho, (2001) 4 SCC 181
Lakshmi Ram Bhuyan Versus Hari Prasad Bhuyan and others, (2003) 1 SCC 197
Niyamat Ali Molla Vs Sonargon Housing Cooperative Society Ltd. & ors., (2007) 13 SCC 421
S. Satnam Singh and others Versus Surender Kaur and another, (2009) 2 SCC 562

For the Petitioners: Mr. G.D. Verma, Sr. Advocate with Mr.B.C. Verma, Advocate.
For the Respondents: Mr. Anuj Nag, Advocate with Mr.Ashish Verma, Advocate, for respondent Nos. 1 to 5 and LRs No.6(a) to (c).

The following judgment of the Court was delivered:

Sanjay Karol, J (oral)

Plaintiffs' application, so filed under the provisions of Sections 151, 152 and 153 of the Code of Civil Procedure, seeking amendment of the judgment and decree dated

31.07.1997 passed by Sub-Judge (I) Dharamshala in Civil Suit No. 154/91, titled as *Madan Lal & others Versus Nikko Ram & others,* as affirmed/amended vide judgment and decree dated 14.07.1998, passed by learned District Judge, Dharamshala, in Civil Appeal No. 77-D/XIII-1997, titled as *Nikko Ram & others Versus Madan Lal & others,* stands rejected by the Court below vide order dated 12.01.2004 in Civil Misc. Application No. 303/03, titled as *Madan Lal & others Versus Nikko Ram & others*.

2. Operative portion of the decree sheet dated 31.07.1997 reads as under:-

> "...the suit of the plaintiffs succeeds and is decreed by passing a decree to the effect that the plaintiffs have become owner of the suit land comprised in Khata No. 121, Khatauni No. 302, Khasra Nos. 663, 664, Kita 2 measuring 0-33-43 hects., land revenue Rs.3.22, jamabandi for the year 1984-85, situated at Mohal Kadyal Mauza Lunj, Tehsil & District Kangra, by way of adverse possession and defendants are restrained from causing any interference with the peaceful possession of the plaintiff over the suit land by passing a decree of permanent, prohibitory injunction. No order as to costs". (Emphasis supplied)

3. In terms of the application in question, plaintiffs want two more Khasra numbers i.e. 667 and 668 to be incorporated in the decree sheet, which were allegedly left out on account of typographical mistake or clerical error.

4. Significantly, in the defendants' appeal judgment and decree passed by the trial Court stand affirmed.

5. For just and proper appreciation of the controversy in issue, relevant paragraph of the application, is reproduced as under:-

> "4. That the suit of the applicants was decreed by Sub Judge but then Sub Judge has omitted to mention a part of suit land i.e. Khata no. 122, Khatauni no. 304, Khasra nos. 667 and 668 land measuring 0-08-27 hects. in the judgment and decree. And the Hon'ble District Judge has also omitted the same as the same was omitted in judgment and decree of trial court. The omission to mention part of suit land was occasioned due to accidential slip or clerical error as the court never intended to pass judgment and decree in this manner since the suit of the applicants was decreed".

And response thereto so filed by the defendants reads as under:-

> "4. Paragraph 4 of the application is correct that suit has been decreed but the correction as prayed for cannot be ordered to be carried out. The Hon'ble Court has no jurisdiction to order the correction as prayed for. The mistake is not accidental slip or clerical error. No rectification of the judgment and decree can be ordered".

6. Evidently the accidental slip/clerical error on the part of the adjudicatory authority is the ground on which correction is sought for.

7. The Court below has rejected the application on three grounds: (i) no appeal against the decree was preferred; (ii) applicants failed to get the judgment in question reviewed; and (iii) from the operative portion of the judgment or decree it could not be

inferred as to whether the trial Court had decreed the suit qua Khasra Nos. 667 and 668 or not.

8. At this juncture, it be also observed that the Court, partly allowed the application, in correcting the name of the Mohal from Kanbyal to Kalar, being the second prayer made by the applicants in the very same application.

9. Sections 151, 152 and 153 of the Code of Civil Procedure read as under:-

> "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.
>
> 153. General power to amend.—The Court may, at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding".

10. It is a settled position of law that decree is a formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and it may be either preliminary or final. It is also settled position of law that for determining as to whether an order passed by the Court is a decree or not, what requires to be considered are the pleadings, proceedings and circumstances leading to the passing of the decree.

11. For determining the question as to whether an order passed by a court is a decree or not, it must satisfy the following tests: (i) There must be an adjudication; (ii)Such adjudication must have been given in a suit; (iii) It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;(iv)Such determination must be of a conclusive nature; and (v) There must be a formal expression of such adjudication.

12. The Hon'ble Supreme Court of India in *Jayalakshmi Coelho Versus Oswald Joseph Coelho,* (2001) 4 SCC 181, has held as under:-

> "A reference to the following cases on the point may be made:
>
> The basis of the provision under section 152 CPC is found on the maxim *actus curiae neminem gravabit* i.e. an act of court shall prejudice no man (*Jenk Cent-118)* as observed in a case reported in *Assam Tea Corpn. Ltd. V. Narayan Singh,* AIR 1981 Gau 41. Hence, an unintentional mistake of the court which may prejudice the cause of any party must be rectified. In another case reported in *L. Janakirama Iyer v. P.M. Nilakanta Iyer,* AIR 1962 SC 633 it was found that by mistake the words "net profit" were written in the decree in place of "mesne profit". This mistake was found to be clear by looking to the earlier part of the judgment. The mistake was held to

be inadvertent. In *Bhikhi Lal v. Tribeni,* AIR 1965 SC 1935 it was held that a decree which was in conformity with the judgment was not liable to be corrected. In another case reported in *Master Construction Co. (P) Ltd. v. State of Orissa,* AIR 1966 SC 1047 it has been observed that 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 the point, it has been indicated as an example that in a case where the order may contain something which is not mentioned in the decree would be a case of unintentional omission or mistake. Such omissions are 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 rearguments on merits are required for such rectification of mistake. In a case reported in *Dwarka Das v. State of M.P.,* (1999) 3 SCC 500 this Court has held that the correction in the order or decree should be of the mistake or omission which is accidental and not intentional without going into the merits of the case. It is further observed that the provisions cannot be invoked to modify, alter or add to the terms of the original decree so as to in effect pass an effective judicial order after the judgment in the case. The trial court had not granted the interest pendent lite though such a prayer was made in the plaint but on an application moved under Section 152 CPC the interest pendent lite was awarded by correcting the judgment and the decree on the ground that non-awarding of the interest pendent lite was an accidental omission. It was held that the High Court was right in setting aside the order. Liberal use of the provisions under Section 152 CPC by the courts beyond its scope has been deprecated. While taking the above view this Court had approved the judgment of the Madras High Court in *Thirugnanavalli Ammal v. P. Venugopala Pillai,* AIR 1940 Mad 29 and relied on *Maharaj Putta Lal v. Sripal Singh,* AIR 1937 Oudh 191. Similar view is found to have been taken by this Court in a case reported in *State of Bihar v. Nilmani Sahu,* (1996) 11 SCC 528, where the Court in the guise of arithmetical mistake on reconsideration of the matter came to a fresh conclusion as to the number of trees and the valuations thereof in the matter which had already been finally decided. Similarly in the case of *Bai Shakriben v. Special Land Acquisition Officer,* (1996) 4 SCC 533 this Court found omission of award of additional amount under Section 23 (1-A), enhanced interest under Section 28 and solatium etc. could not be treated as clerical or arithmetical error in the order. The application for amendment of the decree in awarding of the amount as indicated above was held to be bad in law."

In the very same report their Lordships have held that inherent powers would generally be available to all courts and authorities irrespective of the fact whether the provisions contained under Section 152 CPC may or may not strictly apply to any particular proceeding. In a matter where it is clear that something

which the court intended to do but the same was accidentally slipped or any mistake creeps in due to clerical or arithmetical mistake it would only advance the ends of justice to enable the court to rectify such mistake. But before exercise of such power the court must be legally satisfied and arrive at a valid finding that the order or the decree contains or omits something which was intended to be otherwise, that is to say, while passing the decree the court must have in its mind that the order or the decree should be passed in a particular manner but that intention is not translated into the decree or order due to clerical, arithmetical error or accidental slip. The facts and circumstances may provide clue to the fact as to what was intended by the court but unintentionally the same does not find mention in the order or the judgment or something which was not intended to be there stands added to it.

Their Lordships further contended that the power of rectification of clerical, arithmetical errors or accidental slip does not empower the court to have a second thought over the matter and to find that a better order or decree could or should be passed. There should not be reconsideration of merits of the matter to come to a conclusion that it would have been better and in the fitness of things to have passed an order as sought to be passed on rectification. On a second thought the court may find that it may have committed a mistake in passing an order in certain terms but every such mistake does not permit its rectification in exercise of the court's inherent powers as contained under Section 152 CPC. It is to be confined to something initially intended but left out or added against such intention.

13. Hon'ble the Supreme Court in *Lakshmi Ram Bhuyan Versus Hari Prasad Bhuyan and others,* (2003) 1 SCC 197 further observed that:-

"14. How to solve this riddle? In our opinion, the successful party has no other option but to have recourse to Section 152 CPC which provides for clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission being corrected at any time by the court either on its own motion or on the application of any of the parties. A reading of the judgment of the High Court shows that in its opinion the plaintiffs were found entitled to succeed in the suit. There is an accidental slip or omission in manifesting the intention of the court by couching the reliefs to which the plaintiffs were entitled in the event of their succeeding in the suit. Section 152 enables the court to vary its judgment so as to give effect to its meaning and intention. Power of the court to amend its orders so as to carry out the intention and express the meaning of the Court at the time when the order was made was upheld by Bowen, L.J. in *Swire, Re, Mellor v. Swire,* (1885) 30 Ch D 239 subject to the only limitation that the amendment can be made without injustice or on terms which preclude injustice. Lindley, L.J. observed that if the order of the court, though drawn up, did not express the order as intended to be made then

> "there is no such magic in passing and entering an order as to deprive the court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal"."

14. The Hon'ble Supreme Court of India in *Niyamat Ali Molla Versus Sonargon Housing Cooperative Society Ltd. and others,* (2007) 13 SCC 421 was dealing with the case where decree holder had sought detailed description of the suit property to be inserted in the decree. Plaintiff's application, so filed under Section 152 CPC having been allowed was subject matter of challenge before the Court. In the factual backdrop, Court held that Section 152 of the Code of Civil Procedure empowers the court to correct its own error in a judgment, decree or order from any accidental slip or omission. The principle behind the said provision is *actus curiae neminem gravabit* i.e. nobody shall be prejudiced by an act of court.

15. The apex Court in *S. Satnam Singh and others Versus Surender Kaur and another,* (2009) 2 SCC 562 has held that ordinarily a party should not be prejudiced by an act of Court. The power of amendment, in a case of this nature, as noticed hereinbefore, would not only be dependent upon the power of the Court but also the principle that a Court shall always be ready and willing to rectify the mistake it has committed.

16. Thus power of the Court to amend its judgment and decree on the grounds referred to and specified is statutory in nature. Court is duty bound to exercise such power, both in equity and in the interest of justice. However, such power is only to meet the legislative intent within the settled parameters of law.

17. The Code of Civil Procedure recognizes the inherent power of the court. It is not only confined to the amendment of the judgment or decree as envisaged under Section 152 of the Code but also inherent power in general. The courts also have duty to see that the records are true and present the correct state of affair. There cannot, however, be any doubt whatsoever that the court cannot exercise the said jurisdiction so as to review its judgment. It cannot also exercise its jurisdiction when no mistake or slip occurred in the decree or order. This provision should, however, not be construed in a pendantic manner. A decree may, therefore, be corrected by the court both in exercise of its power under Section 152 as also under Section 151 of the Code of Civil Procedure.

18. Perusal of the plaint reveals the subject matter to be four Khasra numbers i.e. 663, 664, 667 and 668, situated in Mohal Kanbyal, Mauza Lunj, Tehsil and District Kangra. Written statement records the defendants to be "owners in possession of the suit land", which fact stood refuted in the replication.

19. On the basis of the pleadings of the parties, trial Court framed the following issues:-

1. Whether the plaintiffs have become owners of the suit land by way of adverse possession, as alleged? OPP.
2. Whether the plaintiffs are entitled for the relief of injunction, as prayed for? OPP.
3. Whether the suit is not maintainable in the present form? OPD.

4. Whether the suit is bad for non-joinder of necessary parties? OPD.
5. Whether the suit is barred by limitation? OPD.
6. Whether the plaintiffs have locus-standi to file the present suit? OPD.
7. Whether the suit is properly valued for the purposes of court fee and jurisdiction? OPD.
8. Whether the plaintiffs are estopped by their act and conduct? OPD.
9. Whether the land in suit is in possession of the defendants, as alleged? OPD.
10. Relief.

20. Crucially trial Court found the defendants not to be "in possession of the suit land" and finding the plaintiffs' possession, over "the suit land" to be adverse qua the defendants, based on the revenue entries, reflecting the possession of the plaintiffs' predecessor-in-interest to be hostile, since the year 1975, answered issues No.1 and 9 in their favour. Significantly such findings have attained finality and the decree as affirmed by the lower Appellate Court remained un-assailed, which undisputedly has attained finality.

21. Material, so placed on record, as discussed by the trial Court only leads to one inference and that being the subject matter of the *lis, inter se* parties, which stood adjudicated by the Courts below, to be the entire suit land comprising Khasra Nos. 663, 664, 667 and 668. Even the evidence, oral/documentary is clearly suggestive of such fact. It is in this backdrop that the Court below erred in partly dismissing the plaintiffs' application in not correcting the typing mistake/clerical error erroneously crept in, in not recording Khasra Nos. 667 and 668 either in the operative portion of the judgment or the decree sheet. Court erred in dismissing the application on the grounds referred to earlier, which are legally unsustainable in law, in view of the discussion herein earlier. There was no question of the plaintiffs seeking review, in view of special statutory provisions.

22. For all the aforesaid reasons, revision petition is allowed. The impugned order dated 12.01.2004 passed by learned District Judge, Kangra at Dharamshala, in Civil Misc. Application No. 303/03, titled as *Madan Lal & others Versus Nikko Ram & others,* to the extent it rejects petitioners' prayer is quashed and set aside. Plaintiffs' application is allowed. Judgment and decree dated 31.07.1997 passed by Sub-Judge (I) Dharamshala in Civil Suit No. 154/91, titled as *Madan Lal & others Versus Nikko Ram & others,* stand corrected with the inclusion of Khasra Nos. 667 and 668 alongwith Khasra Nos. 663 and 664.

23. In view of the above, present petition stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Shri Sunil Kumar Garg & another .....Petitioners

Versus

State of Himachal Pradesh & others ....Respondents

CWP No. 3321 of 2015
Date of decision: 23.07.2015

Constitution of India, 1950- Article 226- A show cause notice was issued to the petitioners, which was challenged by them-held that the petitioners had not approached the authority and had not put up their case before the Authority – a show cause notice cannot be questioned by filing a writ petition- petition dismissed with a liberty to the petitioner to show cause before authority. (Para 3-5)

Case referred:
Micromax Informatics Ltd. Versus State of H.P & others, ILR 2015 XLV (III) HP 1334 (D.B.)

For the petitioners :	Mr. Bhupender Gupta, Senior Advocate with Mr. Hamender Chandel and Ms. Charu Gupta, Advocates.
For the respondents:	Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Additional Advocate General, Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

By the medium of this writ petition, the petitioners have sought the following reliefs, on the grounds taken in the writ petition:

> *"1. That the executive directions of the respondents whereby the buyers of the Evacuee land as per the Administration of Evacuee Property Act, 1950 and Displaced Persons (Compensation and Rehabilitation) Act, 1954, have been held to be Non-Agriculturists for the purpose of Section 118 of the HP Tenancy and Land Reforms Act, 1972 may be held illegal and in violation of Section 2(2) of the HP Tenancy and Land Reforms Act.*
>
> *2. That the show cause notice dated 1.7.2015, Annexure P-11, may be held illegal on the grounds mentioned in the CWP and quashed."*

2. The main grievance of the writ petitioners is that the respondents have made final decision in the impugned show cause notice. Thus, it is a final order.

3. It is a moot question-whether show cause notice can be questioned by the medium of the writ petition?

4. The petitioners have questioned the show cause notice (Annexure P-11), whereby they have been asked to show cause. They have not approached the authority concerned, had not put up their case before the said authority and have tried to give a slip to law, by invoking the jurisdiction of this Court, by the medium of this writ petition, which is not permissible under law.

5. This Court in a batch of writ petitions, the lead case of which is **CWP No. 3012 of 201**5, titled as **Micromax Informatics Ltd. Versus State of H.P & others,** decided on 24.06.2015, has held that show cause notice cannot be questioned by the medium of a writ petition. It is apt to reproduce paras 21 to 23 of the aforesaid judgment herein:-

*"21. This Court has also held in **CWP No. 1159 of 2014-F** titled **Sandeep Sethi versus State of H.P. and others**, that the show-cause notice cannot be questioned by the medium of the writ petition. The apex Court has also laid down the same principles of law in **Union of India and Anr. v. Kunisetty Satyanarayana**, reported in 2007 AIR SCW 607 and **Special Director and another v. Mohd. Ghulam Ghouse and another**, reported in 2004 AIR SCW 416.*

*22. While going through the writ petitions on hand, it appears that the petitioners have tried to give a slip to the law. The same issue has already been determined by this Court in **M/s Technomac's** and **M/s Samsung's** cases supra.*

23. Having glance of the above discussion, the writ petitions deserve to be dismissed in limine and the same are dismissed as such. However, the dismissal of these writ petitions shall not cause any prejudice to the writ petitioners to appear and file reply to the show-cause notice(s) before respondent No2 and take all the grounds, which have been taken in the writ petitions on hand."

6. In the given circumstance, the writ petition is dismissed, with a liberty to the petitioners to show cause before the concerned Authority and in case the decision goes against them, they are at liberty to challenge the same within two weeks from today. Till then, the said order shall not be given effect to.

7. Pending applications stand disposed of.

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

Smt. Basohli (deceased) through LR Sh. Vijay Kumar & ors. ..... Appellants

Vs.

Bhagtu Ram & ors. ..... Respondents

RSA No. 30 of 2005.
Date of decision: 24.7.2015.

Code of Civil Procedure, 1908- Order 41- Appellate Court is bound to advert to the reasoning given by the trial Court and then to assign its own reasons for arriving at a different findings – trial Court had recorded the findings that civil Court did not have jurisdiction to hear and entertain the suit- no reasons were given by the Appellate Court to arrive at a contrary findings- hence, appeal allowed and the case remanded to the Appellate Court for decision on all questions including question of jurisdiction. (Para-9 to 16)

Cases referred:

Shasidhar and others vs. Smt. Ashwini Uma Mathad and another 2015 AIR SCW 777
Santosh Hazari vs. Purushottam Tiwari (deceased) by LRS (2001) 3 SCC 179

For the appellants : Mr. R.K. Gautam, Senior Advocate with Ms. Megha Kapur Gautam, Advocate.
For the respondents: Mr. Ashwani Kaundal, Advocate, for respondents No. 1, 2(a) to 2(c).

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

This Regular Second Appeal is directed against the judgement and decree dated 10.1.2005 passed by learned District Judge, Hamirpur in Civil Appeal No. 39 of 2004, whereby he reversed the judgement and decree passed by learned trial court dated 31.12.2003 and decreed the suit of the plaintiffs- respondents.

2. The facts as set out in the plaint are that plaintiffs -respondents alongwith Sh. Setu Ram proforma respondent, filed a suit claiming themselves to be joint owners in possession with defendants of old khasra No. 571 measuring 36 Kanals 4 Marlas. They pleaded that part of this land donated by new khasra No. 565 measuring 8 Kanals 6 Marlas, Tika Bharoli Bhagaur, Tappa Hathol, Tehsil Nadaun, District Hamirpur, H.P. (the suit land) in consolidation in 1983 was allotted to the plaintiffs. Since, then the suit land is coming in possession of the plaintiffs and recorded in jamabandi 1985-86. But the defendants in connivance with the consolidation authorities in 1993. Vide mutation No. 362 dated 12.7.93 got allotted portion of the suit land to the extent of 3 Kanals 2 Marlas in their favour on the basis of tenancy. Defendants were never tenants of the plaintiffs prior or after consolidation proceedings. So mutation No. 362 dated 12.7.1993 in the name of defendants is illegal, null and void. Taking undue advantage of wrong entries, the defendants are adamant to dispossess the plaintiffs from the suit land and thus liable to be prohibited from doing so.

3. The defendants- appellants in joint written statement claimed that out of the suit land, they were allotted 3 Kanals 2 Marlas land vide order dated 19.4.1993 in remand case No. 28/89 decided by the Consolidation Officer, Hamirpur and on the basis of which, mutation No. 362 dated 12.7.1993 was rightly sanctioned. It was reflected in jamabandi 1990-91 showing them in possession as owners of 3 Kanals 2 Marlas land donated by Khasra No. 365/1. In lieu of this land, plaintiffs got land of the defendants vide order dated 19.4.1993 of the Consolidation Officer in remand case No. 28/89. The order has attained finality. The plaintiffs have no locus-standi to challenge the same. As the matter of tenancy has been adjudicated upon by a competent court, so the Court has no jurisdiction to try the suit. Order of Consolidation Officer was passed on merits and acquired finality, objections qua maintainability, locus-standi, cause of action, jurisdiction and limitation were also raised.

4. By way of rejoinder, the plaintiffs re-asserted their case and controverted the contrary pleas of the defendants. On 10.5.2000 the following issues were framed by the learned trial Court:

1. Whether the plaintiffs are owners in possession of the land in suit and any change in revenue record and allotment of 3 Kanals 2 Marlas to defendants by the C.O. Hamirpur on the basis of tenancy is illegal, beyond facts and law behind the plaintiffs hence null and void and not binding upon the plaintiffs ? OPP
2. If issue No.1 is proved, whether the plaintiffs are entitled to the relief of injunction as prayed for? OPP

3. Whether the suit is not maintainable in the present form? OPD
4. Whether the plaintiffs have no locus standi to file the suit? OPD
5. Whether the plaintiffs have no cause of action to file the suit? OPD
6. Whether this Court has no jurisdiction to try the suit? OPD
7. Whether the suit is barred by limitation? OPD
8. Whether the defendants are entitled to special costs under Section 35-A CPC? OPD
9. Relief.

5. The learned trial court after recording the evidence and evaluating the same dismissed the suit and in the appeal preferred against the same, the judgement and decree passed by the learned trial court were set-aside, as a result whereof the suit of the plaintiff was decreed and the defendants- appellants were restrained from causing any interference in any manner of the suit land.

6. On 2.5.2005, the appeal was admitted on the following substantial questions of law:-

1. Whether the findings of the learned first appellate Court are dehors the evidence on record and un-sustainable?
2. Whether the findings of the learned first appellate court are beyond the pleadings of the parties?
3. Whether the Civil Court has no jurisdiction to try this suit?

I have heard the learned senior counsel for the appellants as also the learned counsel for the respondents and gone through the records of the case.

7. Since all the substantial questions of law are somehow interconnected and interrelated, I proceed to answer them jointly.

8. It cannot be disputed that the first appeal has to be decided on facts as well as on law. In the first appeal, the parties have the right to be heard both on questions of law and also on facts and the first appellate court is required to address itself on all issues and decide the case by giving reasons.

9. The scope, ambit and power of the first appellate court while deciding the first appeal have been subject matter of various judicial pronouncements and I only need to refer to the recent pronouncement of the Hon'ble Supreme Court in **Shasidhar and others** vs. **Smt. Ashwini Uma Mathad and another 2015 AIR SCW 777** where the Hon'ble Supreme Court held as follows:-

> "11. Having heard learned counsel for the parties and on perusal of the record of the case and examining the issue arising in this appeal, we find force in the submissions of the learned counsel for the appellants.
>
> 12. The powers of the first appellate Court, while deciding the first appeal under Section 96 read with Order XLI Rule 31 of the Code, are indeed well defined by various judicial pronouncements of this Court and are, therefore, no more res integra.
>
> 13. As far back in 1969, the learned Judge – V.R. Krishna Iyer, J (as His Lordship then was the judge of Kerala High Court) while deciding the first appeal under Section 96 of the CPC in Kurian Chacko vs. Varkey Ouseph,

AIR 1969 Kerala 316, reminded the first appellate Court of its duty as to how the first appeal under Section 96 should be decided. In his distinctive style of writing and subtle power of expression, the learned judge held as under:

> "1. The plaintiff, unsuccessful in two Courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff's title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal, the learned Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.
>
> 2. An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate Court. Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation....."
>
> (Emphasis supplied)

14. This Court in a number of cases while affirming and then reiterating the aforesaid principle has laid down the scope and powers of the first appellate Court under Section 96 of the Code.

15. We consider it apposite to refer to some of the decisions.

16. In Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs . (2001) 3 SCC 179, this Court held (at pages 188-189) as under:

> " .....the appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court.....while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it....."

17. The above view has been followed by a three- Judge Bench decision of this Court in Madhukar & Ors. v. Sangram & Ors. ,(2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.

18. In H.K.N. Swami v. Irshad Basith ,(2005) 10 SCC 243, this Court (at p. 244) stated as under:

> "3 . The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."

19. Again in Jagannath v. Arulappa & Anr. (2005) 12 SCC 303, while considering the scope of Section 96 of the Code this Court (at pp. 303-04) observed as follows:

> "2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion....."

20. Again in B.V Nagesh & Anr.vs. H.V.Sreenivasa Murthy, (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words:

> "3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:
>
> (a) the points for determination;
>
> (b) the decision thereon;
>
> (c) the reasons for the decision; and
>
> (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.
>
> 4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions putforth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari , (2001) 3 SCC 179 at p. 188, para 15 and Madhukar v. Sangram , (2001) 4 SCC 756 at p. 758, para 5.).
>
> 5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant

> aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."
>
> 21. The aforementioned cases were relied upon by this Court while reiterating the same principle in State Bank of India & Anr. vs. Emmsons International Ltd. & Anr. (2011) 12 SCC 174. This Court has recently taken the same view on similar facts arising in Vinod Kumar vs. Gangadhar, 2014(12) Scale 171."

10. Applying the aforesaid principles to the facts of the present case, I find that the learned first appellate court while deciding the first appeal failed to keep the aforesaid principles in consideration and rendered the impugned decision. This would be apparent from the bare perusal of the judgement rendered by the learned trial court where apart from other grounds it had dismissed the suit on the ground of jurisdiction as would be evident from para-25 of its findings, which reads thus:

> "25. In the case in hand, the scheme of H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 provides for the equally efficacious remedies against the order passed by the Consolidation Officer and thus it cannot be said that the adequacy and sufficacy of remedies is not provided under the said Act. Further more, it is not established on record that the Consolidation Authority while dealing with the present matter violated the basic principles of natural justice and the provisions of the said Act. I am of the view that although a civil court jurisdiction in such like matters is not absolutely barred, but in the facts and circumstances of the present case the jurisdiction of the Civil Court is barred."

11. But surprisingly, the learned appellate court did not even touch this aspect of the matter and went on to formulate the following points, which according to it arose for determination in the appeal:

1. Whether the plaintiffs were able to prove their possession over the entire suit land of Khasra No.565 and contrary findings deserves to be set aside after accepting the appeal.
2. Relief.

12. Thereafter, it answered point No. 1 in favour of the respondents and allowed the appeal. The learned lower appellate court has though reversed the findings of the learned trial court, but it has not at all adverted to the reasoning as given by the learned trial court and has therefore not discharged its duties as cast upon it under the law.

13. The learned lower appellate court was required to come into close quarters with reasoning assigned by the learned trial court and then assign its own reasons for arriving at a different findings. The question of jurisdiction went to the root of the case and unless and until the court came to the conclusion that it in fact had the jurisdiction, it could not have proceeded any further. This was a duty expected to be discharged by the learned first appellate court being not only a final court whose findings remain immune from

challenge in this court, but being also a final court of law because even an erroneous decision may not be vulnerable before this court in second appeal.

14. It is more than settled that jurisdiction of this court while exercising powers under section 100 CPC have now ceased to be available to correct mere errors of law or the erroneous findings of the first appellate court even on questions of law unless question of law be a substantial one. This was so observed by the Hon'ble Supreme Court in **Santosh Hazari** vs. **Purushottam Tiwari (deceased) by LRS (2001) 3 SCC 179** in the following terms:-

> "15. A perusal of the judgment of the trial Court shows that it has extensively dealt with the oral and documentary evidence adduced by the parties for deciding the issues on which the parties went to trial. It also found that in support of his plea of adverse possession on the disputed land, the defendant did not produce any documentary evidence while the oral evidence adduced by the defendant was conflicting in nature and hence unworthy of reliance. The first appellate court has, in a very cryptic manner, reversed the finding on question of possession and dispossession as alleged by the plaintiff as also on the question of adverse possession as pleaded by the defendant. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court . First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions putforth, and pressed by the parties for decision of the appellate Court . The task of an appellate court affirming the findings of the trial Court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice (See Girijanandini Devi v.Bijendra Narain Choudhary, AIR 1967 SC 1124. We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it . While writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact base d on conflicting evidence arrived at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact. (See: Madhusudan Das v. Narayanibai (1983) 1 SCC 35). The rule is – and it is nothing more than a rule of practice – that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped

the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh, AIR 1951 SC 120). Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate Court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one."

15. Since the learned lower appellate court has not at all adverted to the question of jurisdiction, therefore, its findings have been rendered vulnerable and cannot be sustained.

16. The substantial questions of law are accordingly answered in favour of the appellants.

17. Consequently, the appeal succeeds and the judgement and decree passed by the learned first appellate court are set aside and the case is remanded to the said court for decision afresh on all questions including the question of jurisdiction. Since the suit has been instituted in the year 1996, the learned lower appellate court shall make all endeavours to decide the same expeditiously and in no event later than 31st December 2015. The parties through their learned counsel are directed to appear before the learned first appellate court on 5.8.2015. The records be returned forthwith so as to reach the concerned court well before the date fixed. Costs easy.

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

Sh. Dharam Singh .....Appellant.

Vs.

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 82 of 2014
Reserved on: 22.07.2015
Date of decision: 24.07.2015

Indian Penal Code, 1860- Sections 341 and 302- Accused had restrained the deceased when he was proceedings on his tractor- accused asked the deceased to get down and gave

2-3 blows of stick on the head due to which deceased died- Medical Officer found that death was caused due to head injury- eye witnesses had seen the accused inflicting the injury on the person of the deceased- accused had made a disclosure statement on which stick was recovered- stick was found stained with the blood- held, that prosecution case was proved beyond reasonable doubt and the accused was rightly convicted. (Para-19 and 20)

For the appellant : Mr. Dushyant Dadwal, Advocate.
For the respondent: Mr. M.A. Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

This appeal is instituted against the judgment and order, dated 02.11.2013, rendered by the learned Additional Sessions Judge, Sirmaur District at Nahan, H.P. in Sessions Trial No. 9-N/7 of 2012, whereby the appellant-accused (hereinafter referred to as "accused", namely Dharam Singh), who was charged with and tried for offences punishable under Sections 341 and 302 of the Indian Penal Code, had been convicted and sentenced to suffer simple imprisonment for a period of one month under Section 341 of the Indian Penal Code. He was also sentenced to suffer imprisonment for life and to pay a fine of Rs.10,000/- and in default of payment of fine to undergo further simple imprisonment for a period of six months under Section 302 of the Indian Penal Code.

2. Case of the prosecution, in a nut-shell, is that on 14.11.2011 at about 8:00 a.m. at place Muglawala Rajban link road, accused Dharam Singh has wrongly restrained the deceased Hardev Singh while he was proceeding in particular direction in which he had a right to proceed on his tractor bearing registration No. HP-17B-6637 and thereafter, he made the deceased Hardev Singh to get down from the tractor in question and gave 2-3 blows of stick on the head of deceased Hardev Singh and as a result of which, Hardev Singh suffered serious injuries on his head. The blood had oozed out. He died on 16.11.2011. Kashmiri Lal had informed the father of the deceased, namely, Krishan Chand about the incident and thereafter the police of Police Post, Rajban was informed by Krishan Chand on telephone. The statement of Kashmiri Lal under Section 154 Cr. P.C. was recorded on the spot, on the basis of which, FIR Ex. PW4/A was registered in Police Station, Paonta Sahib. During the investigation, the Investigating Officer clicked the photographs of the spot and prepared the spot map Ex. PW20/B. The blood stained soil was lifted from the spot and was put in a plastic vial, which was put in a cloth parcel and sealed with seal 'H' at four places. Sample of seal was also taken on a separate cloth of piece, which is Ex. PW20/G. The inquest reports were prepared and the post mortem was conducted. Accused made a disclosure statement under Section 27 of the Indian Evidence Act in the presence of PW-8 HC Data Ram and PW-9 Constable Surender Kumar, on the basis of which, the police recovered *danda* from the heap of the wood. The case property alongwith samples of seal was sent to SFSL, Junga through PW-2 Constable Vikram Dev Singh and PW-3 HHC Lal Bahadur vide RC Ex. PW1/B and Ex. PW1/C, who deposited the same in the office of SFSL, Junga. The investigation was completed and after the completion of all the codal formalities, the challan was put up in the Court.

3. The prosecution had examined as many as 20 witnesses to support its case. The accused was also examined under Section 313 of the Cr. P.C. Accused denied the case

of the prosecution. The accused was convicted and sentenced, as noticed hereinabove. Hence this appeal.

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

5. Mr. M.A. Khan, learned Additional Advocate General has supported the judgment and order, dated 02.11.2013.

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

7. PW-1 HHC Himmat Singh deposed that the case property was deposited with him. He made entries in the *malkhana* register. The case property was sent to SFSL, Junga. PW-2 Constable Vikram Dev Singh testified that Incharge *malkhana* had handed over four *Pulindas* sealed to him vide RC No. 123/11 for depositing the same at SFSL, Junga. He deposited the same at SFSL, Junga.

8. PW-3 HHC Lal Bahadur deposed that on 22.11.2011, Incharge *malkhana* Police Station Paonta Sahib had handed over to him two sealed parcels for depositing the same at SFSL, Junga vide RC No. 119/11. He deposited the same at SFSL, Junga.

9. PW-4 Inspector Bhisham Thakur and PW-5 Constable Kalyan Singh are formal witnesses. PW-6 Sarwan Singh deposed that on 14.11.2011 at about 8:00 a.m., he was going from home to Muglawala. When he reached near the house of Attru Ram, he saw accused Dharam Singh giving *danda* blow on the head of deceased Hardev Singh. Kashmiri Lal was also with Hardev Singh. A tractor No. HP-17B-6637 was standing on the road. Hardev Singh ran at a distance of 15 to 20 feet towards field after holding his head. Thereafter, he sat down and the accused fled away from the spot. Krishan Chand, father of Hardev Singh and other persons also came on the spot. Police took into possession the samples of blood stained soil. In his cross-examination, he categorically stated that accused Dharam Singh had given two blows of *danda* on the head of deceased Hardev Singh in his presence. He denied the suggestion that Hardev received injury due to fall from the tractor. He also denied that the tractor was being driven by Kashmiri Lal and Hardev was sitting on the tractor.

10. PW-7 Sh. Krishan Chand is the father of the deceased. He deposed that he had purchased the manure from Vijay Kumar of village Bahaliwala. Hardev Singh was going to bring manure in his tractor No. HP-17B-6637 from said Vijay Kumar from his field at village Bahaliwala. Hardev Singh left the house at about 8:00 a.m. Kashmiri Lal was also with Hardev Singh. He received phone call of Kashmiri Lal and he told him that Hardev Singh was beaten up by accused Dharam Singh with *danda* and Hardev Singh had received injuries. He reached on the spot. He found Hardev Singh in an injured condition. There was injury on his head. Hardev Singh was taken to hospital. He informed the police. Police visited the spot. Accused Dharam Singh was against the selling of manure of his brother Vijay Kumar and he raised objection. *Shawl* of Hardev was stained with blood, which was taken into possession vide memo Ex. PW7/A.

11. PW-8 HC Data Ram deposed that on 14.11.2011, he received an information at Police Post Rajban that a boy had been attacked on his head by a *danda.* The injured was taken to hospital for his treatment. The Investigating Officer had prepared the spot map and the photography of the spot was made by the Investigating Officer. On 22.11.2011, the

accused Dharam Singh, while in policy custody, gave a disclosure statement to the police that he had concealed a *danda* near his house, of which he was having exclusive knowledge and could get the same recovered, which was recorded vide Ex. PW8/A.

12. PW-9 Constable Surender Kumar deposed that on 22.11.2011, accused Dharam Singh gave a disclosure statement to the police while in police custody that he had concealed a *danda* near his house. Only he was having the knowledge of the same and could get the same recovered. His statement was recovered vide Ex. PW8/A.

13. PW-10 Sh. Harbans Lal deposed that on 14.11.2011, he was at his home in the morning at about 8:00 a.m. He came to know that accused Dharam Singh had beaten Hardev Singh with *danda.* Thereafter, he went to the spot. He noticed the injuries on the head of Hardev Singh and the blood was oozing out. Hardev Singh was taken to the hospital at Jolly Grant Himalayan Institute, Dehradoon in a vehicle. On 16.11.2011, Hardev Singh was referred to PGI, Chandigarh, but he succumbed to injuries. The post mortem was got conducted by the police on 17.11.2011. The accused got *danda* recovered from the heap near his house. Police prepared the sketch of the *danda.*

14. PW-11 Sh. Layak Ram deposed that he was working in Laborate Factory at Nariwala. On 14.11.2011, he was going to this factory for work. At about 8:00 a.m., when he reached at Kartarpur Chowk, he saw that accused Dharam Singh stopped the tractor of Hardev Singh without any reason and gave beatings to him with *danda.* Accused Dharam Singh gave two blows of *danda* on the head of Hardev Singh. Hardev Singh ran towards the field to a distance of 15 to 20 feet and sat in the field. Thereafter, the injured was taken to Jolly Grant Himalayan Hospital, Dehradoon for treatment. He was referred to PGI, Chandigarh. He died on way to PGI, Chandigarh. The post mortem was got conducted by the Police at C.H. Paonta Sahib. In his cross-examination, he deposed that the tractor was stopped by Dharam Singh by giving a signal by hand. Thereafter, the tractor was stopped by the deceased Hardev Singh in the field. Accused Dharam Singh started giving beatings to the deceased with a *danda* on his head on the stationed tractor and also on the road.

15. PW-12 Sh. Hemant Singh and PW-13 ASI Parkash Chand are formal witnesses. PW-14 Sh. Roop Chand deposed that on 14.11.2011, when he was present at his home at about 8:00/8:10 a.m., the deceased Hardev Singh was going to load manure towards the house of accused. The accused was sitting in the field carrying a stick in his hand. Thereafter, the villagers rushed to his home and disclosed that his cousin deceased Hardev Singh had been beaten by some one, on account of which, he visited the spot and saw that deceased was lying on the ground and he had sustained injury on his head. In his cross-examination, he deposed that after the alleged occurrence, he saw the accused sitting on the boundary of field.

16. PW-15 Sh. Gulsher Ahmad and PW-16 Constable Krishna Nand are formal witnesses. PW-17 Dr. Pooja Thami has conducted the post mortem examination. According to her, the cause of death was head injury and the death could be caused by a blow of *danda* Ex. P10.

17. PW18 Sh. Mahesh Sharma is a formal witness. PW-19 Dr. Saleem Ahmad deposed that he examined the patient in the emergency. On examination, the type of injury was lacerated wound with dimension of 5 X 1 cm. near left temporal region caused by blunt weapon. He proved injury report Ex. PW18/B and MLC Ex. PW18/C.

18. PW-20 ASI Kanwar Singh was the Investigating Officer. He inspected the spot and prepared the spot map Ex. PW20/B. Photographs were also taken. The disclosure statement was made by the accused on 22.11.2011 vide Ex. PW8/A. The *danda* was got recovered. The reports of SFSL, Junga are Ex. PX and Ex. PY.

19. The case of the prosecution, precisely is that deceased had gone to bring manure. His tractor was stopped by the accused. The accused gave *danda* blows on the head of the deceased. He was taken to Jolly Grant Himalayan Hospital, Dehradoon for treatment. Thereafter, he was referred to PGI, Chandigarh. He succumbed to his injuries on way to PGI, Chandigarh. The post mortem was got conducted at C.H. Paonta Sahib. The cause of the death was head injury. PW-6 Sh. Sarwan Singh and PW-11 Sh. Layak Ram are the eye witnesses. They had seen accused hitting the deceased with *danda* on the head after stopping the tractor. PW-10 Sh. Harbans Lal also deposed that he came to know that the accused Dharam Singh had beaten Hardev Singh with *danda*. PW-14 Sh. Roop Chand deposed that accused was sitting in the field carrying a stick in his hand and he had seen the deceased Hardev Singh going to bring the manure. PW-17 Dr. Pooja Thami has categorically stated that the deceased died due to head injury and according to her, the injury could be caused by blow of a *danda* Ex. P-10. PW-7 Sh. Krishan Chand, father of the deceased had reached on the spot when he received the information of the incident.

20. PW-8 HC Data Ram deposed that that accused had made a disclosure statement vide Ex. PW8/A on 22.11.2011 that he had concealed the *danda* near his house. PW-9 Constable Surender Kumar also deposed that a disclosure statement was made by the accused under Section 27 of the Indian Evidence Act on 22.11.2011 that he had concealed a *danda* near his house. PW-10 Sh. Harbans Lal deposed that Accused Dharam Singh while in police custody got recovered a *danda* from a heap of wood near his house and the same was taken into possession vide memo Ex. PW10/A.

21. According to Ex.-PY, the *danda* was found stained with blood, though the results were inconclusive in respect of blood groups. Human blood was detected on Ex.2 (blood stained soil lifted from the spot), Ex. -3 (blood stained shawl) and Ex.-4 (blood stained wooden piece/data). Accordingly, the prosecution has proved the case against the accused beyond reasonable doubt.

22. Consequently, there is no merit in this appeal and the same is dismissed. No costs.

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

Sh. Jai Singh .....Appellant

Versus

Smt. Reena Devi & others ...Respondents

FAO No. 359 of 2008
Decided on : 24.07.2015

Motor Vehicles Act, 1988- Section 169- Claimants pleaded that the deceased was travelling in a vehicle but had not pleaded that he was travelling in the vehicle with goods or had hired the vehicle for carrying goods- the owner asserted the deceased was travelling in

the vehicle as owner of the goods- held that the tribunal has to give findings keeping in view the pleadings of the party - Tribunal had rightly held that the deceased was travelling in the vehicle as a gratuitous passenger- the owner had committed willful breach of the terms and conditions of the policy and was rightly held liable to pay compensation. (Para 5-10)

For the Appellant : Mr. Lalit Sehgal, Advocate.
For the Respondents: Mr. Vaibhav Tanwar, Advocate, for respondents No. 1 to 4.
Ms. Shilpa Sood, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award, dated 16th April, 2008, made by the Motor Accidents Claims Tribunal, Fast Track Court, Shimla, Himachal Pradesh, (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 18-S/2 of 2005/2002, titled Smt. Reena Devi & others versus Sh. Jai Singh & another, whereby compensation to the tune of Rs.9,79,800/- with interest @ 9% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimants-respondents No. 1 to 4 herein and the owner-appellant herein was saddled with liability (for short, "the impugned award").

2. The claimants and insurer have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. The learned Counsel for the owner argued that the Tribunal has fallen in an error in exonerating the insurer from liability and saddling the owner with the liability.

4. The argument advanced by the learned Counsel for the appellant is devoid of any force for the following reasons.

5. The claimants have averred in paras 10 and 22 of the claim petition that the deceased was traveling in the offending vehicle bearing registration No. HP-09A-0181, but it was not the case of the claimants that the deceased was traveling in the said vehicle with goods or he had hired the vehicle for carrying goods. It is apt to reproduce para-10 and relevant portion of para 22 of the claim petition herein:-

> "10. *The deceased was traveling in the vehicle in question to Kuthar.*
>
> *11 to 21 .....*
>
> *22. The deceased was traveling in the ill-fated vehicle bearing registration No. HP-09-0181....."*

6. Appellant-respondent No. 1 in the claim petition has filed reply to the claim petition. It is apt to reproduce para-5 and relevant portion of para 13 of the claim petition:

> "5. *That the contents of para 10 of the petition are also admitted as the decision was traveling in the vehicle in question alognwith his goods being carried to Village Kuthar.*
>
> 6. to 12. .....
>
> 13. *In reply to the contents of para 22 of the petition it is submitted that the deceased late Sh. Ranjit Singh alongwith other occupants boarded the ill fated vehicle alongwith their goods at village Deothi for going to*

Kuthar and when the said vehicle reached at Kunishdhar near village Kuthar, the same went off the road and fell down into deep gorge....."

7. In the first breath, the owner has admitted the contents of the said paras and in the second breath, he has stated that the deceased was traveling in the offending vehicle as owner of the goods, which is not the case projected by the claimants before the Tribunal.

8. The question is whether-this Court can travel beyond the pleadings? The answer is in the negative for the following reasons.

9. In terms of the mandate of the provisions of Section 169 of the Motor Vehicles Act, 1988, for short 'the Act', the provisions of the Code of Civil Procedure are not applicable. The Court has to arrive at prima-facie satisfaction while keeping in view the pleadings of the parties.

10. Having said so, I am of the considered view that the Tribunal has rightly held that the deceased was traveling in the offending vehicle as a gratuitous passenger. The insurance contract/policy (Ext. RW-1/C) is on the file, which does not cover the risk. The owner has committed willful breach in terms of the mandate of Sections 147 and 149 of the Act read with the Insurance Policy. Thus, the insurer has not to satisfy the award.

11. Having said so, no interference is required. Accordingly, the impugned award is upheld and the appeal is dismissed.

12. The Registry is directed to release the awarded amount in favour of the claimant, strictly as per the terms and conditions contained in the impugned award.

13. Send down the records after placing a copy of the judgment on the Tribunal's file.

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

Naresh Kumar Goel ...Appellant.

Versus

Mam Raj and others ...Respondents.

FAO No. 116 of 2008
Decided on: 24.07.2015

Motor Vehicles Act, 1988- Section 166- Tribunal had awarded compensation of Rs. 20,000/- with interest @ 7.5%-held that the Insurance Company should not have questioned the amount of Rs. 20,000/- awarded to the claimant. (Para 1-2)

For the appellant: Mr. Bimal Gupta, Advocate.

For the respondents: Ms. Devyani Sharma, Advocate, for respondent No. 1.
Mr. J.S. Bagga, Advocate, for respondent No. 2.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The owner-insured has questioned the judgment and award, dated 10.12.2007, made by the Motor Accident Claims Tribunal-II, Sirmaur District at Nahan, H.P. (for short "the Tribunal") in MAC Petition No. 37-N/2 of 2003, titled as Shri Mam Raj versus Shri Naresh Kumar Goel and others, whereby compensation to the tune of Rs.20,000/- with interest @ 7.5% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimant-injured and the appellant-owner-insured came to be saddled with liability (for short "the impugned award").

2. It is travesty of justice that a meager amount of compensation to the tune of Rs.20,000/- has been questioned by the medium of this appeal and the same is pending on the dockets of this Court for the last more than seven years.

3. However, I have gone through the impugned award and the record. No case for interference is made out. The appeal is accordingly dismissed and the impugned award is upheld.

4. At this stage, Mr. J.S. Bagga, learned counsel for the insurer, stated at the Bar that the insurer has already made the payment to the claimant-injured and has moved an application for execution. His statement is taken on record.

5. Registry is directed to release the amount deposited by the owner-insured before this Registry in favour of the insurer through payee's account cheque.

6. Send down the record after placing copy of the judgment on Tribunal's file.

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

National Insurance Company Ltd. ...Appellant.

Versus

Smt. Shayda and others ...Respondents.

FAO No. 132 of 2008
Decided on: 24.07.2015

Motor Vehicles Act, 1988- Section 166- Claim petition was filed by six claimants- the Tribunal had deducted 1/3rd towards personal expenses-held that the Tribunal had erred in deducting 1/3rd towards personal expenses and should have deducted 1/5th towards the same. (Para 7)

For the appellant: Mr. Ashwani Sharma, Advocate.

For the respondents: Nemo for respondents No. 1 to 7.

Ms. Shashi Kiran, Advocate, vice Mr. Rupinder Singh, Advocate, for respondent No. 8.

Mr. N.K. Thakur, Senior Advocate, with Mr. Rohit Bharoll, Advocate, for respondent No. 9.

Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate, for respondent No. 10.

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 28.11.2007, made by the Motor Accident Claims Tribunal, Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 63 of 2001, titled as Smt. Shayda and others versus Sh. Mohinder Pal and others, whereby compensation to the tune of Rs.3,94,000/- with interest @ 7½ % per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (for short "the impugned award").

2. This appeal is outcome of a vehicular traffic accident, which was caused by the driver, namely Shri Dhani Ram, while driving bus, bearing registration No. HP-34-5401, rashly and negligently, on 20.06.2001 at about 1.30 P.M. at place Banala near Aut, in which so many persons sustained injuries and succumbed to the injuries.

3. It is stated that five appeals, outcome of the same accident, were also pending, stand already dismissed. One of the said appeals was FAO No. 14 of 2006.

4. I have gone through the impugned award. The appellant-insurer has questioned the impugned award on three counts:

(i) That the premium amount cheque was not credited by the bank into the account of the appellant-insurer within time;

(ii) That the accident was outcome of the contributory negligence; and

(iii) That the amount awarded is excessive.

5. Learned counsel for the appellant frankly conceded that later on, the premium amount was received by the insurer. So, the question of bouncing of cheque of the premium amount does not arise.

6. It was for the appellant-insurer to prove that the accident was the outcome of the contributory negligence of the drivers of both the vehicles involved in the accident, has failed to do so.

7. The amount awarded is Rs.3,94,000/- and the claimants are six in number. The Tribunal has fallen in an error in deducting one third towards personal expenses, one fifth was to be deducted. However, the claimants have not questioned the same. Accordingly, the same is reluctantly upheld.

8. All the three points are replied accordingly.

9. Keeping in view the fact that the five appeals arising out of the same accident involving the same issue have already been dismissed read with the discussions made hereinabove, this appeal is also dismissed. The impugned award is upheld accordingly.

10. 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 through payee's account cheque.

11. Send down the record after placing copy of the judgment on Tribunal's file.

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

Oriental Insurance Company ...Appellant.
Versus
Smt. Manju Devi and others ...Respondents.

FAO No. 83 of 2008
Decided on: 24.07.2015

Motor Vehicles Act, 1988- Section 166- Deceased was aged 37 years at the time of the accident and multiplier of '14' is applicable- taking income of the deceased as Rs. 6,000/- p.m. and deducting 1/3rd towards personal expenses, the claimants had lost source of dependency to the extent of Rs. 4,000/-p.m. or Rs. 48,000/- per annum–they are entitled to a compensation of Rs. 48,000/- x 14 = 6,72,000/-(Para 11-13)

Cases referred:
Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents: Mr. Tara Singh Chauhan, Advocate, for respondents No. 1 to 3.
Mr. Bharat Bhushan Vaid, Advocate, for respondent No. 4.
Nemo for respondent No. 5.

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 12.12.2007, made by the Motor Accident Claims Tribunal, Bilaspur, H.P. (for short "the Tribunal") in M.A.C. Case No. 61 of 2005, titled as Smt. Manju Devi and others versus Shri Jameel Akhter and others, whereby compensation to the tune of Rs.8,03,000/- with interest @ 6% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the insurer came to be saddled with liability (for short "the impugned award").

2. The owner-insured, the driver and the claimants have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-insurer has questioned the impugned award on three counts:

(i) That the driver of the offending vehicle was not having a valid and effective driving licence at the time of the accident;

(ii) That the multiplier applied by the Tribunal is not in consonance with the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "MV Act") read with the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120;** and

(iii) That the income of the deceased assessed by the Tribunal is on higher side.

4. In order to determine all these points, it is necessary to give a flashback of the facts of the case, the womb of which has given birth to the appeal in hand.

5. The claimants invoked the jurisdiction of the Tribunal in terms of Section 166 of the MV Act for grant of compensation on the ground that they lost their sole bread earner, Shri Krishan Kumar, in a vehicular traffic accident, which was caused by the driver, namely Shri Gopal Dass, while driving truck, bearing registration No. HP-31 B-0307, rashly and negligently, on 18.04.2005, at about 11.15 A.M. on National Highway near Ghambrola bridge, in which he sustained injuries and succumbed to the injuries.

6. The respondents in the claim petition, i.e. the owner-insured, the driver and the insurer, resisted the claim petition on the grounds taken in the respective memo of objections.

7. Following issues came to be framed by the Tribunal on 04.04.2006:

"1. Whether the deceased Krishan Kumar had died in the accident of truck No. HP-31 B-0307 which was being driven rashly and negligently by respondent No. 2 at the time of the accident, if so, its effect? *OPP*

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

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

4. Whether the offending vehicle was being plied contrary to the provisions of the Motor Vehicles Act, if so, its effect? *OPR-3*

5. Relief."

8. Parties led evidence. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation in favour of the claimants and saddled the appellant-insurer with liability.

9. There is no dispute about the findings returned by the Tribunal on issue No. 1. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

10. Issues No. 2, 3 and 4 are covered by the questions framed hereinabove. Admittedly, the deceased was 37 years of age at the time of the accident, has rightly been held by the Tribunal and admitted by the learned counsel for the parties appearing before this Court.

11. While going through the Second Schedule appended with the MV Act read with the judgment made by the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench in **Reshma Kumari's case (supra),** two has to be deducted from the multiplier given in the Schedule. Viewed thus, the Tribunal has fallen in an error while applying the multiplier of '16', as multiplier of '14' was applicable.

12. The Tribunal has held that the deceased was a trained plumber and has assessed his income as Rs.6,000/- per month by exercising guess work. I am of the considered view that the guess work exercised by the Tribunal is just and proper and the assessment made is not on the higher side. The Tribunal has rightly deducted one third towards personal expenses in view of the judgments (supra) and held that the claimants have lost source of dependency to the tune of Rs. 4,000/- per month, i.e. Rs.48,000/- per annum.

13. Having said so, the claimants are held entitled to compensation under the head 'loss of dependency' to the tune of Rs.48,000/- x 14 = Rs.6,72,000/-. The compensation awarded by the Tribunal under the heads 'loss of consortium' to the tune of Rs.25,000/- and 'conventional charges' to the tune of Rs.10,000/- is upheld.

14. Viewed thus, the claimants are held entitled to total compensation to the tune of Rs.6,72,000/- + Rs.25,000/- + Rs.10,000/- = Rs.7,07,000/- .

15. The driving licence, Ext. R-4 is on the record. While going through the said driving licence, one comes to an inescapable conclusion that the driver of the offending vehicle was having a valid and effective driving licence to drive 'HTV' with effect from 20.04.2002. The accident has taken place on 18.04.2005. Thus, it can be safely held that the driver of the offending vehicle was having a valid and effective driving licence to drive the offending truck, bearing registration No. HP-31 A-0307, at the relevant point of time.

16. Learned Senior Counsel appearing on behalf of the appellant-insurer argued that the driving licence was not issued in terms of the provisions contained in Section 7 of the MV Act. The argument of the learned Senior Counsel, though attractive, is devoid of any force for the following reason:

17. The owner-insured has discharged his duty by checking the contents of the driving licence of the driver. It was not for the owner-insured to verify the contents of the said driving licence. Even otherwise, the driving licence, Ext. R-4, is on the record. It contains the endorsement of 'HMV', appears to be legal one .

18. The appellant-insurer has not proved that the owner-insured has committed any willful breach.

19. Viewed thus, the Tribunal has rightly directed the appellant-insurer to indemnify the owner-insured because the offending vehicle was insured with it, which factum is not in dispute.

20. Having glance of the above discussions, the appeal is disposed of and the impugned award is modified, as indicated hereinabove.

21. 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. The excess amount be released in favour of the appellant-insurer through payee's account cheque.

22. Send down the record after placing copy of the judgment on Tribunal's file.

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

Oriental Insurance Company .....Appellant
Versus
Vikrant Kumar & others ...Respondents.

FAO (MVA) No. 160 of 2008
Date of decision: 24th July, 2015.

Motor Vehicles Act, 1988- Section 166- Claimant had sustained injuries in a motor vehicle accident- he had placed on record the documents showing that an amount of Rs. 82,660/- was spent by him- the Tribunal had awarded this amount-held that the award passed by the Tribunal cannot be said to be excessive. (Para-15)

For the appellant: Mr.G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For the respondents: Mr. Tara Singh Chauhan, Advocate, for respondent No.1.
Mr. Lokender Thakur, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice,*(Oral)*

The insurer, by the medium of this appeal, has questioned the judgment and award made by the Motor Accident Claims Tribunal, Bilaspur, hereinafter referred to as "the Tribunal" in MAC No.17 of 2005, titled *Vikrant Kumar versus Salinder and others,* whereby compensation to the tune of Rs.82,660/- alongwith 6% interest per annum came to be awarded in favour of the claimant and insurer came to be saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Driver, owner and claimants have not questioned the impugned award on any ground thus, it has attained finality so far as it relates to them.

3. The learned senior counsel for the appellant argued that the claim petition is after thought and no FIR was lodged and came to be lodged as per the order made by the Judicial Magistrate concerned.

4. A meager amount has been awarded, so I believe that the insurance company should not have questioned the same. The arguments advanced by the learned

senior counsel for the appellant, though attractive, are without any force, for the following reasons.

5. It appears that claimant Vikrant Kumar filed claim petition before the Tribunal for the grant of compensation, as per the break-ups given in the claim petition. The same was resisted by the owner, driver and insurer and following issues came to be framed.

(i) *Whether the petitioner sustained injuries on account of rash and negligent driving of respondent No.2 Ram Chand alias Mimi driver of Bus No. HP-24-3401? OPP.*

(ii) If issue No. 1 is supra is proved, to what amount of compensation the petitioner is entitled to and from which of the respondents? OPP

(iii) Whether the respondent No. 2 driver of Bus No. HP-24-3401 was not holding a valid and effective driving license at the time of accident, if so, its effect? OPR-3.

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

(v) Whether the vehicle in question was plying on the road in contrary to the provisions of MV Act, as alleged OPR-3.

(vi) Whether the accident is result of contributory negligence of respondent No. 2 and petitioner? OPR-3.

(vii) Relief.

6. Claimant examined Surender Kumar (PW2), Chengu Ram (PW3), Dr. Mukand Lal (PW4) and himself appeared as PW1 in the witness-box.

7. Driver and owner examined Kumari Gayatri Sharma, (RW1) Dr. Amarjeet Singh (RW2), Ram Chand (RW3) and HHC Nasib Khan (RW-4).

8. The claimant also placed on record medical bills Ext. P1 to P40, copy of FIR Ext. PW2/A, Taxi Bill Ext. PW2/B, cash memo Ext. PW2/C and disability certificate Ext. PW4/A. The respondents have also produced on record documents, mention of which is made at Form-A appended to the impugned award.

9. The Tribunal, after scanning the evidence, held that the claimant has proved that the bus driver has driven the offending vehicle rashly and negligently and caused the accident, in which the claimant has sustained injuries.

10. The insurer/respondent No 3 before the Tribunal, has filed the reply. It is apt to reproduce para 5 of the reply on preliminary objections herein.

> *"5.The accident is result of contributory negligence of respondent No. 2 and the driver of motor cycle involved in the accident as such the answering respondent is not liable for any compensation."*

11. The driver and owner have also filed the reply. It is apt to reproduce para 13 of the reply herein.

> *"13.Para No. 24 of the petition is wrong hence denied. No accident took place due to the rash and negligent driving of respondent No.2. Actually, the motor cycle was being driven by*

the petitioner himself alongwith two pillion riders and the petitioner struck the motor cycle against the vehicle/bus of the respondents and on the spot the petitioner made apology and requested the respondents not to register any case against the motor cycle driver but later on the petitioner filed this false petition. The accident has taken place due to the sole negligent driving of the petitioner himself, therefore, he is not entitled for any compensation. The petitioner has o income. If the petitioner is held entitled to any compensation then the same may be recovered from respondent No. 3 or from the insurer of the motor cycle."

12. While going through the averments contained in the claim petition as well as the reply filed by the respondents before the Tribunal, one comes to an inescapable conclusion that the accident was outcome of rash and negligent driving of the driver of the offending bus.

13. The owner and driver have not questioned the impugned award, thus, the findings returned on issue No. 1 are upheld.

14. Issue No. 6 is governed by the findings returned on Issue No. 1, merits to be upheld. The findings returned on this issue are required to be upheld for the other reasons that it was for the insurer to prove the same, has not led any evidence, thus failed to discharge the onus. Accordingly, findings returned on this issue are upheld.

15. A meager amount of Rs.82,660/- has been awarded by the Tribunal. The claimant has placed on record the documents, which do disclose that he has spent the said amount and cannot be said to be excessive in any way.

16. Having said so, no interference is required. Accordingly, the appeal is dismissed.

17. The Registry is directed to release the amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account.

18. Send down the record forthwith, after placing a copy of this judgment.

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

State of Himachal Pradesh .....Appellant.

Versus

Khub Ram & another .....Respondents.

Cr. Appeal No. 7 of 2002-B.
Reserved on: 14.7.2014.
Date of Decision :24.7.2014.

N.D.P.S. Act, 1985- Section 20- A car was intercepted by the police officials and officials of NCB- one packet containing 9 kg, second packet containing 15 kg, third packet containing 19 kg. and fourth packet containing 19 kg. of charas were recovered from the car- the secret information was duly reduced into writing and was conveyed to Dy. SP/SHO Police Station Banjar, Addl. S.P. and Superior officer of NCB- held, that Trial Court had erred in concluding that prosecution had not complied with the requirement of Section 42(2) of N.D.P.S. Act. (Para-17 to 22)

Case referred:
Karnail Singh versus State of Haryana, (2009)8 SCC 539

For the Appellant: Mr. Ramesh Thakur, Assistant Advocate General.
For the Respondents: Mr. Y.P.S. Dhaulta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal, is, directed by the State, against the impugned judgment, rendered, on, 1.9.2001 by the learned Sessions Judge, Kullu, Himachal Pradesh, in Sessions trial No. 47 of 2000, whereby, the learned trial Court acquitted the accused/respondents for theirs having committed an offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

2. Brief facts, of the case are, that, PW-5 R.P. Singh, Intelligence Officer, Narcotic Control Bureau, Chandigarh, along with his team, for, collecting intelligence, came to Kullu on 28.7.2000. On 30.7.2000, when he along with his team, was, present at Bathahar, he received a secret information about transportation of a huge haul of contraband from Bathahar towards Banjar. PW-5 along with Mr. O.P Bhat, Investigating Officer, N.C.B, went, to, P.S. Banjar at 10.00 a.m. and informed SHO, P.S. Banjar by giving information Ex.PW5/A. Shri Kushal Sharma, PW-7, SHO telephonically conveyed the information to S.P. Kullu and entered the same in the daily diary at serial No.24, dated 30.7.2000. PW-7 accompanied by Sh. R.P. Singh, Constable Vinod Kumar, S.I. Shiv Ram, ASI Narain Singh, H.C. Naresh Chand, H.C. Mohan Lal, constable Sunil Kumar, constable Uttam Singh, L.C. Hara Dei and team members of PW-5, went to Bhathahar and laid a Nakka at Faryadi Mor, 16 kilometers from Banjar. At 2.45 a.m., spotting head light of a vehicle from Bathahar, coming towards Banjar, the same was stopped and was found to be a Maruti car bearing No.DL-2CD-2489. The car was being driven by accused Ram Singh and accused Khub Ram was occupant of the car. Name of the accused were enquired into, who turned perplexed and four plastic bags kept in the dicky of the car were checked. On opening, they were found to be containing charas in the shapes of sticks. Charas with the help of testing kit was tested by Shri R.P. Singh and was found to be charas. One bag was marked "A" and Charas contained therein was found to be 9 kilo grams. Therefrom, three samples of 25 grams each were separated and marked X1, X2 and X3. Second bag was marked "B" and found to be containing 15 kilograms of charas. The charas of the bag was divided in two lots of 7.5 kilograms, each and both lots were marked as Y and Z. From both bags marked as Y and Z, three samples each weighing 25 grams were separated and marked Y1, Y2 and Y3, Z1, Z2 and Z3. The third bag was marked as "C" and it found to be containing 19 kilograms of charas. It was also divided into two lots and marked, as, M and

N. From both those lots, 3-3 samples each weighing 25 grams each were separated and marked as M1, M2 and M3, and N1, N2 and N3. On the fourth bag, distinct mark of D was affixed and the same was found to be containing 19 kilograms of charas. It was also divided into two lots of 9.5 kilograms and both lots were marked as O and P. Out of these lots, three samples each of 25 grams were separated and marked as O1, O2 and O3 and P1, P2 and P3. All samples were wrapped in polythene bag and thereafter wrapped with a cloth and sealed with seal bearing impression "H". The remaining lots of charas were packed in polythene bags and thereafter, polythene packets individually were wrapped in cloth bag, which was stitched and thereafter sealed with seal "H". Signatures of the witnesses were obtained on the packets and samples. Sample packets were put, in, the sample plastic bag from which particular charas was recovered and packets were also sealed by affixing seal impression "H". NCB forms were filled and seal entrusted to R.P. Singh. The entire case property was taken into possession vide memo Ex.PW5/B which was signed by the accused and the witnesses. Accused were then apprised about the offence, punishment provided for qua which memo Ex.PW5/A was prepared. The vehicle along with its documents was taken into possession vide recovery memo Ex.PW5/D. Shri Kushal Chand, SHO, Police Station Banjar sent a rukka, Ex.PW2/B, through constable Virender Kumar to Police Station Banjar, on the basis of which FIR Ex.PW2/A was entered by the MHC Narain Singh. Thereafter constable Virender Kumar brought the file to the spot after registration of the case. Specimens of the seal were taken on memo Ex.PW7/B. Photographs were also taken. On the evening of 31st July, 2000, 26 sealed packets of the case property were deposited with MHC Narain Singh, P.S. Banjar, who entered the same in the Malkhana register. Out of them, seven packets were sent to CTL, Kandaghat vide R.C. No.30 of 2000. The copy of the information recorded in the daily diary, through, constable Bahadur Singh was sent to S.P. office, Kullu, through, constable Uttam Singh, where it was entered in the relevant register by ASI Lal Singh, Reader. On analysis of the samples, vide chemical report Ex.PW7/D, the contents were reported to be charas.

3. 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.

4. The accused were charged for theirs having committed an offence punishable under Section 20 of the Act, by the learned trial Court, to which they pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined seven witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication.

5. On appraisal of the evidence on record, the learned trial Court returned findings of acquittal against the accused.

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

7. On the other hand, the learned defence counsel 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 the evidence on record and do not necessitate interference, rather merit vindication.

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

9. The first witness, who stepped into the witness box to prove the prosecution case, is, PW-1 Uttam Singh. He has deposed that, on 1.8.2000, Dy S.P./SHO Kushal Sharma, P.S., Banjar, handed over to him special report which he took to S.P. Office, Kullu, and handed it over to Addl. S. P., on the same day. He deposed that, so, long the special report remained in his custody, nobody tampered with it. In cross-examination, he deposed that he started from Banjar in the morning and handed over the report, at 10.00/10.15 a.m.

10. PW-2 H.C. Narain Singh deposes that on receipt of rukka, he registered FIR Ex.PW2/A and made his endorsement, Ex.PW2/B, on the rukka, which was signed by him. He continued, to, depose that on the same day at about 6.10 P.M., SHO Kushal Sharma, deposited with him 26 sealed parcels with seal 'H" along with NCB forms. On 1.8.2000, he, deposes that he sent seven sample parcels, through, constable Bahadur Singh to CTL, Kandaghat, vide R.C. No. 38/2000 along with NCB form, in, triplicate and other documents. He further testifies after the constable having deposited the same at CTL, Kandaghat, he delivered to him the receipt qua its deposit to him. He proceeds to depose that during investigation, he supplied copies of rapat rojnamacha, R.C. and abstract of entry made in the Malkahan register to the Investigating Officer. Ex.PW2/A and Ex.PW2/A-1 are deposed to be copies of malkhana register and Ex.PW2/B and Ex.PW2/C are deposed to be copies of R.C. and rapat rojnamacha, respectively. These have been deposed to be correct as per the original.

11. PW-3 C. Bahadur Singh deposed, that, on 31.7.2000, MHC Narain Singh handed over to him copy of rapat rojnamacha No.24, dated 30.7.2000, information under Section 42(2) of the NDPS Act which he took to S.P. office Kullu and handed over the same to Addl. S.P., at about 10 a.m. Subsequently, he deposed that he went, to, P.S. Banjar and that, on, 1.8.2000 at about 8.00 P.M. MHC handed over to him samples, sample seal, NCB form, which he took to CTL, Kandaghat vide RC No. 38/2000, which, he, deposited on 2.8.2000 and on return handed over the receipt of deposit to MHC.

12. PW-4 ASI Lal Singh deposed, that, on 31.7.2000, Addl. S.P., Kullu handed over to him information under Section 42(2) of the NDPS, Act which, he, entered at serial No.36 of the relevant register. On 1.8.2000, Additional S.P., Kullu again handed over to him special report, which he entered at serial No.37 of the concerned register. He deposed that during the investigation he handed over copy of information Ex.PW4/A to the Investigating Officer, as also, copy of special report, Ex.PW4/B. Both have been deposed to be correct as per the original by this witness.

13. PW-5 R.P. Singh, Intelligence Officer, NCB, Chandigarh deposed that on 28.7.2000, NCB team was constituted for collecting intelligence and it came to Kullu. On receipt of information, the NCB team went towards Banjar side and on 30.7.2000 at Bathahar they received secret information that on that day large quantity of charas would be taken from Bathahar towards Banjar. O.P. Bhatt, Investigating Officer of NCB was also accompanying him. On the receipt of the information, they went to Police Station, Banjar

during night. At about 10.00 p.m., he gave information in writing to SHO comprised in Ex.PW5/A and the same has been deposed to have been signed by him. Dy.S.P./SHO Kushal Sharma has been deposed to be present in the police station. He deposed that in their presence, SHO/Dy.S.P., Kushal Sharma telephonically conveyed the information to the S.P., Kullu and their application was entered by the police in the register. He further proceeds to corroborate the entire genesis of the prosecution case qua the laying of naka, search, seizure and recovery of the huge haul of contraband in the manner as alleged by the prosecution and extracted hereinabove. In his cross-examination, he, deposed that on reaching Banjar, he telephonically informed Zonal Director about the information. The information has been deposed by him to have been comprised in Ex.PW5/A. During his inexorable cross-examination, he denied the suggestion of the defence that he omitted to join the independent witnesses. He has also denied the suggestion that owing to land slide on 30.7.2000, the road was blocked at 12 noon near Faryadi Mor and remained blocked upto 1st August, 2000.

14. PW-6 LHC Vijay Kumar deposed that on 31.7.2000, he along with Dy. S.P. Kushal Sharma, the then SHO, Police Station Banjar and other police officials and NCB Officials were at Faryadi Mor and remain with them from 11 P.M. to 6.45 A.M. He deposed that the Investigating Officer handed over to him rukka of the case, for registration of the FIR at 6.45 a.m., which he took to Police Station Banjar. After registration of FIR by MHC, the file was taken by him to the spot and the same was delivered to the Investigating Officer.

15. PW-7, Kushal Chand, Dy. S.P./SHO corroborates the testimony of PW-5 qua the latter on 31.7.2000 at about 10.00 a.m. having come to the police station and handed over to him secret information comprised in Ex.PW5/A and he proceeded to record the same in the rapat rojnamacha register, copy of the same has been deposed to be Ex.PW2/C. In all other material particulars, relating to search, seizure and recovery from the alleged conscious and exclusive possession of the accused in the manner as alleged by the prosecution, he, has lent a forceful corroboration to the testimony of PW-5.

16. The secret information, as, deposed by PW-5, R.P. Singh, Intelligence Officer, of a large haul of contraband being transported from Bathahar towards Banjar, was received by PW-5, on 30.7.2000. The secret information was recorded/reduced into writing in Ex.PW5/A. The information was conveyed to Dy. S.P./SHO Kushal Sharma, PW-7, Police Station, Banjar. The fact of the PW-5 having conveyed the information, recorded in Ex.PW5/A to PW-7 at Police Station, Banjar, on the night of 31.7.2000, at about 10.00 a.m. stands corroborated by PW-7. Subsequently, an entry in the daily diary vide report No.25, copy of which has been proved to be comprised in Ex.PW2/C, was recorded. PW-5, also telephonically conveyed the information to his superior officers, at, Zonal Office, NCB, Chandigarh. The said fact has not come to be repulsed by adduction of evidence by the defence to tear, its, veracity and authenticity. A perusal of testimony of PW-3, Bahadur Singh, unfolds, as well, as, divulges the crucial fact of PW-2, Narain Singh, having handed over to him copy of rapat rojnamcha No. 24, dated 30.7.2000, information under Section 42(2) of the NDPS Act, which he carried to the S.P. Office Kullu and handed over the same to Addl. S.P. at about 10 a.m. Subsequently, he deposes that he had gone to Police Station, Banjar. The disclosure made in the testimonies of the witnesses aforesaid, brings to the fore, the evidence fact of (a) secret information having been received by PW-5 and it having come to be reduced into writing by PW-5, in, Ex.PW5/A; (b) the secret information having been conveyed and transmitted by PW-5 to PW-7, Dy.S.P./SHO, Police Station Banjar on the night of 30.7.2000, whereupon, an entry in rapat rojnamcha No.24, comprised, in,

Ex.PW2/C, was recorded. (c) The secret information having been transmitted by PW-3 on 31.7.2000 to Additional S.P., Kullu and (d) A telephonic information having been transmitted by PW-5 to his superior officers at NCB, Zonal Office, Chandigarh. (e) The secret information recited in Ex.PW5/A also too comprises reasons for belief given the time of its receipt and immediacy as well as expediency for preempting the transportation of the haul of contraband, so as to render dispensable the possession of search warrant as well as authorization by PW-5 preceding to carry out the search of conveyance between sunset and sunrise.

17. The Incident took place at about 2.45 a.m., on, 31.7.2000 and preceding to it, Ex.PW5/A was recorded. There, is, a statutory obligation enjoined upon the officer, carrying out search, seizure and recovery of the contraband from a "conveyance", as was the Maruti car occupied at the relevant stage by both the accused, especially when such proceedings of search, seizure and recovery of contraband are carried out between sunset and sunrise, as has happened in this case, to record reasons of belief that search warrants or authorization conveying or according permission, to, the searching party to carry out the search of conveyance, which was to be searched and wherefrom recovery was to be effected, could not, be obtained, as, delay which would be occasioned in obtaining it, and, hence, its imprompt procurement would facilitate the concealment of the evidence or the escape of the offender. The evident fact which emerges from the unfoldment, in, the testimonies of the prosecution witnesses, as, referred to hereinabove, is that PW-5 in Ex.PW5/A has loudly and plain speakingly communicated, his having received a secret information on 30.7.2000, of, a huge haul of contraband being transported from Bathahar. Hence, in the face of the fact, that, the NCB team constituted for nabbing the culprits was deficient, in, manpower and, hence, the services of the local police were requisitioned, as also, as articulated by Ex.PW5/A, of the help from the Dy. S.P./SHO, Police Station, Banjar, being requisitioned to be rendered for facilitating, a, successful nabbing of the accused with the huge haul of contraband. Consequently, when this Court has already drawn a conclusion hereinabove that the recording of the secret information along with its further communication, was quickly, rapidly and promptly done by PW-5, to the Dy. S.P., SHO, Police Station Banjar, as also, by him to his superior officers, at, NCB, Zonal Office, Chandigarh. Also, when secret information does not recite the names of the accused in it, obviously, for non recital of the names of the accused in it, whose names may not have been in the knowledge of PW-5, hence, when the information was not specific qua the names of the persons, who would carry/transport a huge haul of contraband or who were suspected to handle and transport the huge haul of contraband from Village Bathahar, hence, obviously, when a secret information recorded as Ex.PW5/A, as such omitted to display the name of each of the accused, who would carry a huge haul of contraband. As, a natural concomitant, then, given the authenticity of the secret information and the prompt action taken on it, portrays the speedy communication by PW-5 to PW-7, as also, to his superiors at NCB, Zonal Office, Chandigarh. He, hence, cannot be construed to have committed any omission or lapse, in, not obtaining warrants preceding the search of the conveyance, in, which it was being carried out and wherefrom it was ultimately recovered from the exclusive and conscious possession of both, the accused being its driver and occupant. As a sequel then, it has to be formidably, concluded, that the non-obtaining of search warrants by PW-5 before carrying out the search of the conveyance from which the haul of the contraband was recovered, from the exclusive and conscious possession of the accused, especially when, he, was not in the know of the names of the accused or in the know of the number of the vehicle, in, which it was being carried out, would not constitute the said omission to be a severe lapse, having grave repercussions, upon the success of the prosecution case. In aftermath, this Court

convincingly comes to the forthright inference, that, when even otherwise, given the expediency or urgency of the prompt carrying out of the proceedings relating to the search, seizure and recovery of contraband from the conveyance, in, which it was concealed and hidden, and was to be transported at night, as also, given the fact that it was not known to the PW-5 or other police officials about the exact time when the haul of the contraband would be carried, in, the vehicle from which it was recovered. Therefore, for want of information, qua the exact time, when the contraband would be transported in the vehicle by the accused, in which event, it would, given the precise information qua the exact time of its being transported, hence, providing adequate leverage, in, time to PW-5 to obtain warrants authorizing them to search the conveyance. However, when such, precise information with exactness qua the time about its being carried, in, the vehicle, as, done by the accused, was not available with the PW-5. Therefore, it can, also, be said that when they were ready to nab the accused on arrival of the vehicle, at, "any time". Obviously, then, in case, delay would have been occasioned, in, obtaining the warrants or authorization from the competent officer, for searching the conveyance, in, which it was carried, the very purpose of setting up the naka for searching the vehicle and on, its, search recovery and seizure of contraband from the exclusive and conscious possession of the accused, as, done, would have been preempted, as well, as, aborted. In nut shell, it has to be concluded, that, hence, when there are stark and overwhelming circumstances existing, in, this case which do not render the omission on the part of PW-5 to obtain search warrant or authorization, from the competent officer preceding, to, the search of the conveyance from which the contraband was recovered, to be constituting a tenacious and potent legal flaw, besides, such omissions do not oust the prosecution case.

18. The information, as, comprised in Ex.PW5/A, as discussed hereinabove was conveyed both, to, Additional S.P., Kullu, with utmost promptitude and without dereliction. Information was also conveyed by PW-5, to, his superior officers at NCB, Zonal Office, Chandigarh. Now, in the face of the latter fact having remained un-rebutted, it is not open, to, the counsel for the accused/appellant, to, contend that the secret information comprised, in, Ex.PW5/A having remained un-communicated to his superior officers, at, NCB, Zonal Office, Chandigarh, the prosecution case is to be faulted. Moreover, it has also got to be construed that the communication of the secret information by PW-5 to his superior officers at NCB, Chandigarh, constitutes compliance with the mandate of Section 42(2) of the NDPS Act. Further more, the recording of the secret information along with the necessity, hence, to promptly nab the accused, too, comprises compliance with the provisions of Section 42(2) of the NDPS, Act, when the conveyance was searched between sunset and sunrise to record reasons to belief in writing. Besides when, even if, the Dy. S.P./SHO, Police Station Banjar or Additional S.P., Kullu was not his superior officers, rather, when they were available in immediate vicinity of the site of the occurrence, besides, when they contrary to lack of manpower with the PW5, to, efficaciously and successfully carry out the search, seizure and recovery of the contraband from the dicky of the car driven and occupied by the accused respectively, rather had adequate and sufficient manpower. Obviously when there is no bar to intra departmental or intra agency or intra investigating agency co-ordination and collaboration in nabbing the accused, who were carrying or transporting the huge haul of contraband, this, Court does not find any flaw or lack of transparency, in, the act of PW-5 in giving the information to PW-7 and Additional S.P., Kullu, for, requisitioning the services of the local police for the successful carrying out of the search of the car, driven and occupied by the accused, respectively, wherefrom the contraband was recovered.

19. Before departing, it is necessary, while, reversing the findings of the learned trial Court, to, hence, advert, to, the factum of inherent fallacies of frailties with which the judgment of the learned trial Court is fraught with. The prime reason, as, afforded by the learned trial Court, for recording findings of acquittal in favour of the accused, is, of the statutory compliance, of, provisions of Section 42(2) of NDPS, Act, having not come to be recorded, by PW-5, hence, necessitating the returning of findings of acquittal, in, favour of the accused, comprised in the fact of MHC Narain Singh, PW-2, having omitted, to, depose of PW-3 being deputed to send a copy of Rapat Roznamcha, Ex. PW-2/C, for its transmission, to, A.S.P, Kullu. As such, the deposition, of, PW-3, qua, its having come to be delivered, by him, to, ASP, is, ingrained with a falsity. However, the said attribution of falsity, to, the deposition of PW-2, is, itself ingrained in untruth, in, as much, as, when PW-3 deposes qua the said fact and his deposition in his examination-in-chief, has remained un-shattered, during the course of his cross-examination. Consequently, truth is to be imputed to his deposition in his examination-in-chief qua the above fact. Besides when PW-3 Narain Singh has remained unexamined or uncross-examined qua the aforesaid fact, it cannot be said that the mere omission, in, his deposition qua the said fact, renders his testimony of his having handed over Ex.PW2/C to Additional S.P. at about 10.00 a.m. on 31.7.2000, to, acquire any grain of untruth or prevarication. Consequently, for the reasons aforesaid, this Court has concluded, that, Ex.PW5/A records, a truthful fact, of, secret information having been received by PW-5, as also, given the fact that it was, hence, promptly, transmitted to Dy.S.P./SHO, Police Station, Banjar, qua which factum, of its transmission, to him by PW-5 has been testified by PW-7, Dy.S.P./SHO, too. Hence, it is to be inferred that there is no laxity on the part of PW-5, to, record or to transmit the secret information initially, to, Dy.S.P./SHO, Police Station, Banjar and subsequently through PW-3 for its transmission, to, Additional S.P., Kullu.

20. The other reasons which have been afforded by the learned trial Court, in, proceedings to conclude, that, there was infraction on the part of PW-5, to, comply with the provisions of Section 42 (2) of the NDPS Act, is comprised in the fact that when the conveyance, in, which the contraband was allegedly carried by the accused, was subjected to search, seizure and recovery, therefrom, at, hours between sunset and sunrise, in as much,as, when detection thereof and consequent recovery, was effected from the conscious and exclusive possession of the accused at 2.45 a.m., on, 31.7.2000, hence, as, mandated, in, the aforesaid provisions of law, that preceding such search and seizure of conveyance at, hence, between sunset and sunrise, such search of the conveyance was permissible only, in the event of the Investigating Officer, being empowered by search warrant and authorization, which having been not in the possession of PW-5, renders the entire proceedings to be for non-compliance with the mandatory statutory provisions, to be, vitiated. However, the said reason falters and is rendered frail, in, the face of the discussion aforesaid portraying the fact that given the immediacy of apprehension of the accused. Besides, when for the other reasons, highlighted hereinabove, which are to be construed, to, have precluded the Investigation officer, to, before proceeding to search and recover contraband from the conveyance in which it was carried, obtain search warrant or authorization, that, hence, there was no willful or volitional departure from the mandate of the provisions of Section 42(2) of the NDPS Act, envisaging, that preceding the act of the Investigating Officer, proceeding to search the conveyance in which the huge haul of contraband was carried, at, about 2.45 a.m., he, was required to before doing, possess, search warrants or authorization to do so. Rather, when the reasons attributed hereinabove also divulges palpable tenable extenuatory circumstances for such purported infraction, it does not acquire any sinew. Moreover, for reiteration, it has also got to be construed that

communication of secret information by PW-5, to his superior officers at NCB, Chandigarh, constitutes compliance with the mandate of Section 42(2) of the NDPS Act. Furthermore, the recording of the secret information along with the necessity, to promptly nab the accused, too, comprises compliance with the provisions of Section 42(2) of the NDPS, Act, when the conveyance was searched between sunset and sunrise, in as much, as, they constitute and comprise "reasons to belief in writing" of the immediacy of the apprehension of the accused which immediacy of search, seizure and recovery may have been thwarted by delay occasioned in the procurement of search warrant or authorization.

21. Moreover, the reasons, as, attributed by the learned trial Court in, its, impugned judgment qua the omission on the part of PW-5, to transmit the information to his superior officials, infects the judgment with the vice of infraction of the provisions of Section 42(2) of the NDPS Act and that, hence, the transmission of information by PW-5 to PW-7, who was not his superior officer, cannot, constitute any compliance, with the provisions of the Section 42(2) of NDPS, Act, mandating transmission of information, by, PW-5 to his superior officers, who were, rather, at NCB Zonal Office, Chandigarh and not at Kullu. The effect of above contention, too, get ridden with frailty, in, the face of PW-5, having pronounced, in, his deposition, qua his telephonically intimated his superior officers, at, NCB, Zonal Office, Chandigarh, the said deposition has remained unscathed or un-torn. Besides, un-stripped of truth by way of any tenacious evidence, in, rebuttal thereto, having come to be adduced at the instance of the accused. Consequently, the learned trial Court fell, in, error in concluding, that in the PW-5 having not endeavored to transmit the contents of PW-5/A to his superior officers, at NCB Zonal Office, Chandigarh, whereas, he was mandated to do so renders, it, to constitute an infraction, of, the provisions of Section 42(2) of NDPS, Act, as such, vitiating the entire prosecution case. Moreso, when the provisions of Section 42(2) of NDPS, Act do not envisage imposition of any prohibition upon the PW-5 or Investigating Officer, to, transmit the secret information in a mode other than its statutory dispatch.

22. Before parting , it, is also imperative, to, refer to a judgment of the Hon'ble Apex Court reported in **Karnail Singh versus State of Haryana, (2009)8 SCC 539**, wherein, the Hon'ble Apex Court holds:-

> "12. The ratio in *Abdul Rashid ((2000)2 SCC 513),* is that the non-recording of vital information collected by the police at the first instance can be counted as a circumstance in favour of the accused-appellant. The police officer examined as a crucial witness, PW2, in that case admitted that he proceeded to the spot only on getting information that somebody was trying to transport a narcotic substance, but failed to take down the information in writing. Nor did he apprise his superior officer of any such information either then or later, much less send a copy of the information to the superior officer. Thus, it was a case of absolute non-compliance with the requirements of Section 42(1) and (2).
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> 13. The facts in *Sajan Abraham v. State of Kerala, (2001)6 SCC 692,* were completely different. The appellant/accused - Sajan Abraham was put on trial for an offence punishable under Section 21 of the Act. As per

the prosecution case, on 10.10.1993 at about 7.45 p.m. the appellant was in possession of a manufactured drug by the name of "Tidigesic" and three syringes for injecting the same near Blue Tronics Junction at Palluruthy. The Head Constable, PW 3 and two other Constables of the Special Squad got information at about 7.00 p.m. on the said date that a person was selling injectable narcotic drugs near Blue Tronics Junction at Palluruthy. They informed this to PW 5 - Sub-Inspector of Police, Palluruthy Cusba Police Station, who was coming in a jeep along with his police party. Thereafter PW 5 along with his police party including PW 3 and other members of the Special Squad went to the scene of occurrence found the accused standing on the road with a packet in his hand. He was identified by PW 3 and apprehended by PW 5. On search, the packet possessed by the appellant revealed that it contained 5 strips of 5 ampoules each of Tidigesic and three injection syringes and a purse containing currency note of Rs. 10. At the spot, one ampoule was taken as a sample for chemical analysis and the said contraband articles were seized as per Ext. P-1 and seizure mahazar was prepared at the spot. The appellant was also arrested. The charge-sheet was submitted, the appellant pleaded not guilty.

17. It is clear from *Sajan Abraham (supra)* that to enforce the law under the NDPS Act stringently against the persons involved in illicit drug trafficking and drug abuse, the legislature has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted to be mandatory. It is further clear that this is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The court however while construing such provisions strictly should not interpret them literally so as to render their compliance impossible. It concluded that if in a case, the strict following of a mandate results in delay in trapping an accused, which may lead the accused to escape, then the prosecution case should not be thrown out. It is also clear that when substantial compliance has been made it would not vitiate the prosecution case.

22. Sub-section (2) of Section 42 as it originally stood mandated that the empowered officer who have taken down information in writing or records the grounds of his belief under the proviso to sub- section (1), should send a copy of the same to his immediate official superior forthwith. But after the amendment in the year 2001, the period within which such report has to be sent was

specified to be 72hours. Section 43 deals with the power of seizure and arrest of the suspect in a public place.

23. We may note that *Abdul Rashid* followed *State of Punjab vs. Balbir Singh - 1994 (3) SCC 299.*We extract below the passage that was followed : (Balbir Singh Case, SCC p.321, para 25)

> "25. (2-C) Under Section 42(1), the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1), if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.
>
> To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.
>
> (3) Under Section 42(1), such 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 total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case."

25. A careful examination of the facts in *Abdul Rashid* and *Sajan Abraham* shows that the decisions revolved on the facts and do not really lay down different prepositions of law. In Abdul Rashid, there was total non-compliance with the provision of section 42. The police officer neither took down the information as required under section

> 42(1) nor informed his immediate official superior, as required by Section 42(2). It is in that context this Court expressed the view that it was imperative that the police officer should take down the information and forthwith send a copy thereof to his immediate superior officer and the action of the police officer on the basis of the unrecorded information would become suspect though the trial may not be vitiated on that score alone. On the other hand, in *Sajan Abraham*, the facts were different. In that case, it was very difficult, if not impossible for the Sub- Inspector of police to record in writing the information given by PW-3 and send a copy thereof forthwith to his official superior, as the information was given to him when he was on patrol duty while he was moving in a jeep and unless he acted on the information immediately, the accused would have escaped. The Sub-Inspector of Police therefore acted, without recording the information into writing, but however, sent a copy of the FIR along with other records regarding arrest of the accused immediately to his superior officer. It is in these circumstances that this Court held that the omission to record in writing the information received was not a violation of Section 42."

The paragraphs, as, extracted hereinabove, mandate the necessity of "substantial compliance" and not "strict compliance" with the requirement enshrined, in, section 42(2) of NDPS Act. Besides, render permissible entry, for search and seizure by the Investigating Officer, of, a conveyance, even when such an act, is, performed by the Investigating officer, between sunset and sunrise, even without the Investigating Officer possessing search warrants and authorization to do so, when special circumstances involving an emergent situation permit him, to do so and when the recording of an information and sending copy thereof to the superior officers, would delay the nabbing or apprehension of the accused or provide an opportunity to the accused to escape, in which event, the recording of information and sending copy thereof to superior officers, may get postponed. Therefore, when, it has been construed hereinabove for formidable reasons that communication of secret information by PW-5, to, his superior officers at NCB, Chandigarh, constitutes compliance with the mandate of Section 42(2) of the NDPS Act. Furthermore, the recording of the aforesaid secret information per se along with the necessity to promptly nab the accused, too, comprises compliance with the provisions of Section 42(2) of the NDPS, Act, in as much, as, it divulges reasons to believe qua immediacy of nabbing or apprehension of the accused and search of the vehicle. Consequently, even , when the conveyance was searched between sunset and sunrise, it is to be firmly held given the pronouncement in Ex.PW5/A of the facts, recorded therein, disclosing immediacy of necessity of apprehension of the accused, that the Investigating Officer, had substantially complied with the proviso of Section 42(2) of the NDPS Act, consequently, his act, in, searching the conveyance, between sunset and sunrise, without search warrant, is, not ingrained with any vitiation, arising from his omission, to, record reasons to believe in writing, especially, when Ex. PW-5/A, is, an omnibus communication thereof. Moreover, given the evident fact as eminently surging forth from the testimonies of the prosecution witnesses qua the immediate recording of secret information comprised in Ex. PW-5/A and its prompt and immediate dispatch to

SHO, besides its dispatch by PW-5 to his superior officers at NCB Zonal Officer, Chandigarh. Preponderantly, also, the prime fact of the quantum of haul of contraband, as, likely to be transported by the accused from Bathahar to Banjar, obviously necessitated, an, immediate laying of Naka at the instance of PW-5 with the aid and assistance of PW-7, to, obviate and avert as well, as, preempt transportation of huge haul of contraband, as communicated in the communication comprised in Ex. PW-5/A. Therefore, with, there having been abysmal lack of evidence, qua, the fact that the secret information, through a telephonic communication by PW-5, to, his superior officers at NCB, Zonal Office, Chandigarh, remained un-communicated. Consequently, the exercise of search, seizure and recovery of the contraband from the car which was occupied by the accused as driver and occupant, respectively, constitutes "substantial compliance" which, is, adequate and sufficient within the contemplation of the provisions of Section 42(2) of NDPS Act. This Court ought not to omit to loudly and plain speakingly articulate, here, that the intra agency participation, in as much, as, inter se the team headed by PW-5, an officer of Narcotic Control Bureau, Chandigarh and the team headed by PW-7, SHO/Dy.S.P., Police Station Banjar, who constituted the manpower, of, the local police was, to, fulfill the objective of nabbing the accused with large haul of contraband, as, was likely to be conveyed by them, as, communicated in Ex.PW5/A. Hence, to, preempt its transportation given the deficient manpower with PW-5, the act of PW-5, in, soliciting the services of PW-7 was an expedient act. Besides, also when the police unit of NCB has not been shown to be located within the local limits of the territory where the exercise relating to search, seizure and recovery from the alleged excusive and conscious possession of the accused was carried out. As such, when an FIR could have been lodged, only with the police Station located in the vicinity of the place of seizure. Obviously, then when the necessary FIR qua the incident was lodgable, only at the nearest police station, which had PW-7, as, its head itself. Consequently, the act of PW5, in, intimating the PW-7 and on intimation delivered to him, by, the informer his having prepared rukka and lodged FIR, cannot, succumb to any legal ouster.

23. In view of the above discussion, the appeal filed by the State is allowed and the judgment of the learned trial Court is set aside. Both the accused/respondents are convicted for theirs having committed an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985. They be heard on quantum of sentence on 4.8.2014 on which date they be produced before this Court.

****

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

Surinder Singh alias Chhinda & anr. .....Appellants.

Versus

State of Himachal Pradesh .....Respondent

Cr. A. No. 373/2012
Reserved on: 22.7.2015.
Decided on: 24.07.2015.

Indian Penal Code, 1860- Sections 364, 302 and 201 read with Section 34- 'R' had gone towards Garshanker along with passengers in his taxi- he did not return- the matter was

reported to the police- taxi was found lying unattended and dead body of 'R' was found- witnesses identified the accused- record showed that accused were already shown to PW-3 and PW-5- held, that purpose of identification of the accused is to test the memory of the witnesses - if accused are shown to the witnesses prior to the identification, the purpose of identification is defeated and such evidence cannot be relied upon- further, FIR was lodged on 15.6.2010, whereas, dead body was recovered on 10.6.2010- according to witnesses, dead body was decomposed and was not identifiable- police had taken the blood sample from the rear seat of the car but the scientific officer could not tell the period for which the blood stain had been dried- ligature mark could not be present due to the decomposed and putrified body and summer season- vehicle was hired on 5.6.2010 while dead body was recovered on 10.6.2010- the accused could not have been convicted on the basis of last seen theory- held, that in these circumstances, prosecution version not proved and accused acquitted. (Para-44 to 72)

Cases referred:

Laxmipat Choraria and others vrs. State of Maharashtra, AIR 1968 SC 938
Wakil Singh and others vrs. State of Bihar, AIR 1981 SC 1392
Mohanlal Gangaram Gehani vrs. State of Maharashtra, AIR 1982 SC 839
State of Madhya Pradesh vrs. Chamru alias Bhagwandas and others, (2007) 12 SCC 423
Mahabir vrs. State of Delhi, AIR 2008 SC 2343
Bachau and another vrs. State of U.P., 2003 Cr. L.J. 2060
Maya Kaur Baldev Singh Sardar and another vrs. State of Maharashtra, (2007) 12 SCC 654
Ajit Singh Harnam Singh Gujral vrs. State of Maharashtra, (2011) 14 SCC 401
Sahadevan and another vrs. State of Tamil Nadu, (2012) 6 SCC 403
Kanhaiya Lal vrs. State of Rajasthan, (2014) 4 SCC 715
Sultan Singh vrs. State of Haryana, (2015) 1 SCC (Cri.) 502
Ashok vrs. State of Maharashtra, (2015) 2 SCC (Cri.) 636
Bhim Singh and another vrs. State of Uttarakhand, (2015) 4 SCC 281

For the appellants : Ms. Seema K. Guleria, Advocate.
For the respondent : Mr. M.A.Khan, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is directed against the judgment dated 15.5.2012 rendered by the learned Sessions Judge, Solan, District Solan, H.P.(Camp at Nalagarh), in Sessions Case No. 10-NL/7 of 2010, whereby the appellants-accused (hereinafter referred to as the accused) who were charged with and tried for offence punishable under Sections 364, 302, 201 read with Section 34 IPC, have been convicted and sentenced under Section 302 read with 34 IPC, with rigorous imprisonment for life and a fine of Rs. 25,000/- each and in default of payment of fine to further undergo rigorous imprisonment for two years. Both the accused were also convicted and sentenced for an offence under Section 364 IPC read with Section 34 IPC with rigorous imprisonment for ten years and a fine of Rs. 10,000/- each and in default of payment thereof to further undergo rigorous imprisonment for one year. They were also convicted and sentenced for an offence under Section 201 IPC read with Section 34 IPC with rigorous imprisonment for seven years and a fine of Rs. 5,000/- each and in

default of payment they were further sentenced to undergo rigorous imprisonment for six months. All the sentences were ordered to run concurrently.

2. The case of the prosecution, in a nutshell, is that on 15.6.2010, a written complaint was filed by complainant Sanjay Kumar son of Sh. Devi Ram, resident of village Brahman Majra, Tehsil Nalagarh, Distt. Solan, H.P. According to the contents of the complaint, on 5.6.2010, one Rajinder Kumar son of Devi Ram, had gone with his taxi bearing regn. No. DL-3C-AC-4353 towards Gadshankar, Distt. Hoshiarpur alongwith passengers and thereafter he was supposed to come back after leaving the passengers, but he did not come back and his mobile phone was switched off. On 6.6.2010, a complaint was made of his missing in the Police Station, Nalagarh. The complainant further disclosed in his complaint that on 9.6.2010, the taxi of Rajinder Kumar was found lying unattended at Malpur Police Station and on 10.6.2010, a dead body was found in village Mojewal. The complainant further disclosed that the persons who had hired the taxi of Rajinder Kumar had committed murder of Rajinder Kumar and it was found that such persons had already been involved in the same occurrence as the sketches of such persons have been shown to taxi drivers Bagga Ram and Goldy, who identified the sketch of such persons who had hired the taxi of Rajinder Kumar. The police arrested the accused persons and they were identified by the prosecution witnesses. The recoveries were made from the accused by the police on the basis of disclosure statements made by the accused. The matter was investigated and the challan in the Court was filed after completing all the codal formalities.

3. The prosecution examined as many as 46 witnesses. The accused were also examined under Section 313 Cr.P.C. According to them, they were falsely implicated. The accused were convicted and sentenced by the learned trial Court, as noticed hereinabove. Hence, this appeal.

4. Ms. Seema K. Guleria, 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, learned Addl. Advocate General for the State, has supported the judgment dated 15.5.2012 of the learned trial Court.

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

6. PW1, ASI Balbinder Singh, deposed that on 9.6.2010, an information was received in PS that an abandoned car was found near village Hawali, at a secluded place. Thereafter, he went to the spot alongwith ASI Shiv Kumar. The vehicle was taken into possession alongwith RC, driving licence and insurance copy.

7. PW-2 Sanjay Kumar is the brother of deceased. According to him, his brother alongwith the taxi had gone to Nalagarh on 5.6.2010. When he did not come back on 6.6.2010, he reported the matter to the Police Station. He alongwith his elder brother and other relations went to Nalagarh taxi stand, from where they went in search of taxi of his brother towards Punjab. On 9.6.2010, an information was received from Police Station Mehalpur (Hoshiarpur) to the effect that a vehicle was found in abandoned condition bearing No. DL-3C-AC-4353. It was taken into possession by the Punjab police. On 10.6.2010, the dead body was found in Pojewala forest which had been brought for post mortem in the hospital. Thereafter, they went to the hospital at Balachaur which was identified to be of his brother Rajinder Kumar. They identified the blue jean pant and T-shirt as well as belt of the deceased to be of Rajinder Kumar (deceased) having mark of '*Bram Sutli*' on his body. His

brother left the house on 5.6.2010 from Nalagarh and was carrying Rs. 5000/- in purse for purchase of fertilizer. He was wearing black chappal and one wrist watch which were not found with his dead body. On 15.6.2010, he came to Nalagarh and filed a written complaint. He was told by taxi drivers Bagga Ram and Goldy that the taxi of Rajinder Kumar was hired by three persons by proclaiming that an ailing person was to be taken from Garshanker for his treatment. Goldy and Bagga Ram had identified the sketches of the persons at Police Station Mehalpur, Hoshiarpur where the taxi of Rajinder Kumar was recovered as the same persons who had hired the taxi of Rajinder Kumar from Nalagarh. He could not register the case after the recovery of the dead body of Rajinder Kumar since he remained busy in performing the last rites of Rajinder Kumar after the dead body was handed over to them after completion of the post mortem. In his cross-examination, he admitted categorically that when the accused were brought to Nalagarh Police Station from Hoshiarpur then Bagga Ram and Goldy, taxi drivers alongwith other taxi drivers had gone to Police Station Nalagarh alongwith their relations to identify them at Police Station Nalagarh. The accused were not muffled when they were brought to PS Nalagarh from Hoshiarpur. The dead body was partially decomposed. He identified the dead body of his brother Rajinder Kumar in hospital at Balachaur, Punjab.

8. PW-3 Bagga Ram son of Joginder Singh deposed that on 5.6.2010, three persons came to taxi stand Nalagarh to hire a taxi. He demanded Rs. 2000/- as fare from these persons but these persons sought some rebate so it was settled for Rs. 1800/-. All the persons disclosed that they have come from Baddi and were going to their homes to bring the ailing person to hospital. He dissuaded Rajinder Kumar not to take them in their taxi, however, Rajinder Kumar did not listen to him. He tried to contact Rajinder Kumar on the same day at about 7/8 PM but his mobile was found switched off. They had gone to Police Station Garhshanker on 8.6.2010 to identify the suspects through sketches prepared by Punjab Police. They identified the sketches of two persons who had engaged the taxi of Rajinder Kumar from Nalagarh on 5.6.2010 and they returned from PS Garhshanker to Nalagarh. On 25.6.2010, he alongwith Goldy taxi driver, identified the accused. The identification parade was held in Sub-Jail, Solan. They identified the accused persons who were mixed with other persons in the jail premises. Firstly, he identified the accused and thereafter Goldy also identified the accused persons to be the same persons who had engaged the taxi of Rajinder Kumar from Nalagarh on 5.6.2010.

9. PW-4 Bagga Ram has categorically deposed in his cross-examination that PW Bagga Ram son of Joginder Singh and Chaman Lal alias Goldy were not summoned in the Police Station by Nalagarh police to identify the accused as these persons were called at Solan for identification of the accused. The accused were brought to Nalagarh police station with muffled faces.

10. PW-5 Chaman Lal alias Goldy also deposed the manner in which the taxi of Rajinder Kumar was hired. In his cross-examination, he deposed that many persons from taxi union used to go to Police Station to see the accused persons who had been arrested by the police. He had gone once to the Police Station to see the accused on the next day of their arrest. The police had shown them the persons who had been arrested. He was called to the Police Station and thereafter he was told by the police to be present at Solan for identification of the accused on the next day. The accused were shown by the police in the lock-up. Voluntarily said that their faces were muffled.

11. PW-7 Hans Raj deposed that on 9.6.2010, when he was patrolling in village Moothgarh, he came to know that a dead body was lying in the Malewal forest. It was

located by Member of Gram Panchayat. The dead body was found on the spot in decomposed condition. The dead body was identified by the relations of the deceased. It was referred to Amritsar hospital and thereafter it was sent to Balachaur hospital for conducting post mortem. The post mortem of the dead body was conducted at Balachaur hospital and dead body was handed over to the relations. Viscera of deceased, including belongings was handed over to MHC in a sealed parcel. In his cross-examination, he admitted that the dead body was decomposed and it was very difficult to identify the same. The dead body was in the shape of semi-skelton.

12. PW-10 Madan Lal is the brother of deceased. On 5.6.2010, Rajinder Kumar left the house alongwith taxi and Rs. 5000/- was given to him to purchase fertilizer. He was wearing a T-shirt and blue jean pant. He was also having a black belt and chappal alongwith the mobile phone. His taxi was hired by three persons from Nalagarh. On 6.6.2010, his younger brother Sanjay Kumar reported the matter in the Police Station Nalagarh about the missing of Rajinder Kumar and they tried to locate him. As they engaged many vehicles to find out Rajinder Kumar but he could not be located. On 9.6.2010, they were informed that the taxi of Rajinder Kumar was lying abandoned near Mehilpur and it was brought to Mehilpur (Hoshiarpur). They tried to locate Rajinder Kumar nearby where his vehicle was found but he could not be located. On 10.6.2010, they came to know that a dead body was lying in Balachaur hospital which was recovered by the police to be identified and when they went to Balachaur hospital they identified the dead body of deceased Rajinder Kumar lying at Balachaur hospital. The wife of deceased also accompanied them to identify the dead body. The clothes of deceased were also identified. In his cross-examination, he deposed that the dead body was partially decomposed as part of mussles were not present. However, the dead body was in a position to be recognized. According to him, there were signs of '*Bram Sutli*' over the dead body of deceased and the shape and feature of the dead body were the signs to be recognized to be of his brother deceased Rajinder Kumar.

13. PW-11 Saravjeet Singh deposed that on 29.6.2010, he accompanied the police alongwith the accused and one Yash Pal, Madan Lal, Randeep Singh and the accused led the police party towards village Chhungia next to Pojewal on link road where the vehicle was stopped at the instance of accused. The accused further led them towards the forest where the accused claimed that the dead body had been thrown and the purse was recovered at the instance of Taranjeet Singh having photo of deceased Rajinder Kumar, including receipt of toll tax of vehicle DL-3C-AC-4353 and visiting card and copy of RC which were taken into possession vide seizure memo Ext. PW-11/A.

14. PW-12 Ram Singh deposed that he had gone to PS Nalagarh on 24.6.2011 when a team of experts had come to examine Indigo car. It was parked in the Police Station. There were three glasses and one packet of cigarette having three cigarette and some hair were also lying. There were blood stains over the rear seat of the car and some mud was also lying in the Car which was observed by the expert. The blood stains lying on the rear seat were taken alongwith the piece of seat cover and put into a sealed packet as per memo Ext. PW-12/A. He signed the same. He identified comb Ext. P-32 and cigarette packet containing three cigarettes Ext. P-33. He proved soil Ext. P-35 and Ext. P-36 polythene which were lifted from the vehicle lying in the police station. He identified hair Ext. P-38. He identified the glasses Ext. P-40, P-41 and Ext. P-42 to be the same, which were taken into possession by the team of experts. He identified cloth packet Ext. P-43, seat cover of car Ext. P-44 and foam of seat Ext. P-45 to be the same which were taken into possession by

the expert team. He also identified hair Ext. P-47 which were lifted from the dash board of the vehicle.

15. PW-13 Baldev Krishan Chaudhary has proved seizure memo Ext. PW-13/A qua which mobile Nokia was taken into possession. This mobile was found in the bag by accused Taranjeet.

16. PW-14 Dabinder Singh deposed that when Taranjeet Singh was arrested by the police, he left one mobile phone Nokia black in colour which was handed over by him to the police vide seizure memo Ext. PW-14/A.

17. PW-15 Gurmeet Kaur, deposed that she was Sarpanch Gram Panchayat Hawali. On 9.6.2010, she came to know that an abandoned car DL-3C-AC-4353 was lying on the road side near their village. She informed the police. The police came on the spot from Mehalpur. The vehicle was found locked, therefore, assistance of the local mechanic was sought to open the same. On 29.6.2010, when Himachal Police came alongwith the Punjab Police accompanied by one Sardar, she joined them. There were three persons with the police, including the sardar who identified the spot where the vehicle was found abandoned and Sardar had pointed out the place where the key of the car was found below a tree after lifting the brick lying on the ground. It was taken into possession vide memo Ext. P-24.

18. PW-16 Yash Pal, deposed that on 28.6.2010, accused Taranjeet Singh disclosed that he had concealed one purse and the key of the car and he further undertook to get it recovered as per disclosure statement Ext. PW-16/A. Accused Surinder Singh alias Chhinda also disclosed during custody that he had concealed one wrist watch and piece of cloth (parna) and undertook to get it recovered vide his disclosure statement Ext. PW-16/B. Accused Taranjeet, Jitender and Surinder Singh on 29.6.2010 identified the place at Taxi stand Nalagarh where taxi of deceased Rajinder Kumar was hired vide memo Ext. PW-16/C. The accused while in police custody on 29.6.2010 had proceeded in a vehicle in Punjab area near Pojewal on a link road where accused Jitender Kumar had shown a house in the village of a lady and then lady identified accused Jitender who had come over to her when the taxi of the deceased had been taken by these persons. Thereafter, they came in the same vehicle alongwith the accused and in a forest at a secluded place accused Taranjeet stopped the vehicle and identified the place where the taxi of the deceased was stopped and the deceased was strangulated with parna. That place was identified vide memo Ext. PW-16/D by all the accused. He signed the same. The police had taken soil from the spot vide memo Ext. PW-16/E. The accused also led to the place where the dead body of the deceased was thrown in the forest at a secluded place which was identified vide memo Ext. PW-16/F. Accused Taranjeet also got the purse of the deceased recovered vide memo Ext. PW-11/A to the place which was identified where the dead body was thrown. The purse is Ext. P-12. The accused further identified the place where the taxi of deceased was parked vide memo Ext. PW-16/H. He identified the key Ext. P-24. The sample of soil was also lifted from the place where the accused identified the abandoned vehicle of the deceased vide memo Ext. PW-16/K. Accused Surinder alias Chhinda got the wrist watch with golden chain (Titan make) and one piece of cloth recovered from his house from village Manga, Punjab which was taken into possession vide seizure memo Ext. PW-16/L. In his cross-examination, he admitted that the police had already visited the places which were identified by the accused persons where he accompanied the police alongwith the accused.

19. PW-17 Randeep Singh deposed that accused Surinder Singh alias Chhinda brought a wrist watch and parna from his house as the watch was with golden chain. He identified the wrist watch Ext. P-10. It was taken into possession vide memo Ext. PW-16/L. The piece of cloth (parna) Ext. P-25 was taken into possession vide memo Ext. PW-17/A.

20. PW-18 Karam Singh deposed that Himachal Pradesh Police had visited in his shop and had shown a piece of cloth (Rumal). They purchased the similar piece of cloth (patka) Ext P-29 from his shop against the receipt Ext. PW-18/A, after making payment. The piece of cloth was taken in possession vide seizure memo Ext. PW-17/A.

21. PW-19 Dilawar Singh deposed that he was running a Dhaba at Bharvai Road, Hoshiarpur. On 6.6.2010, three persons, out of which one person was sardar and two were *monas*, came in a car to his shop and purchased cigarette from his shop and thereafter remained sitting in the Dhaba of Raju adjoining to his shop. After some time, he was told by the servant of Raju that the glasses of a Dhaba and his mobile had also been taken away by those persons.

22. PW-20 Jitender Saini deposed that on 6.6.2010, three boys, one sardar and two *munas* had come to the Dhaba. They asked him to prepare three cups of tea. His mobile was lying on the table for charging. He prepared the tea and served to these persons. He also served them with a *Paranthas*. When he was busy in preparing *parantha,* these persons after taking tea had gone towards their car parked nearby alongwith the tea and ultimately ran away. They also took away his mobile lying on the table for charging. In his cross-examination, he admitted that when he came to the PS Nalagarh, he was told by the police that these accused persons had taken away the glasses and mobile from his Dhaba.

23. PW-21 Tajender Singh has proved report Ext. PW-21/A. He identified the key Ext. P-24.

24. PW-22 Gagandeep deposed that he was coming back to his house at about 8:30 PM on his bicycle. He was busy with his mobile when a vehicle came from behind and his mobile was snatched and he could not identify the vehicle or the persons.

25. PW-23 Avtar Singh deposed that he used to deal with sim cards of mobiles. He brought the register pertaining to sim car No. 90415-14251. It was sold to Surinder Singh. He also brought the identity proof of his brother on the basis of which sim card was issued to Surinder alias Chhinda. He proved extract of register vide Ext. PW-23/A. In his cross-examination, he admitted that there is cutting in the original register Ext. PW-23/A which had taken place subsequently after issue of extract Ext. PW-23/A.

26. PW-24 Inderjeet Singh deposed that Taranjeet Singh used to work in milk plant Ludhiana where he used to drive the vehicle. He left the job. When Taranjeet Singh left the job his bag and mobile remained there where he used to reside. He handed over the mobile and bag to his maternal uncle who in turn deposited these articles in the PS Nalagarh.

27. PW-25 Tej Mohammad deposed that the accused Jitender alias Jyoti had taken them to Anandpur Bazar where a shop was identified from where he claimed to had purchased one piece of cloth Patka and the police purchased similar cloth for Rs. 20/-, which was taken into possession vide memo Ext. PW-17/A.

28. PW-26 Surinder Singh deposed that one pair of chappal Ext. P-9 was taken into possession from the house of Jitender by the police vide memo Ext. PW-10/B. The

piece of cloth (patka) and one wrist watch were taken into possession from the house of Surinder Singh alias Chhinda vide seizure memo Ext. PW-16/L.

29. PW-27 Surjeet Bhumla deposed that he was informed on 9.6.2010 by village boy who used to graze cattle that a dead body was lying near his village at Chandyani Kalan and the same was being eaten up by the dogs. The police sought assistance of the photographer and taken the photographs of the dead body lying over the spot. There was a piece of cloth around the neck of the body and the dead body had been taken away by the police for the post mortem.

30. PW-29 HC Ved Prakash deposed that the case property was deposited with him and he made entries in the malkhana register. The case property was sent to SFSL. This case property was sent to SFSL through Constable Chanchal Kumar, HHC Shyam Lal and Const. Sunil Kumar.

31. PW-30 HHC Shyam Lal deposed that he has taken the case property to SFSL vide RC No. 57/2010.

32. PW-33 Roshni Devi is the mother of the deceased. She deposed that on 1.12.2010, her blood sample was taken by the doctor for DNA in Civil Hospital, Nalagarh.

33. PW-34 Dr. Manohar Lal deposed that on 11.6.2010, an application was moved by the police for conducting post mortem examination. On external appearance, the dead body was found decomposed and partially skeltionised. The dead body was of adult male, moderately built, wearing light blue jean pant and light mongia colour shirt. The body was in a stage of putrefaction, foul smelling gases were emitting and maggots were present. There was softening and greenish discoloration of tissues/skin and liquification of tissues had started at places. Bony rib cage was exposed from front of neck, clavicles in upper part to sides of chest and up to upper part of abdomen below. Bones of left arm and forearm were exposed and left hand was missing and wrist joint was open. Right arm and forearm bones were exposed, left leg bones were also exposed and left foot was separated at ankle joint and attached only by soft tissue. Left knee joint was opened up, left foot toes were missing, except little toe. Scalp and eye brow hair were absent, right orbit was empty and left eyeball collapsed. On the sides of neck, shallow discolored grooves were present which were about 2 cm wide. This groove faded towards back of neck, grooves were present below the level of thyroid cartilage. The cause of death was asphyxia due to strangulation. In his cross-examination, he admitted that the dead body was decomposed and it was difficult to identify the dead body at the time of post mortem.

34. PW-35 Amit Chauhan, has proved call details of mobile No. 90415-14251 vide mail Ext. PW-35/A, PW-35/B and PW-35/C.

35. PW-36 Devender Verma has supplied the call details of mobile nos. 98162-45450, 99159-52502 and 99154-37701 vide Ext. PW-36/C, PW-36/D, PW-36/E and PW-36/F.

36. PW-37 Surjit Singh has supplied call details of phone Nos. 99145 10036 and 95922-21470.

37. PW-38 Sunil Kumar has taken the case property to SFSL vide RC No. 131/10.

38. PW-40 Nasib Singh Patial, has proved report Ext. PW-40/A. In his cross-examination, he admitted that the period for which the blood stains were dried could not be opined. The blood stains were lifted from seat cover and foam of the car.

39. PW-41 Dr. Gagan Jain, deposed that he took the blood sample of Roshni Devi for DNA profiling.

40. PW-44 Rachh Pal Singh had taken the photographs of the dead body lying at forest Chanyani Kalan vide Ext. PW-7/Q-1 to Ext. PW-7/Q-5 and also prepared CD of the photographs vide memo Ext. PW-44/A. He also took the photographs of the places from where the dead body was recovered. One purse Ext. P-12, photograph Ext. P-13, identity card Ext. P-14 and Ext. P-15, receipts of toll tax Ext. P-16 and Ext. P-17 and receipts Ext. P-18, P-19, photocopy of RC Ext. PW-20 and photo Ext. P-21 were recovered lying on the spot, which were taken into possession vide seizure memo Ext. PW-11/A.

41. PW-45 Const. Chanchal Kumar has deposited the case property vide RC No. 56/10 alongwith the copy.

42. PW-46 Insp. Prem Lal has conducted the investigation in the matter. On 16.6.2010, he investigated the spot and prepared the spot map of Taxi union Nalagarh. He went to village Chandyani Kalan in PS Pojewala District Nawanshahar. He also inspected the spot from where the dead body of the deceased was recovered. He collected the soil. He also took the photographs of the spot. The sim cards were recovered from the accused. He deposited the case property with MHC in the malkhana. The accused were arrested on 18.6.2010. Accused Taranjit Singh was also arrested subsequently. An application was moved on 22.6.2010 before the JMIC, Solan, for holding test identification parade. The test identification parade proceedings were conducted by JMIC, Solan vide memo Ext. PW-46/F. The prosecution witnesses identified accused Jitender, Surinder alias Chhinda and Taranjit Singh. The remaining case property was also recovered. He recorded the statements of the witnesses. He proved the post mortem report. These recoveries were made on the basis of disclosure statements made by the accused. In his cross-examination, he admitted that it had emerged during investigation that the dead body was decomposed but he could not say that it was not in a position to be recognized. He denied the suggestion that accused had been shown to Bagga Ram taxi driver and Chaman Lal alias Goldy before the test identification parade.

43. PW-2 Sanjay Kumar has specifically testified that they came to know that accused had been arrested at Hoshiarpur and when the accused were brought to Nalagarh Police Station from Hoshiarpur then Bagga Ram son of Joginder Singh(PW-3) and Chaman Lal alias Goldy (PW-5), taxi drivers alongwith other taxi drivers had gone to Police Station Nalagarh alongwith their relations to identify them at Police Station Nalagarh. The faces of the accused were not muffled when they were brought to PS Nalagarh from Hoshiarpur. He also admitted that the dead body was partially decomposed. They identified blue jean pant and T-shirt as well as belt of the deceased, including body structure to be of Rajinder Kumar, having mark of '*Bram Sutli*' on his body. PW-3 Bagga Ram son of Joginder Singh deposed that the identification parade was held in sub jail Solan. They identified the accused persons who were mixed with other persons in the jail premises. Firstly, he identified the accused and thereafter PW-5 Chaman Lal alias Goldy also identified the accused. He admitted that the sketches were shown by the police at Police Station Garshankar which were identified by him to be of accused persons. PW-4 Bagga Ram son of Rattan Lal has deposed that PW-3 Bagga Ram son of Joginder Singh and PW-5 Chaman Lal

alias Goldy were not summoned in the Police Station by Nalagarh police to identify the accused as these persons were called at Solan for identification of the accused. Now, as per the version of PW-2 Sanjay Kumar, PW-3 Bagga Ram and PW-5 Chaman Lal alias Goldy, taxi drivers visited the Police Station Nalagarh to identify the accused. The faces of accused were not muffled when they were brought to PS Nalagarh from Hoshiarpur. PW-5 Chaman Lal has admitted in his cross-examination that many persons from taxi union used to visit the Police Station to see accused persons who had been arrested by the police. He had also gone once to the Police Station to see the accused on the next date of their arrest. The police had shown them the persons who had been arrested. He was called in the Police Station and thereafter told by the police to be present at Solan for identification of the accused on the next day. He also deposed that PW-3 Bagga Ram son of Joginder Singh also went to the Police Station. The police had shown the accused in the lock up.

44. What emerges from the statements of these witnesses is that the faces of the accused were already shown to PW-3 Bagga Ram son of Joginder Singh and PW-5 Chaman Lal. The very purpose of test identification parade was defeated since the faces of the accused persons were already shown to PW-3 Bagga Ram son of Joginder Singh and PW-5 Chaman Lal.

45. Their lordships of the Hon'ble Supreme Court in the case of ***Laxmipat Choraria and others vrs. State of Maharashtra,*** reported in ***AIR 1968 SC 938,*** have held that the ability of the witness to identify should be tested without showing him the suspect, or his photograph, or furnishing him data for identification. Their lordships have held as follows:

> "21. The next question is whether Ethyl Wong's identification of Laxmipat and Balchand, whose photographs were shown to her at the Air Terminal at Bombay should be accepted. -Reference in this connection has been made to English cases in which it has been laid down that the showing of a large number of photographs to a witness and asking him to pick out that of the suspect is a proper procedure but showing a photograph and asking the witness whether it is of the offender is improper. We need not refer to these cases because we entirely agree with the proposition. There can be no doubt that if the intention is to rely on the identification of the suspect by a witness, his ability to identify should be tested without showing him the suspect or his photograph, or furnishing him the data for identification. Showing a photograph prior to the identification makes the identification worthless."

46. In the case in hand, the accused had been shown in the Police Station to the witnesses and their sketches were also shown to the witnesses.

47. Their lordships of the Hon'ble Supreme Court in the case of ***Wakil Singh and others vrs. State of Bihar,*** reported in ***AIR 1981 SC 1392,*** have held that when none of the witnesses gave any description of dacoits in their statements or in oral evidence nor gave any identification marks, such as stature of accused or whether they were fat or thin or of fair colour or black colour, the accused could not be convicted. It has been held as follows:

> "2. In the instant case we may mention that none of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits

whom they have alleged to have identified in the dacoity, nor did the witnesses give any identification marks viz., stature of the accused or whether they were fat or thin or of a fair colour or of black colour. In absence of any such description, it will be impossible for us to convict any accused on the basis of a single identification, in which case the reasonable possibility of mistake in identification cannot be excluded. For these reasons, therefore, the trial court was right in not relying on the evidence of witnesses and not convicting the accused who are identified by only one witness, apart from the reasons that were given by the trial court. The High Court, however has chosen to rely on the evidence of a single witness, completely over-looking the facts and circumstances mentioned above. The High Court also ignored the fact that the identification was made at the T.I. parade about 3| months after the dacoity and in view of such a long lapse of time it is not possible for any human being to remember, the features of the accused and he is, therefore, very likely to commit mistakes. In these circumstances unless the evidence is absolutely clear, it would be unsafe to convict an accused for such a serious offence on the testimony of a single witness."

48. In the instant case, PW-3 Bagga Ram son of Joginder Singh also admitted that accused were not shown with muffled faces. PW-5 Chaman Lal alias Goldy has only deposed that three persons had come at about 1:30 PM to the taxi stand, one was sardar and two *monas*. He also did not give the description of these persons including any identification mark, stature of the accused, whether they were fat or thin or tall or fair colour or black colour.

49. In the case of ***Mohanlal Gangaram Gehani vrs. State of Maharashtra,*** reported in ***AIR 1982 SC 839,*** their lordships of the Hon'ble Supreme Court have held that when the accused was shown to victim by police before trial, his identification in Court by victim is valueless and cannot be relied upon. Their lordships have held as follows:

"20. Thus, as Shetty did not know the appellant before the occurrence and no Test Identification parade was held to test his power of identification and he was also shown by the police before he identified the appellant in court, his evidence becomes absolutely valueless on the question of identification. On this ground alone, the appellant is entitled to be acquitted. It is rather surprising that this important circumstance escaped the attention of the High Court while it laid very great stress in criticising the evidence of Dr. Heena when her evidence was true and straight forward.

25. The only other evidence against the appellant is that of P.Ws. 3 and 4. So far as P.W. 3 is concerned his evidence also suffers from the same infirmity as that of Shetty. P.W. 3 (Shaikh) admits at page 22 of the Paperbook that he had not seen the accused or any of the three accused before the date of the incident and that he had seen all the three for the first time at the time of the incident. He further admits that the names of the accused were given to him by the police. In these circumstances, therefore, if the appellant was not known to him before the incident and was identified for the first time in the court, in the absence of a test identification parade the evidence of P.W. 3 was valueless and could not be relied upon as held by this court in V.C. Shukla v. State (Delhi Administration)(1) Where this Court made the following observations:

"Moreover, the identification of Tripathi by the witness for the first time in the court without being tested by a prior test identification parade was valueless."

50. In the case of ***State of Madhya Pradesh vrs. Chamru alias Bhagwandas and others,*** reported in ***(2007) 12 SCC 423,*** their lordships of the Hon'ble Supreme Court have held that showing photograph of accused to the witness before the parade would take away the effect of TI parade. Their lordships have held as follows:

"10. We find that it is not merely a case of non-mention of the names. Undisputedly, the photographs of accused Chamru were shown to two of the child witnesses before the test identification parade. That took away the effect of the test identification parade. Learned counsel for the appellant has referred to the evidence of PW 3 to contend that she was not shown the photographs. Even a bare perusal of her evidence in court shows that she was not a credible witness and was tutored. She has categorically stated that she knew the accused by name. As noted above, her evidence also shows that she was tutored. For example, the voltage of the bulb which was supposed to be lighted at a distance of about 200 yards was stated to have been seen by her. Most of her statements in court were exaggerations and embellishments. Secondly, most of the vital facts were not stated during investigation."

51. In the instant case, the faces of the accused persons have been shown to PW-3 Bagga Ram son of Joginder Singh and PW-5 Chaman Lal alias Goldy and their sketches were also circulated.

52. In the case of ***Mahabir vrs. State of Delhi,*** reported in ***AIR 2008 SC 2343,*** their lordships of the Hon'ble Supreme Court have held that test identification parade do not constitute substantive evidence and the same could be used as corroboration. The main object, during investigation stage, is to test memory of witness based upon first impression and also to enable prosecution to decide whether all or any of them could be cited as eye-witnesses of crime. Test identification parade should be conducted as soon as possible after arrest of accused. This is necessary to eliminate possibility of accused being shown to witnesses prior to parade. Their lordships have held as follows:

"11. As was observed by this Court in Matru v. State of U.P. (1971 (2) SCC 75) identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. (See Santokh Singh v. Izhar Hussain (1973 (2) SCC 406). The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of

tests and significantly, therefore, there is no provision for it in the Code and the Indian Evidence Act, 1872 (in short the 'Evidence Act'). It is desirable that a test identification parade should be conducted as soon as possible after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

12. It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad v. Delhi Administration (AIR 1958 SC 350),Vaikuntam Chandrappa and others v. State of Andhra Pradesh (AIR 1960 SC 1340), Budhsen and another v. State of U.P. (AIR 1970 SC 1321) and Rameshwar Singh v. State of Jammu and Kashmir(AIR 1972 SC 102)."

53. The Division Bench of the High Court of Allahabad in the case of ***Bachau and another vrs. State of U.P.,*** reported in ***2003 Cr. L.J. 2060,*** has held that when the accused was seen by witnesses during transit, the evidence of such witnesses cannot be relied upon. The identification of an accused suspect should and must not be procured by means decried by Courts. Showing of the suspect at any stage from the time of their arrest till their lodging in police lock-up, their withdrawal from here and production for remand order in Court and thereafter their journey from here to Jail provide sufficient opportunity to investigating agency to do it is most unfair mode of investigation. It has been held as follows:

"8. It is further contended by learned Counsel for the appellants that most of the witnesses during the trial were sent to Jail for identifying those accused

persons who surrendered in court. They completely failed to identify any surrendered accused person.In the above circumstances the identification of this appellant by these witnesses is rendered highly doubtful and it was not possible without any outside aid.

We find force in the contention raised by learned Counsel for the appellants. Scrutinishing the evidence of P.W. 14 who is also the arresting officer of this appellant it is apparent that this appellant was taken to the village of the dacoity i.e. Balua immediately after his arrest. He offered an explanation that a dacoity was to be committed in that village and members of his gang were likely to collect there therefore he took him there for this purpose. This fact was not transcribed in the case diary nor in the G.D. on his return. Therefore, in our opinion, the explanation does not merit any consideration by us. Once this fact is established that the appellant was taken by the Sub Inspector after his arrest to the village of dacoity the probability of his being shown to the witnesses is strongly favoured. Apart from it the belated lodging of the appellant at the Police Station is yet another circumstance that strengthens our suspicion. This appellant is earlier stated was arrested at 4.00 P.M. on 27-7-79. He was lodged in the lockup of Police Station Balua by the same Sub-Inspector on 28-7-79 at 6.05 P.M. Admittedly as per deposition of P.W. 13 three hours are normally taken for coming to Police Station Balua from Varanasi. The enormous delay in lodging this appellant in the police lock-up remains wholly unexplained in the circumstances of the case. There is yet another circumstance that adversely stresses on the identification of this appellant by the witnesses. Most of the witnesses who identified this appellant went to Jail to identify other accused on 2-3 occasions in the past. They failed completely to identify a solitary suspect lodged in the Jail. All these suspects were those who surrendered in Court. These two accused Bachau (now dead) and the appellant were arrested and brought to the Police Station. Their complete failure to identify any suspect in their different sojurns to Jail create serious doubt in our mind about the authenticity of the identification proceedings conducted in Jail against this appellant. It clearly exhibits an outside aid to these witnesses undoubtedly. Before being lodged in the lock-up of the concerned police station they were taken to the village of dacoity further fortifies our above conclusion. deification of an accused suspect should and must not be procured by means decried by Courts. Showing of the suspect at any stage from the time, of their arrest till their lodging in police lock-up, their withdrawal from here and production for remand order in Court and thereafter their journey from here to Jail provide sufficient opportunity to investigating agency to do it is most unfair mode of investigation. As identification procured in this manner is most unconvincing and illegal in character. If the accused successfully establishes this possibility from his own evidence or from the evidence adduced by prosecution his success is immediately ensured. Accused succeeds once he created a reasonable probability of the use of such an outside aid or dubious means. Investigation is meant to work out offences and not to rope in innocent persons by such dubious methods. It smudges the investigation as dishonest and unfair. The appellant had to remain in Jail for a considerably long period. Who would compensate him for this illegal incarceration, agony, and loss of face if the society stares us at our

face. Though right now we do not propose to undertake any remedial measure but it has to be considered one day."

54. The prosecution has not examined the JMIC, Solan, who has conducted the test identification parade. It was a serious lacunae. Their lordships of the Hon'ble Supreme Court in the case of ***Maya Kaur Baldev Singh Sardar and another vrs. State of Maharashtra,*** reported in ***(2007) 12 SCC 654,*** have held that when the Magistrate, who conducted the TI parade, was not produced as a witness, participation of the suspect accused in the crime was doubtful. Their lordships have held as follows:

> "20. It has been pleaded by Mr. Kotwal that accused No.5 Kawaljit Singh was apparently not a member of the Rajvinder Kaurs parental family as he was a servant employed in Nasik in the Dhaba of accused Bakhtawar Singh and that as Rajvinder Kaurs statement with regard to his identity and presence was also ambivalent his involvement was in doubt. It has also been argued that the identification parade with respect to Kawaljit Singh had been held after his photograph has been shown to Rajvinder Kaur. It has however been pointed out by the learned State counsel that the Rajvinder Kaur had admitted that she had not known Kawaljit Singhs actual name and that he was known to her as Rana but she was categorical in that he had been one of the assailants and that she had identified him on two occasions in the police station some time after the incident.
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> 21. We have considered this argument as well. We find some doubt as to Kawaljit Singhs participation. Rajvinder Kaurs evidence with regard to his relationship with her family appears to be somewhat uncertain. She also admitted that his photograph had been shown to her on the 29th June 1999 and that she had been called to identify him in the parade thereafter though she had not known his name at that point of time. Our opinion is further fortified by the fact that even the Panchnama with respect to the proceedings of the identification parade is not on record and the Executive Magistrate who conducted the parade has not been produced as a witness."

55. The deceased had gone missing on 5.6.2010. The missing report was filed on 6.6.2010. The Punjab police has recovered the car on 9.6.2010. The dead body was recovered on 10.6.2010. However, the fact of the matter is that the FIR was registered only on 15.6.2010. It is settled law that FIR must be registered promptly but in case there is delay in registration of the FIR, the same has to be explained. The only explanation given for not lodging the FIR promptly by PW-2 Sanjay Kumar is that he remained busy in performing the last rites of Rajinder Kumar (deceased) after receipt of the dead body.

56. The next issue involved in this appeal is whether the body of deceased was identifiable or not. PW-2 Sanjay Kumar deposed that they identified the blue jean pant and T-shirt as well as belt of the deceased to be of Rajinder Kumar including the body structure of the deceased and having mark of '*Braham Sutli'* on his body. In his cross-examination, he has admitted that the body was partially decomposed.

57. PW-10 Madan Lal deposed that they came to know that the dead body was lying in Balachaur hospital which was recovered by the police to be identified. They went to Balachaur hospital and identified the dead body of deceased Rajinder Kumar lying at Balachaur hospital. The wife of deceased also accompanied them to identify the dead body. The clothes of deceased were also identified. In his cross-examination, he admitted that

when he saw the dead body at Balachaur hospital, there were only a T-shirt and underwear over the dead body. The dead body was partially decomposed as part of mussles were not present. Though, according to him, the dead body was in a position to be recognized. PW-7 Hans Raj deposed that when he was patrolling in village Moothgarh, he came to know that a dead body was lying in the Malewal forest. The dead body was found on the spot in a decomposed condition. The dead body was identified by the relations of the deceased. In his cross-examination, he specifically admitted that the dead body was decomposed and it was very difficult to identify the same. The dead body was in the shape of semi skelton.

58. PW-27 Surjeet Bhumla has stated that on 9.6.2010, he was informed by village boy, who used to graze cattle that a dead body was lying near his village at Chandyani Kalan and the same was being eaten up by the dogs. He verified the facts by going to the spot and thereafter he informed the Police Station Pojewala telephonically. According to him, there was a piece of cloth around the neck of the dead body. PW-34 Dr. Manohar Lal has stated that on external appearance, the dead body was found decomposing and partially skeltionised. The dead body was of adult male, moderately built, wearing light blue jean pant and light mongia colour shirt. The body was in a stage of putrefication, foul smelling gases were emitting, maggots were present. There was softening and greenish discoloration of tissues/skin and liquification of tissues had started at places. Bony rib cage was exposed from front of neck, clavicles in upper part to sides of chest and up to upper part of abdomen below. Bones of left arm and forearm were exposed and left hand was missing and wrist joint was open. Right arm and forearm bones were exposed, left leg bones were also exposed and left foot was separated at ankle joint and attached only by soft tissue. Left knee joint was opened up, left foot toes were missing, except little toe. Scalp and eye brow hair were absent, right orbit was empty and left eyeball collapsed. He has specifically deposed that the dead body was decomposed and it was difficult to identify the same at the time of post mortem.

59. It has come in the statement of PW-2 Sanjay Kumar that the body was partially decomposed. PW-7 Hans Raj deposed that the dead body was decomposed. It was difficult to identify the same and it was in the shape of semi-skelton. PW-10 Madan Lal has also deposed that the dead body was partially decomposed as part of mussles were not present. PW-27 Surjeet Bhumla has also admitted that he was informed that the dead body was eaten up by dogs. PW-34 Dr. Manohar Lal has also deposed that the dead body was decomposed and it was difficult to identify the same at the time of post mortem. The photographs of the dead body were taken. According to the prosecution case, the blue jean pant was recovered alongwith the belt. We have seen the photographs minutely. These were taken immediately after the dead body was recovered. There is only T-shirt and it was without pant. PW-10 Madan Lal in his cross-examination has also admitted that when he saw the dead body at Balachaur hospital, there were only a T-shirt and underwear over the same.

60. According to PW-27 Surjeet Bhumla, the piece of cloth was found around the neck of the dead body, however, PW 34, Dr. Manohar Lal has not seen any parna around the neck while carrying out the post mortem examination. Now, as far as the '*Bhram Sutli*' mark is concerned, the impressions of '*Bhram Sutli*' could not last since the body was decomposed or putrefied. The rib cage was visible. PW-10 Madan Lal has deposed that they went to Balachaur hospital and identified the body and thereafter the post mortem examination was conducted.

61. Mr. M.A.Khan, learned Addl. Advocate General has vehemently argued that the DNA profiling was conducted by taking sample of blood of PW-33 Roshani Devi, mother of the deceased. The blood was also lifted from the rear seat of the Car. PW-40 Nasib Singh Patial, Scientific Officer, SFSL, Junga, has admitted in his cross-examination that the blood was collected from the vehicle inspected but the period for which the blood stains had been dried could not be opined. The police should have taken the DNA sample from the dead body of the deceased instead of relying upon dry blood stains which were lifted from the car. PW-34 Dr. Manohar Lal has admitted that no DNA sample was taken from the dead body of the deceased at the time of conducting post mortem examination. Thus, it is doubtful as to whether it was the body of the deceased Rajinder Kumar which was recovered at Pajewala or it was the body of some other person.

62. According to the post mortem report and statement of PW-34 Dr. Manohar Lal, who has conducted the post mortem examination, the cause of death was asphyxia due to strangulation. In his examination-in-chief, he has deposed that on the sides of neck, shallow discolored grooves were present which were about 2 cm wide. These groove faded towards back of neck and grooves were present below the level of thyroid cartilage. Bony rib cage was exposed from front of neck, clavicles in upper part to sides of chest and up to upper part of abdomen below. The deceased had gone missing on 5.6.2010. The dead body was recovered on 10.6.2010. The post mortem was conducted on 11.6.2010. The dead body was recovered from the State of Punjab. The body was decomposed and partially skeltionized. Thus, there is no possibility of the grooves being present on the side of the neck and also below the thyroid cartilage. The grooves and ligature marks could be possible if the body was recovered in winter season. The Court can take judicial notice of the fact that the place from where the dead body was recovered i.e. under the jurisdiction of Garshankar Police Station, was bound to be very hot and humid in the month of June. The medical opinion has to be given weightage but it must conform to basic principles of medical jurisprudence. It is reiterated that there was no possibility of the grooves or ligature marks on the neck taking into consideration the decomposed and putrefied body and summer season.

63. According to ***Modi's Medical Jurisprudence & Toxicology, 22nd Edition***, in cases of strangulation and hanging, the ligature mark would be apparent, even if the epidermis had peeled off, as the skin on and round about the mark persists for some time. In the instant case, the deceased went on missing on 5.6.2010 and the post mortem was conducted on 11.6.2010 when the body had decomposed and putrified. Thus, in this eventuality, the ligature marks could not be seen by PW-34 Dr. Manohar Lal.

64. In ***Parikh's Text Book of Medical Jurisprudence and Toxicology,*** the author has made an observation that no inference can usually be drawn from the presence or absence of a ligature mark alone. The decomposed bodies commonly received for autopsy present a swollen neck and exaggerated folds of skin. Unless, dissection of the neck reveals ante mortem evidence of violence in the underlying tissues, no importance should be attached to the mere finding of the above appearances which could be only postmortem decomposition changes.

65. The car was taken into possession alongwith other documents vide seizure memo Ext. PW-1/A. According to PW-16 Yash Pal, the accused Surinder Singh alias Chhinda had made disclosure statement vide Ext. PW-16/B to the effect that he had concealed one wrist watch and piece of cloth (parna) and undertook to get it recovered. The accused on 29.6.2010 identified the place at taxi stand Nalagarh from where the taxi of

Rajinder Kumar was hired. According to PW-16 Yash Pal, Taranjeet Singh identified the place where the taxi of the deceased was stopped and deceased was strangulated with parna. The accused also led the police to the place where the dead body of deceased was thrown in the forest. It was identified vide memo Ext. PW-16/F. The accused also identified the place where the taxi of deceased was parked vide memo Ext. PW-16/H. However, the fact of the matter is that PW-16 Yash Pal in his cross-examination has admitted specifically that the police had already visited the places which were identified by the accused persons when he accompanied the police alongwith the accused. Since the police had already visited the places, which were to be identified by the accused, the subsequent recoveries also become doubtful.

66. Mr. M.A.Khan, learned Addl. Advocate General for the State has also argued that the deceased was last seen alive with the accused at Nalagarh. He has referred to the statements of PW-3 Bagga Ram son of Joginder Singh and PW-5 Chaman Lal alias Goldy. The deceased has disappeared on 5.6.2010 and the dead body was recovered on 10.6.2010. Their lordships of the Hon'ble Supreme Court in the case of ***Ajit Singh Harnam Singh Gujral vrs. State of Maharashtra,*** reported in ***(2011) 14 SCC 401,*** have held that when the victim was last seen alive with accused and subsequently found dead, the duration of time between events ought to be so small that possibility of any other person being author of crime can be ruled out. Their lordships have held as follows:

> "27. The last seen theory comes into play where the time gap between the point of time when the accused and deceased were last seen alive and when the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible, vide Mohd. Azad alias Samin vs. State of West Bengal 2008(15) SCC 449 = JT 2008(11) SC658 and State through Central Bureau of Investigation vs. Mahender Singh Dahiya 2011(3) SCC 109 = JT 2011(1) SC 545, S.K. Yusuf vs. State of West Bengal, J.T. 2011 (6) SC 640 (para14).
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> 28. In our opinion, since the accused was last seen with his wife and the fire broke out about 4 hours thereafter it was for him to properly explain how this incident happened, which he has not done. Hence this is one of the strong links in the chain connecting the accused with the crime.
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> 29. The victims died in the house of the accused, and he was there according to the testimony of the above witnesses. The incident took place at a time when there was no outsider or stranger who would have ordinarily entered the house of the accused without resistance and moreover it was most natural for the accused to be present in his own house during the night."

67. Their lordships of the Hon'ble Supreme Court in the case of ***Sahadevan and another vrs. State of Tamil Nadu,*** reported in ***(2012) 6 SCC 403,*** have held that last seen theory although an important event in chain of circumstances and/or could point to guilt of accused with some certainty, but this theory should be applied while taking into consideration prosecution case in its entirety and keeping in mind circumstances that precede and follow the point of being so last seen. Their lordships have held as follows:

> "27. The courts below, the Trial Court in particular, have laid some emphasis on the theory of last seen, while finding the accused guilty of the offence. As far as PW5 is concerned, he says that he only saw three persons going on the moped and he could not identify these persons. PW4 stated that he had seen the deceased going on a moped with Chandran at about 2.00 o'clock in the

afternoon. The time lag between the time at which this witness saw the accused and the deceased together and when the body of the deceased was found on the next day is considerably long. According to PW4, he could identify Loganathan while, according to PW5, the face of the deceased was burnt and, therefore, he could not identify him. Moreover, according to the doctor, PW7, the deceased had died about 27 to 28 hours before the autopsy. The autopsy, was admittedly, performed upon the deceased on 10th of July, at about 2 o'clock. That implies that the deceased would have died sometime during the morning of 9th July, while according to PW4, he had seen the deceased along with Chandran after 2 p.m. on 9th July, 2002.

28. With the development of law, the theory of last seen has become a definite tool in the hands of the prosecution to establish the guilt of the accused. This concept is also accepted in various judgments of this Court. The Court has taken the consistent view that where the only circumstantial evidence taken resort to by the prosecution is that the accused and deceased were last seen together, it may raise suspicion but it is not independently sufficient to lead to a finding of guilt."

68. In the case of ***Kanhaiya Lal vrs. State of Rajasthan,*** reported in ***(2014) 4 SCC 715,*** their lordships of the Hon'ble Supreme Court have held that circumstance of last seen together does not by itself necessarily lead to inference that it was accused who committed the crime. It has been held as follows:

"12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant."

69. Their lordships of the Hon'ble Supreme Court in the case of ***Sultan Singh vrs. State of Haryana,*** reported in ***(2015) 1 SCC (Cri.) 502,*** have held that the opinion of expert witness on technical aspects has relevance but the opinion has to be based upon specialized knowledge and the date on which it is based has to be found acceptable by the Court. It has been held as follows:

"13. Thus, taking of plea by the accused to save himself/herself is not enough. The contention in the present case that PW 2-Dr. S.K. Gupta mentioned the history of burn due to bursting of stove was given by the patient and one Amar Nath who accompanied her is without any merit. In the same statement the said witness states that the victim was unfit to make a statement. Amar Nath, who is said to have given this information, has not been examined by the defence. Statement of Dr. S.K. Gupta that Amar Nath gave this information is hearsay. Moreover, PW 2-Dr. S.K. Gupta has been examined as an expert witness to give his opinion about the health condition of the patient based on his expertise. He is not a witness of fact. Similarly, contention that PW 3-Dr. Gajinder Yadav who conducted the post mortem made a statement in cross examination that there was more probability of death being caused by accidental fire as there was no smell of kerosene oil from the body of the deceased and that the fire had started from the lower parts of the body towards upper parts is equally without any merit. Such

statement of an expert witness without being based on any specialized knowledge cannot be accepted. The opinion of expert witness on technical aspects has relevance but the opinion has to be based upon specialized knowledge and the data on which it is based has to be found acceptable by the Court. In Madan Gopal Kakkad versus Naval Dubey.1 , it was observed 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. 2 , while expressing his view 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."

70. In the case of ***Ashok vrs. State of Maharashtra,*** reported in ***(2015) 2 SCC (Cri.) 636,*** their lordships of the Hon'ble Supreme Court have held that 'last seen together' by itself is not conclusive proof but alongwith other circumstances surrounding the incident, like relations between accused and deceased, enmity between them, previous history of hostility, recovery of weapon from accused, etc. are to be looked into. It has been held as follows:

> "8. The "last seen together" theory has been elucidated by this Court in Trimukh Marotiu Kirkan v. State of Maharashtra, (2006)10 SCC 106, in the following words:
>
> > "Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. 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."
>
> 9. In Ram Gulab Chaudhary v. State of Bihar, (2001) 8 SCC 311, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however,

offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they had murdered the boy.

10. In Nika Ram v. State of H.P., (1972) 2 SCC 80, it was observed that the fact that the accused alone was with his wife in the house when she was murdered with a "Khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

11. The latest judgment on the point is Kanhaiya Lal v. State of Rajasthan, (2014) 4 SCC 715. In this case this Court has held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing the connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.

12. From the study of above stated judgments and many others delivered by this Court over a period of years, the rule can be summarized as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of Indian Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused etc., non-explanation of death of the deceased, may lead to a presumption of guilt.

20. From the above discussion, we conclude that the prosecution has not brought any clinching evidence in support of last seen together theory so as to shift the burden of proof on the accused-appellant. In light of this, the prosecution has evidently failed to prove the guilt of the accused-appellant beyond doubt. Therefore, the appeal is allowed and the judgment and order passed by the High Court as also by the Trial Court are set aside. The appellant is directed to be released forthwith if not required in connection with any other case.

71. Their lordships of the Hon'ble Supreme Court in the case of ***Bhim Singh and another vrs. State of Uttarakhand,*** reported in ***(2015) 4 SCC 281,*** have held that there should not be any snap in the chain of circumstances and if there is a snap in the chain, the accused is entitled to benefit of doubt. Their lordships have held as under:

"22. In the present case, the guilt or innocence of the accused has to be adduced from the circumstantial evidence. The law regarding circumstantial evidence is more or less well settled. This Court in a plethora of judgments has held that when the conviction is based on circumstantial evidence solely, then there should not be any snap in the chain of circumstances. If there is a snap in the chain, the accused is entitled to benefit of doubt. Gurpreet

Singh v. State of Haryana (2002) 8 SCC 18 is one of such cases. On the question of any reasonable hypothesis, this Court has held that if some of the circumstances in the chain can be explained by any other reasonable hypothesis, then the accused is entitled to benefit of doubt. But in assessing the evidence, imaginary possibilities have no place. The Court considers ordinary human probabilities.

23. On circumstantial evidence, this Court has laid down the following principles in Sharad Birdhichand Sardar v. State of Maharashtra, (1984) 4 SCC 116:

> "(1) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely "may be" fully established.
>
> (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say they should not be explainable on any other hypothesis except that the accused is guilty.
>
> (3) The circumstances should be of conclusive nature and tendency.
>
> (4) They should exclude every possible hypothesis except the one to be proved and,
>
> (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. Whenever there is a break in the chain of circumstances, the accused is entitled to the benefit of doubt; State of Maharashtra v. Annappa Bandu Kavatage (1979) 4 SCC 715."

72. The case of the prosecution, precisely, is that the accused were working at Baddi and they had gone to Nalagarh to hire the taxi to take patient at Garshankar. In case the accused intended to hire the taxi to take patient to Garshankar or Ropar hospital, they could have hired it from Baddi itself instead of going to Nalagarh which is at a distance of 15-20 kms. from Baddi. It also casts doubt on the version of the prosecution story. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

73. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 15.5.2012, rendered by the learned Sessions Judge, Solan, H.P., (Camp at Nalagarh) in Sessions case No. 10-NL/7 of 2010, is set aside. The accused are acquitted of the charges framed under Sections 302, 364 and 201 read with Section 34 IPC, by giving them benefit of doubt. 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.

74. 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.

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

United India Insurance Company Ltd. .....Appellant.

Versus

Vikas Katoch and others ...Respondents

FAO (MVA) No. 335 of 2008.

Date of decision: 24th July, 2015.

Motor Vehicles Act, 1988- Section 149- Driver was driving a Maruti van which falls within the definition of light motor vehicle- it was for the insurer to plead and prove that the owner had committed willful breach of the terms and conditions of the policy- no evidence was led to prove this fact- held that the Tribunal had rightly held the driver was possessing a valid driving license. (Para 7-8)

Case referred:

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

For the appellant: Mr. Ashwani K. Sharma, Advocate.

For the respondents: Mr. R.S. Gautam, Advocate, for respondent No.1.
Mr. Naveen K. Bhardwaj, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This appeal is directed against the award dated 17.05.2008, made by the Motor Accident Claims Tribunal, Kullu, H.P. in claim petition No. 20 of 2007, titled *Vikas Katoch versus Sanjay Kumar and others,* hereinafter referred to as "the Tribunal" for short, whereby compensation to the tune of Rs.7,38,000 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 Vikas Katoch invoked the jurisdiction of the Motor Accident Claims Tribunal, Kullu, by the medium of claim petition which was filed under Section 166 of the Motor Vehicle Act, for short "the Act" for the grant of compensation to the tune of Rs.15 lacs, as per the break-ups given in the claim petition.

3. The owner, driver and insurer resisted the claim petition and following issues came to be framed.

(i) Whether the petitioner sustained injuries in a motor accident caused on 2.10.2004 near Kala Kendar Kullu due to rash and negligent driving of Maruti Van bearing Reg. No.HP-01-0096 by its driver-respondent No.2?OPP.

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

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

(iv) Whether the vehicle in question was being plied in violation of the terms and conditions of insurance policy at the time of accident ? OPR-3.

(v) Whether the petition has been filed ion collusion with the respondents No. 1 and 2. If so its effect? OPR-3.

(vi) Relief.

4. Parties led evidence and also placed on record the documents, mention of which is made at Form-A, appended to the impugned award.

5. I have gone through the record and am of the considered view that the claimant has proved by leading oral as well as documentary evidence that the driver had driven the offending vehicle rashly and negligently on 2.10.2004 at Kala Kendar Kullu and caused the accident in which the petitioner-claimant sustained injuries and became permanently disabled. Accordingly, findings on issue No. 1 are upheld.

6. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 to 5. It was for the insurer to plead and prove that the driver was not having a valid and effective driving license, has failed to discharge the onus.

7. The perusal of the record reveals that the driver, who was driving a maruti van, which falls within the definition of "light motor Vehicle" in terms of Section 2 (21) of the Act, was having a valid and effective driving license, as per the law laid down by this Court in FAO No. 196 of 2008 titled ***Sarwan Singh versus Bimla Sharma and others*** alongwith connected matters decided on 30.5.2014.

8. The Tribunal, after scanning the evidence, rightly came to the conclusion that the driver was having an effective and valid driving license.

9. It was for the insurer to plead and prove that the owner has committed willful breach, has failed to discharge the onus in terms of the judgment delivered by the apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217.** It is apt to reproduce para 10 of the said judgment herein:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the*

genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh 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."

10. The insurer has not led any evidence that there was collusion between the motor cyclist and the driver of the offending vehicle. Accordingly, the findings returned on all these issues are upheld.

11. **Issue No. 2.** The Tribunal has saddled the insurer with the liability for the simple reason that the vehicle was insured and the insurer has to satisfy the third party claim. The Tribunal has discussed how the accident has shattered the physical frame of the claimant and it has also affected his future prospects, future life and also he has become burden on his parents for ever. The Tribunal has made discussion of this fact right from paras 27 to 37 of the impugned award.

12. While going through the impugned award, I am of the considered view that the amount awarded is meager, but unfortunately, the claimant has not questioned the same. Accordingly, the findings returned on issue No. 2 are upheld.

13. For the foregoing reasons, the appeal merits to be dismissed and is accordingly dismissed and the impugned award is upheld.

14. The Registry is directed to release the amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account.

15. Send down the record forthwith, after placing a copy of this judgment.

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

Court on its own motion
Ref:- Krishan Chand ...Petitioner.
Versus
The State of H.P. & others ...Respondents.

CWPIL No. 17 of 2014
Date of Order: 27.07.2015

Constitution of India, 1950- Article 226- State sought the modification of the order passed by the Court by seeking a direction that the encroached land and the orchard be taken over by the Forest Department-the income generated by the Department will be utilized for afforestation -the State permitted to pluck the apple, conduct their sale, utilize the grant for planting forest trees and to fence the area with the barbed wire-State further directed to furnish particulars of encroachers and the action taken against them. (Para 3-8)

Present: Mr. J.L. Bhardwaj, Advocate, as Amicus Curie.
Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 to 8.
Mr. Satyen Vaidya, Advocate, for respondent No. 9.

The following order of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

CMP No. 8099 of 2015

By the medium of this motion, the State-respondents have sought modification of order, dated 06.04.2015, read with the orders passed thereafter by this Court, on the grounds taken in the memo of the application.

2. While going through the application, it appears that the State has not sought modification of the orders (supra), but has shown its bona fides to protect the apple trees, the fruits and the crop(s), which is/are standing on the encroached forest land and to protect the environment as cutting of a large number of trees may cause deforestation.

3. Shri Tarun Shridhar, Additional Chief Secretary (Forests) to the Government of Himachal Pradesh, has sworn in the affidavit and virtually has given undertaking. It is apt to reproduce para 2 and relevant portion of para 4 of the application herein:

> *"2. That the Respondent No. 2 truly and whole heartedly appreciates the spirit behind this interim order for the preservation and conservation of forests in this mountanous State of Himachal Pradesh. The State is committed to the protection and conservation of its pristine forests in order to enhance the tree cover. The Forest Department along with other concerned departments is making earnest efforts to remove the encroachments on forest lands in order to*
>
> *comply the aforesaid orders of this Hon'ble Court.*
>
> *3. .....*
>
> *4. That with due regards to the spirit and intent behind the directions passed in the aforesaid order by this Hon'ble Court, the partial modification of the direction contained in para 15 (e) to the extent that the encroached land along with all standing crops and plants existing over it shall be taken over by the forest department for its further management and properly*

fenced with barbed wire at the costs and expenses of the encroacher is prayed for in order to avoid the highlighted effects which may have adverse repercussion in the entire landscape. The income so generated by the department shall be spent in carrying out the afforestation over such lands in a phased manner. During the process of afforestation, the standing fruit bearing crops like apples, pears etc. after culmination of their life span shall be replaced gradually with nature plants of wild origin."

4. Before we pass any direction, we deem it proper to record herein that it appears that the officials/officers of the State have remained in deep slumber for a pretty long time and have shut their eyes allowing the encroachers to plant apple trees, which have now become fruit growing trees/orchards, is suggestive of the fact that those encroachers would have cut down the forest trees from the encroached forest land, made that land vacant and thereafter, would have made plantation. The least is said is better.

5. It is also not known as to whether any action has been drawn by the State authorities against all those encroachers, who have cut down the forest trees and have made plantation of apple trees and whether any action has been taken against all those officers/officials who were in position from time to time.

6. It is made clear that we are not going to make any modification in any of the interim directions passed from time to time, but in order to preserve/protect the forests, the crops and the fruits, i.e. apples, we deem it proper to issue the following directions:

(i) The State officers in general and the Chief Secretary to the Government of Himachal Pradesh and the Principal Secretary (Forests) to the Government of Himachal Pradesh in particular, are held responsible to pluck the apples, conduct the sale of the apples and utilize the sale price for planting forest trees, which are known as forest species, and not any other kind of plantation, i.e. apple, pears, plum, cherries, almonds, etc.

(ii) They are directed to take a exercise of pruning of apple trees, on the encroached forest land, after plucking the apples in order to minimize the apple crop in the coming seasons.

(iii) They are also permitted to conduct sale of standing crops on the encroached forest land and utilize the sale price for the purpose of plantation of forest trees and its preservation with a further direction to ensure that no person is allowed to sow seeds of any crop on the encroached forest land. For the coming seasons, if any crop grows on its own, i.e. by natural process, that be destroyed.

(iv) The respondents-State are directed to ensure that immediately after removing the crops, plantation drive is made so that no land remains vacant for making room

for any person to sow seeds or to plant apple trees and the species of the crop, which is standing, as on today, on the encroached forest land.

(v) They are directed to fence the entire land by barbed wires and ensure that no encroachment is made in future.

(vi) They are also directed to furnish details and particulars of those persons, who have made encroachment on the forest land by plantation of apple trees, by sowing any crop or by any other method, and whether any action has been taken against them so far and what is the outcome.

7. The Chief Secretary to the Government of Himachal Pradesh, the Principal Secretary (Forests) to the Government of Himachal Pradesh and the Director General of Police are personally held responsible to monitor the entire exercise and have also to execute an undertaking to the effect that they will ensure that all directions passed by this Court from time to time, including the directions contained in this order, are implemented and complied with in letter and spirit.

8. It is made clear that any deviation shall be seriously viewed and the Chief Secretary to the Government of Himachal Pradesh, Principal Secretary (Forests) to the Government of Himachal Pradesh and the Director General of Police shall be personally responsible for any violation.

9. Respondents to file detailed status report by or before 3rd August, 2015.

10. The application is disposed of accordingly.

CWPIL No. 17 of 2014

11. Respondents to file status report in terms of the previous orders. List on **3rd August, 2015,** the date already fixed. Copy **dasti.**

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

Kewal Ram ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Criminal Appeal No.4160 of 2013
Reserved on : 13.7.2015
Date of Decision: July 27, 2015

N.D.P.S. Act, 1985- Section 20- Accused was found sitting on seat No. 19 holding a bag on his leg- the bag was checked and it was found to be containing 1.1 kg of charas- independent witnesses had turned hostile and had stated that no recovery was effected in their presence- testimony of police official cannot be ignored on the ground that he is

interested in the success of the case – however, testimonies of police officials were contradictory- police officials were standing near front door, therefore, it can not be said that recovery was effected in their presence- it was admitted by prosecution witnesses that proceedings were videographed or photographed - however, video or photographs were not be produced before the Court- held, that in these circumstances, prosecution version could not be relied upon- accused acquitted. (Para- 7 to 31)

Cases referred:
Lal Mandi v. State of W.B., (1995) 3 SCC 603
Makhan Singh v. State of Haryana, decided on 21.4.2015
Jagdish v. State of M.P., (2003) 9 SCC 159
Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722
Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760
Girja Prasad v. State of M.P., (2007) 7 SCC 625
Aher Raja Khima v. State of Saurashtra, AIR 1956
Tahir v. State (Delhi), (1996) 3 SCC 338

For the Appellant	:	Mr. Manoj Pathak, Advocate.
For the Respondent	:	Mr. V.S. Chauhan, Additional Advocate General and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellants-convict Kewal Ram, hereinafter referred to as the accused, has assailed the judgment dated 20.9.2013/30.9.2013, passed by Special Judge, Solan, District Solan, Himachal Pradesh, in Sessions Trial No.8-S/7 of 2012, titled as *State of Himachal Pradesh v. Kewal Ram*, whereby he stands convicted of the offence punishable under the provisions of Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the Act).

2. It is the case of prosecution that on 14.10.2011, police party, comprising of Constable Ram Krishan (PW-8), HHC Hem Raj (PW-9), HC Om Parkash, HC Ambi Lal, Constable Ajay Kumar, and headed by HC Ram Pal (PW-11), was on a patrol duty at a place known as Shamti. A private bus, bearing No.HP-64-4497, which was coming from Pulwahal side, was stopped for checking. Police party boarded the bus and found accused Kewal Ram sitting on Seat No.19, who was holding a bag on his legs. On Seat No.18, Jai Singh (PW-1) was sitting. In the presence of Jai Singh and conductor Anil Sharma (PW-2), bag carried by the accused was searched, from which Charas was recovered, which on weighment was found to be of 1.100 kg. Contraband substance was sealed with five seals of seal impression 'A' and taken into possession vide Memo (Ex.PW-1/A). NCB form (Ex.PW-7/F) was filled up in triplicate, on the spot. Ruka (Ex.PW-11/A) was sent through Constable Ram Krishan (PW-8), on the basis of which FIR No.246, dated 14.10.2011 (Ex.PW-7/A), under the provisions of Section 20 of the Act, was registered at Police Station, Sadar (Solan), District Solan, Himachal Pradesh. Accused was arrested. Case property was entrusted to HC Sohan Lal (PW-7), who, after making entry in the Malkhana Register (Ex.PW-7/C), kept the

same in safe custody, and sent it, through Prem Chand (PW-4), for chemical analysis at the Forensic Science Laboratory, Junga. Report of the Expert (Ex.PX) was taken on record. Also, Special Report (Ex.PW-5/A), so sent by the Investigating Officer, was received in the office of the Deputy Superintendent of Police by Constable Davinder Kumar (PW-5). With the completion of investigation, which, prima facie, revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

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

4. In order to establish its case, prosecution examined as many as 12 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. He 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 offence and sentenced him as aforesaid. Hence, the present appeal by the accused.

6. We have heard learned counsel for the parties as also perused the record.

7. In the instant case, we find the independent witnesses Jai Singh (PW-1) and Anil Sharma (PW-2) not to have supported the prosecution and despite their extensive cross-examination, nothing fruitful could be elicited from their testimonies. On the contrary, from their unrebutted testimonies, a different version, with regard to the manner in which the search and seizure operations were carried out, has emerged. Both these witnesses have categorically deposed that no recovery was effected from the accused in their presence. They have deposed that after the bus was searched by the police officials, five persons were detained and taken to the Police Station. In fact, Jai Singh himself was a suspect. The bag was kept on the rack of the bus and not claimed by any person. The witnesses have deposed that police had obtained their signatures on blank papers. Conductor Anil Sharma has further gone to state that no proceedings were conducted in his presence, as he was made to wait outside the bus.

8. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to an accused.

9. In Criminal Appeal No.682 of 2015 (SLP (Crl.) No.458 of 2013), titled as *Makhan Singh v. State of Haryana*, decided on 21.4.2015, the apex Court has held that testimony of independent witnesses cannot be ignored, particularly when it casts doubt on the recovery and the genuineness of the prosecution version.

10. In almost identical circumstances, the apex Court in *Jagdish v. State of M.P.,* (2003) 9 SCC 159, adopted the same approach.

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. When we peruse testimonies of police officials Ram Krishan (PW-8), Hem Raj (PW-9) and Ram Pal (PW-11), the only ones to have been examined, we do not find their

version to be clear, consistent and cogent, with regard to recovery of the contraband substance from the conscious possession of the accused. We do not find their testimonies to be inspiring in confidence. In fact, there are contradictions, which have rendered their version to be doubtful/unbelievable and the witnesses not worthy of credence.

17. According to Ram Pal, accused, who was sitting on Seat No.19, was carrying a bag on his legs. In the presence of Jai Singh, Anil Sharma and Hem Raj, the bag was searched. From the bag, a grey coloured envelope, containing a sweet box tied with a nylon plastic string, was recovered. The sweet box was containing Charas. The witness states that the contraband substance was kept back in the sweet box as also the envelope, which was sealed with seal impression 'A'. Thereafter, it was taken into possession. Now, when we peruse report (Ex. PX), we find there is no reference of any grey coloured bag. Also, neither the box nor the grey coloured bag has been produced in Court.

18. That apart, version of Ram Pal that search was carried out in the presence of Hem Raj stands belied, in fact contradicted, by the said witness, who states that "*it is correct that I personally did not go to the seats No.17 to 20 (Self stated the same was visible where I was standing in the bus). I was standing inside the door of the bus. I cannot tell whether any passenger was occupying seat No.17. (Self stated perhaps seat No.17 was vacant)*". He could not state as to which and how many seats were checked by which of the police officials.

19. It is the admitted case of the police officials that except for Ram Pal, all the police officials, who entered the bus, were standing near the front door. Now, if that were so, then how is it that recovery was effected in the presence of either Ram Krishan or Hem Raj, as undisputedly in the bus, there were 30-35 passengers. In fact, Ram Krishan admits that personal search of the accused was not conducted in his presence.

20. According to Ram Pal it took only 15-20 minutes in checking all the passengers of the bus, whereas according to Hem Raj, it took about "one hour".

21. We are of the considered view that Hem Raj was not present, where the accused was sitting, which fact stands established through the unrebutted testimony of Ram Pal, who states that "*when I searched the passengers of the bus the other police officials remained near the front window of the bus".*

22. The contradiction does not end here. According to Ram Pal, he never suspected involvement of either Jai Singh or Tapender in the crime, whereas according to Hemj Raj "*Jai Singh was detained by the police*".

23. Contradiction qua the detention/ involvement of Jai Singh in the crime apart, if the contraband substance was actually recovered from the conscious possession of the accused, why is it that five other persons were detained by the police. Who were they? It remains a mystery. All this has rendered the genesis of the prosecution case to be doubtful.

24. We find there is contradiction with regard to the proceedings being videographed and photographed. According to Ram Krishan, it was so done, which fact stands denied by Hem Raj and Ram Pal is absolutely silent on this aspect. Now if the proceedings were videographed or photographs were taken on the spot, they why was such evidence concealed from the Court. It would have only revealed the exact events which took place on the spot.

25. In fact, version of Ram Krishan that the police was on patrol duty, stands belied by Ram Pal, according to whom, from the SIU Police Station, the police officials straightway went to the spot and checked the bus in question. Thus, the genesis of the prosecution story thus is rendered doubtful.

26. As per Constable Ram Krishan, NCB forms (Ex.PW-7/F) were filled in, after preparation of seizure Memo (Ex.PW-1/A), which version is contradicted by the seizure memo itself, wherein it stands recorded that no NCB form was prepared after the seizure of the case property.

27. On the question of NCB form, we find Constable Ram Krishan to have deposed that columns No.1 to 8 of the NCB form were filled up on the spot, which was prior to sending of the Ruka. Now, if this were true, then obviously police has not prepared the documents in accordance with law. This we say so for the reason that Column No.1 pertains to the number of FIR, of which police would have no information prior to sending of the Ruka, which only shows that the documents were prepared lateron. It is pertinent to mention that the Investigating Officer does not disclose who filled up Column No.1 of the NCB form.

28. Further, in Court, tickets of the Bus (Ex. PW-2/A-1 to A-3) have been produced, but then there is no entry of movement of the same from the Malkhana.

29. Even on the question of sealing of the case property, we have doubt, for the original specimen seal has not been produced on record.

30. There is contradiction with regard to the seat which Jai Singh was occupying. Police officials state that Jai Singh was occupying Seat No.18, which fact stands denied by Ram Pal.

31. 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 accused Kewal Ram was found in conscious and exclusive possession of Charas.

32. Trial Court has not correctly appreciated the testimonies of the prosecution witnesses. Reliance, selective in nature, on the testimony of the police officials, has resulted into incorrect appreciation of their testimonies.

33. Thus, findings of conviction and sentence, returned by the Court below, cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused.

34. Hence, for all the aforesaid reasons, the appeal is allowed and the judgment of conviction and sentence, dated 20.9.2013/30.9.2013, passed by Special Judge, Solan, District Solan, Himachal Pradesh, in Sessions Trial No.8-S/7 of 2012, titled as *State of Himachal Pradesh v. Kewal Ram* is set aside and the accused is acquitted of the charged offence. He be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to him accordingly. Release warrants be immediately prepared. 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.

Poonam Kumari .....Petitioner

Versus

State of Himachal Pradesh & another ....Respondents

CWP No. 1364 of 2015
Date of decision: 27.07.2015

Constitution of India, 1950- Article 226- Petitioner was selected as PTA- she joined as such on 12.10.2007- her services were terminated on 29.2.2008- she filed a written statement in which direction was passed that she be allowed to rejoin her duty- it was contended that petitioner was not allowed to work because of model code of conduct – held, that petitioner was not allowed to work for no fault of her- a direction issued to treat the services of the petitioner notionally. (Para-3 to 7)

Case referred:
Sanjay Dhar versus J&K Public Service Commission and another, (2000) 8 Supreme Court Cases 182

For the petitioner : Ms. Jyotsna Rewal Dua, Senior Advocate with Ms. Amrita Messie, Advocate.

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

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

By the medium of this writ petition, the petitioner has sought the following main reliefs, on the grounds taken in the writ petition:-

"i) *For issuing a writ of Mandamus to the respondents to count period w.e.f. 12.10.2007 to 18.5.2008 towards petitioner's service and seniority. Also for directing the respondents to treat the period of 9 days from 4.11.2008 to 12.11.2008 as extra ordinary leave and to count it towards her service.*

ii) For directing the respondents to release grant in aid to the petitioner for 12.10.2007 to 18.5.2008 along with interest.

iii) For directing the respondents to regularize/take on contract basis, the services of the petitioner as PTA Teacher at par and alongwith those whose services had been taken over after completion of 7 years of service by 10.12.2014 alongwith all consequential benefits by counting the period of 12.10.2007 to 18.5.2008 towards her service."

2. The respondents have filed reply. It is apt to reproduce paras 2(b) and 2(d) of the reply herein:-

> *"2(b) That in reply to this para it is respectfully submitted that the petitioner was selected vide resolution dated 09.10.2007 on the fixed amount i.e. Rs. 1000/- per month out of their local funding and it was clearly provided in the resolution that the engagement will only be till 29.02.2008. She joined as such on 12.10.2007 whereas model code of conduct was imposed vide Notification dated 10.10.2007. Therefore, the PTA also passed resolution on 12.10.2007 that appointment cannot be given to the teachers who were interviewed on 05.10.2007 due to imposing of model code of conduct, hence they will be paid only Rs. 1000/- and the engagements were stopped by the Govt. vide instructions dated 03.01.2008. According to resolution dated 09.10.2007 the services of the petitioner were terminated on 29.01.2008. Thereafter she was allowed to rejoin on 19.05.2008 in view of interim order dated 15.05.2008 passed by this Hon'ble Court in CWP No. 757/2008.*
>
> *(c) ……..*
>
> *(d) That in reply to this para it is respectfully submitted that as per Govt. instructions dated 06.08.2013, it was decided that the services of Para Teachers will be regularized after completion of ten years and PTA engaged under GIA to PTA Rules 2006 will be taken over on Contract after completion of 7 years of service. Whereas the petitioner was engaged by the PTA out of its local fund. Hence these instructions are not applicable in the case of petitioner. Thereafter the Govt. has decided vide instructions dated 03.01.2015 that EOL availed for doing B.Ed./any other higher qualification required to fulfill eligibility as per R&P Rules, Maternity leave beyond 84 or 168 days (two separate spells of Maternity leave) as the case may be, leave availed on medical grounds should not be considered as break for the purpose of counting the qualifying period of 10 or 7 years for regularization/taking on contract as the case may be and a period of maximum 60 days of absence on account of other reasons in a total period of 10 years should not be considered as break in service of regularization for para teachers. In case of PTA this should be for a maximum period of 42 days for taking over them on contract. The petitioner was not engaged under the PTA-GIA w.e.f. 12.10.2007 to 29.02.2008 as per resolution of the PTA and thereafter she did not work w.e.f. 01.03.2008 to 18.05.2008. Hence the case of the petitioner is not covered under said instructions. Moreover petitioner had not completed continuous service on the day when last taking over order were released in favour of PTA provided teachers."*

3. Admittedly, the petitioner was selected as PTA vide resolution dated 9th October, 2007. She joined as such on 12th October, 2007. Her services were terminated on 29th February, 2008, constraining her to file CWP No. 757 of 2008, titled as Poonam Kumari versus State of Himachal Pradesh & others, wherein interim direction dated 15th May, 2008, was passed by this Court directing the respondents to allow her to re-join her duties. She re-joined on 19th May, 2008.

4. Mr. Anup Rattan, learned Additional Advocate General, stated at the Bar that though, the petitioner has joined as PTA on 12th October, 2007, but she was not allowed to work because of model code of conduct and is in position w.e.f. 19th May, 2008.

5. It appears that the petitioner has been deprived of her legitimate right, which she has earned in terms of selection made vide resolution dated 9th October, 2007, but was not allowed to work w.e.f. 12th October, 2007 to 18th May, 2008, for no fault of her.

6. Keeping in view the law laid down by 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,** we deem it proper to direct the respondents to treat the services of the petitioner w.e.f. 12th October, 2007 to 18th May, 2008, notionally. Ordered accordingly.

7. Accordingly, the writ petition is disposed of, alongwith pending applications.

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

State of Himachal Pradesh and others ...Appellants.

Versus

Abhinav Soni and others ...Respondents.

LPA No. 720 of 2011
Reserved on: 14.07.2015
Decided on: 27.07.2015

Constitution of India, 1950- Article 226- Respondents appointed the writ petitioners as Veterinary Officers on contract @ Rs. 8,000/- p.m.– the petitioners claimed N.P.A. on the ground that they were deprived of their right to practice and similar benefit is being granted to the Medical Officers and the Veterinary Officers appointed on regular basis – held that the responsibilities of the Veterinary Officers appointed on contract and regular basis are same-similar benefit was being granted to Medical Officers- it was not permissible to deny the benefits to the Veterinary Officers- Petition allowed. (Para-8 to 27)

Cases referred:

K.C. Bajaj and others versus Union of India and others, (2014) 3 Supreme Court Cases 777

Chairman, Railway Board and others versus C.R. Rangadhamaiah and others, (1997) 6 Supreme Court Cases 623

State of Haryana versus Charanjit Singh and others etc. etc., AIR 2006 Supreme Court 161

State of Punjab & Anr. versus Surjit Singh & Ors., 2009 AIR SCW 6759

The Principal Secretary (Personnel) & another versus Pratap Thakur, ILR 2014 (IX) HP 313

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

For the respondents: Mr. Ajay Mohan Goel, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Appellants-writ respondents, by the medium of this Letters Patent Appeal, have questioned the judgment and order, dated 30.08.2011, made by the Writ Court/learned Single Judge in CWP No. 124 of 2011, titled as Abhinav Soni and others versus State of H.P. and others, whereby the writ petition filed by the writ petitioners-respondents herein came to be allowed and the writ petitioners-respondents herein were held entitled to Non Practicing Allowance (for short "NPA") with effect from 01.01.2011, i.e. date of presentation of the writ petition (for short "the impugned judgment").

2. Selection process was drawn by the writ respondents-appellants herein for appointment of Veterinary Officers on contract basis in terms of the advertisement notices. Writ petitioners-respondents herein participated, were selected, came to be appointed on contract basis and their remuneration was fixed at Rs.8,000/- per month.

3. The grievance projected by the writ petitioners-respondents herein in the writ petition is that they are entitled to grant of NPA in view of the fact that they have been banned from private practice, thus, are entitled to NPA, which was not granted to them. Para 7 of the writ petition specifies that the State has also appointed MBBS Doctors, i.e. Medical Officers, on contract basis, were given 25% NPA in terms of Annexures P-5, P-6 and P-7 to the writ petition. The writ petitioners-respondents herein filed representation before the concerned authorities, which was rejected in terms of Annexure P-14 to the writ petition despite the fact that the recommendation was made by the authorities, constraining them to file the writ petition wherein they have prayed for grant of NPA and other reliefs on the grounds taken in the memo of writ petition.

4. In terms of the Service Rules read with the terms and conditions contained in the orders, the officers, who are not permitted to go for private practice, are entitled to NPA.

5. The writ petitioners-respondents herein have annexed Annexures P-1 to P-12 with the writ petition in order to support their case that they are entitled to NPA. Annexure P-13 is the representation, which stands rejected vide order, dated 09.11.2010 (Annexure P-14).

6. The writ respondents-appellants herein have filed reply and have not denied the fact that the Medical Officers appointed on contract basis are getting NPA.

7. The writ respondents-appellants herein have not been able to justify as to how the MBBS Doctors/Medical Officers appointed on contract basis are being granted the benefit of NPA.

8. The writ respondents-appellants herein have not specifically averred how the Veterinary Officers appointed on contract basis and the Veterinary Officers appointed on regular basis are discharging different duties and responsibilities.

9. While going through the order of appointment on contract basis, one comes to an inescapable conclusion that the Veterinary Officers appointed on contract basis are discharging the same job and responsibilities, which the Veterinary Officers appointed on regular basis are discharging.

10. The Writ Court/learned Single Judge, after examining the pleadings and the law applicable, held that the writ petitioners-respondents herein are entitled to NPA from the date of presentation of the writ petition, i.e. with effect from 01.01.2011, which has been questioned by the writ respondents-appellants herein by the medium of this appeal.

11. We have gone through the impugned judgment. Though, the judgments cited and discussed in the impugned judgment are not applicable and are virtually against the writ petitioners-respondents herein, but in paras 23 and 24 of the impugned judgment, the Writ Court/learned Single Judge has discussed how the Veterinary Officers appointed on contract basis are entitled to NPA while keeping in view the fact that the Veterinary Officers appointed on regular basis and the MBBS Doctors/Medical Officers appointed on regular basis/contract basis are enjoying the benefit of NPA.

12. Admittedly, the job of the Veterinary Officers appointed on contract basis and the Veterinary Officers appointed on regular basis is one and the same, their responsibilities are same and in terms of the appointment orders, they have been prohibited from indulging in private practice. Thus, the action of the writ respondents-appellants herein is discriminatory.

13. The MBBS Doctors/Medical Officers, who are also appointed on contract basis, have been granted the benefit of NPA. They have obtained the same degree, are having same qualifications, then, how NPA can be granted to one category of doctors, who are dealing with human beings and not to another category of the doctors, who are dealing with animals.

14. How distinction can be made between a MBBS Doctor, who deals with human being and a Veterinary Officer, who is also having the same qualification and same degree, but is dealing with animals.

15. Thus, it appears that the decision made by the writ respondents-appellants herein is not sustainable in the eyes of law, rather, is discriminatory.

16. The Apex Court in a case titled as **K.C. Bajaj and others versus Union of India and others,** reported in **(2014) 3 Supreme Court Cases 777,** has dealt with the history of NPA. It is apt to reproduce paras 9, 10 and 28 of the judgment herein:

> *"9. Paras 5.0, 5.2 to 6.0, 10.3, 10.4, 11.1, 11.2, 11.3 and 12 of order dated 18.5.2002 passed by the High Court read as under:*
>
> *"5.0. History of grant of NPA clearly shows that the same was being granted in lieu of private practice. It was also granted having regard to availability of less promotional avenue and late entry in the service, NPA was granted in*

terms of Fundamental Rule 9(21)(a)(i) read with Fundamental Rule 9(21)(a)(ii), which read thus:-

"9. Unless there be something repugnant in the subject of context the terms defined in this Chapter are used in the Rules in the sense here explained-

* * *

***(21)(a) "Pay"** means the amount drawn monthly by a Government servant as-*

(i) the pay other than special pay or pay granted in view of the personal qualifications which has been sanctioned for a post held by him substantively or in an officiating capacity or to which he is entitled by reason of his position in a cadre; and

(ii) overseas pay, special pay and personal pay; and

(iii) any other emoluments which may be specially classed as pay by the President.'

* * *

5.2. It also appears that the Ministry of Health and Family Welfare in terms of the instructions, as contained in the letter dated 7-4-1998, categorically stated that N.P.A. be treated to be a pay by way of service benefits including retirement benefits. It is also beyond any cavil of doubt that 25% of the basic pay was recommended towards payment of NPA by the 5th CPC, which was accepted by the Government of India in terms of its circular letter dated 7-4-1998.

5.3. By reason of the aforementioned recommendations, an attempt had been made to bring pre-1-1-1986 retirees and post-1-1-1986 at par having regard to the fact that the rates of their pension were slightly different. By reason of the said recommendation, the slab system, which was prevailing thitherto having been given a go by and in place thereof payment of 25% of the basic pay as NPA w.e.f. 1-1-1996 was recommended. In other words, a revolutionary step was taken by the 5th CPC by making recommendations so that the retiral benefits is enhanced not only for pre-1-1-1986 retirees but also post-1-1-1986 retirees at par.

5.4. In para 137.13 of its Report, the 5th CPC clearly stated that it was desirable to grant complete parity in pension to all past pensioners irrespective of the date of their retirement, but having regard to the fact that the same was not found to be feasible and having regard to the considerable financial implications, a suggestion was made that the process of bridging the gap in the matter of payment of pension would be fulfillled if certain additional

reliefs be granted in addition to the recommendations of the Fourth Central Pay Commission (in short, '4th CPC') in terms whereof the past pensioners were granted additional relief in addition to the consolidation of their pension.

5.5. Yet again in para 137.14 of its Report, the 5th CPC recommended that as a follow up of their basic objective of parity, the pension of all pre-1-1-1986 retirees should be updated by notional fixation of their pay as on 1-1-1986 by adopting the same formula as for the service benefits. Pursuant whereto, all the past pensioners of pre-1-1-1986 were to be brought on a common platform so as to grant them the benefit of the revision of pay scale as recommended by 4th CPC as on 1-1-1986. It was further laid down that all pre- 1-1-1986 pensioners, who had been brought on to the 4th CPC by notional fixation of their pay and who had retired after 1-1-1986, the recommendation was that the consolidated pension would not be less than 50% of the minimum pay of the post as revised by the 5th CPC.

6.0. It is, therefore, evident that the 5th CPC recommendations were to bring all the pensioners whether pre-1-1-1986 retirees or post-1-1-1986 on a common platform. The recommendations in no uncertain terms suggest that the payment of pension of pre-1-1-1986 retirees and post-1-1-1986 retirees should be the same. The Central Government admittedly acted in terms of the aforementioned recommendations by determining the pension, which was not less than 50% of the minimum of their pay in the revised pay-scale of the post held by the pensioners at the time of retirement w.e.f. 1-1-1986. For the said purpose, the minimum of the pay revised in the 5th CPC of the post concerned was determined were with 25% of the pay as NPA was added and 50% thereof had been taken as revised minimum pension as per the qualifying service.

* * *

10.3. It is difficult for us to accept the contention that despite the fact that NPA shall form part of pay so far as post- 1-1-1986 retirees are concerned, the same would not form part of pay despite provisions in the Fundamental Rules so far as pre-1-1-1986 retirees are concerned. The 5th CPC has taken into consideration, as noticed hereinbefore, the history of grant of NPA and wherefrom it is evident that NPA became part of pay.

10.4. It is not a case where cut-off date has been fixed. The Central Government is entitled for the purpose of determination of pension pursuant to the policy decision to

fix a cut-off date. It is also true that such a cut-off date cannot be held to be arbitrary and irrational, as it was not picked out of a hat. However, in the instant case, we are not concerned with any cut-off date, but we are concerned with the question as to whether despite recommendations of the 5th CPC, a discrimination can be made. The very fact that the Central Government accepts that the emoluments would mean basic pay + NPA in view of its definition as existing in the Rule 9(21)(a)(i) of the Fundamental Rules, there cannot be any reason whatsoever as to why NPA shall be considered to be a part of pay for post- 1-1-1986 retirees and not for pre-1-1-1986 retirees.

* * *

11.1. We may, in this connection, notice that emoluments has been defined in Rule 33 of CCS (Pension) Rules, 1972 in the following terms:-

> *'33. **Emoluments.** - The expression "emoluments" means basic pay as defined in Rule 9(21)(a)(i) of the*
>
> *Fundamental Rules which a Government servant is receiving immediately before his retirement or on the date of his death and will also include Non Practising Allowance granted to the Medical Officer in lieu of private practice.'*

Thus, even in terms of the aforementioned definition, NPA would be part of pay.

11.2. In D.S. Nakara and Ors. v. Union of India, (1983) 1 SCC 305 : 1983 SCC (L&S) 145, it is stated: (SCC pp. 330-31, para 42)

> *'42. If it appears to be undisputable, as it does to us that the pensioners for the purpose of pension benefits form a class, would its upward revision permit a homogeneous class to be divided by arbitrarily fixing an eligibility criteria unrelated to purpose of revision, and would such classification be founded on some rational principle? The classification has to be based, as is well settled, on some rational principle and the rational principle must have nexus to the objects sought to be achieved. We have set out the objects underlying the payment of pension. If the State considered it necessary to liberalise the pension scheme, we find no rational principle behind it for granting these benefits only to those who retired subsequent to that date simultaneously denying the same to those who retired prior to that date. If the liberalization*

was considered necessary for augmenting social security in old age to government servants then those who retired earlier cannot be worse off than those who retired later. Therefore, this division which classified pensioners into two classes is not based on any rational principle and if the rational principle is the one of dividing pensioners with a view to giving something more to persons otherwise equally placed, it would be discriminatory. To illustrate, take two persons, one retired just a day prior and another a day just succeeding the specified date. Both were in the same pay bracket, the average emolument was the same and both had put in equal number of years of service.'

11.3. Yet again in V. Kasturi v. SBI, (1998) 8 SCC 30 : 1999 SCC (L&S) 78, the Apex Court pointed that in D.S. Nakara's case, (1983) 1 SCC 305 : 1983 SCC (L&S) 145, a distinction has been made between a new scheme and a liberalized pension scheme. When a new scheme come into force, the same may not apply to the persons who had retired prior thereto, but when there is a revision in the existing scheme by way of upward revision, the scheme should be applied.

12. For the reasons aforementioned, the impugned order cannot be sustained, which is set aside accordingly. These writ petitions are allowed. However, in the facts and circumstances of the case, there shall be no orders as to cost."

10. The aforementioned order of the Delhi High Court was challenged by the respondents by filing special leave petitions, which were converted into Civil Appeal Nos. 1972-74 of 2003. During the pendency of the appeals, other similarly situated doctors made representations for grant of benefit in terms of the High Court's order. Thereupon, the Government of India made a reference to the Attorney General and sought his opinion on the question whether judgment of the Delhi High Court was correct and should be accepted. The Attorney General considered the relevant rules, the Office Memorandums and gave detailed opinion, which reads thus:

"OPINION

Sub: Regarding the inclusion of Non Practising Allowance (NPA) to Pensioners Doctors in the calculation of pension.

1. Doctors in the Central Government who retired prior to 1-1-1996 are aggrieved by the Office Memorandum dated 29-10-1999 issued by the Government of India, Ministry of Personnel, Public

Grievances and Pension, Department of Pensions and Pensioners Welfare [hereinafter referred to as 'MoPP'] which inter alia provides that Non-Practising Allowance [NPA] is not to be taken into consideration after refixation of their pay and as a result NPA is not to be added to the minimum of the revised scale of pay as on 1-1-1996 in cases where pension is to be stepped up to 50% in terms of the earlier OM dated 17-12-1998.

2. As per the Rule 9(21)(a)(i) of the Fundamental Rules, NPA forms a part of the pay of a government doctor and is taken into account for computing dearness allowance, entitlement of IADA for sanctioning advances under GFRs, house building Advance and other allowances as well as for calculation of retrial benefits.

3. By an Office Memorandum dated 27-10-1997 issued by MoPP, the Government decided to accept the modified parity formula while implementing the recommendations of the Vth Pay Commission Government servants who retired before 1-1-1986 [i.e. before the implementation of the IVth Pay Commission] and those who retire before 1-1-1996 [i.e. before implementation of the Vth Pay Commission] were sought to be brought at par by the notional fixation of pay of the first category as of 1-1-1986 and thereafter consolidation of their pension as on 1-1-1996.

4. A number of representations were received by the Government from Government servants who retired prior to 1-1-1996 and they claimed parity with government servants who retired after 1-1-1996. By Office Memorandum dated 17-12-1998, issued by MoPP, the Government of India sought to achieve parity between pre-1-1-1996 retirees and post-1-1-1996 retirees. By the aforesaid OM, it was provided that pension/family pension of pre-1-1-1996 retirees would be stepped upto 50% / 30% of the minimum of the corresponding revised scale of pay in respect of that post as on 1-1-1996. Thus, all retired government officers retiring from a particular post were to be given pension which was comparable to a large extent. This decision of the Government finds some support from the judgment of the Supreme Court in D.S. Nakara v. Union of India, (1983) 1 SCC 305 : 1983 SCC (L&S)145.

5. Like all retired government servants, government doctors of the Central Health Scheme were also

given benefit of stepping up of their pension to 50% of the minimum revised scale of pay as on 1-1-1996 by including NPA being granted to the government doctors in that scale of pay and such stepped pension was in fact paid to them.

6. However, subsequently on 29-10-1999, as mentioned herein above, the MoPP issued Office Memorandum making a technical distinction between pay and scale of pay and provided that since NPA cannot be given while stepping the pension up to 50%.

7. The government doctors who retire after 1-1-1996 would get benefit of NPA as it forms a part of their pay. Hence, just on the basis only of date of retirement, there would be wide disparity between pension of government doctors, i.e. who retired prior to 1-1-1996 would get much less pension then those who retire after 1-1-1996.

8. The distinction between 'pay' and 'scale of pay' made out in the Office Memorandum dated 29-10-1999 to deny benefit of NPA for the purpose of stepping up of the pension to 50%, is purely technical and mechanical distinction and does not take into account the special position of NPA qua a Government doctor.

9. NPA is a matter of right of government doctor and is meant as a compensation for denial of private practice. The scale of pay prescribed..... department of the Government of India and does not account the special feature of Central Health Service. In Central Health Service, NPA de jure and de facto is a part of the scale of pay as it is inevitably linked to the basic pay. Simply because NPA is not formally included in the scale of pay of the government doctors and taken as a separate element, it cannot be said that NPA has to be ignored altogether for stepping up of pension. NPA is a separate element only because scales of pay of government servants are of general application and not meant for individual services. However, if an element is inevitably a part of the pay, as NPA is, in effect it has to be construed as a scale of pay.

10. Since, NPA for government doctors is a part of their pay, it would be discriminatory if retired government doctors are denied benefit of stepping up of their pension without reference to the NPA presently given to serving doctors and those who retire after 1-1-1996. In fact,denial of NPA to pre-1-

1-1996 retired government doctors would fall foul of the guarantee of equality under Article 14 of the Constitution.

11. The fixation of pension and stepping up of the same to 50% of the revised scale of pay for pre-1-1-1996 retirees as provided by the Government of India in its Official Memorandum dated 17-12-1998 was meant to achieve parity amongst all retired government servants, including government doctors. The comparison of pension being paid to the government doctors who retired prior to 1-1-1996 has to be made with the pension to be paid to government doctors who retired after 1-1-1996. If the latter category is given benefit of NPA for calculation of their pension, the former category cannot be denied the same by reference to a general scale of pay governing all government servants without considering the special feature of government doctors.

12. The Delhi High Court in its order dated 18-5-2002 in K.C. Garg v. Union of India, WP(C) No. 7322 of 2001 has quashed the Office Memorandum dated 29-10-1999. In the said order, the High Court has quite rightly observed that the benefit sought to be given by the earlier OM dated 17-12-1998 was wrongly taken away by the OM dated 29-10-1999. The High Court has observed that in view of the stated objectives of the Government to provide parity in pension amongst government doctors, NPA would have to be necessarily taken into account for stepping up of pension to 50% of the revised scale of pay has been held to be ultra vires the Constitution.

13. The Government of India has filed an SLP against the order of the Delhi High Court dated 18-5-2002. The reason for grant of leave in this case is the conflicting decisions of the Delhi High Court and the Chennai Bench of the Central Administrative Tribunal on one hand and the Principal Bench of the Central Administrative Tribunal, New Delhi on the other. I have no hesitation in opining that the judgment of Justice S.B. Sinha, now a judge of the Supreme Court is correct and should be accepted in preference to the view of the Principal Bench of the Central Administrative Tribunal, Delhi. Consequently steps will have to be taken with regard to the pending Special Leave Petition."

11 to 27. .....

> *28. In view of the above discussion, we hold that the ratio of the Digambar's case (1995) 4 SCC 683, cannot be invoked to justify the pick and choose methodology adopted by the Union of India in resisting the claim of similarly situated doctors that NPA payable to them shall be taken into consideration for calculating the pension. Such an approach by the Union of India is ex-facie arbitrary, unjust and has resulted in violation of Article 14 of the Constitution.*

17. The ratio laid down in para 28 of the judgment (supra) squarely applies to the instant case because the State-writ respondents-appellants herein have also made pick and choose methodology, which is not justifiable.

18. The State-writ respondents-appellants herein have made the policy to fill up the posts on contract basis instead of regular basis, is not the fault of the writ petitioners-respondents herein and they cannot be denied the rights, to which they are entitled to. Thus, the writ petitioners-respondents herein are appointee of selection process and are not the back door entries.

19. The Apex Court in **Chairman, Railway Board and others versus C.R. Rangadhamaiah and others,** reported in **(1997) 6 Supreme Court Cases 623,** has also laid down the tests as to how an act of the State can be said to be discriminatory.

20. The Apex Court has discussed the issue in the case titled as **State of Haryana versus Charanjit Singh and others etc. etc.,** reported in **AIR 2006 Supreme Court 161.** It is apt to reproduce paras 14, 15 and 17 of the judgment herein:

> *"14. In the case of Sandeep Kumar & Ors. v. State of Uttar Pradesh & Ors., reported in (1993) Supp (1) SCC 525, regularisation was refused but equal pay was granted on the admitted position that the concerned workmen were doing the same work.*
>
> *15. In the case of Bhagwan Dass & Ors. v. State of Haryana & Ors., reported in (1987) 4 SCC 634, this Court held that if the duties and functions of the temporary appointees and regular employees are similar there cannot be discrimination in pay merely on the ground of difference in modes of selection. It was held that the burden of proving similarity in the nature of work was on the aggrieved worker. We are unable to agree with the view that there cannot be discrimination in pay on the ground of differences in modes of selection. As has been correctly laid down in Jasmer Singh's case (supra) persons selected by a Selection Committee on the basis of merit with due regard to seniority can be granted a higher pay scale as they have been evaluated by competent authority and in such cases payment of a higher pay scale cannot be challenged. Jasmer Singh's case has been noted with approval in Tarun K. Roy's case.*
>
> *16. .....*

17. Having considered the authorities and the submissions we are of the view that the authorities in the cases of Jasmer Singh, Tilak Raj, Orissa University of Agriculture & Technology and Tarun K. Roy lay down the correct law. Undoubtedly, the doctrine of "equal pay for equal work" is not an abstract doctrine and is capable of being enforced in a Court of law. But equal pay must be for equal work of equal value. The principle of "equal pay for equal work" has no mechanical application in every case. Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who were left out. Of course, the qualities or characteristics must have a reasonable relation to the object sought to be achieved. In service matters, merit or experience can be a proper basis for classification for the purposes of pay in order to promote efficiency in administration. A higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is also an acceptable reason for pay differentiation. The very fact that the person has not gone through the process of recruitment may itself, in certain cases, make a difference. If the educational qualifications are different, then also the doctrine may have no application. Even though persons may do the same work, their quality of work may differ. Where persons are selected by a Selection Committee on the basis of merit with due regard to seniority a higher pay scale granted to such persons who are evaluated by competent authority cannot be challenged. A classification based on difference in educational qualifications justifies a difference in pay scales. A mere nomenclature designating a person as say a carpenter or a craftsman is not enough to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of "equal pay for equal work" requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities made a difference. Thus normally the applicability of this principle must be left to be evaluated and determined by an expert body. These are not matters where a writ court can lightly interfere. Normally a party claiming equal pay for equal work should be required to raise a dispute in this regards. In

any event the party who claims equal pay for equal work has to make necessary averments and prove that all things are equal. Thus, before any direction can be issued by a court, the court must first see that there are necessary averments and there is a proof. If the High Court, is on basis of material placed before it, convinced that there was equal work of equal quality and all other relevant factors are fulfilled it may direct payment of equal pay from the date of the filing of the respective writ petition. In all these cases, we find that the High Court has blindly proceeded on the basis that the doctrine of equal pay for equal work applies without examining any relevant factors."

21. The Apex Court in another case titled as **State of Punjab & Anr. versus Surjit Singh & Ors.,** reported in **2009 AIR SCW 6759,** has discussed the judgments made by the Apex Court right from the year 1960 upto 2009 and has discussed the concept of equal pay for equal work. It is apt to reproduce paras 38, 40 and 42 herein:

"38. Reliance placed by Mr. Gupta on Haryana State Minor Irrigation Tubewells Corpn. v. G.S. Uppal, [(2008) 7 SCC 375 at 384] is equally meritless. In that case, the question involved was application of the recommendations of the Pay Revision Committee. As a discriminatory treatment was meted out to the appellants therein, this Court interfered opining that the decision of the Government is unreasonable, unjust and prejudicial.

39. .....

40. Yet again, we may also notice that another Bench of this Court in State of Haryana v. Tilak Raj & Ors., [(2003) 6 SCC 123] has clearly laid down the law in the following terms:

"11. A scale of pay is attached to a definite post and in case of a daily-wager, he holds no posts. The respondent workers cannot be held to hold any posts to claim even any comparison with the regular and permanent staff for any or all purposes including a claim for equal pay and allowances. To claim a relief on the basis of equality, it is for the claimants to substantiate a clear-cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with the other group vis-'-vis an alleged discrimination. No material was placed before the High Court as to the nature of the duties of either categories and it is not possible to hold that the principle of "equal pay for equal work" is an abstract one.

12. "Equal pay for equal work" is a concept which requires for its applicability complete and wholesale

identity between a group of employees claiming identical pay scales and the other group of employees who have already earned such pay scales. The problem about equal pay cannot always be translated into a mathematical formula."

41. .....

42. Therein the leave was granted purported to be on the basis of the benefit of regular pay-scale granted by other department in terms of the decision of the High court in Gurmukh Singh vs. State of Punjab [C.W.P. No. 9623 of 1993 decided on 12.4.1994]. The main plank of the case of the workmen therein was that they had been not only working for a long time it was urged that their regular counter-parts were holding similar posts and their postings are being inter-changed with them. The High Court noticing the allegation of the writ petitioners that they had been discharging absolutely similar functions with the same element of responsibility and having similar qualifications as are being discharged by the regularly appointed persons which having not been specifically controverted opined as under:

"However, no material has been placed before this Court to show as to what is the real difference between the duties being performed by the petitioners (daily wagers) and regular employees. The statement containing the date of joining of the petitioners shows that all of them have rendered service between one to eleven years as on the date of the filing of the petition. The fact that they are continuously in service has not been controverted by the respondents. Therefore, merely because 64 petitioners have remained absent for different durations cannot be a ground for taking the view that all the 973 petitioners are discharging duties without proper responsibility. Absence from duty may constitute a misconduct but that by itself cannot lead to an inference that whole body of employees does not discharge its duties with responsibility. In fact on a query made by the court, learned Deputy Advocate General stated at the bar that the Government is not in a position to dispense with the services of the petitioners because the same are necessary for maintaining the distribution and supply of the drinking water to the people in rural as well as urban areas. From this, it can safely be inferred that the nature of the work being performed by the petitioners is not of a casual nature or of a fixed duration. They might have been posted to work against particular projects, but,

these projects are perennial in character and there is no indication that the projects are going to be wound up by the Government. Continuous engagement of a large number of employees for years together is also indicative of the requirement of the man-power. Therefore, merely because the Government has not thought it proper to sanction regular posts, it cannot be held that there is a marked distinction between the functions of the petitioners and the regular employees."

22. This Court in **LPA No. 11 of 2012,** titled as **The Principal Secretary (Personnel) & another versus Pratap Thakur,** decided on 22.09.2014, has discussed the law and enumerated the parameters for granting equal pay for equal work.

23. The perusal of the pleadings does disclose that the State-writ respondents-appellants herein have tried to create a class among the officers, who are equal in all respects and are performing the same work/duties, have the same responsibility and who have joined the service after succeeding in selection process. Thus, the act of the State-writ respondents-appellants herein is not permissible in law.

24. This Court in a batch of LPAs, **LPA No. 184 of 2011,** titled as **State of H.P. and others versus Dr. Jagdish Chand Panta and others,** being the lead case, decided on 27.08.2014, while dismissing the appeals, held that discrimination was illegal. It is apt to reproduce paras 4 and 6 of the judgment herein:

"4. It appears that the benefit of NPA was allowed to the petitioners for the first time w.e.f. on 1st April, 1997 and in terms of Office Memorandum dated 10th June, 2005, the NPA was modified and again it was enhanced in terms of Office Memorandum dated 7th July, 2007. The Office Memorandum, dated 7th July, 2007 was questioned by the writ petitioners on the ground that it is discriminatory and amounts to creating a class among the officers who are equal in all respects and had prayed that the said Office Memorandum be quashed, so far as it was impugned by the writ petitioners and benefit be given to the writ petitioners without making any classification.

5. .....

6. We have gone through the Office Memorandum impugned in the writ petitions and the discussion made by the Writ Courts. It appears that in terms of the impugned Office Memorandum, classification was made out of the same set of Officers, who are having same qualification, same rights and same title, without any justification and, therefore, the Writ Courts have rightly held that such a classification is impermissible in law."

25. The said decision was questioned by the State before the Apex Court by the medium of Special Leave to Appeal (C) Nos. 10839-10844/2015, which came to be dismissed on 08.07.2015.

26. Keeping in view the facts of the case read with the tests laid down by the Apex Court from time to time and the discussions made hereinabove, we are of the considered view that the State-writ respondents have made discrimination on the following grounds:

(i) NPA has been granted to the Veterinary Officers appointed on regular basis, but not to the Veterinary Officers appointed on contract basis despite the fact that they are performing same job, are discharging same duties and responsibilities.

(ii) The Medical Officers, who came to be appointed on contract basis, were given the benefit of NPA, but was denied to the writ petitioners-respondents herein, i.e. the Veterinary Officers appointed on contract basis.

27. Having said so, we hold that the Veterinary Officers appointed on contract basis are also entitled to NPA right from the date of filing of the writ petition, as directed by the Writ Court/learned Single Judge.

28. Viewed thus, the impugned judgment merits to be upheld on different grounds, as given hereinabove.

29. Having glance of the above discussions, the appeal is dismissed and the impugned judgment is upheld. Pending applications, if any, are also disposed of accordingly.

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

Yashu ...Petitioner.

Vs.

State of Himachal Pradesh and others ...Respondents.

CWP No. 1943 of 2015
Decided on: 27.07.2015

Constitution of India, 1950- Article 226– Petitioner contended that the investigation was not conducted properly by the police and police be directed to register the FIR- it was reported that no offence was found to have been committed after investigation and a Calandra under Section 107 and 151 of Cr.P.C. was filed- held that the remedy of the petitioner is before Competent Court- petition disposed off with the direction to invoke the jurisdiction of the Competent Court. (Para 2-4)

For the petitioner: Mr. Digvijay Singh, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Vikram Thakur, Deputy Advocate Generals, for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

It is contended that the police has not conducted the investigation in its right direction, the case has not been registered against the accused for the commission of the offences which they have allegedly committed and it is prayed that respondents No. 2 and 3 be directed to register FIR against respondents No. 4 and 5 under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short "the Act").

2. Respondents No. 1 to 3 have filed reply. It is stated that police has carried out investigation and found that no case is made out in terms of the provisions of the Act and have submitted CALANDRA in terms of Section 107/151 of the Code of Criminal Procedure, 1973 (for short "CrPC") before the Sub Divisional magistrate, Banjar.

3. It is for the petitioner to seek appropriate remedy by filing a petition before the Court of competent jurisdiction.

4. In the given circumstances, we deem it proper to dispose of this writ petition with liberty to the petitioner to invoke the jurisdiction of the Court of competent jurisdiction for seeking appropriate remedy, if permissible.

5. The writ petition is disposed of accordingly alongwith all pending applications. Copy dasti.

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

Cr. Appeal No. 210 of 2011 alongwith
Cr. Appeal No. 99 of 2012.
Judgments reserved on : 13.5.2015
Date of Decision : July 29, 2015

1. Cr. Appeal No. 210 of 2011
Chain Ram ... Appellant
Versus
State of Himachal Pradesh ... Respondent
2. Cr. Appeal No. 99 of 2012
Chain Ram ... Appellant
Versus
State of Himachal Pradesh ... Respondent

Indian Penal Code, 1860- Section 376- Accused raped the prosecutrix- prosecutrix disclosed this fact to PW-3 and his wife- accused was confronted with this fact but he denied having committed any such act- the date of birth of the prosecutrix was recorded to be 28.9.1993- incident had taken place on 2nd and 3rd March, 2010- dental age of the prosecutrix was found to be 12 to 16 years and her radiological age was found to be 13 to 15 years- thus it was duly proved that the prosecutrix was minor on the date of incident - medical officer had found injuries on the person of the prosecutrix - mere fact that

prosecutrix had turned hostile is not sufficient to doubt the prosecution case when she admitted that she had narrated the incident to PW-3, that she had visited the police Station, that her statement was recorded by the police and had signed the same and that her statement was recorded by SDM- she got identical version recorded with three authorities at different places and time- she had not denied those statements- held, that in these circumstances, accused was rightly convicted. (Para-7 to 37)

Cases referred:

State of Punjab versus Gurmit Singh and others, (1996) 2 SCC 384
Siriya @ Shri Lal vs. State of Madhya Pradesh, (2008) 8 SCC 72
Yomeshbhai Pranshankar Bhatt vs. State of Gujarat, (2011) 6 SCC 312
Bhajju alias Karan Singh vs. State of Madhya Pradesh, (2012) 4 SCC 327
Ramesh Harijan vs. State of Uttar Pradesh, (2012) 5 SCC 777
State of Maharashtra versus Chandraprakash Kewalchand Jain, (1990) 1 SCC 550
O. M. Baby (dead) by Legal Representative vs. State of Kerala, 2012 (11) SCC 362
M.P. v. Dharkole alias Govind Singh and others, (2004) 13 SCC 308
State of Punjab versus Jagir Singh (1974) 3 SCC 277
State of Rajasthan versus N.K. THE ACCUSED (2000) 5 SCC 30

For the appellant : Ms. Salochana Kaundal, Advocate, in Cr. Appeal No. 210 of 2011.
Ms. Seema Sood, Advocate, in Cr. Appeal No. 99 of 2012.

For the respondent : Mr. Ashok Chaudhary and Mr. V. S. Chauhan, Addl. Advocate Generals with Mr. J. S. Guleria, Asstt. A.G. for the respondent-State in both the appeals.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In these appeals filed under the provisions of Section 374 of the Code of Criminal Procedure, 1973, appellant/convict has assailed the very same impugned judgment dated 25.3.2011, passed by learned Addl. Sessions Judge, Fast Track Court, Shimla, H.P., in Sessions Trial No. 13-S/7 of 2010, titled as State of Himachal Pradesh vs. Chain Ram, whereby he stands convicted of the offence punishable under the provisions of Section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of ten years and pay fine of Rs.10,000/- and in default thereof, further undergo imprisonment for a period of one year.

2. It is the case of prosecution that accused Chain Ram was married to Bhagpati through whom prosecutrix (PW-1) was born. During the subsistence of the first marriage accused married Rattu Devi and started residing with her in village Hiranh, Tehsil Chopal, Distt. Shimla, H.P. However, prosecutrix continued to reside with her real brother Atma Ram, bhabhi Reena Devi and mother who is not mentally stable, in village Khoni, Tehsil Jubbal, Distt. Shimla, H.P. On 2nd March, 2010, prosecutrix was taken by the accused to village Hiranh where twice he subjected her to sexual assault, which fact she disclosed to her friend Kaushalya Devi (PW-4) as also relative Kewal Ram (PW-3) and his wife Mathru Devi. When confronted, accused denied having committed any such act. Kewal Ram took the prosecutrix to Police Station, Nerwa, where on the basis of her statement, F.I.R. No.

15/2010, dated 7.3.2010 (Ext. P-C) was registered against the accused, under the provisions of Sections 376 and 506 of the Indian Penal Code. SI-SHO Sohan Lal (PW-7) got the prosecutrix medically examined from Dr. Mamta Mahajan (PW-8) who issued MLC (Ext. PW-8/A). The radiological age of the prosecutrix was also got determined from Dr. Susheel Pundir (PW-5). As per the medical opinion, prosecutrix was below 16 years of age and possibility of sexual assault could not be ruled out. Laceration was noticed on her private parts. The accused was also got medically examined. SI-Sohan Lal who conducted the necessary investigation, collected the incriminating material/articles; recorded statements of relevant witnesses. Scientific evidence was also collected. Investigation revealed complicity of the accused in the alleged crime. Hence, challan was presented in the Court for trial.

3. Accused was charged for having committed offences punishable under the provisions of Sections 376 and 506 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

4. In order to prove its case, in all, prosecution examined as many as eight witnesses and statement of the accused under Section 313 Cr.P.C. was also recorded, in which he took up the following defence:

> "I am innocent. I have not done anything wrong. Mangat Ram and Kewal Ram wanted to oust me from that village."

Accused examined one official witness (DW-1) in his defence.

5. Appreciating the material on record, including the testimonies of the witnesses, trial Court convicted the accused for having committed an offence punishable under the provisions of Section 376 IPC and sentenced him as aforesaid. Hence, the present appeal.

6. We have heard Ms. Salochana Kaundal and Ms. Seema Sood, learned counsel, on behalf of the appellant as also Mr. Ashok Chaudhary and Mr. V. S. Chauhan, learned Addl. Advocate Generals 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. Relationship of the prosecutrix with the accused and the fact that she was residing at village Khoni, Tehsil Jubbal with her brother Atma Ram, bhabhi Reena Devi and mother Smt. Bhagpati is not disputed. Solemnization of second marriage with Rattu Devi, resident of village Hiranh, tehsil Chopal, is also an undisputed, in fact, admitted fact. Undisputedly accused is staying with Rattu Devi at village Hiranh. Prosecutrix was studying in a school at village Khoni and that accused had taken her to village Hiranh, is also admitted.

8. 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 ?

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"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 apex Court reiterated such view in Siriya @ Shri Lal vs. State of Madhya Pradesh, (2008) 8 SCC 72.

9. That on the date of commission of the alleged offence i.e. 2nd and 3rd March, 2010, prosecution was more than 16 years of age, stands established from the birth certificate (Ext. PZ), issued under the Registration of Births and Deaths Act, 1969 and the relevant Rules framed there under, wherein her date of birth is recorded as 28.9.1993. The dental age of the prosecutrix has been opined to be between 12 to 16 years and her radiological age, as per the version of Dr. Susheel Pundir (PW-5) is between 13 to 15 years. The benefit of doubt, in the given facts and circumstances, with regard to variation of age, has to be given to the accused in view of birth certificate (Ext. PZ). We may clarify that even before us, the fact that prosecutrix was minor was not argued.

10. We now proceed to examine the medical evidence on record. Request (Ext. PW-6/A) for medical examination of the prosecutrix, so forwarded by SI-Sohan Lal through Lady Constable Shamim (PW-6), was presented before Dr. Mamta Mahajan (PW-8) who was posted as a Senior Resident at the Kamla Nehru Hospital, Shimla. The said Doctor examined

the prosecutrix and issued MLC (Ext. PW-8/A). She opined that the introitus admitted two fingers with difficulty. However possibility of sexual assault could not be ruled out. No external injury was observed. On local examination hymen was found to be absent and on the posterior wall of introitus, 5 c.m. sized laceration was noticed. Suggestion put by the accused, of the laceration having been caused on account of itching/unhygienic conditions does not, in any manner, render the medical opinion to be doubtful, false or incorrect. Thus by way of corroborative evidence, possibility of prosecutrix being subjected to rape cannot be said to have been ruled out.

11. The question which still remains to be examined and which is crucial in the instant case, is as to whether testimony of the prosecutrix, who was declared hostile, can still be relied upon to uphold the conviction of the accused or not? Is it that prosecutrix was under some pressure at the time of reporting the crime? Was such report false? Is it that co-villagers and particularly Kewal Ram (PW-3) had wanted the accused to be falsely implicated or is it that subsequently prosecutrix was influenced by the family to falsely depose, favouring her father, but while doing so, she actually narrated the truth in the court?

12. For examining these questions, let us first highlight the sequence of events which took place prior to the registration of the First Information Report. In this regard we have carefully examined the testimonies of the relevant prosecution witnesses i.e. the prosecutrix (PW-1), Ashish Kohali (PW-2), Kewal Ram (PW-3) and Kaushalya Devi (PW-4).

13. According to Kewal Ram, on 5.3.2010 prosecutrix came weeping to his house. His wife Mathru was also present there. Prosecutrix disclosed that her father had beaten her. In the meantime, Kaushalya Devi (PW-4) who also came, informed that earlier during the day, prosecutrix had told her that her father had raped her. At that time prosecutrix also informed Mathru and Kaushalya Devi that that during the nights of 2nd and 3rd March, 2010, her father had raped her. Witness further states that on 5.3.2010 and 6.3.2010, prosecutrix stayed with him in his house. On 6.3.2010 he tried to make inquires from the accused but he was not available. On 7.3.2010 when he confronted the accused, the incident was denied.

14. Version of this witness stands corroborated by Kaushalya Devi (PW-4) according to whom, earlier during the day prosecutrix had also disclosed to her about the incident. Uncontrovertedly it has come on record that prosecutrix and Kaushalya Devi are friends. Witnesses have denied any animosity between them and the accused.

15. Thus far, we find the witnesses to have deposed clearly and their depositions to be consistent, their version to be believable and the witnesses reliable.

16. We find the version of the prosecutrix, who upon being declared hostile was cross examined by the Public Prosecutor, to be in line with the version so narrated by the aforesaid witnesses.

17. Their Lordships of the Hon'ble Supreme Court in *Yomeshbhai Pranshankar Bhatt vs. State of Gujarat,* (2011) 6 SCC 312 have held that evidence of hostile witness may contain elements of truth and should not be entirely discarded. Their Lordships have held as under:

> "22. The learned counsel for the appellant further submitted the doctor had not given his written opinion that the deceased was fit enough to give her statement. Though orally, the doctor said so. Relying on this part of the evidence especially the evidence of the husband of the deceased, the learned

counsel for the appellant submitted that even though the husband may have been declared hostile, the law relating to appreciation of evidence of hostile witnesses is not to completely discard the evidence given by them. This Court has held that even the evidence given by hostile witness may contain elements of truth.

23. This Court has held in State of U.P. vs. Chetram and others, AIR 1989 SC 1543, that merely because the witnesses have been declared hostile the entire evidence should not be brushed aside. [See para 13 at page 1548]. Similar view has been expressed by three-judge Bench of this Court in Khujji alias Surendra Tiwari vs. State of Madhya Pradesh, [AIR 1991 SC 1853]. At para 6, page 1857 of the report this Court speaking through Justice Ahmadi, as His Lordship then was, after referring to various judgments of this Court laid down that just because the witness turned hostile his entire evidence should not be washed out."

18. Their Lordships of the Hon'ble Supreme Court in *Bhajju alias Karan Singh vs. State of Madhya Pradesh,* (2012) 4 SCC 327 have held that evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. Their Lordships have held as under:

"36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the cases:

(a) Koli Lakhmanbhai Chanabhai v. State of Gujarat (1999) 8 SCC 624

(b) Prithi v. State of Haryana (2010) 8 SCC 536

(c) Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1

(d) Ramkrushna v. State of Maharashtra (2007) 13 SCC 525"

19. Their Lordships of the Hon'ble Supreme Court in *Ramesh Harijan vs. State of Uttar Pradesh,* (2012) 5 SCC 777 have again reiterated that any portion of evidence consistent with case of prosecution or defence can be relied upon. Their Lordships have further held that seizure/recovery witnesses though turning hostile, but admitting their

signatures/thumb impressions on recovery memo, they could be relied on by prosecution. Their Lordships have held as under:

> "23. It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide: Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848; and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853).
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> 24. In State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Narain Shukla v. Daroga Singh & Ors., AIR 2008 SC 320; and Subbu Singh v. State by Public Prosecutor, (2009) 6 SCC 462. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. (See also: C. Muniappan & Ors. v. State of Tamil Nadu, AIR 2010 SC 3718; and Himanshu @ Chintu v. State (NCT of Delhi), (2011) 2 SCC 36)"

20. In this backdrop, we proceed to examine the testimony of the prosecutrix.

21. Initially prosecutrix deposed that on the dates of the alleged incident she spent the night with her father and mother. None opened her clothes. Also nothing happened with her. At this point in time, she was declared hostile and cross examined by the Public Prosecutor. She revealed nothing to either Kewal Ram or Kaushalya. Also there is enmity between her father and Kewal Ram. Version thus far, is not in support of the prosecution case or her earlier version. But later part of her testimony is different. She admits that the day following the incident, she went to the house of Kewal Ram. This was despite such animosity and her father telling her not to go there. But then why is it that she went there? she is silent. Crucially even in Court, she does not disclose having been tutored by anyone, much less, Kewal Ram or Kaushalya Devi of falsely implicating or deposing against her father. We find that from the subsequent part of her testimony, the truth has emerged. She admits having visited Police Station, Nerwa alongwith Kewal Ram and reported the matter to the police. She does not refer exercise of any undue influence or coercion. No doubt she refers Kewal Ram having forcibly taken her to the police station but categorically does not state that he asked her to file a false complaint. She appears to be an intelligent witness and has never failed in her class. Unequivocally she admits her signatures on statement (Ext.PA) so recorded by the Sub Divisional Magistrate (U), Shimla as also F.I.R. (Ext. PC). Version so narrated therein, only corroborates the version of the independent witnesses. She admits that "*The police recorded the same, which I told them and then I signed the same.*". She admits to have slept in the house of Kewal Ram in the night of 5.3.2010.

Also that on 7.3.2010 when Kewal Ram, Mathru, Atma Ram and Ganga Ram had collected, her father had intimidated them. Though initially she denies having informed Kewal Ram, Mathru and Kaushalya of being raped by her father on the 2nd & 3rd March, 2010, but later on admitted having informed the police, the SDM and the Medical Officer of the fact that during the nights of 2nd & 3rd March, 2010, she had been subjected to rape by her father. Quite apparently she had left the house of her brother only on the asking of her father.

22. It has also come on record that with the registration of the F.I.R. (Ex. PC) statement of the prosecutrix was recorded before Sh. Ashish Kohali (PW-2), the Sub Divisional Magistrate (U) Shimla. This witness categorically and uncontrovertedly states that such statement (Ext. PA) was recorded by him on 8.3.2010. Version so disclosed by the prosecutrix was reduced into writing. Only after contents thereof were read over and explained to the prosecutrix, did she sign the statement, which was endorsed by him. Crucially witness admits to have read over the statement (Ext.PA), which was voluntarily signed. We notice that prosecutrix can sign in English. Significantly neither Kewal Ram nor Kaushalya were present at the time when such statement was recorded. At that time she never expressed any threat or force allegedly exercised by Kewal Ram, as she wants the court to believe, by deposing that Kewal Ram had forcibly taken her to Police Station Nerwa for lodging the F.I.R.

23. Testimony of this witness, to a large extent, establishes the prosecution case, beyond reasonable doubt. Her version, despite being a hostile witness, to the extent it implicates the accused, can be relied upon. That part of her testimony is fully inspiring in confidence. It cannot be said that the witness is wholly unreliable or unbelievable and her testimony not worthy of credence.

24. For sustenance, prosecutrix is dependent upon her relations and particularly brother Atma Ram, who, as has emerged through the testimony of Amit Sharma (DW-1), had visited the accused at Sub Jail, Kaithu on 21.12.2010. Significantly, in court, testimony of the prosecutrix was recorded the following day i.e. on 22.12.2010 and she came to the Court with her brother and bhabhi whom she not only loves but also works on their advice. Though there is nothing on record to establish such fact, but she admits to have visited the jail to see her father. It has also come in her testimony that just before her deposition, outside the court, her brother and bhabi had met the accused. We may also observe that prosecutrix was confronted with her earlier statement (Ext. PW 7/E) narrating her father's illegal conduct and behaviour.

25. It has come on record that mother of the prosecutrix is mentally not stable. Quite evidently, though unsuccessfully, but for obvious reasons and out of compulsion, she tried not to support the prosecution with the only object of saving her father.

26. We may observe that prosecutrix got almost identical version recorded not once but thrice and each time with different authorities at different places and time. Firstly it was recorded by the S.H.O. on 7.3.2010. Second time she disclosed and got the factum of sexual assault recorded in her MLC on 8.3.2010 to the effect that *"According to the victim she stays in Khoni, Jubbal from where her father took her to Hirah, Tehsil Tikri and was sexually assaulted on 2/3/2010 and 3/3/2010. She narrated everything to the villagers on 5th/3 and subsequently lodged on 7/3/2010. She was beaten by her father and asked not to narrate anything. Since the incident took place, she has changed her clothes and took bath. She has washed the clothes she had worn at time of assault."* Noticeably she signed the MLC in English language and never disputed contents thereof. Kewal Ram was not present, hence

there was no question of exercising any undue influence at that time. Third time it was before the Sub Divisional Magistrate (U), Shimla (Ext. PA). A common thread runs through all these statements, which stands duly proved on record, indicating involvement of the accused in the alleged crime. Such statements were made without any delay, ruling out any possibility of improvement, deliberation or tutoring.

27. Crucially prosecutrix does not deny having made such statements. No reasonable explanation or justifiable cause, resiling from her version, is forthcoming. She is a helpless and hapless child. Her mother, who would have supported her, in such a situation, is mentally unstable. Other than her brother and bhabhi, she has none to fall back upon. So, she had no alternative, but to accede to their demand, resile from the allegations and swallow the insult, she suffered at the hands of her own father. She was just 16 years of age at the time of commission of crime.

28. At this juncture we deem it appropriate to deal with the statement of law on the point.

29. 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.

30. 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].

31. 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."
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> [Emphasis supplied].

32. The aforesaid ratio is squarely applicable to the instant facts.

33. In view of the aforesaid discussions, we are of the considered view that prosecutrix truthfully disclosed the incident, without any threat, pressure or coercion from any quarter, much less Kewal Ram, to the neighbours, police, the Doctor and/or the Sub Divisional Magistrate, Shimla. Such disclosure was voluntary. Kewal Ram accompanied her to the police station which is at a distant place where, in a hilly terrain like Himachal Pradesh, it takes time to travel. From Chopal she was brought to Shimla by the police and at that time she was certainly not under the influence of Kewal Ram.

34. We may also observe that the accused has not been able to probablize the defence so taken by him.

35. 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)

36. 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."
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> (Emphasis supplied).

37. 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.

38. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that accused committed rape on the prosecutrix.

39. For all the aforesaid reasons, there is no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Findings of conviction cannot be said to be erroneous or perverse. Hence, the appeals are dismissed. Appeals stand disposed of, so also pending application(s), if any. Records of the Court below be immediately sent back.

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

Kishori Lal ..... Petitioner
Vs.
State of H.P. & ors. ..... Respondents

CWP No. 1431 of 2015
Judgment reserved on: 24.7.2015
Date of decision: July 29, 2015.

Constitution of India, 1950- Article 226- Petitioner entered into an agreement to sell the land to install an Atta-Chakki (Flour Mill)- he applied to Senior Executive Engineer for electricity connection- he deposited the amount but the connection was not released due to the resistance offered by the private respondent- private respondent refused to execute the sale deed and the petitioner had to file a civil suit for specific performance in which status quo order was passed- respondent sold the part of the suit land despite the status quo order- seller was impleaded as party and another order of status quo was passed- held, that petitioner was put into possession on the basis of agreement to sell- installation of transformer will not confer the ownership upon the petitioner – transferee pendente lite is not a necessary party- petition allowed- the respondents No. 6 to 9 directed to install the transformer and respondents No. 2 to 5 directed to render all necessary assistance and respondent No. 10 directed not to create any hindrance. (Para-9 to 12)

Case referred:
T.G. Ashok Kumar vs. Govindammal and another (2010) 14 SCC 370

For the petitioner : Mr. Ajay Sharma, Advocate.
For the respondents : Ms. Meenakshi Sharma and Mr. Rupinder Singh, Additional Advocate Generals with Ms. Parul Negi, Deputy Advocate General, for respondents No. 1 to 5.
Mr. Satyen Vaidya, Advocate, for respondents No. 6 to 9.
Mr. Onkar Jairath, Advocate, for respondent No.10.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Through this writ petition, the petitioner has claimed the following substantive reliefs:-

(a) That impugned acts of the respondents, above stated, which amount to executive inaction, may very kindly be quashed and set aside with directions to respondents No.1 and so also to the H.P.State Electricity Board, respondent No.6 herein, to get the matter inquired into at their own level with respect to dereliction of duties on the part of Police people and officials of the Electricity Board, including the Senior Executive Engineer, SDO (E), Jawali, which acts on their part amount to misconduct, as per service jurisprudence.

(b) That further directions may be issued to respondents No. 1 and 6 to take suitable action against officers/officials for misconduct as per provisions of the service jurisprudence after receipt of the inquiry report. Directions may also be given to put on records of this case the inquiry report pursuant to inquiry, as is conducted and action, as is taken, as the same will be an eye-opener for others not to fell prey to the musclemen.

(c) That directions may be issued to respondents No. 1 and 6 to provide police assistance and to install transformer and to provide electricity to the industry of the petitioner forthwith without any further delay, in the interest of law and justice.

2. The facts as pleaded in the petition are that after superannuation from Government service, the petitioner with a view to settle his unemployed son entered into an agreement dated 3.8.2009 with the private respondent to buy land comprised in Khata No. 224, Khatauni No. 457, Khasra No. 858, area measuring 0-18-00 hectares, to the extent of 181/362 shares i.e. 0-09-00 hectares and Khata No. 247, Khatauni No. 458, Khasra No. 857 area measuring 0-59-51 hectares, to the extent of 181/724 shares, i.e. area measuring 0-14-88 hectares. In total, the private respondent agreed to sell his land in both khatas measuring 0-23-88 hectares situated in Mohal Dhan, Mauza and Tehsil Jawali, District Kangra, H.P. as per jamabandi for the year 2003-04 for a total consideration of Rs.13,02,000/-.

3. The purpose of purchasing the land was to install an Atta Chakki (Flour Mill) and accordingly the petitioner applied to the Senior Executive Engineer for electricity connection vide his application dated 31.3.2014. The long and short of the matter is that though the electricity board was ready to provide the electricity connection but on account of the resistance offered by the private respondent, the same was not being released despite the fact that the petitioner had deposited a sum of Rs.4,00,000/- to Rs.5,00,000/- in the electricity board authorities account.

4. It is further contended that the private respondent was approached time and again to get the sale deed registered, but to no avail which constrained the petitioner to file a civil suit for specific performance and vide orders dated 5.9.2011 the parties to the suit were directed to maintain status quo qua alienation and possession of the suit land. Despite the status quo orders, the private respondent sold a part of the suit land to one Sh. Vinay Kumar. On coming to know about this fact, the suit filed was amended by arraying Sh. Vinay Kumar as party and sale deed executed in his favour was also challenged. An application for injunction was again filed and vide order dated 16.5.2013 which were passed in the presence of Vinay Kumar, the parties were directed to maintain status quo qua nature and possession of the suit property. It is further represented that even this order of injunction has been violated inasmuch as the sale deed in favour of Vinay Kumar has been registered for which the proceedings under Order 39 Rule 2A CPC have been initiated and are pending.

5. The official respondents, who comprise of the Secretary (Home) and certain police officials, have filed a joint reply wherein it has been averred that Sh. Vinay Kumar is a necessary party and have further stated that on account of the dispute being essentially civil in nature, these respondents have no role to play.

6. The private respondent has filed his separate reply wherein preliminary submissions regarding competence and maintainability of the petition have made to the effect that Vinay Kumar is a co-owner of the suit land in whose absence the petition is not maintainable. It has further been stated that it was only on account of the petitioner's inability to arrange for the balance consideration that the private respondent was constrained to sell the land as he was in dire need of money. However, in the same breath, the private respondent has claimed that he has unnecessarily been impleaded and put to financial loss. On merits, in addition to reiterating what has been stated in the preliminary submissions, it has been stated that the petitioner has not acquired any title to the property since no legal and valid sale deed has been executed in his favour.

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

7. At the outset, certain undisputed facts may be noticed:

(i) The possession of the suit land as per the agreement to sell dated 3.8.2009 is with the petitioner.

(ii) It is the petitioner who has filed the suit for specific performance which is pending adjudication.

(iii) Though a part of the property was sold to Vinay Kumar by the private respondent but that was after the orders of status quo qua alienation and possession had already been passed by the Court on 5.9.2011. This, in fact necessitated the amendment of the suit and Vinay Kumar impleaded as party and thereafter again vide order dated 16.5.2013 which was passed in the presence of Vinay Kumar, the parties were directed to maintain status quo qua nature and possession over the suit property.

8. This being the factual position, the next question which therefore arises for consideration is as to whether the private respondent can oppose the installation of the transformer only on the ground that he is owner of the property or that a part of the property has been sold by him to Vinay Kumar.

9. Undoubtedly, by applying for transformer, the petitioner cannot be held to be the owner of land. The petitioner's claim in this regard has to be judged only in light of the fact that he is in possession of the suit land. Once, it is not disputed that the possession of the land is with the petitioner, then, I see no reason why the private respondent should object to the installation of the transformer for the purpose of running flour mill. After all, the installation of transformer would not in any manner confer ownership of the land upon the petitioner and the same would essentially abide by the outcome of the civil litigation pending inter se between the parties.

10. Insofar as non-joinder of Vinay Kumar as a party respondent is concerned, suffice it to say that the transfer of a part of the land in his favour, prima-facie would be hit by the doctrine of lis-pendence. As provided under Section 52 of the Transfer of Property Act, this Section does not declare a pendent elite transfer by a party to the suit as void or illegal, but only makes the pendente lite purchaser bound by the decision in the pending litigation. The principle underlying Section 52 is that if during the pendency of any suit in a court of competent jurisdiction which is not collusive, in which any right of an immovable property is directly and specifically in question, such property cannot be transferred by any party to the suit so as to affect the rights of any other party to the suit under any decree

that may be made in such suit. If ultimately the title of the pendente lite transferor is upheld in regard to the transferred property, the transferee's title will not be affected.

11. On the other hand, if the title of the pendente lite transferor is recognised or accepted only in regard to a part of the transferred property, then the transferee's title will be saved only in regard to that extent and the transfer in regard to the remaining portion of the transferred property to which the transferor is found not entitled, will be invalid and the transferee will not get any right, title or interest in that portion. This was so held by the Hon'ble Supreme Court in **T.G. Ashok Kumar vs. Govindammal and another (2010) 14 SCC 370** wherein it was observed as under:-

> "11. *Section 52 dealing with lis pendens is relevant and it is extracted below :*
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> > *"**52. Transfer of property pending suit relating thereto**.--During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right of immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose."*
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> *12. In Jayaram Mudaliar v. Ayyaswami (1972) 2 SCC 200 this court held (at SCC p. 218, para 47) that the purpose of Section 52 of the Act is not to defeat any just and equitable claim, but only to subject them to the authority of the court which is dealing with the property to which claims are put forward. This court in Hardev Singh v. Gurmail Singh (2007) 2 SCC 404 held that Section 52 of the Act does not declare a pendente lite transfer by a party to the suit as void or illegal, but only makes the pendente lite purchaser bound by the decision in the pending litigation.*
>
> *13. The principle underlying Section 52 is clear. If during the pendency of any suit in a court of competent jurisdiction which is not collusive, in which any right of an immovable property is directly and specifically in question, such property cannot be transferred by any party to the suit so as to affect the rights of any other party to the suit under any decree that may be made in such suit. If ultimately the title of the pendente lite transferor is upheld in regard to the transferred property, the transferee's title will not be affected.*
>
> *14. On the other hand, if the title of the pendente lite transferor is recognized or accepted only in regard to a part of the transferred property, then the transferee's title will be saved only in regard to that extent and the transfer in regard to the remaining portion of the transferred property to which the transferor is found not entitled, will be invalid and the transferee will not get any right, title or interest in that portion.*
>
> *15. If the property transferred pendente lite, is allotted in entirely to some other party or parties or if the transferor is held to have no right or title in that property, the transferee will not have any title to the property. Where a co-owner alienates a property or a portion of a property representing to be the absolute owner, equities can no doubt be adjusted while making the division*

during the final decree proceedings, if feasible and practical (that is without causing loss or hardship or inconvenience to other parties) by allotting the property or portion of the property transferred pendente lite, to the share of the transferor, so that the bonafide transferee's right and title are saved fully or partially."

However, it may be clarified that the aforesaid observation would be subject to and abide by the final outcome of the pending civil litigation.

12. After taking into consideration the peculiar facts and circumstances of the case and also bearing in mind that there is a civil suit already pending between the petitioner and private respondent, I see no reason for not allowing or permitting the petitioner to install the transformer, more particularly, when the electricity board has virtually no objection in installing the same.

13. Even otherwise, the principles of justice, equity and fair play demand that the petitioner who has already paid a considerable part of the sale consideration and has been put to possession of the property way back in the year 2009 should be permitted to make the best use of the land.

14. Moreover, the private respondent at this stage cannot be permitted to complain as it is being made clear that by granting permission to the petitioner to install the transformer, no findings qua the ownership etc. are being accorded as these will essentially be determined in the civil litigation.

15. The petition is accordingly allowed and in the event of the petitioner fulfilling all the necessary conditions and on payment of requisite charges is entitled to have the transformer installed in the premises, the respondents No. 6 to 9 are directed to install the same within a period of 15 days subject to the conditions of eligibility and fulfillment of all other conditions. The respondent No.10 is permanently restrained from creating any let or hindrance in the installation of the transformer. The respondents No. 2 to 5 are directed to render all necessary assistance in the installation of the transformer.

16. Before parting, it may again be clarified that the installation of the transformer does not in any manner confer ownership of the land or the premises upon the petitioner and the same shall be subject to the outcome of the civil suit which is pending inter se between the petitioner and respondent No.10. With the aforesaid observations, the petition stands disposed of, so also the pending application, if any, leaving the parties to bear their own costs.

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

M/s Lomash Pharmaceuticals through
its sole Prop. Smt. Vandana Sharma ..... Petitioner

Vs.

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

CWP No. 9635 of 2013.
Judgement reserved on: 23.7.2015.
Date of decision: 29.7.2015

Constitution of India, 1950- Article 226- Petitioner filed a writ petition which was objected by the respondent on the ground that in view of the arbitration clause the writ petition is not maintainable- held that constitutional remedy is always available to an aggrieved person and Arbitration clause in an agreement cannot render the writ petition not available ipso facto- although the court may refuse to exercise the jurisdiction in exercise of its discretion. (Para 2 to 18)

Constitution of India, 1950- Article 226- Two contracts for supply of medicines were awarded to the petitioner which were extended from time to time- letters were issued to the petitioner stating that there were certain short comings and supplied medicines did not conform to the standard specifications - the petitioner filed a reply along with the report of the laboratory in which it was stated that there was no short comings in the supply and the drugs were substandard - however, the respondent cancelled the contract, forfeited the money and black listed the petitioner- the respondent pleaded that the reports given by the drug testing laboratory were placed before the Committee which had also considered the explanation given by the petitioner and the order was passed on the basis of the report of the committee- the petitioner had failed to show that the laboratory (report of which was filed by the petitioner) was a recognized laboratory – therefore, no reliance can be placed on the report filed by the petitioner. (Para-19 to 28)

Cases referred:

Indian Aluminium Company vs. Kerala State Electricity Board AIR 1975 SC 1967
M/s Bisra Lime Stone Company Ltd. and another vs. Orissa State Electricity Board and another (1976) 2 SCC 167
State of U.P. and others vs. Bridge & Roof Company (India) Ltd. (1996) 6 SCC 22
Harbanslal Sahnia and another vs. Indian Oil Corpn. Ltd. and others (2003) 2 SCC 107
Empire Jute Company Limited and others vs. Jute Corporation of India Limited and another (2007) 14 SCC 680
Union of India and others vs. Tantia Construction Private Limited (2011) 5 SCC 697
M/s Ram Barai Singh & Co. vs. State of Bihar & ors. JT 2014 (14) SC 357
Gorkha Security Services vs. Government (NCT of Delhi) and others (2014) 9 SCC 105

For the petitioner : Mr. Sanjeev Bhushan, Advocate.
For the respondents : Ms. Meenakshi Sharma, Mr. Rupinder Singh, Addl. Advocate Generals with Ms. Parul Negi, Dy. Advocate General, for respondents No. 1 and 2.
Mr. Tara Singh Chauhan, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

By medium of this petition, the writ petition has claimed the following substantive reliefs:-

1. That a writ in the nature of certiorari may be issued and Annexure P-7 dated 29.10.2013 may kindly be quashed and set-aside.
2. That a writ in the nature of mandamus may be issued directing the respondents to revive the rate contracts of the petitioner for various

medicines as entered into with the petitioner firm in the interest of law and justice.

2. The question which arises in the instant case is as to whether in the first instance the writ petition is entertainable or not. In this regard, it may be pertinent to mention here that the respondents have taken a preliminary objection regarding maintainability of the writ petition on the ground that there exists an arbitration clause contained in condition No. 40 of the tender document, and therefore, writ petition would not be maintainable.

3. This contention of the respondents that the High Court would not be competent to entertain the writ petition on account of the arbitration clause has been contested by the petitioner. It has been contended that merely because there exists an arbitration clause, it would not be a ground for not entertaining the writ petition. Clause 40 of the tender document reads thus:-

> "40. In case of any dispute, the same will be resolved through a reference of the matter to an Arbitrator to be appointed by the Secretary, Animal Husbandry to the Government of Himachal Pradesh, Shimla. Thereafter any dispute concerning this tender shall be subject to the court jurisdiction of Shimla, Himachal Pradesh only.
>
> The contract shall be interpreted under Indian Laws and in case of any legal dispute at any point of time the same shall be subject to local or pecuniary jurisdiction of the Courts of Shimla Himachal Pradesh"

4. Therefore, before proceeding any further, this court is required to adjudicate and render findings regarding the maintainability of the writ petition in view of the aforesaid arbitration clause.

5. Similar issue has been subject matter of various decisions of the Hon'ble Supreme Court and some of them may be noticed as under:-

6. In **Indian Aluminium Company** vs. **Kerala State Electricity Board AIR 1975 SC 1967** the question before the Hon'ble Supreme Court was as to whether the respondent- Board had the power under clause-13 of the agreement to levy any coal surcharge at all and was a question arising under the agreement, which contained an arbitration clause and it was held as follows:-

> "38. But that does not put an end to the controversy between the parties. It is true that in the Press Note the Board relied only on Sections 49 and 59 and the Sixth Schedule of the Supply Act as the source of the power under which it claimed to levy the coal surcharge and these provisions have been found not to contain the power sought in them. But, if there is one principle more well settled than any other, it is that, when an authority takes action which is within its competence, it cannot be held to be invalid, merely because it purports to be made under a wrong provision if it can be shown to be within its power under any power provision. A mere wrong description of the source of power - a mere wrong label - cannot invalidate the action of an authority, if it is otherwise within its power. The Board claimed that in any event, even if Sections 49 and 59 and the Sixth Schedule to the Supply Act could not be construed as authorising the Board to enhance unilaterally the rates for supply of electricity, the Board had the power under clause (13) of

the agreement to levy the coal surcharge on the appellant and the decision to levy the call surcharge could be justified by reference to this power. Now. if this claim of the Board were well founded, it would afford a complete answer to the challenge made on behalf of the appellant. But the appellant raised various contentions in answer to this plea based on clause (13) of the agreement. We have referred to some of these contention in an earlier part of the judgment. It is here that the case of the appellant founders on the reck of the preliminary objection. Clause (23) of the agreement provides that any dispute or difference relating to a question thing or matter arising under the agreement shall be referred to the arbitration of a single arbitrator. Questions such as : whether the Board had power under clause (13) of the agreement to levy any coal surcharge at all when no such power was conferred on it by the Act, whether the action of the Board in levying the coal surcharge on the appellant under clause (13) of the agreement was arbitrary and unreasonable or whether it was based on extraneous and irrelevant considerations and whether, on the facts and circumstances of the case, the Board was justified under clause (13) of the agreement to levy the coal surcharge on the appellant, are plainly questions arising under the agreement and they are covered by the arbitration provision contained in clause (23) of the agreement. All the contentions raised by the appellant against the claim to justify the levy of the coal surcharge by reference to clause (13) of the agreement would, therefore, seem to be covered by the arbitration agreement and there is no reason why the appellant should not pursue the remedy of arbitration which it has solemnly accepted under clause (23) of the agreement and instead invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution to determine questions which really form the subject-matter of the arbitration agreement. We are, therefore, of the view that the High Court was right in exercising its discretion against entertaining the writ petition on merits, in so far as it was directed against the validity of the levy of the coal surcharge under clause (13) of the agreement. The merits of the contentions raised by the appellant would have to be decided by arbitration as provided in clause (23) of the agreement."

7. In **M/s Bisra Lime Stone Company Ltd. and another** vs. **Orissa State Electricity Board and another (1976) 2 SCC 167** the Hon'ble Supreme Court was dealing with an agreement containing an arbitration clause and it refused to exercise discretion and leave the matter to arbitration by observing as under:-

"24. It is then submitted that this Court should not use its discretion in favour of arbitration in a matter where it is a pure question of law as to the power of the Board to levy a surcharge. This submission would have great force if the sole question involved were the scope and ambit of the power of the Board under Sections 49 and 59 of the Act to levy a surcharge, as it was sought to be initially argued. The question in that event may not have been within the content of clause 23 of the agreement. But all questions of law, one of which may be interpretation of the agreement, need not necessarily be withdrawn from the domestic forum because the Court has discretion under Section 34 of the Arbitration Act or under Article 226 of the constitution and that the Court is better posted to decide such questions. The arbitration

clause 23 is a clause of wide amplitude taking in its sweep even interpretation of the agreement and necessarily, therefore, of clause 13 therein. We are therefore, unable to accede to the submission that we should exercise our discretion to withhold the matter from arbitration and deal with it ourselves."

8. In **State of U.P. and others** vs. **Bridge & Roof Company (India) Ltd. (1996) 6 SCC 22,** the Hon'ble Supreme Court when confronted with an arbitration clause observed that where a contract contains a clause providing inter-alia for settlement of disputes by reference to arbitration, the parties should follow and adopt the remedy as provided under the contract and it was held:-

> "21. There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration [Clause 67 of the Contract]. The Arbitrators can decide both questions of fact as well as question of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy – in this case, provided in the contract itself - is a good ground for the Court to decline to exercise its extraordinary jurisdiction under Article 226. The said Article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 - whether for issuance of mandamus or any other writ, order or direction - was misconceived for the reasons mentioned supra."

9. The Hon'ble Supreme Court **Harbanslal Sahnia and another** vs. **Indian Oil Corpn. Ltd. and others (2003) 2 SCC 107** has held that the rule of exclusion of writ jurisdiction on account of availability of an alternative remedy was a rule of discretion and not one of the compulsion and it was observed as follows:-

> "7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged. [See Whirlpool Corporation v. Registrar of Trade Marks. Mumbai & Ore.] The present case attracts applicability of first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and nonexistent cause. In such circumstances, we feel that the appellants should have been

allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

10. In **Empire Jute Company Limited and others** vs. **Jute Corporation of India Limited and another (2007) 14 SCC 680,** the Hon'ble Supreme Court has held that the power of judicial review vested in the superior court undoubtedly has wide amplitude but the same should not be exercised when there exists an arbitration clause, the writ court ordinarily would not exercise its discretionary jurisdiction and it was observed as under:-

"14. Construction of the contract entered into by and between the parties is in question before us. There exists an arbitration agreement. The Arbitration Agreement is of wide amplitude; by reason whereof not only the dispute relating to quality of the jute sought to be supplied by the respondent No.1 may be gone into, the construction, meaning and operation and effect of the contract or breach thereof, if any, would have also fallen for determination of an Arbitrator.

15. It is not correct to contend that clause 8.0 provides for procedure for claim settlement. The said provision in regard to the quality of jute supplied has in our opinion nothing to do with clause 9.0. The arbitration agreement entered into by and between the parties is independent of clause 8.0. It is now well settled that when there exists an arbitration agreement, the writ court ordinarily would not exercise its discretionary jurisdiction to enter into the dispute.

16. The learned Single Judge embarked upon the question of construction of the agreement. In a sense, the Division Bench overturned the said decision. Construction of the agreement therefor fell for consideration of the High Court. Division Bench, as noticed hereinbefore, itself opined that the arbitration clause should be taken recourse to for the purpose of computation of the quantum of the carrying cost. The question of payment of carrying cost by the appellant in favour of the respondent would arise provided the same is payable. Payability of such carrying cost would, thus, depend upon construction of clause 2.0 read with clause 5.0 of the sale contract.

17. Respondent, no doubt, could have taken recourse to clause 16.0 of the agreement in terms whereof it could realize any amount which the Corporation might have to pay. Disputed fact was required to be gone into before a definite opinion could be arrived at as to whether in the facts and circumstances, the obligation to pay the carrying cost was applicable.

18. The power of judicial review vested in the superior courts undoubtedly has wide amplitude but the same should not be exercised when there exists an arbitration clause. The Division Bench of the High Court took recourse to the arbitration agreement in regard to one part of the dispute but proceeded to determine the other part itself. It could have refused to exercise its jurisdiction leaving the parties to avail their own remedies under the agreement but if it was of the opinion that the dispute between the parties being covered by the arbitration clause should be referred to arbitration, it should not have proceeded to determine a part of the dispute itself.

19. Similar question arose for consideration in M/s. Bisra Stone Lime Co. Ltd. etc. Vs. Orissa State Electricity Board and another [AIR 1976 SC

127] wherein it was held that the High Court may refuse to exercise its jurisdiction, if there exists a valid arbitration clause stating;

> "24. It is then submitted that this Court should not use its discretion in favour of arbitration in a matter where it is a pure question of law as to the power of the Board to levy a surcharge. This submission would have great force if the sole question involved were the scope and ambit of the power of the Board under Sections 49 and 50 of the Act to levy a surcharge, as it was sought to be initially argued. The question in that event may not have been within the content of clause 23 of the agreement. But all questions of law, one of which may be interpretation of the agreement, need not necessarily be withdrawn from the domestic forum because the court has discretion under Section 34 of the Arbitration Act or under Article 226 of the Constitution and that the court is better posted to decide such questions. The arbitration clause 23 is a clause of wide amplitude taking in its sweep even interpretation of the agreement and necessarily, therefore, of clause 13 therein. We are therefore, unable to accede to the submission that we should exercise our discretion to withhold the matter from arbitration and deal with it ourselves.

20. A similar view was taken by this Court in Sanjana M. Wig (Ms) Vs. Hindustan Petroleum Corpn. Ltd. [(2005) 8 SCC 242 holding;

> "12. The principal question which arises for consideration is as to whether a discretionary jurisdiction would be refused to be exercised solely on the ground of existence of an alternative remedy which is more efficacious. Ordinarily, when a dispute between the parties requires adjudication of disputed question of facts wherefor the parties are required to lead evidence both oral and documentary which can be determined by a domestic forum chosen by the parties, the Court may not entertain a writ application (See Titagarh Paper Mills Ltd. v. Orissa SEB and Bisra Stone Lime Co. Ltd. v. Orissa SEB)"
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> 13. However, access to justice by way of public law remedy would not be denied when a lis involves public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief."

21. Relying on some of the earlier decisions of this Court, this Court held:

> "It may be true that in a given case when an action of the party is dehors the terms and conditions contained in an agreement as also beyond the scope and ambit of the domestic forum created therefore, the writ petition may be held to be maintainable; but indisputably therefore such a case has to be made out. It may also be true, as has been held by this Court in Amritsar Gas Service and E. Venkatakrishna that the arbitrator may not have the requisite jurisdiction to direct restoration of distributorship having regard to the provisions contained in Section 14 of the Specific Relief Act, 1963; but while entertaining a writ petition even in such a case, the

court may not lose sight of the fact that if a serious disputed question of fact is involved arising out of a contract qua contract, ordinarily a writ petition would not be entertained. A writ petition, however, will be entertained when it involves a public law character or involves a question arising out of public law functions on the part of the respondent."

22. The legal position has undergone a substantial change, having regard to Section 5 of the Arbitration and Conciliation Act, 1996 vis-a-vis provisions of Arbitration Act, 1940. The said provision reads as under:-

"5. *Extent of judicial intervention* " Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

23. In terms of 1940 Act, even a civil suit could have been entertained subject of course to exercise of the court's jurisdiction under Section 21 thereof. Section 5 of 1996 Act takes away the jurisdiction of the Court. There cannot be any doubt whatsoever, the provision of the 1996 Act must be given effect to.

24. As the disputed facts as also the law are required to be determined by the Arbitrator, we are of the opinion that all disputes between the parties should be directed to be resolved upon taking recourse to the arbitration agreement contained in clause 9.0 of the Sale Order. "

11. The Hon'ble Supreme Court in **Union of India and others** vs. **Tantia Construction Private Limited (2011) 5 SCC 697,** has held that the arbitration clause was not a bar to the invocation of writ jurisdiction when injustice is caused and the rule of law violated. It was further held that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities and it was observed as follows:-

"33. Apart from the above, even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.

34. We endorse the view of the High Court that notwithstanding the provisions relating to the Arbitration Clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the Writ Petition filed on behalf of the Respondent Company. We, therefore, see no reason to interfere with the views expressed by the High Court on the maintainability of the Writ Petition and also on its merits."

12. In **M/s Ram Barai Singh & Co.** vs. **State of Bihar & ors. JT 2014 (14) SC 357** the Hon'ble Supreme Court set aside the order passed by the Division Bench of Patna

High Court, which had dismissed the writ petition on the ground of maintainability in view of existence of an arbitration clause. It was held that though existence of alternative remedy can be a ground of refusal to exercise writ jurisdiction, but the same cannot *ipso facto,* render a writ petition not maintainable and it was held as follows:-

> "9. We find ourselves in agreement with case of the appellant that the Division Bench failed to notice the relevant facts including the history of earlier litigation. It also failed to notice that the agreement itself had worked out long back and in the earlier round of litigation as well as in the present round the respondents never raised any objection on the basis of arbitration clause.
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> 10. The Division Bench noticed the judgment of this Court in the case of State of U.P. & Ors. v. Bridge & Roof Company (India) Ltd.(1996) 6 SCC 22 as well as in the case of ABL International Ltd. & Anr. v. Export Credit Guarantee Corporation of India Ltd. & Ors. (2004) 3 SCC 553 for coming to the conclusion that where the contract itself provides an effective alternative remedy by way of reference to arbitration, it is good ground for declining to exercise extraordinary jurisdiction under Article 226 of the Constitution of India and that the Court will not permit recourse to other remedy without invoking the remedy by way of arbitration, "unless, of course, both the parties to the dispute agree on another mode of dispute resolution."
>
> 11. In our considered view, the aforesaid two decisions did not warrant setting aside of the judgment of learned Single Judge without going into merits and dismissing the writ petition at appellate stage on ground of alternative remedy when no such objection was taken by the respondents either before the writ court or even in the Memorandum of Letters Patent Appeal.
>
> 12. "In our view, a constitutional remedy by way of writ petition is always available to an aggrieved party and an arbitration clause in an agreement between the parties cannot ipso facto render a writ petition "not maintainable" as wrongly held by the Division Bench". Availability of alternative remedy is definitely a permissible ground for refusal by a writ court to exercise its jurisdiction in appropriate cases. But once the respondents had not objected to entertainment of the writ petition on ground of availability of alternative remedy, the final judgment rendered on merits cannot be faulted and set aside only on noticing by the Division Bench that an alternative remedy by way of arbitration clause could have been resorted to."

13. It is not necessary nor expedient here to refer various judgements rendered by this court and other High Courts on the point in detail so as to unduly dilate and burden the judgement any more in view of the exposition of law that is discernible from the conspectus of the judgements of the Hon'ble Supreme Court referred to supra.

14. From the conspectus of the above judgements of the apex court what emerges is that a constitutional remedy by way of writ petition is always available to an aggrieved party and an arbitration clause in an agreement between the parties cannot *ifso facto* render a writ petition "not available". Though availability of alternative remedy is definitely a permissible ground for refusal by a writ court to exercise its jurisdiction in appropriate case, but the same is a rule of discretion and not one of the compulsion.

15. The respondents at this stage has pressed into service a Division Bench judgement of this court in **CWP No. 4779 of 2014** titled **M/s Indian Technomac Company Ltd.** vs. **State of H.P. & others, decided on 4.8.2014 alongwith connected matters,** of which, I was one of the member, wherein this court after discussing various judgements held as follows:-

> "16. The sum and substance of the above discussion is that the writ petitioners-Company have remedies of appeal(s), before approaching the High Court by way of the writ petitions, for the redressal of their grievances. The petitioners ought to have exhausted the remedy of appeal before the Deputy Excise and Taxation Commissioner or Additional Excise and Taxation Commissioner or the Excise Commissioner, as the case may be, and if the petitioners were not successful in those appeal proceedings, another remedy available to them was to challenge the said order(s) by the medium of appeal before the Tribunal, and again, if they were unsuccessful, they could have availed the remedy of revision before the High Court in terms of Section 48 of the HP VAT Act, 2005. Keeping in view the above discussion, read with the fact that the dispute raised in these writ petitions relates to revenue/tax matters, it can safely be concluded that the petitioners have sufficient efficacious remedy(ies) available."

16. There is no quarrel with the proposition of the ratio laid down in the aforesaid judgement, but what has probably been overlooked by the respondents is that in **M/s Indian Technomac Company Ltd.** case (supra), the court was dealing with the case where there existed an alternative remedy under the statute itself and accordingly this court dismissed the writ petition on the ground of availability of an alternative remedy under the Act, which is not the fact situation obtaining in this case.

17. It is more than settled that an alternative remedy is not an absolute bar to the exercise of extraordinary jurisdiction under Article 226 of the Constitution of India but where the statute provides efficacious and alternative remedy, the High Court will do well in not entertaining a petition under Article 226 of the Constitution of India because of misplaced consideration, statutory procedure cannot be allowed to be circumvented.

18. However, in the present case, as noticed above, there is no statutory bar and it is only on account of the arbitration clause that the respondents have challenged the maintainability of the writ petition. This contention in view of the aforesaid discussion cannot be upheld and accordingly the writ petition despite there being an arbitration clause in the agreement is held to be maintainable.

Now proceeding with the merits of the case, the brief facts, may be noted.

19. The petitioner's firm on 30.9.2011 was awarded a rate contract for the medicine called as 'Flumethrin', which is an Allopathic veterinary medicine. Another rate contract dated 18.6.2012 was awarded in his favour for supply of medicine called as 'Delta Methrine' which too is an Allopathic veterinary medicine. Vide rate contract dated 19.11.2011 and 18.6.2012, two other rate contracts were awarded in favour of the petitioner for the supply of Ayurvedic medicines called as 'Ayurvedic Stomachic Powder, Antibloat Powder and Astringent Powder.

20. These rate contracts were thereafter extended from time to time, till the time the petitioner received letters dated 26.9.2013 and 1.10.2013 respectively, whereby the

petitioner was informed that there was certain shortcomings in the supplies and the supplied medicine did not conform the standard specifications. It was also stated that the ingredient found in the medicine was not in accordance what was indicated on the label of the medicines or the details which had been submitted by the petitioner alongwith the quotation/ tender.

21. On 6.10.2013, the petitioner responded to these letters and explained his position and also appended a report from a laboratory, which according to the petitioner was duly approved by the Central Government under the Drug and Cosmetics Act, 1940 (for short the Act), wherein it was reported that the medicine was as per the prescribed standard and there was no shortcoming whatsoever.

22. The grievance of the petitioner is that the respondents without affording proper opportunity have now vide order dated 29.10.2013 not only withdrawn/ cancelled all the four contracts and forfeited the earnest money but have also blacklisted the petitioner.

23. The respondents No. 1 and 2 are the Secretary (Animal Husbandry) and Director, Animal Husbandry respectively and have filed the joint reply, wherein in the preliminary submissions, the very maintainability of the writ petition has been questioned in view of the arbitration clause contained in condition No. 40 of the tender document. In so far as the merits of the case is concerned, it has been mentioned that the contracts awarded in favour of the petitioner were cancelled keeping in view the negative reports given by the Drug Testing Laboratory, Jogindernagar (RIISM), which were placed before a Committee constituted by the Director, Animal Husbandry headed by an officer of the rank of Joint Director. This committee comprised of five expert and came to the conclusion that there were certain shortcomings in the supplies and the supplied medicines did not conform to the standard specifications/ composition. It was also noticed that in some cases, the ingredients were not in accordance with what was indicated on the labels of the medicines or in accordance with the details submitted by petitioner at the time of submitting the quotation/ tender.

24. The explanation offered by the petitioner was not found to be satisfactory by the committee and was rather found to be incomplete and also that "fresh test reports' did not cover the specifications quoted by the petitioner in his tender. The Committee, therefore, proposed that clauses 27 and 28 of the tender documents be invoked and the petitioner be debarred from further supplies for a period of five years and be blacklisted besides taking other action.

25. The respondent No. 3 is the Chief Executive Officer, H.P. State Cooperative Wool Procurement and Marketing Federation and has filed a separate reply, wherein similar preliminary objection as has been taken by respondents No. 1 and 2 in their reply regarding maintainability of the writ petition in view of an arbitration clause in the agreement has been raised. Apart from other grounds, this respondent has set out in detail what according to it is the factual position of the records, as under:-

I. Certain Ayurvedic Veterinary Medicines were supplied by the petitioner to the field offices of the Animal Husbandry Department, Himachal Pradesh at Kangra at Dharamshala, Solan, Bilaspur and Chamba against rate contracts.

II. As per the stipulation at clause 27 of the tender document governing rate contracts, the Deputy Directors Animal Health/ Breeding, Kangra at Dharamshala, Solan, Bilaspur and Chamba got the

samples of the medicines supplied by the petitioner tested from the Drug Testing Laboratory (RIISM), Jogindernagar.

The copies of the 'Tender Documents' containing the Terms and Conditions governing the rate contracts, duly accepted by the petitioner at the time of filing his tenders in respect of medicines found substandard are already annexed as Annexure R-3/A and R-3/B.

III. The test reports preferred by the Drug Testing Laboratory (RIISM), Jogindernagar were considered by a committee of six officers headed by an officer of the rank of Joint Director and having five experts on board. The committee was constituted in the interest of fair play and justice by the Director of Animal Husbandry, HP i.e. the respondent No.2. It was concluded by the said committee that there are certain shortcomings in the supplies as the supplied medicines did not conform to the standard specifications. It was also noticed that in some cases the ingredients were not in accordance with either as indicated on the lebels of the medicines or details submitted by the petitioner at the time of submitting the quotation/ tender.

IV. The petitioner was accordingly afforded an opportunity by the respondent No. 3 who is the nodal agency for the procurement of Veterinary medicines for the respondent No. 2 to explain its position in the matter by 03/10/2013 and 07/10/2013 vide communications No.1-305/2011(W.F.)-9238, 9250 dated 26.9.2013 and No.1-305/2011 (W.F.)-9409, 9413 dated 1.10.2013 respectively.

The copies of above communications are annexed at Annexure R-3/D, R-3/E, R-3/F and R-3/G respectively.

The copy of government notification declaring the respondent No. 3 as nodal agency is annexed at Annexure R-3/H.

V. The petitioner submitted his reply as a single letter alongwith certain fresh test reports after the stipulated time frame i.e. on 10/10/2013.

VI. Although the petitioner submitted its reply after the stipulated time frame i.e. on 10/10/2013 again in the interest of justice and fair play the same alongwith the 'fresh test reports' submitted by the petitioner were duly considered and examined by the committee supra.

Since the petitioner has not submitted the complete copy at Annexure P-6 with the petition, the complete copy of the communication as received from the petitioner by the respondent No. 3 is annexed at Annexure R-3/J.

VII. The explanation tendered by the party was not found satisfactory by the committee supra as the deficiencies pointed out in the test reports of testing laboratory at Jogindernagar, H.P. (RIISM) wherefrom the testing was got done by the fields officers of the Department of Animal Husbandry, H.P. were not taken care of in the 'fresh test reports' submitted by the petitioner. It was also found that the explanation tendered by the petitioner was incomplete and also

that the 'fresh test reports' did not cover the specifications quoted by the petitioner in his tender.

VIII. In view of above the committee constituted by the Director Animal Husbandry, H.P, to consider the matter regarding supply of 'substandard' medicine by the petitioner concluded that as per the test reports of testing laboratory at Jogindernagar, HP (RIISM), wherefrom the testing was got done by the fields officers of the Department of Animal Husbandry, HP, the products supplied by the petitioner are technically deficient and thus substandard.

The committee supra thus decided to go with the findings of the test report of RIISM and agreed/ was convinced that the supplies made by the petitioner were substandard and against the terms of the tender.

IX. The committee therefore proposed that under clause 27 and 28 of the tender document governing the supplies, the petitioner be debarred from further supplies for a period of 5 years and accordingly blacklisted, besides other actions.

X. The report of the committee was finally accepted by the Director, Animal Husbandry, HP i.e. respondent No.2. The nodal agency i.e. Respondent No.3 was thereafter directed to initiate action in the matter.

XI. The Nodal Agency i.e. respondent No.3 accordingly issued a self speaking communication/ order dated 29.10.2013 to the petitioner and all other concerned- (Annexure P-7).

This respondent like respondents No. 1 and 2, has sought to justify its action as being just and legal on the basis of what has been stated in paras-I to XI (supra).

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

26. The learned counsel for the petitioner has vehemently argued that in the teeth of the reports submitted by the petitioner, which reports were from a duly recognized laboratory, the respondents could not have withdrawn/ cancelled the rate contracts and forfeited its security. He further contended that nowhere in the show cause notice issued to it, was it contemplated that petitioner would be black-listed. In absence of a specific notice to this effect, the action of the respondents in black-listing the petitioner's firm cannot therefore, be countenanced.

27. While on the other hand, the respondents have strenuously argued that it was only on account of the medicines not being in conformity with the specifications as prescribed under the law and further the same being not in accordance with what had been quoted by the petitioner, that the respondents had to resort to the aforesaid action. It is further contended that the reports submitted by the petitioner alongwith its reply could not at all be considered since the laboratory from where these tests had been conducted was not recognized either by the Central Government or the State Government.

28. Keeping in view of the nature of defence taken by the respondents, the petitioner was called upon to show any document on record or even in his possession, which may prove that the Dove Research and Analytic whose reports had been submitted by it

was in fact a recognized laboratory under the provisions of Drugs and Cosmetic Act, 1940. The petitioner failed to do so, therefore, no credence can be attached to the reports submitted by the petitioner in response to the show cause notice.

29. The further question in such circumstances is as to whether once the samples of medicines as supplied by the petitioner did not conform to the provisions of the Act, could the rate contracts be withdrawn/ cancelled, security be forfeited and the petitioner's firm be blacklisted?

30. The respondents have sought to justify their action by invoking clause(s) 27 and 28 of the agreement, which reads thus:-

> "27. The approved suppliers shall have to provide test certificate/ analysis report in respect of all batches of medicines alongwith supplies separately from any of the Govt. Analytical Laboratories set up by the Central or State Govt. or any analytical drug testing laboratory licensed under Drugs and Cosmetics Act, 1940 and rules there under. The supplies will be deemed to be completed only upon receipt of above said analytical test report. Further to ensure the quality of medicines to be supplied by the approved suppliers, pre-dispatch/ post dispatch sampling of the same may be got done from competent authority and samples got tested independently from any analytical laboratory(s) in the country established under the Drugs and Cosmetics Act, 1940 and rules there under for which testing charges will be borne by the suppliers.
>
> 28. If any of the products supplied by the tenderer after such sampling (whether partially or wholly used/ consumed after supply) are subsequently fund to be sub-standard or Misbranded or spurious or under-weight, then the cost of such supplies shall be recovered from other dues of the tenderer, even if, payment for that particular medicine stands already released. The tenderer shall not be entitled to any payment whatsoever for such batches of products. Further, the tenderer will lift back the unconsumed quantity of such product at his cost within 15 days from the date of intimation by the concerned Indenting officers/ Federation, failing which the concerned Indenting Officers shall have the right to destroy the same. The State Government/ Federation reserves the right to take any other action against the supplier which may include forfeiture of the security deposits, debarment for next five years from participation in medicine tender for Animal Husbandry Hospitals/ Dispensaries and any other action as may be deemed fit to be taken against such supplier(s)."

31. Undoubtedly, the respondents in order to ensure the quality of the medicines have got the samples of the medicines supplied by the petitioner tested independently from the Laboratory at Jogindernagar. These tests have confirmed that the supplies made by the petitioner were not in conformity with the provisions of the Drugs and Cosmetic Act, 1940 and were sub-standard, therefore, no fault much less illegality can be found in the action of the respondents, whereby they cancelled the rate contract of the petitioner and ordered the forfeiture of the security as this is in conformity with clause(s) 27 and 28 of the agreement (supra).

32. Now the only question which remains for consideration is as to whether the respondents could have blacklisted the petitioner from supplying the medicines for a period of five years?

33. It is not in dispute that in terms of clause-28 of the agreement, the respondents are competent and have reserved their right to take any action against the supplier, which may include forfeiture of security and debar him for next five years from participation in medicines tender or any other action, which they may deem fit. But then the question arises as to whether in absence of specific notice to this effect can the action of the respondents be sustained.

34. Now in case, the first notice dated 26.9.2013 is seen, it after making reference of certain shortcomings in the supplies, then calls upon the petitioners to explain its position and the operative portion of the same reads as under:-

> "From the perusal of the test report it appears that there are certain shortcomings in the supplies/ the supplied medicines do not conform to the standard specifications. It is also made out that the ingredients are not in accordance with either as indicated on the labels of the medicines or details submitted by you along with your quotation/ tender.
>
> Before further action in the matter is initiated as per the terms of the tender, you are hereby afforded an opportunity to explain your position latest by 03.10.2013. In the event of no reply from your end by this date, it will be presumed that you have nothing to say and action will be taken without any further notice, please take note."

35. To the similar effect is the show cause notice dated 1.10.2013, the relevant extract whereof reads as under:-

> "From the perusal of the test reports it appears that there are certain shortcomings in the supplies/ the supplied medicines do not conform to the standard specifications. It is also made out that the ingredients are not in accordance with either as indicated on the labels of the medicines or details submitted by you alongwith your quotation/ tender.
>
> Before further action in the matter is initiated as per the terms of the tender, you are hereby afforded an opportunity to explain your position latest by 07.10.2013. In the event of no reply from your end by this date. It will be presumed that you have nothing to say and action will be taken without any further notice, please take note."

36. The learned counsel for the respondents have vehemently argued that in view of existence of clause(s) 27 and 28 (supra), they could take any of the action, as contemplated in the aforesaid clause(s) and therefore, there is no illegality in their action, whereby they have blacklisted the petitioner for five years.

37. It is more than settled that the fundamental purpose behind the serving of show cause notice is to make the noticee understand the precise case set up against him which he has to meet. Therefore, this not only requires the statement of imputations detailing out the alleged breaches and defaults one has committed, so that he gets an opportunity to rebut the same, but another requirement is the nature of the action, which is proposed to be taken for such a breach, that has to be clearly set out so that the noticee is able to point out that proposed action is not warranted in the given case, even if the

defaults/ breaches complained of are not satisfactorily. When it comes to black listing, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

38. In observing so, I draw strength from the recent judgement of the Hon'ble Supreme Court in **Gorkha Security Services** vs. **Government (NCT of Delhi) and others (2014) 9 SCC 105,** wherein it was observed as follows:-

> ***"Necessity of serving show cause notice as a requisite of the Principles of Natural Justice:***
>
> 16. It is a common case of the parties that the blacklisting has to be preceded by a show cause notice. Law in this regard is firmly grounded and does not even demand much amplification. The necessity of compliance with the principles of natural justice by giving the opportunity to the person against whom action of blacklisting is sought to be taken has a valid and solid rationale behind it. With blacklisting many civil and/ or evil consequences follow. It is described as "civil death" of a person who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person from participating in Government Tenders which means precluding him from the award of Government contracts.
>
> 17. Way back in the year 1975, this court in the case of M/s. Erusian Equipment & Chemicals Ltd. v. State of West Bengal & Anr. (1975) 1 SCC 70 , highlighted the necessity of giving an opportunity to such a person by serving a show cause notice thereby giving him opportunity to meet the allegations which were in the mind of the authority contemplating blacklisting of such a person. This is clear from the reading of Para Nos. 12 and 20 of the said judgment. Necessitating this requirement, the court observed thus:
>
> > "12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.
> >
> > *** *** *** ***

> 20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist".

18. Again, in Raghunath Thakur v. State of Bihar and Ors. (1989) 1 SCC 229 the aforesaid principle was reiterated in the following manner:-

> "4. Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order insofar as it directs blacklisting of the appellant in respect of future contracts, cannot be sustained in law. In the premises, that portion of the order directing that the appellant be placed in the blacklist in respect of future contracts under the Collector is set aside. So far as the cancellation of the bid of the appellant is concerned, that is not affected. This order will, however, not prevent the State Government or the appropriate authorities from taking any future steps for blacklisting the appellant if the Government is so entitled to do in accordance with law i.e. after giving the appellant due notice and an opportunity of making representation. After hearing the appellant, the State Government will be at liberty to pass any order in accordance with law indicating the reasons therefor. We, however, make it quite clear that we are not expressing any opinion on the correctness of otherwise of the allegations made against the appellant. The appeal is thus disposed of."

18. Recently, in the case of Patel Engineering Ltd. v. Union of India and Anr. (2012) 11 SCC 257 speaking through one of us (Jasti Chelameswar, J.) this Court emphatically reiterated the principle by explaining the same in the following manner: "

> "13. The concept of "blacklisting" is explained by this Court in Erusian Equipment & Chemicals Ltd. v. State of W.B. as under:
>
> '20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains.'

14. The nature of the authority of the State to blacklist the persons was considered by this Court in the abovementioned case and took note of the constitutional provision (Article 298), which authorises both the Union of India and the States to make contracts for any purpose and to carry on any trade or business. It also authorises the acquisition, holding and disposal of property. This Court also took note of the fact that the right to make a contract includes the right not to make a contract. By definition, the said right is inherent in every person capable of entering into a contract. However, such a right either to enter or not to enter into a contract with any person is subject to a constitutional obligation to obey the command of Article 14. Though nobody has any right to compel the State to enter into a contract, everybody has a right to be treated equally when the State seeks to establish contractual relationships. The effect of excluding a person from entering into a contractual relationship with the State would be to deprive such person to be treated equally with those, who are also engaged in similar activity.

15. It follows from the above judgment in Erusian Equipment case that the decision of the State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into the contractual relationship with such persons is called blacklisting. The State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The authority of the State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that the State is to act fairly and rationally without in any way being arbitrary—thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors."

20. Thus, there is no dispute about the requirement of serving show cause notice. We may also hasten to add that once the show cause notice is given and opportunity to reply to the show cause notice is afforded, it is not even necessary to give an oral hearing. The High Court has rightly repudiated the appellant's attempt in finding foul with the impugned order on this ground. Such a contention was specifically repelled in Patel Engineering (supra).

Contents of Show Cause Notice

21. The Central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of Show Cause Notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be

taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/ breaches complained of are not satisfactorily explained. When it comes to black listing, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

22. The High Court has simply stated that the purpose of show cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show cause notice should meet the following two requirements viz:

i) The material/ grounds to be stated on which according to the Department necessitates an action;

ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

We may hasten to add that even if it is not specifically mentioned in the show cause notice but it can be clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement."

"27. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show cause notice, it can be clearly inferred that such an action was proposed, that would fulfill this requirement. In the present case, however, reading of the show cause notice does not suggest that noticee could find out that such an action could also be taken. We say so for the reasons that are recorded hereinafter."

"29. No doubt, rules of natural justice are not embodied rules nor can they be lifted to the position of fundamental rights. However, their aim is to secure justice and to prevent miscarriage of justice. It is now well established proposition of law that unless a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice, in exercise of power pre-judicially affecting another must be in conformity with the rules of natural justice."

"31. When it comes to the action of blacklisting which is termed as 'Civil Death' it would be difficult to accept the proposition that without even putting the noticee to such a contemplated action and giving him a chance to show cause as to why such an action be not taken, final order can be passed blacklisting such a person only on the premise that this is one of the actions so stated in the provisions of NIT."

39. Tested on the touch-stone of the principles and the guidelines laid down by the Hon'ble Supreme Court in the aforesaid case, the action of the respondents in black listing the petitioner-firm cannot be countenanced. The mere existence of clause(s) 27 and

28 in the agreement entered into between the parties does not meet the mandatory requirement of the show cause notice in which it ought to have been either specifically mentioned or could clearly and safely be discerned from the reading thereof that would sufficient to meet this requirement and the petitioner could thereafter be black-listed. Therefore, without any specific stipulation in the show cause notice, noticed above, the respondents could not have been imposed the penalty of blacklisting the petitioner. Hence, the impugned order of blacklisting the petitioner without proper notice is contrary to the principle of natural justice and accordingly the same is quashed and set-aside.

40. Consequently, the writ petition is partly allowed to the aforesaid extent. However, I may make it clear that it would be open to the respondents to take any action in this behalf after complying with the necessary procedure or formalities delineated above. The parties to bear their own costs.

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

Sh.Prem Dutt son of Basti Ram & others ....Appellants/Defendants

Versus

Smt.Mangla wife of Shri Ram Rattan & others .....Respondents/Plaintiffs.

RSA No. 102 of 2003
Order reserved on 8th July 2015
Date of Judgment 29 July 2015

H.P. Tenancy and Land Reforms Act, 1972 and Punjab Redemption of Mortgage Act, 1913– Plaintiff filed a Civil Suit seeking redemption of the suit land pleading that the suit land was mortgaged by the defendant with the plaintiff for a consideration of Rs. 1900/-the names of the defendants were recorded as non occupancy tenants – the proprietary rights were conferred upon the defendants on the basis of the revenue records- defendants admitted the mortgage but asserted that the mortgage was redeemed and the defendants were put in possession as tenants- the proprietary rights were rightly conferred- according to the Punjab Redemption Act, the property can be redeemed only by filing an application for redemption before the Collector- no record of the application having been filed before the collector was produced- no rapat Rojnamcha showing the redemption was proved- the defendants had failed to lead evidence to show that they were inducted as tenants- the mutation was passed without summoning and hearing the parties- the column of rent also recorded Bilah Lagan Kabja Rajabandi (without rent, the possession is with the consent)- Mere entry of Mal (land revenue) and Swai (local rate surcharge) is not sufficient to prove the payment of rent- there is no period of limitation for redemption- suit decreed. (Page 13-22)

Cases referred:

Harbans vs. Om Parkash, 2006(1) Supreme Bound Reports 144

Parkash Chand and others vs. Amar Singh and another, 2010(3) Himachal Law Reporter 1298 (H.P.)

Harbhajan Singh Vs. Neranjan Singh (P&H), 2009 (1) SLJ page 45

Chain Singh & others Vs. Kood Singh & others, 2011 (12) Himachal Law reporter page 711 (HP)

Jattu Ram vs. Hakam Singh and others, 1994(1) SLJ 68 (SC)

Guru Amarjeet Singh Vs. Rattan Chand and others, AIR 1994 SC 227

For the Appellants: Mr. G.D.Verma Sr. Advocate with Mr.B.C. Verma, Advocate.
For the Respondents: Ex-parte.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present regular second appeal is filed under Section 100 of Code of Civil Procedure against the judgment and decree passed by learned District Judge Solan in Civil Appeal No. 37-S/13 of 1999 titled Prem Dutt and another vs. Mangla Devi and others dated 2.3.2002 and against judgment and decree passed by learned Civil Judge (Senior Division) Solan in civil Suit No. 67/1 of 1980 decided on dated 26.4.1999.

2. Brief facts of the case as pleaded are that Smt. Mangla Devi and other plaintiffs filed suit for declaration to the effect that revenue entries recorded in the names of defendants regarding suit land comprised in Khewat-Khatauni No. 3 min/6 and 7 Khasra Nos. 30, 43 52 min, 82, 85, 3, 24 and 52 min measuring 13 bighas 17 biswas as non-occupancy tenants are wrong, illegal, null and void. Consequential relief of possession also sought by way of redemption of land. It is pleaded that suit land was mortgaged with defendants by predecessors-in-interest of plaintiffs in consideration amount of Rs. 1900/- (Rupees one thousand nine hundred only) vide rapat Roznamcha 163 dated 3.2.1959. It is pleaded that defendants were not recorded as mortgagees in the revenue record but defendants were recorded as non-occupancy tenants illegally. It is pleaded that defendants were not inducted as tenants at any point of time and revenue entries are wrong and contrary to factual position. It is pleaded that on the basis of revenue entries proprietary rights were conferred upon the defendants in the year 1976 and appeals were preferred before collector and additional commissioner Shimla and learned both Appellate Courts set aside the order of A.C. II Grade and remanded back the case. It is pleaded that remand order was not complied by revenue officials and plaintiffs who were successors-in-interest of original mortgagor offered the mortgage amount to defendants with the request to redeem the suit land in favour of plaintiffs but defendants refused to accept the request of plaintiffs. Prayer for decree the suit as mentioned in relief clause of plaint sought.

3. Per contra written statement filed on behalf of defendants pleaded therein that suit land was mortgaged in consideration amount of Rs. 1900/- (Rupees one thousand nine hundred only) by Smt. Kubja. It is pleaded that mortgaged land was redeemed after few months and thereafter defendants were recorded as tenants. It is pleaded that Kubja used to receive the rent from defendants and after enforcement of H.P. Land Reforms Act defendants have acquired the proprietary rights over the suit land. It is pleaded that plaintiffs have no locus standi and suit of the plaintiffs is not maintainable and suit is bad for non-joinder and mis-joinder of necessary parties and Civil Court has no jurisdiction to try and decide the suit. Prayer for dismissal of suit sought.

4. As per the pleadings of parties learned trial Court framed following issues on dated 9.5.1991 and 9.1.1993:-

1. Whether predecessor in interest of plaintiff redeemed the mortgage and inducted defendants as tenants who acquired proprietary rights of the suit land under law? …..OPD

1B. Whether plaintiffs have no locus standi to file the present suit as alleged? OPD

1C Whether suit is not maintainable as alleged? OPD

1D Whether suit is bad for non-joinder and mis joinder of parties as alleged? OPD

1E Whether civil court has no jurisdiction to try the suit as alleged? OPD

2. Relief.

5. Learned trial Court decided all issues against the defendants and learned trial Court passed preliminary decree of possession by way of redemption of suit land subject to payment of Rs.1900/- (Rupees one thousand nine hundred only) to the defendants. Learned trial Court further directed that plaintiff would deposit Rs. 1900/- (Rupees one thousand nine hundred only) within six months from the date of passing of judgment.

6. Feeling aggrieved against the judgment and preliminary decree passed by learned trial Court appellants namely Prem Dutt and others filed appeal before learned District Judge Solan and District Judge Solan vide Civil Appeal No. 37-S/13 of 1999 decided on dated 2.3.2002 titled Prem Dutt and others vs. Mangla Devi and others dismissed the appeal with costs to the tune of Rs.1000/- (Rupees one thousand only).

7. Feeling aggrieved against the judgments and decrees passed by learned trial Court and learned first Appellate Court appellants filed present regular second appeal.

8. Following oral witnesses examined:-

Sr.No.	Name of witness
PW1	Ravinder Kumar
DW1	Sarwan Kumar
DW2	Man Singh
DW3	Seesh Ram
DW4	Rachha Pal Singh
DW5	Dharam Singh
DW6	Satinder Kumar
DW7	Sudama Ram
DW8	Prem Dutt
PW2	Ram Rattan in rebuttal

9. Following documentary evidence produced:-

Exhibit	Description
Ext.PX	Statement of Seesh Ram
Ext.P1 & Ext.P2	Copy of jamabandis
Ext.P3	Roznamcha Vakayati
Ext.P6 and Ext.P7	Copies of orders
Ext.P10 to	Copies of jamabandis.

Ext.P17	
Ext.DW6/A	Copy of mutation.
Ext.DW7/A	Copy of order
Ext.P4 and Ext.P5	General power of attorneys.
Ext.P9	Copy of order
Ext.DW7/B	Copy of challan
Ext.PW9/A	Copy of mutation
Ext.DW9/B	Roznamcha vakayati

10. Hon'ble High Court of H.P. admitted the regular second appeal on following substantial question of law:-

> Whether both the Courts below have misread and misinterpreted the oral and documentary evidence on record to reject the defence of the appellants-defendants that the predecessor-in-interest of the respondents-plaintiffs redeemed the mortgage and inducted them as tenants and they have become owners by acquiring proprietary rights?

11. Court heard learned Advocate appearing on behalf of appellants and also perused the entire record carefully.

12. Oral evidence adduced by the parties:-

12.1 PW1 Ravinder Kumar Patwari has stated that he has brought the summoned record. He has stated that he has brought the roznamcha No. 96 for the year 1956-57. He has stated that report of rapat roznamcha No. 96 dated 5.11.1956 and report No. 423 dated 30.4.1957 are Ext.P1 and Ext.P2. He has stated that report No. 163 dated 3.2.1959 Ext.P3 is correct as per original record. In cross examination he has stated that all rapat roznamchas were not recorded during his tenure as Patwari. He has stated that jamabandis are prepared after five years and mutations are prepared as per jambandis.

12.2 PW2 Ram Rattan has stated that he is general attorney of Devi Ram. He has stated that photo state copies are Ext.P4 and Ext.P5. He has stated that Kubja and Ratia were owners of suit land. He has stated that Kubja obtained Rs. 1300/- (Rupees one thousand three hundred only) from defendants Nos. 1 and 2 and suit land was mortgaged by Kubja to Biptu and Prem Dutt with possession. He has stated that thereafter in the year 1959 Kubja again took Rs. 600/- (Rupees six hundred only) from Biptu and Prem Dutt and suit land was mortgaged in consideration amount of Rs. 1900/- (Rupees one thousand nine hundred only). He has stated that rapat roznamcha Ext.P3 was recorded. He has stated that thereafter Kubja died and thereafter entry of non-occupancy was recorded illegally. He has stated that defendants were not inducted as tenants at any point of time. He has stated that defendant Nos. 1 and 2 were in possession of suit land as mortgagees. He has stated that thereafter proprietary rights were illegally conferred upon defendant Nos. 1 and 2. He has stated that thereafter appeal was filed before the Collector and mutation Nos. 520 and 521 of proprietary rights were set aside by the Collector. He has stated that learned Collector directed to decide the case as per rapat Roznamcha No. 163 Ext.P3. He has stated that no appeal was filed by Prem Dutt against the order of the Collector. He has stated that Biptu filed appeal before Divisional Commissioner and learned Divisional Commissioner dismissed the appeal on dated 25.2.1984. He has stated that defendant Nos. 1 and 2 were not inducted as tenants at any point of time. He has stated that status of defendant Nos. 1 and

2 is of mortgagees. He has stated that mortgaged land be redeemed. He has stated that he has tendered in evidence copies of jambandis Ext.P10 for the year 1954-55, Ext.P11 for the year 1958-59, Ext.P12 for the year 1962-63, Ext.P13 and Ext.P14 for the year 1974-75, Ext.P15 for the year 1984-85, and Ext.P16 for the year 1988-89 and Ext P-17 for the year 1993-94. He has stated that Kubja died in July 1959. He has denied suggestion that defendant Nos. 1 and 2 were inducted as tenants by Kubja. He has denied suggestion that Kubja had also received rent from defendant Nos. 1 and 2 during her life time. He has denied suggestion that defendant Nos. 1 and 2 have acquired status of proprietary rights under Tenancy and Land Reforms Act.

12.3 DW1 Sarban Kumar Clerk GRR Solan has stated that summoned record was sent to Hon'ble High Court.

12.4 DW2 Maan Singh Patwari has stated that register LR 4 vide seizure memo dated 15.2.1984 was took into possession in case State vs. Bhagat Ram.

12.5 DW3 Sees Ram has stated that Kubja was maternal aunt of his wife. He has stated that Kubja had died and after death of Kubja her property devolved upon her legal representatives. He has stated that Kubja used to reside in village Kharota. He has stated that defendant Nos. 1 and 2 are also known to him. He has stated that suit land was mortgaged with defendant Nos. 1 and 2. He has stated that after redemption of land defendant Nos. 1 and 2 remained as tenants. He has stated that defendant Nos. 1 and 2 used to pay rent to Kubja. He has stated that land was redeemed in the year 1959-60. He has stated that in his presence Kubja had paid redemption money of Rs. 1900/- (Rupees one thousand nine hundred only).

12.6 DW4 Rachh Pal Singh Senior Clerk D.C. Office has stated that he has brought the register of CD-II w.e.f. 1.1.1994 to 31.5.1994. He has stated that application No. 2384 dated 21.4.1994 and application No. 2707 dated 6.5.1994 were returned back to petitioner. He has stated that only Halqua Patwari could state that which mutation was annexed with jamabandis. He has stated that he could not state whether revenue field staff used to consign the mutation in record room along with jamabandis.

12.7 DW5 Dhani Singh Patwari has stated that he has brought the summoned record. He has stated that file was consigned to record room on dated 12.10.1993.

12.8 DW6 Satinder Kumar has stated that he has brought the mutation register Ext.DW6/A. He has stated that same is correct as per original record. He has stated that jamabandis are prepared after five years on the basis of Khasra Girdawari. He has stated that mutation No. 520 was sanctioned as per jamabandi for the year 1974-75. He has stated that mutation Nos. 520 and 521 were not incorporated in jamabandi for the year 1993-94.

12.9 DW7 Sudama Ram Record Keeper in office of DC Office Solan has stated that he is posted as record keeper Solan since 1997. He has stated that he has brought the record of file No. 558 titled Prem Dutt vs. Devi Ram. He has stated that file was relating to compensation and order was passed on dated 12.1.1984. He has stated that as per record Prem Dutt son of Bansi Ram had deposited Rs. 222.72 Ps. vide challan No. 63 on dated 28.7.1979 as compensation amount in favour of Devi Ram. He has stated that challan is correct as per original record Ext.DW7/A and Ext.DW7/B.

12.10 DW8 Prem Dutt has stated that owner of suit land was Kubja. He has stated that in the year 1956-57 suit land was given on tenancy basis in equal shares to him and Biptu. He

has stated that he and Biptu cultivated the suit land and also paid the rent. He has stated that in the year 1958 Kubja was to pay some loan amount to Ganga Ram and thereafter Kubja took Rs. 1300/- (Rupees one thousand three hundred only) from Prem Dutt and Biptu and suit land was mortgaged. He has stated that thereafter in the year 1959 Kubja again took Rs. 600/- (Rupees six hundred only) from him relating to pilgrimage travel expenses and thereafter total mortgage amount was Rs. 1900/- (Rupees one thousand nine hundred only). He has stated that after two months Kubja returned Rs. 1900/- (Rupees one thousand nine hundred only) and told that she could not go to pilgrimage because she became sick. He has stated that thereafter mortgage was redeemed and thereafter suit land was in possession of Prem Dutt and Biptu in the capacity of tenancy. He has stated that after death of Kubja rent was received by her LRs. He has stated that land was redeemed and because of tenancy defendants became owners of suit land in the year 1975. He has stated that copy of mutation is Ext.DW8/A and copy of girdawari is Ext.DW8/B. He has stated that suit land is about 14-15 bighas. He has stated that he did not pay any rent to Kubja. He has stated that Biptu had paid rent on his behalf. He has stated that in the year 1959-60 he had paid rent to Devi Ram, Malti, Mathu etc. He has stated that no rent receipt was obtained. He has denied suggestion that suit land was mortgaged in the year 1959 vide rapat No. 163. He has denied suggestion that contesting defendants were in possession of suit land as mortgagees. He has denied suggestion that wrong entry of tenancy was recorded in revenue record.

Findings upon Substantial question of law framed by Hon'ble High Court:-

13. Submission of learned Advocate appearing on behalf of the appellants that suit land was redeemed by mortgagor namely Kubja is rejected being devoid of any force for the reasons hereinafter mentioned. It is the case of appellants that in the year 1958 Kubja mortgaged the suit land in consideration amount of Rs. 1300/- (Rupees one thousand three hundred only). It is further case of appellants that thereafter in the month of February 1959 Kubja mortgagor was in need of money because mortgagor intended to go for pilgrimage and Kubja in the month of February 1959 mortgaged the suit land in consideration amount of Rs. 1900/- (Rupees one thousand nine hundred only). It is further case of appellants that thereafter after two months mortgagor Kubja returned the mortgaged money to the tune of Rs.1900/- (Rupees one thousand nine hundred only) and suit land was redeemed. As per Section 58 of Transfer of Property Act 1882 there are six types of mortgages. (1) Simple mortgage. (2) Mortgage by conditional sale. (3) Usufructuary mortgage. (4) English mortgage. (5) Mortgage by deposit of title deeds. (6) Anomalous mortgage. It is proved on record that in present case mortgage was usufructuary. Redemption of Mortgage H.P. Act 1971 came into operation in the year 1971 and prior to 1971 Redemption of Mortgage Punjab Act 1913 was applicable to Himachal Pradesh because Himachal Pradesh was part of Punjab area. Redemption of Mortgage Punjab Act 1913 was also applicable to area added to Himachal Pradesh by Punjab Reorganization Act. Hence it is held that Redemption of Mortgage Punjab Act 1913 was in operation in the year 1959 upon the suit property. As per Redemption of Mortgage Punjab Act 1913 the mortgaged land could be redeemed after filing application before the Collector. In present case there is no evidence on record that Kubja filed any application before the Collector for redemption of land. In present case there is no evidence on record that Kubja mortgagor recorded any rapat before Patwari relating to redemption of mortgaged land. Hence it is held that redemption of mortgaged land in the year 1959 is not proved on record as per Redemption of Mortgaged Punjab Act 1913. On contrary there is rapat No. 163 dated 3.2.1959 that mortgagees namely Prem Dutt and Biptu came in Patwarkhana and recorded rapat dated 3.2.1959 that Kubja had mortgaged the suit land in

consideration amount of Rs.1900/- (Rupees one thousand nine hundred only). Prem Dutt and Biptu have voluntarily appeared before Patwari themselves and recorded rapat Ext.P3 dated 3.2.1959 that suit land was mortgaged by Kubja mortgagor to mortgagees Prem Dutt and Biptu in consideration amount of Rs.1900/- (Rupees one thousand nine hundred only). It is proved on record that on dated 3.2.1959 Prem Dutt and Biptu themselves admitted the mortgage of suit land in consideration of Rs. 1900/- (Rupees one thousand nine hundred only). Rapat Roznamcha No.l63 dated 3.2.1959 is recorded by public servant in discharge of his official duty and is relevant fact under Section 35 of Indian Evidence Act 1872. Even PW1 Ravinder Kumar Patwari has also appeared in witness box along with original record and had proved rapat No. 163 dated 3.2.1959 Ext.P3.

14. Submission of learned Advocate appearing on behalf of the appellants that as per testimony of DW3 Sees Ram suit land was redeemed by Kubja and on this ground appeal filed by appellants be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. There is no statement of Kubja on record in order to prove that Kubja had admitted the redemption of suit land in the year 1959. It is held that oral redemption of land contrary to Redemption of Mortgage Punjab Act 1913 cannot be accepted in the Court of law. No rapat roznamcha of redemption of land was recorded in revenue record on behalf of Kubja or on behalf of mortgagees Prem Dutt and Biptu in revenue record.

15. Another submission of learned Advocate appearing on behalf of the appellants that tenancy was created by Kubja and thereafter proprietary rights were conferred upon Prem Dutt and Biptu and on this ground appeal filed by appellants be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that tenancy is bilateral agreement between landlord and tenancy. There is no documentary evidence on record in order to prove that Kubja had inducted Prem Dutt and Biptu as tenants in suit property. There is no rapat roznamcha in order to prove that Kubja had inducted Prem Dutt and Biptu as tenants in the suit land. It is proved on record that Kubja died in the month of July 1959 as per testimony of PW2. Testimony of PW2 that Kubja died in July 1959 remained unrebutted on record. There is no evidence on record that w.e.f. 3.2.1959 after recording rapat No. 163 dated 3.2.1959 Kubja had admitted tenancy of Prem Dutt and Biptu before any revenue authority. There is no rent receipt placed on record by Prem Dutt and Biptu issued by Kubja relating to tenancy. Tenancy has been defined under Section 2 sub-clause 17 of H.P. Tenancy and Land Reforms Act. According to Section 2(17) of H.P. Tenancy and Land Reforms Act the tenant means a person who holds land under land owner and is or but for a contract to the contrary would liable to pay rent for that land to that land owner and includes (1) Sub tenant (2) The predecessors or successors in interest of a tenant or a sub-tenant as the case may be but it does not include (a) Mortgagee (b) A person to whom a holding has been transferred or an estate or holding has been let in farm under the Himachal Pradesh Land Revenue Act 1954 or the Punjab Land Revenue Act 1887 as the case may be for the recovery of an arrear of land revenue or of a sum recoverable as such an arrear. Hence it is held that it is not proved on record that Kubja had inducted Prem Dutt and Biptu as tenants in suit property at any point of time. There is no order of any revenue officer inducting appellants as tenants over suit land.

16. Another submission of learned Advocate appearing on behalf of appellants that mutation of proprietary rights were conferred upon Prem Dutt and Biptu under H.P. Tenancy and Land Reforms Act and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that appeal No. 37 of 2008 was filed before the Collector by Ram Dayal and others relating to mutation

No. 520 dated 21.3.1976 whereby proprietary rights were conferred. It is proved on record that on dated 18.3.1980 learned Collector Sub Division Solan accepted the appeal and set aside the mutation No. 520 dated 21.3.1976 whereby proprietary rights were conferred and case was remanded back to subordinate revenue officers with direction that parties should be called and heard in person and factum of report of roznamcha No. 163 dated 3.2.1959 should also be taken into consideration. There is no evidence on record that thereafter revenue officer had complied order of Collector passed in appeal No. 37 of 2008 titled Ram Dayal and others vs. Biptu and others. Hence mutation No. 520 has no force in the eyes of law because mutation No. 520 was set aside by competent Court of law. It is proved on record that thereafter Biptu filed tenancy appeal No. 24 of 1980 before learned Additional Commissioner titled Biptu vs. Kanu and same was dismissed by learned Additional Commissioner on dated 25.2.1984. It is well settled law that proprietary rights are granted under Section 104 of H.P. Tenancy and Land Revenue Act 1872 by land reform officer only. There is no order of land reform officer placed on record in present case.

17. Another submission of learned Advocate appearing on behalf of appellants that as per entries of jamabandi for the year 1958-59, 1962-63, 1974-75, 1979-1980, 1984-85 1988-89 and 1994-95 appeal filed by appellants be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused above said jamabandis. In jamabandi for the year 1958-59 Ext.P11 there is entry in rent column i.e. *Bina lagan kabja rajamandi.* (Without rent as possession is with consent). It is held that word *Bina lagan kabja rajamandi.* (Without rent as possession is with consent) means no rent in the eyes of law. Hence it is held that payment of rent is not proved as per jamabandi for the year 1958-59. Court has also perused jamabandi for the year 1962-63 Ext.P12. In rent column there is entry *"Mal 1.66 Sawai 0.41 Kul 2.07."* (Land revenue charges 1.66, local rate surcharge 0.41, total revenue 2.07). As per revenue dictionary word 'Mal' means land revenue and word 'Sawai' means local rate/surcharge. It is well settled law that land revenue and local rate surcharge are always paid to State Government. Hence it is held that word Mall (Land revenue) and word Swai (Local rate/surcharge did not falls within definition of rent. Hence it is held that even as per jamabandi for the year 1962-63 payment of rent is not proved on record. Court has also perused jamabandi for the year 1974-75 Ext.P13 relating to Khatauni No. 4. Even as per jamabandi for the year 1974-75 placed on record in rent column the word mal (Land revenue) has been recorded as 1.66 and swai (Local rate/surcharge) has been recorded as 0.41. Hence keeping in view the meaning of mal (Land revenue) and swai (Local rate/surcharge) as per revenue dictionary cited supra it is held that payment of rent is also not proved as per jamabandi for the year 1974-75.

18. Court has also perused jamabandi for the year 1974-75 Ext.P14 relating to Khatauni No.5. In rent column there is entry of mal 2.50 swai 0.62 (Land revenue 2.50 and local rate/surcharge 0.62). Hence it is held that as per jamabandi for the year 1974-75 Ext.P14 the payment of rent is not proved on record. Court has perused jamabandi for the year 1984-85 Ext.P15. In rent column land revenue has been shown as 1.66 relating to Prem Dutt and land revenue has been shown as 2.50 relating to Biptu. Hence it is held that even as per jamabandi for the year 1984-85 there is no entry of payment of rent. Even in jamabandi for the year 1988-89 Ext P-16 land revenue has been shown as 1.66 in rent column relating to Prem Dutt and relating to Biptu land revenue has been shown as 2.50. Hence it is held that as per jamabandi for the year 1988-89 payment of rent is not proved on record. Even as per jamabandi for the year 1993-94 Ext.P17 land revenue relating to Prem Dutt has been shown as 1.66 and land revenue relating to Biptu has been shown as 2.50. Hence it is held that even as per jamabandi for the year 1993-94 payment of rent is not

proved on record. Word mal and word swai did not fall within definition of rent as per revenue dictionary because as per revenue dictionary word mal means land revenue paid to State Government and swai means local rate surcharge paid to the State Government. It is well settled law that payment of rent is essential ingredient for tenancy. As per Section 2(15) of H.P. Tenancy and Land Reforms Act 1972 rent means whatever is payable to land owner in money or kind by a tenant on account of use or occupation of land held by him but shall not include the rendering any personal service or labour. It is well settled law that payment of rent by tenant to the landlord can be made in kind or cash in the following manner. (1) Cash rent which could be irrespective of nature of land and kind of crop grown upon it. (2) Batai rent means division of produce between cultivator and landlord. (3) Zabati rent means fixed money payable per bigha or canal for certain crops. (4) Chakota rent means fixed amount of produce in particular season and fixed amount of cash in another season. In present case appellants did not prove on record any rent in nature of (1) Cash rent. (2) Batai rent. (3) Zabati rent (4) Chakota rent.

19. Another submission of learned Advocate appearing on behalf of appellants that in jamabandis for the year 1958-59, 1962-63, 1974-75, 1984-85, 1988-89 and 1993-94 in possession column names of Prem Dutt and Biptu have been recorded as Gair Marusi in cultivation column and on this ground appellants be treated as non-occupancy tenants over suit land is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that there are twelve columns in jamabandis i.e. (1) Column of Khata. (2) Column of Khatauni. (3) Column of name of lamberdar who collect land revenue. (4) Column of ownership. (5) Column of cultivation. (6) Column of irrigated land. (7) Khasra Numbers. (8) Area. (9) Rent which the tenant used to pay. (10) Type of measurement. (11) Demand of land revenue. (12) Remarks. It is held that simply entry of possession in column No. 5 is not sufficient to hold the status of tenant to Prem Dutt and Biptu. It is well settled law that status of tenant is determined with payment of rent only. DW8 Prem Dutt when appeared in witness box has specifically stated that tenant used to pay batai rent (Division of produce between cultivator and landlord). But there is no entry of batai rent (Division of produce between cultivator and landlord) in jamabandis placed on record. No document of batai rent proved on record. Hence it is held that no payment of rent is proved on record and it is further held that status of appellants as tenants is not proved on record relating to suit land. It is held that word mal and word swai do not mean batai rent (Division of produce between cultivator and landlord). It is held that word mal means land revenue paid to State Government and word swai means local rate/surcharge paid to the State Government. There is no oral or written acknowledgment of receipt of rent on the part of land owner at any point of time by way of cash or kind in the present case.

20. Another submission of learned Advocate appearing on behalf of appellants that tenancy of appellants was prior to mortgage and even after redemption of land tenancy of appellants survives is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that no tenancy prior to mortgage of land is proved on record in favour of appellants and it is held that a person cannot acquire two status at the same time i.e. status of tenant and status of mortgagee. Court has perused jamabandi for the year 1954-55 Ext.P10 placed on record and in ownership column names of Kubja widow of Dakhu and name of Ratia son of Kishnu has been recorded as owners in equal shares and in cultivation column possession of Kubja and Ratia has been recorded. Names of appellants did not figure in ownership column and in cultivation column of jamabandi for the year 1954-55 Ext.P10 placed on record. Hence there is no question of tenancy prior to 1959 in favour of appellants.

21. It is well settled law that there is no limit for redemption of usufructuary mortgage. *(See 2006(1) Supreme Bound Reports 144 titled Harbans vs. Om Parkash. See 2010(3) Himachal Law Reporter 1298 (H.P.) titled Parkash Chand and others vs. Amar Singh and another. See 2009 (1) SLJ page 45 titled Harbhajan Singh Vs. Neranjan Singh (P&H).*It is well settled law that entry of non-occupancy tenant in revenue record can be recorded only by order of competent authority of law. In present case there is no evidence on record in order to prove that any revenue officer had ordered the entry of non-occupancy tenant in favour of Prem Dutt and Biptu at any point of time in revenue record. In view of the fact that there is no order of competent authority to change the revenue entries relating to non-occupancy tenants in favour of Prem Dutt and Biptu and in view of the fact that no rent receipt produced issued by Kubja in favour of Prem Dutt and Biptu and in view of the fact that no induction of tenancy is proved on record by Kubja in favour of Prem Dutt and Biptu it is held that Prem Dutt and Biptu did not acquire status of tenancy over suit land at any point of time in present case. See 2011 (12) Himachal Law reporter page 711 (HP) titled Chain Singh & others Vs. Kood Singh & others. In present case it is proved on record that appellants are in settled possession of suit property. Hence it is held that learned trial Court had rightly granted decree of possession in favour of land owners on the basis of title against the appellants. It is well settled law that status should be proved by way of positive, cogent and reliable independent evidence and it is well settled law that title cannot be claimed on the basis of jamabandis entries only. It was held in case reported in *1994(1) SLJ 68 (SC) titled Jattu Ram vs. Hakam Singh and others* that jamabandi entries did not create any title and it was held that jamabandi entries are only for fiscal purpose. Also see AIR 1994 SC 227 titled Guru Amarjeet Singh Vs. Rattan Chand and others. In view of above stated facts substantial question of law framed by Hon'ble High Court is decided against the appellants.

22. In view of above stated facts appeal filed by appellant is dismissed. Judgment and decree passed by learned trial Court and learned first Appellate Court are affirmed. Parties are left to bear their own costs. Files of learned trial Court and learned first Appellate Court along with certified copy of this judgment and decree sheet be sent back forthwith. The Registrar (Judicial) will prepare the decree sheet as required under Section 100 of Code of Civil Procedure 1908. Appeal stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Rajinder Singh Shandil & ors. .....Petitioners.

Versus

Union of India & ors. .....Respondents.

CWP No. 1936 of 2012.
Reserved on: 28.7.2015.
Decided on: 29.7.2015.

Constitution of India, 1950- Article 226- Central Government framed a scheme called General Insurance (Rationalization of Pay Scales and Other Conditions of Service of Development Staff) Amendment Scheme- Development Officers were required to opt for Special Voluntary Retirement Package within a period of sixty days or to render their services as Development Officers (Administration) - petitioners had not exercised the option-

held, that scheme had become functional after its publication in the official gazette- therefore, the persons who had not exercised the option are not entitled for the benefit under the scheme. (Para-2 to 9)

Cases referred:
National Insurance Company Limited vrs. General Insurance Development Officers Association and others.
(2008) 5 SCC 472
New India Assurance Co. Ltd. vrs. Raghuvir Singh Narang and anr. (2010) 5 SCC 335
Union of India and others vrs. Shri Hanuman Industries and another, (2015) 6 SCC 600
Khem Chand Sharma & anr. vrs. Union of India & ors., 2012(1) Him. L.R. 57

For the petitioners: Mr. Ajay Mohan Goel, Advocate.
For the respondents: Mr. Ashok Sharma, ASGI for respondent No. 1.
Mr. Ashwani K. Sharma, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

In exercise of powers conferred under Section 17-A of the General Insurance Business (Nationalization) Act, 1972, the Central Government has framed the Scheme to further amend the General Insurance (Rationalization of Pay Scales and Other Conditions of Service of Development Staff) Scheme, 1976. The Scheme was called the General Insurance (Rationalization of Pay Scales and Other Conditions of Service of Development Staff) Amendment Scheme, 2003. It has come into force on the day of publication in the official gazette. It was published on 3.1.2003. Para 15 C. of the Scheme reads as under:

> **"15 C. Special Option.—**(1) A Development Officer may, within sixty days of the commencement of the General Insurance (Rationalization of Pay Scales and Other Conditions of Service of Development Staff) Amendment Scheme, 2003, opt:
>
> (a) for Special Voluntary Retirement Package as per Annexure-I appended hereto; or
>
> (b) to render his services as Development Officer (Administration) under paragraph 21A, as per Annexure II.
>
> (2) A Development Officer, who does not exercise any of the options under sub paragraph (1) within the stipulated period of sixty days, shall continue to render service as such under the General Insurance (Rationalization of Pay Scales and Other Conditions of Service of Development Staff) Amendment Scheme, 2003."

2. It is evident from combined reading of para 15C of the Scheme that the Development Officer was required within sixty days of the commencement of the General Insurance (Rationalization of Pay Scales and Other Conditions of Service of Development Staff) Amendment Scheme, 2003, to opt for special voluntary retirement package or to render his services as Development Officer (Administration). The Development Officer, who did not exercise any of the options under sub paragraph (1) within the stipulated period of sixty days, was required to continue to render services as such under the General Insurance

(Rationalization of Pay Scales and Other Conditions of Service of Development Staff) Amendment Scheme, 2003. The petitioners, admittedly, have not exercised the options as per clause 15C. The principal ground taken by the petitioners for not exercising the option is that they have filed CWP No. 3204 of 2003 before the Punjab and Haryana High Court. The Punjab and Haryana High Court has ordered status quo on 31.3.2003. The United Insurance Company preferred a Special Leave Petition SLP (C) No. 13261 of 2003 as well as Transfer Case No. 64 of 2003 before the Hon'ble Supreme Court against the interim order dated 31.3.2003, rendered by the Punjab and Haryana High Court. The SLP/Civil Appeals filed by the Insurance Company were allowed by the Hon'ble Supreme Court vide judgment dated 3.4.2008. The judgment is reported in ***(2008) 5 SCC 472,*** in the case of ***National Insurance Company Limited vrs. General Insurance Development Officers Association and others.*** The operative portion of the same reads as under:

> "[26] In para 28 it was held that there was no need for any consultation with the employees. When the changes introduced by the scheme are considered in the background of the position in law and the decision of this Court by a Constitution Bench in Prakash Sharma's case (supra) there is no scope for interference in these appeals. However, it would be in the interests of the officers and the insurance companies if the Development Officers who work within the cost ratio are not transferred unless the transfer is required to be done in public interest. So far as the promotional prospects and the wage revision are concerned, a draft policy stated to have been formulated for the latter be finalized within a period of three months. The writ petitions filed in different High Courts stand dismissed because of this judgment. Consequentially, the interim orders passed which form the subject matter of challenge in the appeals are vacated subject to the directions given supra."

3. Thereafter, on 19.6.2008, notification was issued pertaining to pay revision. Letter dated 1.1.2009 pertains to promotion policy for Development Officers Grade-I to the cadre of Scale-I Officers. The Development Officers who had exercised any of the options within 60 days, as per Clause 15C have been granted the benefits under the Scheme. The petitioners continued to work as Development Officers. The similarly situated persons have also approached the Hon'ble Supreme Court by way of I.A. No.2. It was permitted to be withdrawn with liberty to pursue the same before the appropriate authority/Court, vide order dated 16.8.2010.

4. Their lordships of the Hon'ble Supreme Court in the case of ***New India Assurance Co. Ltd. vrs. Raghuvir Singh Narang and anr.*** reported in ***(2010) 5 SCC 335,*** have held that the provisions of Amendment Scheme, 2003 were statutory in character and the provisions of the Scheme would prevail over the provisions of the Contract Act or any other law or any principles of contract, having regard to the binding nature of the Scheme and an employee, upon exercising option, cannot withdraw from the same. This case pertains to Voluntary Retirement under the Scheme.

5. The petitioners have been informed, specifically, about the Scheme on 23.1.2003 and despite that they have not exercised their options. The representations made by the petitioners No. 1, 4 & 6 were considered by the highest decision making body of the Insurance Company. The same were rejected on 28.3.2011. The Scheme has become functional after its publication in the official gazette. The underlying principle of the Scheme was also to allow its employees; (a) to seek voluntary retirement; (b) to go from marketing to administrative side; or (c) to continue in service. The employees who have opted for the

Scheme within 60 days have changed their positions. The petitioners, now after more than 12 years, cannot be permitted to give fresh option.

6. Their lordships of the Hon'ble Supreme Court in the case of ***Union of India and others vrs. Shri Hanuman Industries and another,*** reported in ***(2015) 6 SCC 600,*** have held that it is a fundamental legal diktat that delay has to be explained by cogent, convincing and persuasive explanation to justify condonation thereof. It has been held as follows:

> "20. The gravamen of the authorities pertaining to delay highlight in unison that the same has to be explained by cogent convincing and persuasive explanation to justify condonation thereof. The legal diktat being so fundamental that a detailed treatment of the decisions relied upon by the respondents in this regard is not warranted.
>
> 22. On a consideration of the totality of the aspects involved, we are thus of the unhesitant view that the respondents herein in view of their deliberate laches, negligence and inaction have disentitled themselves to the benefit of the adjudication in the earlier lis. In the accompanying facts and circumstances in our comprehension, it would be iniquitous and repugnant as well to the public exchequer to entertain the belated claim of the respondents on the basis of the doctrine of promissory estoppel which is even otherwise inapplicable to the case in hand."

7. Mr. Ajay Mohan Goel, Advocate, appearing for the petitioners, has also vehemently argued that when the amendments were carried out in the Scheme in the year(s) 2008-09, the petitioners were permitted to give fresh option. The option was to be exercised within 60 days from the promulgation i.e. 2003 Scheme. It is reiterated that there is no correlation between the notification/letter dated 19.6.2008 and 1.1.2009.

8. This Court in the case of ***Khem Chand Sharma & anr. vrs. Union of India & ors.,*** reported in ***2012(1) Him. L.R. 57,*** has held that option once exercised cannot be withdrawn. It has been held as follows:

> "9. Submission has been noticed only to be rejected. Scheme, as per its clause 1(2), was to come into force, from the date of its publication in the Official Gazette. In the reply, it is stated that Scheme was published in the Official Gazette on 3.1.2003. Petitioners have filed rejoinder, in which they have not denied this fact. That means, Scheme was published in the Official Gazette on 3.1.2003 and, thus, requests for voluntary retirement made by the petitioners, were within 60 days of the commencement of the Scheme.
>
> 10. Another submission made on behalf of the petitioners is that because of the stay granted by the High Court of Punjab and Haryana, vide order Annexure P-3, which is dated 31.3.2003, implementation of the Scheme stood stayed and hence respondent No. 2 could not have lawfully issued orders for the acceptance of requests of the petitioners for voluntary retirement and could also not have relieved them vide orders, Annexures P-7 and P-8. This submission is also without merit. order Annexure P-3, was made applicable only in the area, within the jurisdiction of Punjab and Haryana High Court, as is clear from a bare reading of para 2 of the said order. Petitioners were working within the jurisdiction of this Court and, therefore, stay order, copy Annexure P-3, was not applicable in their case.

11. Also, petitioners, having once exercised their option for voluntary retirement, could not have withdrawn those options, in view of clause (4) of Para 5 of Annexure –I to the Scheme, Annexure P-1. Aforesaid clause (4) of para 5 says that a Development Officer shall not be eligible to withdraw the option once made for Special Voluntary Retirement Package.

12. Hon'ble Supreme Court, while dealing with a case arising out of this very Scheme, in New India Assurance Company Ltd. V. Raghuvir Singh Narang, (2010) 5 SCC 335, has held that Special Voluntary Retirement Package is a Scheme, statutory in nature and the provisions of the Scheme, prevail over the provisions of the Contract Act or any other law or any principles of contract, having regard to the binding nature of the Scheme and an employee, upon exercising the option, cannot withdraw from the same, in view of clause (4) of Para 5 of Special Voluntary Retirement Package. So, this submission can also not be upheld.

13. Another submission made on behalf of the petitioner is that money payable to the petitioners, on account of ex-gratia, having not been offered within 45 days of their relieving, they are entitled to reinstatement. Scheme, Annexure P-1 does not provide that in case money, payable to a person seeking voluntary retirement, is not paid within the prescribed period of 45 days, the employee will be reinstated automatically or will be entitled to be reinstated on his asking. In the absence of any provision in the Scheme, the consequence of non payment of gratuity money, within the prescribed period can, at the most, be that the affected person can seek compensation or ask for payment of interest or even penal interest, on the amount of gratuity, which the petitioners, in the present case, have not claimed. Also, I find that money, on account of gratuity, which the petitioners, in the present case, have not claimed. Also, I find that money, on account of gratuity, payable to the petitioners, was offered to be paid to them within 10 days of the expiry of 45 days time, but they refused to accept the same."

9. It would be apposite to mention at this stage that the similarly situated persons who have approached the Hon'ble Punjab and Haryana High Court, have withdrawn their CWP No. 4571 of 2010 and analogous matters, on 27.5.2011.

10. In view of the observations made hereinabove, there is no merit in this petition and the same is dismissed, so also the pending application(s), if any.

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

Sh Ganesh Dutt Thakur son of Ghurko Ram. ....Petitioner.

Vs.

Mrs Gita Singh wife of Rattan Singh and another. ...Non-petitioners.

CR.MMO NO.178 of 2014
Order reserved on: 23.7.2015.
Date of Order: July 30 ,2015.

Code of Criminal Procedure, 1973- Section 482- A complaint was filed against the petitioner before Learned Special Judge who sent the same for investigation to DSP State Vigilance and Anti Corruption Bureau- it was contended that no sanction was obtained prior to filing of the complaint and, therefore, order passed by Learned Special Judge be quashed- held, that sanction is required at the time of taking cognizance - no cognizance is taken, when the complaint is sent to the police for investigation -therefore, there was no requirement of taking sanction- petition dismissed. (Para-7 to 14)

Cases referred:
Anil Kumar and others Vs. M.K.Aiyappa and another, 2013 (10) SCC 705
D.L.Reddy and others Vs. V.Narayana Reddy and others, 1976 (3) SCC 252
Madho and another Vs. State of Maharashtra and another, 2013 (5) SCC 615
Lalita Kumari Vs. Vs. State of UP, 2014 (2) SCC 1
Priyanka Srivastava and another Vs. State of Uttar Pradesh and others, 2015 (6) SCC 287

For petitioner:	Mr.Sunil Mohan Goel, Advocate.
For non-petitioner No.1.	Mr.N.K.Thakur, Sr. Advocate with Mr.Ramesh Sharma, Advocate.
For non-petitioner No.2.	Mr.J.S.Rana Assistant Advocate General.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 482 of the Code of Criminal Procedure 1973 for quashing order dated 24.5.2014 passed by learned Special Judge District Sirmour at Nahan HP in Application No.92-Cr.M/4 of 2014 titled Smt. Gita Singh Vs. Deputy Superintendent of Police SV & ACB Nahan District Sirmour HP whereby learned Special Judge Sirmour District at Nahan has sent private complaint filed under Section 156(3) Cr.PC relating to offence under Section 7 and 13(2) of Prevention of Corruption Act 1988 to DSP State Vigilance and Anti Corruption Bureau Nahan District Sirmour HP to make investigation in accordance with law.

BRIEF FACTS OF THE CASE:

2. Smt. Geeta Singh wife of Sh Rattan Singh resident of Set No.25 Type IV Government Colony Kasumpti Shimla Tehsil and District Shimla HP filed application under Section 156(3) Cr.PC for registration and investigation of case under Sections 7 and 13(2) of Prevention of Corruption Act 1988 against Ganesh Dutt Thakur Excise and Taxation Officer. There is recital in the complaint filed under Section 156(3) Cr. PC that Ganesh Dutt Thakur was posted as Excise and Taxation Officer (Flying Squad) Parwanoo in the year 2012. There is further recital in complaint that while Ganesh Dutt Thakur posted as Excise and Taxation Officer (Flying Squad) Parwanoo procured copies of Annual VAT Returns/Account books for the year 2005-06 to 2008-09 of M/s Jay Aay Alloys (P) Ltd. Kala Amb. There is further recital in complaint that on scrutiny of said returns Ganesh Dutt Thakur Excise and Taxation Officer found that firm had evaded VAT by claiming excess Input Tax Credit and thereafter Ganesh Dutt Thakur Excise and Taxation Officer issued show cause notice dated 9.6.2010 to the firm proposing to impose additional demand of Rs.2584579/- (Twenty five lacs eighty four thousand five hundred seventy nine) upon firm. There is further recital in complaint filed before learned Special Judge District Sirmour at Nahan HP that after hearing

firm Ganesh Dutt Thakur ETO reduced additional amount to Rs. 147817/- (One lac forty seven thousand eight hundred seventeen). There is further recital in complaint that Ganesh Dutt Thakur ETO after issuance of notice dated 9.6.2010 obtained pecuniary benefit from the firm and reduced additional demand of VAT to Rs.147817/-(One lac forty seven thousand eight hundred seventeen) from an amount of Rs. 2584579/- (Twenty five lacs eighty four thousand five hundred seventy nine) and caused wrongful loss to the government and obtained wrongful gain himself and for the firm. There is further recital in complaint that on dated 14.11.2012 on the basis of separate and independent information SV&ACB registered FIR No.3/2012 at police station Chamba against Ganesh Dutt Thakur ETO for possessing disproportionate assets. There further recital in complaint that Ganesh Dutt Thakur ETO was found to possess a hotel and a restaurant at Nadaun, a valuable piece of land at Indora, a resort at Nainikhad, a multi storey marble house at Chamba and two flats at Baddi. Complainant Smt. Geeta Singh requested learned Special Judge District Sirmour at Nahan HP for registration of FIR and investigation of case under Section 156(3) Cr.PC in public interest.

3. Learned Special Judge District Sirmour at Nahan passed following order:

24.5.2014

Present: Sh R.L.Garg Advocate for the applicant.

Office report seen. It be registered. Heard. Serious allegations have been levelled in the complaint hence this complaint is sent to the DSP State Vigilance and Anti Corruption Bureau Nahan District Sirmour HP to make investigation in accordance with law. Application along with copy of this order be sent forthwith. Papers of this Court be completed and consigned to the record room.

Announced:
May 24,2014.

Sd/-
Special Judge Sirmour District
at Nahan HP.

4. Feeling aggrieved against the order dated 24.5.2014 petitioner filed present petition under Section 482 Cr.PC.

5. Court heard learned Advocate appearing on behalf of petitioner and learned Advocate appearing on behalf of non-petitioner No.1 and learned Assistant Advocate General appearing on behalf of non-petitioner No.2.

6. Following points arise for determination in present petition filed under Section 482 of the Code of Criminal Procedure 1973:

(1) Whether previous sanction is necessary under Section 19 of the Prevention of Corruption Act 1988 at the time of sending private complaint under Section 156(3) Cr.PC for investigation by Special Judge under Prevention of Corruption Act 1988?.

(2) Final Order.

Finding upon Point No.1.

7. Submission of learned Advocate appearing on behalf of petitioner that in view of ruling reported in 2013 (10) SCC 705 titled Anil Kumar and others Vs. M.K.Aiyappa and another the order passed by learned Special Judge Sirmour District at Nahan dated

24.5.2014 announced in application No.92-Cr.M/4 of 2014 titled Smt. Gita Singh Vs. Deputy Superintendent of Police SV & ACB Nahan District Sirmour HP and consequential FIR No. 5/2014 dated 6.6.2014 registered under Sections 7 and 13(2) of Prevention of Corruption Act 1988 be quashed and set aside is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused judgment reported in 2013 (10) SCC 705 titled Anil Kumar and others Vs. M.K.Aiyappa and another. Ruling cited supra is announced by Hon'ble Division Bench of Supreme Court and Hon'ble Division Bench of Supreme Court held that Special Judge could not refer the matter under Section 156 (3) Cr.PC against public servant without valid previous sanction order for prosecution. Court has also carefully perused the ruling reported in 1976 (3) SCC 252 titled D.L.Reddy and others Vs. V.Narayana Reddy and others announced by Hon'ble three judges bench of apex Court of India. Hon'ble three judges bench of apex Court of India held that power under Section 156(3) Chapter XII Cr.PC and powers under Section 200 Chapter XV Cr.PC are entirely two different powers. Hon'ble three judges bench of apex Court of India held that power under Section 156(3) Cr.PC under Chapter XII is exercised at pre-cognizance stage of case. Hon'ble three judges bench of apex Court of India further held that power under Section 200 Chapter XV Cr.PC is exercised in post cognizance stage of the case. It is well settled law that when there is conflict between rulings of two judges bench and three judges bench then decision of three judges bench always prevails. Also see 2013 (5) SCC 615 titled Madho and another Vs. State of Maharashtra and another. Also see 2014 (2) SCC 1 titled Lalita Kumari Vs. Vs. State of UP. Also see 2015 (6) SCC 287 titled Priyanka Srivastava and another Vs. State of Uttar Pradesh and others.

8. As per Section 22 of the Prevention of Corruption Act 1988. Code of Criminal Procedure 1973 is applicable to cases which fall under the Prevention of Corruption Act 1988 subject to certain modification. There is no express provision in the Prevention of Corruption Act 1988 that provision of Section 156(3) of the Code of Criminal Procedure 1973 will not apply to cases falling under Prevention of Corruption Act 1988.

9. As per Section 19 of Prevention of Corruption Act 1988 previous sanction is required at the time when Special Judge take cognizance of offence punishable under Sections 7,10,11,13 and 15 of Prevention of Corruption Act 1988. It is held that order passed under section 156(3) Cr.PC is not the stage of cognizance of offence in view of ruling given by Hon'ble three judges bench of apex Court of India reported in 1976 (3) SCC 252 titled D.L.Reddy and others Vs. Narayana Reddy and others. It is well settled law that cognizance of offence is taken by Court in private complaint under Section 200 Chapter XV of the Code of Criminal Procedure 1973 when the statement of complainant is recorded on oath.

10. In the present case learned Special Judge Sirmour District at Nahan did not take cognizance of private complaint under Section 200 Chapter XV of the Code of Criminal Procedure and learned Special Judge did not record the statement of complainant on oath. On the contrary learned Special Judge opted to send complaint under Section 156 (3) Chapter XII Cr.PC for investigation at pre-cognizance stage. It is well settled law that whenever any private complaint is received by Court then Court has two options. (1) To send the private complaint under Section 156 (3) Cr.PC for investigation to save valuable time of Court from inquiring into matter which is primary duty of police to investigate. Power under Section 156(3) Cr.PC Chapter XII is exercised by Magistrate before taking cognizance of offence. (2) To proceed under Section 200 Chapter XV Code of Criminal Procedure 1973 and to examine complainant on oath. It is well settled law that if once Court takes cognizance of

the offence himself under section 200 Chapter XV of the Code of Criminal Procedure 1973 then Court could not revert back to pre-cognizance stage.

11. As per Section 26 of Prevention of Corruption Act 1988 every Special Judge appointed under Prevention of Corruption Act 1988 is original trial Court. As per Section 28 of Prevention of Corruption Act 1988 the provisions of special act are in addition to any other law and are not in derogation of any other law for the time being in force.

12. It is well settled law that powers under section 156(3) Chapter XII Code of Criminal Procedure can be exercised in cognizable cases only. There is classification of offences under IPC in part-I of first schedule of Code of Criminal Procedure. There is classification of offences against other laws in part-II of schedule first. Offences which are punishable for more than three years against any other laws have been mentioned as cognizable offences under part II of schedule I of the Code of Criminal Procedure. Punishment under Section 7 of Prevention of Corruption Act 1988 is five years and punishment under Section 13(2) of Prevention of Corruption Act is seven years. Hence it is held that offences under Section 7 and 13(2) of Prevention of Corruption Act 1988 are cognizable offence. As per section 5(4) of Prevention of Corruption Act 1988 Special Judge shall be deemed to be Magistrate.

13. It is held that order passed by learned Special Judge District Sirmour at Nahan under Section 156(3) Cr.PC dated 24.5.2014 in Application No. 92-Cr.M/4 of 2014 titled Smt. Gita Singh Vs. Deputy Superintendent of Police SV & ACB Nahan District Sirmour was passed in pre-cognizance stage of the case. It is held that previous sanction as required under section 19 of Prevention of Corruption Act 1988 at the time of passing order under Section 156(3) Cr.PC was not required. It is held that order under Section 156(3) Cr.PC is in the nature of peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1) of the Code of Criminal Procedure 1973. It is held that such investigation begins with collection of evidence under Section 156 Cr.PC and ends with a report or chargesheet under Section 173 Cr.PC. As per section 4 of Prevention of Corruption Act 1988 all cases under Prevention of Corruption Act 1988 are triable by Special Judge.

14. Another submission of learned Advocate appearing on behalf of petitioner that false facts have been levelled by complainant in the complaint and on this ground petition filed under Section 482 Cr.PC be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the contents of petition and response filed by non-petitioners. Material propositions of facts affirmed by one party and denied by other party and same cannot be decided at this stage of case. Material proposition of facts asserted by one party and denied by other party will be decided by learned trial Court when case shall be disposed of on merit after giving due opportunity to both parties to adduce evidence in support of their case. In view of above stated facts point No.1 is answered in negative.

Point No.2(Final Order)

15. In view of my finding upon point No.1 petition filed under Section 482 of the Code of Criminal Procedure 1973 is rejected. Order passed by Special Judge dated 24.5.2014 in private complaint No.92-Cr.M/4 of 2014 tilted Smt. Geeta Singh Vs. DSP SV&ACB Nahan (HP) is affirmed. Observation made hereinabove is strictly for the purpose of deciding the present petition filed under Section 482 of the Code of Criminal Procedure and

it shall not effect merits of case in any manner. Petition is disposed of. All pending application(s) if any are also disposed of.

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

Hoshiar Singh .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 232 of 2014.
Reserved on: July 29, 2015.
Decided on: July 30, 2015.

Indian Penal Code, 1860- Section 376- **Protection of Children from Sexual Offences Act, 2012-** Section 6- Prosecutrix a mentally retarded person was present in her home all alone - when her parents returned, they found that she was not at home- search was conducted and the accused was found raping the prosecutrix in the cow shed- matter was reported to the police- there was no delay in registration of the FIR- statement of the mother of the prosecutrix was corroborated by PW-2- Medical Officer had found injuries on the person of the prosecutrix- prosecutrix was minor at the time of incident- held, that the prosecution had succeeded in establishing guilt of the accused and he was rightly convicted.

(Para-16 to 20)

For the appellant: Mr. Rajneesh K. Lal, 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 and order dated 11.12.2013 and 13.12.2013, respectively, rendered by the learned Special Judge, Una, H.P. in Sessions Case No. 6-VII/2013, whereby the appellant-accused (hereinafter referred to as accused) who was charged with and tried for offence punishable under Section 376 IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012, was convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs. 20,000/- for the commission of offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the Act), and in default of payment of fine he was further ordered to undergo six months simple imprisonment.

2. The case of the prosecution, in a nut shell, is that PW-11, prosecutrix (name withheld), is the daughter of PW-1 Neelam Kumari and PW-2 Sanjeev Kumar. PW-2 Sanjeev Kumar, her father used to work at Amrali in the Boot Factory as a labourer. PW-11 is mentally retarded. She used to study in sixth standard in Government School. On 14.4.2013, PW-1 Neelam Kumari and PW-2 Sanjeev Kumar had left to Mehatpur for nasal operation of their son. PW-11, prosecutrix remained all alone at home at Village Singhan. Her parents came back at about 3:00 PM. They found that the victim was not present at home. She was searched in the neighbourer's house. PW-1 Neelam Kumari went to the

cowshed of their immediate neighbour Gurdev Singh. She noticed that her daughter was nude and accused, brother-in-law of Gurdev Singh, was doing the bad act with her on chaff. On seeing PW-1 Neelam Kumari, accused absconded from the spot. The matter was reported to the police on 15.4.2013. The statement of Neelam Kumari was also recorded under Section 164 Cr.P.C. The medical examination of the prosecutrix was also undertaken. Simple injuries i.e. bruises, contusions, superficial abrasion on right leg were noticed and preliminary opinion was given that possibility of sexual intercourse could not be ruled out. Her dried vaginal swab, swab smear, cervical swab smear, cut pubic hair, blood sample, including the clothes of the victim were sent for chemical analysis. The victim was also referred to the Medical Board. The Medical Board found the mental state of PW-11, prosecutrix to be the case of moderate mental retardation and not competent to make statement. The accused was charged under Section 6 of the Act and in the alternative under Section 376 IPC. The matter was investigated and challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 16 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C to which he pleaded not guilty. According to him, he was falsely implicated. He examined two witnesses in defence. The learned Trial Court convicted and sentenced the accused on 11/13.12.2013 under Section 6 of the Act. Hence, the present appeal.

4. Mr. Rajneesh K. Lall, 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, appearing for the State has supported the judgment of the learned trial Court dated 11/13.12.2013.

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

6. PW-1 Neelam Kumari testified that her daughter (name withheld) was 14 years of age. Her date of birth is 3.8.1999. She was mentally retarded. She was simpleton and used to go to school. On 14.4.2013, at about 6:00 AM, they had gone to Mehatpur. Her daughter was all alone at home. They had gone to Mehatpur as their son was operated in the Hospital at Mehatpur. She alongwith her husband came back to village Singan at about 3:00 PM. The victim was not present at home. She was searched in the nearby houses and then she went to the cowshed (Barra) of her neighbourer Gurdev Singh. She found that in the cowshed, the clothes of her daughter were kept aside and her daughter was lying nude. Accused was lying over her and was committing penetrated sexual assault upon the prosecutrix. The accused ran away from the spot. She noticed injuries on the person of prosecutrix. She was brought to the house. The incident was narrated to her Bhabhi (wife of her brother), who in turn advised them to make the complaint to the police. Thereafter, she alongwith her husband and daughter went to the Police Station, Haroli. An application Ext. PW-1/A was given to the SHO, PS Haroli. The daughter was examined by Medical Officer at CHC, Haroli. The doctor also took clothes of her daughter, which she was wearing on the date of occurrence. Her daughter identified the place of occurrence. The police also took photographs on the spot. Her statement was also recorded under Section 164 Cr.P.C. vide Ext. PW-1/B. She identified shirt Ext. P-6, salwar Ext. P-7, undershirt Ext. P-8 and dupatta Ext. P-9. In her cross-examination, she admitted that her daughter could not write properly but despite that she understood all the things. There are about 6-7 houses near

her house. She denied the suggestion that the accused was falsely implicated in connivance with Shashi Bala.

7. PW-2 Sanjeev Kumar is the father of the prosecutrix. He has corroborated the statement of PW-1 Neelam Kumari. According to him also, his daughter is simpleton and mentally retarded. He had gone with his wife on 14.4.2013 to Mehatpur at about 6:00 AM in connection with operation of his son. The prosecutrix was all alone at home. They came back at 3:00 PM. The prosecutrix was missing. His wife had gone to search for her in nearby houses. His wife returned back with the prosecutrix after some time and she disclosed to him that she had seen the accused committing sexual intercourse with his daughter. His daughter was naked at the relevant time. The accused ran away from the spot. Shashi Bala came to their house on the next day. Thereafter, complaint was made to the police. In his cross-examination, he deposed that his son was operated upon at Mehatpur.

8. PW-3 Arjun Singh also deposed that the prosecutrix is mentally retarded.

9. PW-5 Dr. Sonia, has issued MLC Ext. PW-5/B. She, on local examination, found labia minor burised, reddish in colour and tender. Lining of vagina was bruised, reddish in colour, no tear or abrasion was present in lining. Hymen was torn, edges of the tear were congested and swollen. There was pain and tenderness in the vagina. Two fingers could be inserted with difficulty. The probable duration of injuries noticed on the vagina and other parts of the body of the victim was less than 3 days. The injuries mentioned in the MLC could be possible if an adult person commits penetrative sexual assault upon the victim. The victim was referred to Intelligence Quotient Test on 20.4.2013. The report of the RFSL is Ext. PW-5/C. The opinion of the Medical Board is Ext. PW-5/E. She identified the child in the Court.

10. PW-6 Dr. G.S.Didhra, has examined the accused. He issued MLR Ext. PW-5/B. According to him, the accused was potent and was capable of performing sexual act.

11. PW-10 Shashi Bala deposed that the mother of the prosecutrix, Smt. Neelam Kumari disclosed her that accused person has committed sexual intercourse with the prosecutrix on 14.4.2013. Neelam Kumari told her that she has not reported the matter to the police and thereafter upon her advice; the matter was reported to the police. She also deposed that the victim is mentally retarded.

12. PW-11, prosecutrix has deposed that accused had put off his clothes, again said that he had put off her clothes in the room where chaff was stored. The accused made her to lie. The accused did the bad act with her. Thereafter, her mother appeared on the spot. She denied the suggestion in her cross-examination that nothing has happened to her. She denied the suggestion that she was not taken to the room where chaff was stored and accused put off his clothes and her clothes and thereafter did the bad act with her.

13. PW-12 Dr. Sukhjit Singh deposed that the prosecutrix was admitted in the hospital from 29.4.2013 to 2.5.2013 and again on 7.6.2013. She was examined by the Board of doctors on 8.6.2013. She was found to be moderate mental retarded. He proved report Ext. PW-5/E.

14. PW-15 Insp. Mohinder Kumar, deposed that FIR Ext. PW-15/A was registered. On 16.4.2013, the place of occurrence was identified by the prosecutrix and her

mother. Site plan was prepared. The I.Q. Test of the prosecutrix was got conducted. The case property was sent to RFSL, Dharamshala.

15. PW-16 Subhash Chand, Panchayat Secretary has proved the date of birth of the prosecutrix vide certificate Ext. PW-14/A. The date of birth of the prosecutrix was 3.8.1999.

16. The accused has also examined DW-1 Ashwani Kumar. According to him, Sanjeev Kumar was on leave on 13.4.2013. DW-2 Raman Kumar deposed that there was no entry regarding admission of Parveen Kumar son of Sanjeev Kumar of Village Singan. However, in his cross-examination, he admitted that there is another private hospital, namely, Malik Hospital, near their hospital. The ENT specialist used to visit the hospital on Thursday. He also admitted that if the doctor is not available in their hospital, the patients go to the other nearby hospital.

17. PW-1 Neelam Kumari has seen the accused committing rape upon her daughter. The accused ran away after seeing PW-1 Neelam Kumari. The incident has happened on 14.4.2013 and the FIR was registered on 15.4.2013. There is no inordinate delay in registration of the FIR. The matter was discussed by PW-1 Neelam Kumari with PW-10 Shashi Bala, who advised her to lodge the FIR. PW-2 Sanjeev Kumar has also corroborated the statement of PW-1 Neelam Kumari. PW-1 Neelam Kumari and PW-2 Sanjeev Kumar had gone to Mehatpur. They came back at about 3:00 PM. The prosecutrix was missing from home. PW-1 Neelam Kumari had gone in search of her daughter. She was found in the cowshed of Gurdev. She narrated the incident to PW-2 Sanjeev Kumar.

18. PW-5 Dr. Sonia has medically examined the prosecutrix. She has categorically opined that there was evidence of vaginal penetrative assault. She has noticed injuries on the person of prosecutrix. Labia minor were bruised, reddish in colour and tender. Lining of vagina was bruised, reddish in colour. No tear or abrasion was present in lining. Hymen was torn, edges of the tear were congested and swollen.

19. PW-12 Dr. Sukhjit Singh has proved the report Ext. PW-5/E. According to him, it was a case of moderate mental retardation. The prosecutrix has also appeared as PW-11. She has categorically deposed that the accused had put off his clothes and her clothes in the room where chaff was stored. She was made to lie by the accused. The accused did the bad act with her. The date of birth of the prosecutrix is 3.8.1999. She was minor at the time of incident. The accused has committed rape upon a child of 14 years, who was mentally retarded. The accused has taken advantage of her being simpleton. There is no occasion for the family of the prosecutrix to falsely implicate the accused in this case when there is no enmity between the two families.

20. The blood was detected in traces in Ext. 1a (dried vaginal swab). Human blood was also detected on Ext. 2b (salwar of the prosecutrix), though it was found insufficient for blood grouping, as per report Ext. PW-5/C. Thus, the prosecution has proved the case against the accused beyond reasonable doubt.

21. Accordingly, there is no merit in this appeal and the same is dismissed. There is no occasion for this Court to interfere with the well reasoned judgment and order of the learned trial Court dated 11.12.2013 and 13.12.2013.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Sh. Medha Brat & another ... Petitioners

Versus

Land Acquisition Collector (Rly) Una & others ... Respondents

CMPMO No. 450 of 2010
Judgment reserved on : 9.7.2015
Date of Decision : July 30, 2015

Code of Civil Procedure, 1908- Order 1 Rule 10- A petition was filed for seeking enhancement of the amount of compensation and its apportionment – an application for impleadment was filed by the co-sharer which was rejected on the ground that it was filed beyond period of limitation- held, that applicant is a co-sharer and the benefit of petition filed for enhancement will also enure for him - no limitation is prescribed for seeking the apportionment- Court had wrongly rejected the application. (Para- 4 to 13)

Cases referred:

G. H. Grant vs. State of Bihar, AIR 1966 SC 237
Jalandhar Improvement Trust vs. State of Punjab & others, (2003) 1 SCC 526
Sharda Devi vs. State of Bihar & another, (2003) 3 SCC 128
A. Viswanatha Pillai & others vs. The Special Tahsildar For Land Acquisition No. IV & others, (1991) 4 SCC 17
The State of Bihar vs. Parsuram Prasad Verma, AIR 1977 Patna 78
Municipality, Nalgonda vs. Hakeem Mohiuddin & others, AIR 1964 Andhra Pradesh 305
Mt. Skalbhaso Kuer Versus Brijendra Singh and others, AIR 1967 Patna 243
Indraj vs. Sham Lal, AIR 1993 Punjab and Haryana 95

For the petitioner : Mr. Ashok Kumar Sood, Advocate, for the petitioners.
For the respondent : Mr. R. S. Verma, Addl. Advocate General for respondents No.1 and 3.
Mr. Rahul Mahajan, Advocate, for respondent No.2.
Mr. H. K. Bhardwaj, Advocate, for respondents No. 4(i) to 4(iii).

The following judgment of the Court was delivered:

Sanjay Karol, J.

The issue which arises for consideration in the present petition is as to whether a co-sharer, raising an issue of apportionment of the amount of compensation, can be impleaded as a party after a period of three years of filing of a composite petition by another co-sharer, under the provisions of Sections 18 and 30 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act).

2. Undisputedly, Amba Dutt and Rudar Dutt filed the said composite petition seeking (i) enhancement of the amount of compensation so determined by the Collector (Land Acquisition) and (ii) apportionment of the amount received by party respondent Smt. Bimla Devi. Allegedly amount belonging to the reference petitioners and *inter alia* Medha

Brat, Dev Brat and Ratni Devi, successors-in-interest of Jagat Ram (hereinafter referred to as the applicants) was wrongly received by her in excess of her share holding.

3. Such application for impleadment filed by the applicants stands rejected by the Court below vide impugned order dated 7.9.2010, passed in CMA No. 189 of 2010, titled as *Medha Brat & others vs. Land Acquisition Collector (Railway) & others*, for the reason that the share of the owners is distinct and specific and the application having been filed beyond the statutory period of limitation, was not maintainable.

4. There is no dispute that the land, jointly owned by the parties herein, stood acquired in terms of common award passed by the Collector (Land Acquisition). It is also not in dispute that the applicants did not seek any reference under the provisions of Section 18 of the Act. Only during the pendency of the composite Reference Petition and that too after a period of three years, did they file an application for impleadment, specifically pleading that even though benefit of the enhanced compensation, if any, as a co-owner, would enure to them, but however since their interest is joint and indivisible, only for proper adjudication of the controversy and to avoid multiplicity of litigation, they be impleaded as a party.

5. The Hon'ble Supreme Court of India in *G. H. Grant vs. State of Bihar,* AIR 1966 SC 237, has held that the dispute inter se the owners, as to their conflicting claims of money is clearly a dispute required to be referred to and adjudicated under the provisions of Section 30 of the Act.

6. The Hon'ble Supreme Court of India in *Jalandhar Improvement Trust vs. State of Punjab & others,* (2003) 1 SCC 526, has also held that the benefit of enhancement of compensation in a Reference Petition filed under Section 18 of the Act, would also enure to the co-owners. No differential treatment can be accorded to the co-owners in view of the statutory provisions.

7. The Hon'ble Supreme Court of India in *Sharda Devi vs. State of Bihar & another,* (2003) 3 SCC 128, while drawing comparative difference between the provisions of Sections 18 and 30 of the Act, has held that even though there is a limitation prescribed for seeking reference under Section 18 of the Act, however, no limitation is provided for seeking a reference under Section 30 of the Act. Also reference under Section 18 can be sought only by a "person interested", whereas, Section 30 does not postulate any such restriction.

8. The Hon'ble Supreme Court of India in *A. Viswanatha Pillai & others vs. The Special Tahsildar For Land Acquisition No. IV & others,* (1991) 4 SCC 17, has further held that co-owner is as much as owner of the entire property as sole owner of the property. No co-owner has different right, title and interest in any particular item or portion thereof. On the other hand he has right, title and interest in every part and parcel of the joint property. He compositely owns the property and is entitled to receive the compensation pro rata as an owner.

9. Thus, in view of the aforesaid exposition of law, one is of the considered view that the court below committed an illegality in dismissing the application. Court below totally lost sight of the fact that the petition so filed was composite in nature and in any case claimants as co-sharers, were otherwise entitled to the benefits of the enhanced amount of compensation, if any. Crucially reference petitioners were themselves seeking re-determination of the amount of compensation, belonging to them as also the applicants, which was wrongly received by party respondent Smt. Bimla Devi. In this backdrop the issue of limitation pales into insignificance.

10. Reliance placed upon the decisions rendered in *The State of Bihar vs. Parsuram Prasad Verma,* AIR 1977 Patna 78 and *Municipality, Nalgonda vs. Hakeem Mohiuddin & others,* AIR 1964 Andhra Pradesh 305, by Mr. H. K. Bhardwaj, learned counsel, is misconceived in view of the law laid down by Hon'ble the Supreme Court of India in *G.H. Grant* (supra) so relied upon by him.

11. There is nothing on record to establish that interest of the co-owners is distinct.

12. While taking the view in favour of the applicants, I am fortified by the decisions rendered by the Division Bench of High Court of Patna in *Mt. Skalbhaso Kuer Versus Brijendra Singh and others,* AIR 1967 Patna 243 as also the Division Bench of High Court of Punjab & Haryana as reported in *Indraj vs. Sham Lal*, AIR 1993 Punjab and Haryana 95, wherein it is held that:

> "11. ....
>
> The words underlined indicate that the learned Judge was of the opinion that the person who had not pressed for his claim before the Collector could not ask the reference Court to implead him as party to the reference. While making these observations, the learned Judge did not appreciate that no period is prescribed for getting a reference made under Section 30 of the Act. A person who has not appeared in acquisition proceedings before the Collector can raise a dispute with regard to apportionment of compensation or relating to the person whom it is payable and apply to Collector for reference under Section 30 for determination of his right to compensation which may have existed before the award or which may have devolved upon him since the award and there is no limitation for making such an application, meaning thereby that the Collector can make more than one reference relating to apportionment to the Court. If the Collector can make more than one reference, it will be unjust to refuse permission to a party to join as a party to the reference. He may succeed in establishing his right to apportionment or may place the matter before the Court which may enable the Court to effectively and completely adjudicate the question of apportionment of compensation. The learned Judge also did not invite his attention to O. 1, R. 10(2) of the Code, which provision is obviously applicable to the proceedings before the reference Court. These provisions enable the reference Court to add a person as party if his presence is considered necessary or proper for the proper adjudication of the dispute before it. Moreover, as observed in the earlier part of the judgment, the reference under S. 30 of the Act is really in the nature of interpleader suit and if that is so, if person prima facie establishes that he has a right which requires examination, it will be unjust not to implead him as a party to the reference." ... ...

13. Section 53 of the Act makes the provisions of the Code of Civil Procedure applicable, hence the court below ought to have allowed the application. Endeavour ought and should have been to curtail all future litigation, *inter se*, the "persons interested". Applicants, in the given facts and circumstances, being absolutely necessary and proper parties were required to be impleaded. The court totally lost sight of the fact that it was dealing with a composite petition and not the one filed only under the provisions of Section 18 of the Act. Applicants had every right to be impleaded as parties for just decision of the

controversy in issue with regard to the apportionment of the amount so determined by the Collector (Land Acquisition) and the additional enhanced amount, if any. Impleadment is necessary for proper and effective adjudication of the controversy, which would also avoid multiplicity of litigation, is in the interest of the parties and would definitely meet the ends of justice.

14. As such, petition is allowed and impugned order dated 7.9.2010, passed in CMA No. 189 of 2010, titled as Medha Brat & others vs. Land Acquisition Collector (Railway) & others, is quashed and set aside. Application for impleadment so filed by Medha Brat, Dev Brat and Ratni Devi stands allowed and the applicants are also impleaded as petitioners in Land Reference Petition No. 48 of 2009.

15. Since the matter is old, hearing is expedited. Endeavour shall be made to decide the petition within a period of one year. Parties are directed to appear before the Court below on 20.8.2015. Petition stands disposed of accordingly, so also the pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

CWP No. 2722 of 2015 a/w
CWPs No. 2786 & 2883 of 2015
Reserved on: 23.07.2015
Decided on: 30.07.2015

CWPs No. 2722 & 2883 of 2015

Sh. Rajender Kumar Arora ...Petitioner(s).

Versus

State of Himachal Pradesh & others ...Respondents.

.....

CWP No. 2786 of 2015

O.P. Shama ...Petitioner.

Versus

State of Himachal Pradesh & another ...Respondents.

Constitution of India, 1950- Article 226- Petitioners were transferred- they filed an application before the Administrative Tribunal which was dismissed- a fresh order of transfer was passed during the pendency of the petition- held that it was not averred in the writ petition that transfer orders were outcome of Malice or malafides- petition dismissed.

(Para 3-12)

CWP No. 2722 of 2015

For the petitioner: Mr. Lovneesh Kanwar, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2.

Mr. Dilip Sharma, Senior Advocate, with Mr. Sanjeev Bhushan & Ms. Nishi Goel, Advocates, for respondent No. 3.

.....

CWP No. 2786 of 2015

For the petitioner: Mr. Dilip Sharma, Senior Advocate, with Mr. Sanjeev Bhushan & Ms. Nishi Goel, Advocates.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, and Mr. J.K. Verma, Deputy Advocate General, for respondent No. 1.

Mr. Lovneesh Kanwar, Advocate, for respondent No. 2.

.....

CWP No. 2883 of 2015

For the petitioner: Mr. Saurav Rattan, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2.

Mr. Dilip Sharma, Senior Advocate, with Mr. Sanjeev Bhushan & Ms. Nishi Goel, Advocates, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

The State-Department of Public Works had issued an order of transfer, dated 28.04.2015, whereby Shri Rajender Kumar Arora came to be transferred and posted as Superintending Engineer (Elect.) Second Circle, HPPWD, Dharamshala and Shri O.P. Shama was promoted as Superintending Engineer (Elect.) and was posted as such at First Circle, HPPWD, Kasumpti, Shimla, was subject matter of Original Application No. 739 of 2015, titled as Shri Rajender Kumar Arora versus State of H.P. and others, before the H.P. State Administrative Tribunal (for short "the Tribunal"). Learned Tribunal dismissed the said Original Application vide judgment and order, dated 30.04.2015, while saddling both the officers with costs quantified at Rs.10,000/- each.

2. Both the officers, feeling aggrieved by the said judgment and order, have questioned the same by the medium of CWPs No. 2722 and 2786 of 2015.

3. Thereafter, the department issued a fresh order of transfer, dated 22.05.2015, made by the Additional Chief Secretary (PW) to the Government of Himachal Pradesh, whereby Shri Rajender Kumar Arora came to be transferred and posted as Superintending Engineer (Elect.) Second Circle, HPPWD, Dharamshala and Shri O.P. Shama, on promotion as Superintending Engineer (Elect.), came to be posted at First Circle, HPPWD, Kasumpti, Shimla, which is subject matter of CWP No. 2883 of 2015.

4. Learned Advocate General, while submitting his arguments, stated that the State, in its wisdom, is of the view that the service of Shri O.P. Shama can be suitably utilized at First Circle, Kasumpti, Shimla whereas the services of Shri Rajender Kumar Arora can be utilized in his best capacity at Dharamshala and it is the prerogative of the State to make transfer orders. Further argued that both the officers are A-class officers, so they cannot seek their posting at the places of their choice.

5. In para 3 of the preliminary objections, the State-respondents have stated that Shri O.P. Shama was born on 15.06.1958 and shall retire from government service on 30.06.2016 whereas the date of birth of Shri Rajender Kumar Arora is 06.03.1959 and shall be retiring from the government service on 31.03.2017, i.e. after nine months' from the date of retirement of Shri O.P. Shama, and this was also one of the criterion for posting Shri O.P. Shama at First Circle, Kasumpti, Shimla.

6. It is apt to reproduce paras 3 to 5 of the preliminary objections in the reply filed by respondent-State in CWP No. 2786 of 2015 herein:

> *"3. That the date of birth of Respondent No. 2 is 6.3.1959 as such he shall retire from Govt. service on 31.3.2017 but that of the petitioner is 15.6.1958 and he shall retire from Government service on 30.6.2016 i.e. 9 months earlier to the petitioner.*
>
> *4. That the Hon'ble Court has also granted stay on order dated 28.4.2015 qua the petitioner with th observation that it shall be open for the respondent-State to transfer respondent No. 3 as per observations made in order dated 30.4.2015 by the learned Himachal Pradesh Administrative Tribunal. The matter was considered and the order dated 22.5.2015 (Annexure P-4) was issued as the respondent Department has only two posts of Superintending Engineer*
>
> *(Electrical) i.e. one at Shimla and other at Dharamshala. The said order dated 22.5.2014 has also been stayed by this Hon'ble Court vide order dated 5.6.2015 in CWP No. 2883/2015 so filed by Respondent No. 2 as such this petition deserves to be clubbed & jointly decided with other two writ petition Nos. 2722/2015 and 2883/2015 so fled by Respondent No. 2.*
>
> *5. That it is well settled position regarding transfer of Government servant that no Government employee can claim his transfer or posting as a matter of right. It is the prerogative of the State of Govt. to post/transfer any employee anywhere in the State keeping in view the administrative exigency. An order of transfer is an incident of Government service as the government servant is at the disposal of the Government which pays him and he may be employed where ever required by the competent authority."*

7. We have gone through all the writ petitions. Shri Rajender Kumar Arora has not averred in any of the writ petitions that the transfer orders made are outcome of malice or mala fides and no officer has been arrayed as party-respondent in the array of respondents in his personal capacity.

8. The State-respondents have specifically stated that they are not in a position to comply with the directions issued by the learned Tribunal for the reason that no such cadre post is available in the tribal areas. No fault can be found with the transfer order made on 22.05.2015, which is subject matter of CWP No. 2883 of 2015.

9. The writ petitions filed by Shri Rajender Kumar Arora and Shri O.P. Shama whereby they have challenged the order made by the learned Tribunal, i.e. CWPs No. 2722 and 2786 of 2015, have become infructuous in view of the transfer order made by the State, which is subject matter of CWP No. 2883 of 2015.

10. The moot question is - whether A-class officers can question the decision of the Government qua their transfers on the grounds taken in the writ petitions. We are of the considered view that no such ground is available to Shri Rajender Kumar Arora, who has not yet vacated the residential accommodation at Dharamshala from the date when he was transferred from Dharamshala to Shimla, vide transfer order, dated 28.11.2014.

11. Keeping in view the averments contained in the writ petitions read with the stand taken by the State and the discussions made hereinabove, no case for interference is made out.

12. In the given circumstances, the order, dated 30.04.2015, made by the learned Tribunal in Original Application No. 739 of 2015 so far as it relates to imposing of costs is set aside and the writ petitions are disposed of, as indicated hereinabove, alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Sanjeev Aggarwal .....Appellant

Versus

The Regional Manager, State Bank of India and others. ...Respondents.

LPA No. 126 of 2007
Judgment reserved on 23.7.2015
Date of decision: 30th July, 2015.

Constitution of India, 1950- Article 226- Appellant was appointed as Clerk-cum-Cashier- he remained absent from duty and was treated to have voluntary retired from the service - reference was made to the Industrial Tribunal which upheld the action of the management of voluntary retirement- clause XVI of the Memorandum of Settlement provided that the management has to record satisfaction that the employee had no intention to join duties and if the employee fails to report for duty within 30 days of the receipt of the notice or fails to tender explanation for his absence satisfying the management that he had not taken any other employment, employee was deemed to have voluntary retired from the service- Tribunal and the Single Judge had not noticed this clause- management had also not conducted any inquiry- award quashed and the matter remanded to the Tribunal to decide the same afresh. (Para-11 to 27)

Cases referred:

Syndicate Bank versus General Secretary, Syndicate Bank Staff Association and another (2000) 5 SCC 65

Viveka Nand Sethi versus Chairman, J& K Bank Ltd. And others (2005) 5 SCC 337

Vijay S. Sathaye versus Indian Airlines Limited and others (2013) 10 SCC 253

For the appellant: Mr.Onkar Jairath, Advocate.
For the respondents: Mr.Anand Sharma, Advocate, for respondent No.1.
Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Ajay Chauhan, Advocate, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This Letters Patent Appeal is directed against the judgment and order dated 28.5.2007, passed by the learned Single Judge of this Court in CWP No. 1775 of 2002 titled *Sanjeev Aggarwal versus Regional Manager S.B.I. and others,* whereby the writ petition came to be dismissed, for short "the impugned judgment."

2. The appellant has questioned the impugned judgment on the grounds taken in the memo of appeal.

3. In order to determine the controversy, it is necessary to give brief facts of the case which have given birth to the instant appeal.

4. It appears that appellant was appointed as Clerk-cum-Cashier by the bank-respondent No.1 herein in December, 1983, remained absent from duty and was treated to have voluntary retired from the service of the bank-respondent No. 1 with effect from 7.8.1988.

5. A dispute was raised by the appellant and reference was made by the concerned authorities dated 4.12.1990, the details of which are given in the award made by the Central Government Industrial Tribunal-cum-Labour Court, dated 16.7.2002, hereinafter referred to as "the Tribunal", for short,. The Tribunal entered into the reference. The appellant filed statement of claim wherein he has pleaded and averred that he fell sick in the month of August, 1988 and was constrained to go on leave, submitted the leave application alongwith medical certificates. Thereafter he was declared fit to resume duties by the doctor and accordingly on 25.3.1989, he was on his way to report duty but met with an accident and he informed the Branch Manager about the said accident and sent leave application, was advised by the doctor bed rest from 24.3.1989 to 4.6.1989. He submitted all the applications and documents alongwith leave application to the bank authorities and reported back on 5.6.1989 but he was not allowed by the bank to join duty and he was told that he has been treated as having voluntarily retired from the service in terms of the provisions of Bipartite Settlement and as per the rules occupying the field.

6. The bank authorities-management also filed counter to the statement of claim filed by the appellant, details of which are given in para 3 of the award.

7. The Tribunal, after examining the reference, pleadings and evidence adduced by both the parties mention of which is made in para 4 of the award, held that the action of the management was legal one and upheld the voluntary retirement of the appellant from the service w.e.f. 7.8.1988.

8. Feeling aggrieved, the appellant has questioned the impugned award by the medium of Civil Writ Petition No.1775 of 2002, which came to be dismissed vide impugned judgment dated 28.5.2007 referred to above.

9. We have heard the learned counsel for the parties.

10. Following questions arise for determination in this appeal.

(i) Whether the order of the Bank-respondent No.1 treating the appellant as voluntary retired from the service of the bank w.e.f. 7.8.1988 in terms of the Bipartite settlement, is legally correct?

(ii) Whether the bank-respondent No.1 had applied and complied with the mandate of the said Bipartite Settlement?

(iii) Whether, without conducing an inquiry, the order of voluntary retirement can be said to be a legal and valid order, in the eyes of law?

11. In order to answer these questions, it is necessary to reproduce the relevant portion of clause XVI of the Memorandum of Settlement dated 17th September, 1984 between the Managements of 55 'A' Class Banks as represented by the Indian Banks' Association and their workmen as represented by the All India Bank Employees' Association and the National Confederation of Bank Employees herein.

"XVI.VOLUNTARY CESSATION OF EMPLOYMENT BY THE EMPLOYEES:

In supersession of clause 2 of the Settlement dated 8th September, 1983 the following shall apply:-

Where an employee has not submitted any application for leave and absents himself from work for a period of 90 or more consecutive days without or beyond any leave to his credit or absents himself for 90 or more consecutive days beyond the period of leave originally sanctioned or subsequently extended or where there is satisfactory evidence that he has taken up employment in India or the management is satisfied that he has not present intention of joining duties, the management may at any time thereafter give a notice to the employee's last known address calling upon the employee to report for duty within 30 days of the notice, stating, inter alia, the grounds for the management coming to the conclusion that the employee has no intention of joining duties and furnishing necessary evidence, where available. Unless the employee reports for duty within 30 days or unless he gives an explanation for his absence satisfying the management that he has not taken up another employment or avocation and that he has no intention of not joining duties, the employee will be deemed to have voluntarily retired from the bank's service on the expiry of the said notice. In the event of the employee submitting a satisfactory reply, he shall be permitted to report for duty thereafter within 30 days from the date of the expiry of the aforesaid notice without prejudice to the bank's right to take any action under the law or rules of service……."

[Emphasis added]

12. The aforesaid clause of the Bipartite Settlement mandates how an employee of the bank can be said to have voluntary retired from the service and what is the procedure to be followed by the Bank authorities.

13. The aforementioned clause of the Bipartite Settlement mandates that the management has to record satisfaction and has to come to the conclusion that the employee has no intention to join duties and if an employee fails to report for duty within 30 days of the receipt of the notice or fails to tender explanation for his absence satisfying the management that he has not taken any other employment and that he had no intention to join duty in that eventuality, the said employee shall be deemed to have been voluntary retired from service on the expiry of the said notice. Meaning thereby, that in all the cases, as given in clause XVI of the Bipartite Settlement, reproduced hereinabove, the management has to record satisfaction and come to the conclusion that the employee has no intention to join duty.

14. The Tribunal has not discussed the mandate of clause XVI of the Bipartite Settlement, referred to above, in the award and even it has not been discussed by the learned Single Judge in the impugned judgment. It is apt to reproduce para 5 of the award herein:

> *"5. I have heard the representatives of the parties and have also gone through the evidence and record of the case. The learned counsel for the applicant has argued that the bank has not conducted any enquiry against the applicant regarding his absence and wrongly treated him as voluntarily abandoned the services of the bank. The action of the bank is in clear violation of the principle of natural justice. The counsel for the workman has further argued that the management has not given any notice of one month or pay in lieu thereof and nor any retrenchment compensation was paid by the bank to the applicant at the time of termination of service and as such non compliance of the mandatory provisions of Section 25-F, it amounts to termination. For his arguments, he has relied on the judgment of Hon'ble Supreme Court in the case of Uptron India Ltd. Vs. Shammi Bhan reported in AIR 1998 SC page 1681. On the other hand learned counsel for the management has argued that the applicant himself chose not to join the bank and remained unauthorisidely absent from the bank. As the workman himself remained absent from 8.8.1989 to 25.3.1989, he chose to send the leave application alongwith medical certificate to the bank only on 5.5.1989, i.e., much after when he was treated by the bank as voluntarily retired from the service. I have gone through the documents prescription slip Ext. M2, medical certificate dated 25.3.1989 Ext. M2/1 and medical certificate Ext. M3 which is dated 10.4.1989. The applicant also relied on the postal receipt which is apparently dated 3.5.1989 bearing Ambala stamp, meaning thereby that the letter itself was posted from Ambala on 3.5.1989 and reached the Branch manager Taruwala on 5.5.1989. Thus, it is amply clear that the applicant after receiving the letter from the bank retiring him voluntarily from*

the service of the bank w.e.f. 8.8.1988 he got prepared the medical certificate in the back date and just to cover the period he sent the letter which was received by the bank on 5.5.1989. The representative of the management also relied on the judgment of Hon'ble Supreme Court of India in the case of Syndicate Bank vs. The General Secretary Syndicate Bank Staff Association and another reported in RSJ 2000 (2) in which it has been held by the Hon'ble Supreme Court that the order passed by the bank after expiry of notice that he had voluntarily retired from the service of the bank, there is no necessity for the bank to hold enquiry as the workman himself defaulted and did not report for the duty within the prescribed period required under the Bipartite Settlement. It is admitted position that the bank had issued letters to the workman on the address which is correct and it is presumed that these letters were issued at the correct address of the applicant and received by him and he himself chose not to attend the duties of the bank. Thus relying on the judgment of the Hon'ble Supreme Court in the syndicate Bank's case, it is held that the bank is not under any obligation to hold departmental enquiry against the workman and there was no necessity for the bank to comply with the provisions of section25-F of the I.D. Act 1947."

15. While going through the reasons given in para 5 of the award, one comes to an inescapable conclusion that the Tribunal has held that the appellant has abandoned his service voluntarily thus, the action of the management treating the appellant to have voluntary retired, is in accordance with law but, it has not discussed clause XVI, supra, which deals with voluntary retirement of an employee from service.

16. Even the learned Single Judge has not discussed this aspect in the impugned judgment, as stated supra, but what the learned Single Judge has recorded in the impugned judgment is that the Tribunal has discussed in details that there was no need to conduct enquiry and it is not the case of violation of principles of natural justice. The learned Single Judge has not discussed the aspect whether the bank authorities had followed the mandate of clause XVI of the Bipartite Settlement.

17. Mr. Anand Sharma, learned counsel for respondent No.1 was asked to show whether there is any proof on the record to the effect that the management has recorded the satisfaction? He had sought adjournment on 2.7.2015. He produced the copies of documents, i.e., notices and they were taken on record, commencing from pages 331 to 335 of the paper-book, which form part of the LPA. He has also produced the copy of Memorandum of Settlement which starts from page 282. The relevant portion is at page 293 which has been reproduced hereinabove.

18. While going through the notices, it is nowhere recorded in the notices that on 26.10.1988, 23.1.1989, 22.4.1989 and 9.5.1988, the bank authorities have recorded its satisfaction.

19. As discussed hereinabove, the bank-respondent No.1 had to follow the procedure showing the door to the employee in terms of clause XVI referred to supra. It was

mandatory on the part of the management to record satisfaction that the employee is absent, he has no intention to resume duty, has taken some other job and in the notices, it was to be conveyed to him that all these conditions have been satisfied. Thereafter, if he fails to offer explanation, in that eventuality, it can be said that he is deemed to have been retired voluntary from service from the effective date. But that is not the case here at all.

20. Admittedly, the management has not conducted any enquiry, in order to hold that he has been willfully absent from duty which, in normal course or cases, other departments do.

21. The apex Court in ***Syndicate Bank versus General Secretary, Syndicate Bank Staff Association and another*** reported in ***(2000) 5 SCC 65*** had discussed the principles how an employee can be said to have voluntarily retired from the service. It is apt to reproduce paras 15 and 18 of the said judgment herein.

> *"15. In the present case action was taken by the Bank under Clause 16 of the Bipartite Settlement. It is not disputed that Dayananda absented himself from the work for a period of 90 or more consecutive days. It was thereafter that the Bank served a notice on him calling upon to report for duty within 30 days of the notice stating therein the grounds for the Bank to come to the conclusion that Dayananda had no intention of joining duties. Dayayanda did not respond to the notice at all. On the expiry of the notice period Bank passed orders that Dayananda had voluntarily retired from the service of the Bank.*
>
> *16-17..... ....*
>
> *18.The Bank has followed the requirements of Clause 16 of the Bipartite Settlement. It rightly held that Dayananda has voluntarily retired from the service of the Bank. Under these circumstances it was not necessary for the Bank to hold any inquiry before passing the order. An inquiry would have been necessary if Dayananda had submitted his explanation which was not acceptable to the Bank or contended that he did report for duty but was not allowed to join by the Bank. Nothing of the like has happened here. Assuming for a moment that inquiry was necessitated, evidence led before the Tribunal clearly showed that notice was given to Dayananda and it is he who defaulted and offered no explanation of his absence from duty and did not report for duty within 30 days of the notice as required in Clause 16 of the Bipartite Settlement."*

22. The ratio laid down in para 15 of the judgment supra, squarely covers the facts as projected in the present case.

23. The apex Court in another case titled ***Viveka Nand Sethi versus Chairman, J& K Bank Ltd. And others*** reported in ***(2005) 5 SCC 337*** has also laid down the same principles. It is apt to reproduce para 14 of the judgment herein.

> *"14.What fell for consideration before the industrial Tribunal was the interpretation and/or applicability of the said Settlement. The Industrial Tribunal committed an error of*

record insofar as it proceeded on the basis that the said Settlement had not been proved. The Settlement being an admitted document should have been considered in its proper perspective by the Industrial Tribunal. Clause (2) of the said Settlement is a complete code by itself. It lays down a complete machinery as to how and in what manner the employer can arrive at a satisfaction that the workman has no intention to join his duties. A bare perusal of the said Settlement clearly shows that it is for the employee concerned to submit a proper application for leave. It is not in dispute that after the period of leave came to an end in June 1983, the workman did not report back for duties. He also did not submit any application for grant of further leave on medical ground or otherwise. It is in that situation the memorandum dated 2.11.1983 was issued and he was asked to joint his duties. It is furthermore not in dispute that despite receipt of the said memorandum, the workman did not join duties pursuant whereto he was served with a notice to show cause dated 31.12.1982. He was required to resume his duties by 15.1.1984. The bank received a telegram on 17.1.1984 and only about a month thereafter he filed an application for grant of leave on medical ground. It is not the case of the workman that any leave on medical ground or otherwise was due to him. Opportunities after opportunities indisputably had been granted to the workman to explain his position but he chose not to do so except filing applications for grant of medical leave and that too without annexing proper medical certificates."

24. The apex Court in case titled ***Vijay S. Sathaye versus Indian Airlines Limited and others*** reported in ***(2013) 10 SCC 253***, also laid down the similar principles of law. It is profitable to reproduce para 15 of the said judgment herein.

"15.In Buckingham and Carnatic Co. Ltd. v. Venkatiah & Anr., 1964 AIR(SC) 1272 while dealing with a similar case, this Court observed :

"Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf."

A similar view has been reiterated in G.T. Lad & Ors. v. Chemicals and Fibres India Ltd., 1979 AIR(SC) 582."

25. Having said so, the Tribunal has fallen in an error in not deciding the reference in its right perspective and has failed to decide the reference in terms of Clause XVI of the Bipartite Settlement, referred to supra.

26. In view of the foregoing discussion and applying the ratio laid down in the judgments of the Supreme Court referred to above, the impugned judgment needs to be set aside and the award needs to be quashed with direction to the Tribunal to decide the matter afresh.

27. As a corollary, the impugned judgment is set aside and the award made by the Tribunal is quashed. The Tribunal is directed to decide the matter afresh within two months from 1.8.2015. Parties are directed to appear before the Tribunal on **1st August, 2015.**

28. The questions are answered accordingly and the appeal is disposed of, alongwith pending applications if any.

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

Cr. Appeal No. 4139 of 2013 with Cr. Appeal Nos. 4173, 4197 of 2013 & 283 of 2014.
Reserved on: July 30, 2015.
Decided on: July 31, 2015.

1. Cr. Appeal No. 4139 of 2013

Hem Raj .....Appellant.

Versus

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

2. Cr. Appeal No. 4173 of 2013

Ravinder Kumar alias Ravi & ors. .....Appellants.

Versus

State of H.P. .....Respondent.

3. Cr. Appeal No. 4197 of 2013

Sanjeev Kumar .....Appellant.

Versus

State of H.P .....Respondent.

4. Cr. Appeal No. 283 of 2014

Pane Ram .....Appellant.

Versus

State of H.P .....Respondent.

Indian Penal Code, 1860- Sections 341, 323, 506, 427, 147, 148, 149, 364, 302 and 201 of IPC and **Indian Arms Act, 1959**- Section 25- Complainant along with 'P' and 'K' was travelling in the vehicle - when they reached near Jhiri Rafting point- they stopped their vehicle - some boys came in front of their vehicle and started dancing- they wrongfully restrained the complainant and another person and gave them beatings- 'H' took the vehicle towards Kullu but his vehicle was chased by accused- 'H' was brought to the rafting point where one boy attacked 'H' with sword- 'H' ran towards river and hid himself in the bushes- 'H' succumbed to his injuries subsequently- Medical Officer had noticed the injuries which were grievous and dangerous to life, these could have been caused by piercing sword in thigh and other injuries could have been noticed by kick and fist blows- accused had made a disclosure statement on which a sword was recovered- it had human blood as per report of FSL - the eye-witnesses had deposed about the quarrel- accused had formed an unlawful assembly with common object and had committed murder of 'H'- presence of accused as

part of unlawful assembly is sufficient to convict him- accused had given sword blow on the thighs which shows that accused had no intention to kill the deceased- otherwise he would chosen a vital part, hence, the case of the accused would fall under Section 304-II of IPC.

(Para- 23 to 34)

Cases referred:

State of West Bengal vrs. Mir Mohammad Omar and others etc. etc., AIR 2000 SC 2988
Lalji and others vrs. State of U.P., (1989) 1 SCC 437
Kaki Ramesh and others vrs. State of A.P., (1994) 4 SCC 397
Ranbir Yadav vrs. State of Bihar, (1995) 4 SCC 392
Yunis alias Karia etc. vrs. State of Madhya Pradesh, AIR 2003 SC 539
Amerika Rai and others vrs. State of Bihar, (2011) 4 SCC 677
Waman and others vrs. State of Maharashtra, (2011) 7 SCC 295

For the appellant(s): M/S. J.L.Bhardwaj, Anup Chitkara and Vivek Sharma, Advocates for respective appellants.
For the respondent/State: Mr. Ramesh Thakur, Asstt. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since all the appeals have arisen from a common judgment, the same were taken together for hearing and are being disposed of by a common judgment.

2. These appeals are directed against the common judgment and order dated 3.8.2013 & 20.8.2013, respectively, rendered by the learned Addl. Sessions Judge(I), Mandi, H.P., in Sessions Trial No. 28 of 2011, whereby the appellants-accused (hereinafter referred to as "accused"), who were charged with and tried for offences punishable under Sections 341, 323, 506, 427, 147, 148, 149, 364, 302 and 201 IPC and Section 25 of Arms Act, each of them were convicted and sentenced to undergo sentence for life imprisonment and to pay fine of Rs. 5,000/- for the offence under Section 302 read with Section 149 IPC; simple imprisonment for one year and fine of Rs. 1,000/- each for offence under Section 148 IPC read with Section 149 IPC; simple imprisonment for six months under section 341 IPC read with section 149 IPC; simple imprisonment for ten years and fine of Rs. 1,000/- each for offence under section 364 IPC read with Section 149 IPC; simple imprisonment for two years under Section 506 read with Section 149 IPC. Accused Hem Raj was also sentenced to undergo simple imprisonment for three months and to pay fine of Rs. 500/- for the offence under Section 25 of the Arms Act. In the case of default of payment of fine, each of the accused was further ordered to undergo simple imprisonment for six months. The substantive sentences were ordered to run concurrently. The period of detention undergone by each of the convict was set off as per the provisions of Section 428 Cr.P.C.

3. The case of the prosecution, in a nut shell, is that on 14.7.2011, information was given by unknown person to the Police Station Aut, to the effect that a quarrel was going on at place rafting point at Jhiri. The police went to the spot. HC Raj Mal, recorded the statement of the complainant Ravi Kumar son of Daya Nand. According to the complaint, on 14.7.2011, he alongwith Parvesh Kumar and Kala-Hunny came from Vor Majara from the house of Hunny in his vehicle bearing registration No. HR-12-R-5533 in the morning at 3:00 AM. At 2:00 PM, when they reached near Jhiri Rafting point, they stopped

their vehicle and some boys came in front of their vehicle and started dancing. They wrongfully restrained them and gave them beatings. Hunny took the vehicle towards Kullu and thereafter his vehicle was chased by accused persons in vehicle No. HP-33-T-9658, in which 4-5 persons were sitting. They brought back Hunny alongwith his vehicle to Rafting point, where one boy attacked Hunny with sword. Hunny ran towards river and they remained hiding in the bushes. FIR No. 99/11 dated 14.7.2011 was registered for the offence under Sections 341, 323, 506 read with Section 34 IPC. Accused Sarvan Kumar, Sanjeev Kumar and Ravinder Kumar were arrested on 14.7.2011 at Jhiri. Hunny succumbed to his injuries in R.S. Hospital, Kullu. The post mortem was got conducted. The investigation was completed and the challan was put up after completing all the codal formalities.

4. The prosecution, in order to prove its case, has examined as many as 20 witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution case. According to them, they were falsely implicated. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, these appeals on behalf of the accused persons.

5. M/S. J.L.Bhardwaj, Anup Chitkara and Vivek Sharma, Advocates for the respective accused, have vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Ramesh Thakur, learned Asstt AG, for the State has supported the judgment of the learned trial Court dated 3/20.8.2013.

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

7. PW-1 Dr. R.M.Gautam has conducted the medical examination of Hunny son of Balraj on 14.7.2011. He noticed the following injuries on his person:

> "1. Stab injury on the left thigh 10 cm above knee joint through and through posterior to anterior object caused by sharp weapon.
>
> 2. Patient complained of pain in the abdomen. Focus abdominal sonography for trauma showed minimum fluid collection in right hepatorenal pouch."

According to his opinion, the injuries were grievous and dangerous to life. He issued MLC Ext. PW-1/B. According to his final opinion, the patient died due to excessive bleeding leading to hemorrhagic shock, injury to intestines and hypothermia. In his cross-examination, he deposed that the patient was not in a position to walk or talk. The loss of blood was to the extent of two liters. One large artery and 2-3 adjoining veins were also cut.

8. PW-2 Ganga Ram deposed that Dr. Nidhi Sharma had sealed the clothes, namely, jean pant, shirt and undershirt of Hunny in his presence in a cloth parcel with seal 'BEMCO' on 14.7.2011. These were handed over to the police vide memo Ext. PW-2/A.

9. PW-4 Mani Devi deposed that she went to the spot alongwith Patwari Hem Singh, police, Sanjay and Hem Raj on 17.7.2011. The place was identified by Sanjay and Hem Raj.

10. PW-5 Hem Singh has issued copies of jamabandi Ext. PW-5/D and Ext. PW-5/E. The police had picked up blood from the stones and grass (moss) with the help of

cotton and water vide seizure memo Ext. PW-5/A. He also prepared the spot map vide Ext. PW-5/B and PW-5/C.

11. PW-7 Dr. Rakesh Thakur has conducted the post mortem of the deceased on 15.7.2011 at 2:00 PM. According to him, injury No. 1 was incised wound on left side thigh and injury No. 2 was incised wound on left thigh posterior aspect at lower 1/3rd. In their opinion, the person died due to excessive blood loss leading to shock and death. The time between injury and death was 10-12 hours and between death and postmortem was 12 hours. The post mortem report is Ext. PW-7/B. An application vide Ext. PW-7/C was filed for seeking his opinion whether the injury noticed by them could be caused by weapon of offence. According to him, the injuries mentioned in the report were possible with the sword shown to him. In his cross-examination, he deposed that the injury noticed by him was ante mortem and operative injury. He has noticed two incised wounds on the thighs.

12. PW-8 HHC Suresh Kumar deposed that a vehicle bearing regn. No. HR-12-R 5533 was parked on the spot. It was damaged. There were blood stains on the left and right side. Hem Raj, one of the accused made statement under Section 27 of the Indian Evidence Act that he could get the sword recovered from Jhiri, which was concealed by him in the bushes above NH-21. It was taken into possession vide memo Ext. PW-8/E. Pane Ram produced the shirt worn by him before the SHO on 16th and disclosed that it belongs to Sanjeev Kumar. It was stained with blood. Sanjeev Kumar and Hem Raj were taken to Rafting point on 17th. Sanjeev Kumar disclosed that he could get recover the stick from the bushes. Police officials searched for it in the bushes. The stick was recovered from the bushes. It was taken into possession vide seizure memo Ext. PW-8/K. Ravinder alias Ravi made a statement before the SHO on 18th that he had washed the vehicle at Rafting point. He showed the place and site plan was prepared. The blood from the spot was preserved. The team of RFSL also preserved the blood from the Van HP-33(T) 9658. The pieces of floor mat were also cut by them. These were taken into possession vide memo Ext. PW-8/O. Pane Ram made statement before the SHO that he could show the place from where shirt was thrown in the river. Accused showed the place where he had thrown the shirt. He identified sword Ext. P-2.

13. PW-9 Const. Desh Raj has taken photographs Ext. PW-9/A-1 to Ext. PW-9/A-7.

14. PW-11 HC Khem Chand deposed that a telephonic call was received from Jhiri Rafting point at about 3:30 PM that a quarrel was taking place. He sent HC Raj Mal, PSI Chand Kishore, HHC Suresh Kumar and Const. Prem Kumar to the spot for verification. FIR Ext. PW-11/A was recorded. The case property was handed over to him. The case property was sent for chemical examination.

15. PW-13 HHC Uday Chand has taken the case property to RFSL, Gutkar.

16. PW-15 Ravi Kumar is the material witness. He testified that at 2:00 PM they reached at Jhiri Rafting point. They stopped there. The music was on. 5-6 local boys came there and started dancing in front of their vehicle. They insisted to play music of their choice. When they objected, the local boys started quarreling and gave beatings to them. They tried to leave the place and Hunny was driving the vehicle but those boys again gave beatings to Hunny. Hunny left the place with vehicle. They came on foot towards Kullu. Those boys chased Hunny towards Manali in vehicle No. HP-33-T-9658. They caught hold of Hunny and brought him back to the same place. In the meantime, Hem Raj came there

running in addition to 5-6 boys and he gave sword blow on thighs of Hunny. Hunny, out of fear, ran towards the river. He jumped into the river. They remained hiding in the bushes. Sanjeev came with the vehicle at Jhiri rafting point. Pane Ram started quarrel and Ravinder, Raju, Dinesh and one other boy was helping them. Local people took Hunny out of the river. He was unconscious. He was taken to hospital. His statement was recorded by the police vide memo Ext. PW-8/D. The sword was recovered at the instance of the accused. The cover of the sword was also recovered. In his cross-examination, he admitted that he did not know the accused nor there was any enmity between them. He also admitted that when the person came with sword, they made no efforts to stop him. 10-15 persons were witnessing the incident.

17. PW-16 Sujeet Kumar has corroborated the statement of PW-15 Ravi Kumar. According to him, they came to Manali for sightseeing. They reached Jhiri at 2. Some boys were dancing and they started quarreling with them. When Hunny went towards Manali, the boys chased him. They brought back Hunny. The vehicle was driven by Sanjeev Kumar. Hem Raj came there and took out sword which he had hidden under shirt of his back and gave blow on thigh of Hunny. He identified accused in the Court. The other co-accused gave beatings to Hunny. Hunny jumped into the river. The police came on the spot after 15-20 minutes. The vehicles were taken into possession. The blood stained pieces of seat cover from the vehicle of Hunny were taken into possession vide memo Ext. PW-8/B. Hem Raj gave statement about hiding of sword. Sword was recovered at the instance of accused. It was taken into possession vide memo Ext. PW-8/E. In his cross-examination, he admitted that earlier to the alleged date of occurrence, accused were not known to him.

18. PW-19 HC Rajmal has recorded the statement of Ravi Kumar under Section 154 Cr.P.C. vide memo Ext. PW-15/A. In sequel to Ext. PW-15/A, FIR Ext. PW-11/A was registered. Vehicle bearing regn. No. HR-12 R 5533 was taken into possession by the police. Blood stains, with the help of blade lying on the back seat of the vehicle, were taken into possession by the police in the presence of witnesses HHC Suresh Kumar and Ravi Kumar. Vehicle bearing regn. No. HP-33 T 9658 was also taken into possession.

19. PW-20 SI Ranjeet Singh deposed that on 15.7.2011, Hem Raj gave statement under Section 27 of the Indian Evidence Act and disclosed about the sword which he had kept in the bushes near upper side of the road. Hem Raj got the sword recovered. Rough sketch of sword Ext. PW-8/F was prepared. He handed over the case property to MHC. The accused were interrogated and on the basis of which, the police recovered the blood stained clothes of the accused. Accused Sanjeev Kumar got recovered stick (danda) from the bushes. The accused were arrested by the police.

20. The case of the prosecution, precisely, is that PW-15 Ravi Kumar and PW-16 Sujeet Kumar along with Parvesh were going to Manali. They had stopped at Rafting point at Jhiri. They were playing music. The local boys started dancing in front of their vehicle. They insisted that the music of their choice be played. It led to quarrel. Hunny (deceased) went in his vehicle towards Kullu. He was chased by the accused and brought back to the same spot in the vehicle by Sanjeev Kumar. In the meantime, accused Hem Raj also reached on the spot with sword. He inflicted sword blows on the thighs of the deceased. The deceased ran towards the river and jumped into it. He was taken out from the river by local people. He was also taken to hospital where he succumbed to his injuries.

21. PW-1 Dr. R.M.Gautam, deposed that the injuries received by the deceased were grievous and dangerous to life. He issued MLC Ext. PW-1/B. According to him, injury

No. 1 was possible by piercing sword Ext. P-2 in thigh and injury No. 2 could be caused with a blunt weapon like fist blows. PW-7 Dr. Rakesh Thakur has also noticed two injuries while conducting the post mortem. According to him injury No. 1 was incised wound left side thigh and injury No. 2 was incised wound left thigh posterior aspect at lower 1/3rd. He also noticed small punctured wound on right side of the chest. According to his opinion, the person died due to excessive blood loss, leading to shock and death. PW-7 Dr. Rakesh Thakur also deposed that one of the tributaries of an artery was bleeding even after surgery. The injuries received by the person were ante mortem. According to him, the injuries noticed by them in the post mortem report could be caused by sword Ext. P-2 and the injury noticed on the stomach was possible with blunt object hit forcefully. Accused Hem Raj has made disclosure statement vide Ext. PW-8/E. He got the sword recovered. The police has taken into possession other case property, including two vehicles bearing registration Nos. HR-12-R-5533 and HP 33-T-9658. The blood samples were also taken. The case property was handed over to PW-11 HC Khem Chand. He sent the same to RFSL, Gutkar, Mandi, through PW-13 HHC Uday Chand.

22. PW-15 Ravi Kumar and PW-16 Sujeet Kumar are the eye witnesses. They have categorically deposed that quarrel had taken place at Jhiri. Hunny took the vehicle towards Kullu. He was chased by the accused persons. He was brought back to Jhiri. Hunny was given beatings by the accused. Hem Raj also gave sword blows on the thighs of Hunny. Hunny ran towards the river. He jumped into the river. They were hiding in the bushes. Hunny was taken out from the river by the local people. He was then taken to hospital. However, both of them had deposed that they did not know the accused before the incident.

23. It has come in the statements of PW-1 Dr. R.M.Gautam and PW-7 Dr. Rakesh Thakur that Hunny died due to excessive loss of blood. According to PW-7 Dr. Rakesh Thakur, injury No. 1 could be caused with the sword Ext. P-2. Injury No. 2 could be caused with fist blows, as per PW-1 Dr. R.M. Gautam. According to PW-7 Dr. Rakesh Thakur, the injury on the stomach could be caused with blunt object, if hit forcefully. We have already noticed that besides the sword blows given by Hem Raj on the thigh of deceased, all the accused have beaten Hunny (deceased) leading to his death. The accused were identified by PW-15 Ravi Kumar and PW-16 Sujeet Kumar. The recovery of the sword was effected on the basis of disclosure statement made by Hem Raj accused. The same was also having blood stains as per the FSL report. The human blood was found on Ext. 5a (vest of Hunny), Ext. 9 (shirt), Ext. 10b (moss lifted from stone on the bank of river) but the results were inconclusive in respect of blood groups. The blood was also found in traces on the resin seat cover of the vehicle but was insufficient for further examinations.

24. The accused persons chased the deceased and brought him back to the same place where he was beaten up and accused Hem Raj gave sword blows on his thighs. He was brought back to the same place where he was beaten up by the accused. Their lordships of the Hon'ble Supreme Court in the case of ***State of West Bengal vrs. Mir Mohammad Omar and others etc. etc.,*** reported in ***AIR 2000 SC 2988,*** have held that repeated chase given by abductors to victim would bring the case within the ambit of Section 364 IPC, more particularly, with the temper which abductors exhibited while searching the accused broadly indicative of fact that they went at that place with some definite purpose. It has been held as follows:

> "15. First is, even in the FIR PW-5 had quoted those words as spoken to by A-1. It must be noted that when FIR was given PW-5 had no reason to

> believe that Mahesh was not alive. If Mahesh had come back alive it is doubtful whether police would have seriously followed up the FIR. Next is, the temper which the assailants exhibited in the house of the deceased's sister (when she was the sole inmate present therein), is broadly indicative of the truculence of the intruders that they went there with some definite purpose. Mahesh was once caught by them on that night itself by PW-4 and then he was badly handled by them. If their intention was only to inflict some blows on the victim they would have stopped with what they did to him at that stage. But when Mahesh struggled and extricated himself from their clutches and escaped to another place at Giri Babu Lane these accused did not stop and they persisted in prowling for their prey and succeeded in tracing him out from that different area and hauled him out violently. Such repeated chase for Mahesh could, in all probabilities, be for his blood. Thus, all the broad features of this case eloquently support the version of the witnesses to conclude that the words attributed to the accused were really uttered by them.
>
> 16. For the aforesaid reasons, we have no difficulty to conclude that all the accused abducted Mahesh in order to murder him."

25. The prosecution has proved that the accused persons formed unlawful assembly and in prosecution of the common object of their unlawful assembly had wrongfully restrained Hunny. He was wrongfully restrained by the accused from moving towards Kullu. The accused have voluntarily obstructed him going towards Kullu. He was prevented from moving towards Kullu though he had a right to go towards Kullu. They have chased him in their Van and brought him back to Jhiri, where he was given sword blows by accused Hem Raj. Hunny was brought back to the spot by other boys in the vehicle which was driven by Sanjeev Kumar accused. The accused persons after forming the unlawful assembly with common object gave beatings to the deceased. The accused have threatened and beaten up the deceased and he jumped into the river. Threats were advanced by the accused persons to cause death/grievous hurt. It is not that the accused have given threats but infact have caused death of Hunny.

26. Their lordships of the Hon'ble Supreme Court in the case of ***Lalji and others vrs. State of U.P.,*** reported in ***(1989) 1 SCC 437,*** have held that when the ingredients of Section 149 IPC are established, corroboration as to overt act or active participation of an accused-member of the unlawful assembly is not required. Their lordships have further held that for conviction under Section 302 IPC with the aid of Section 149, the relevant question to be examined by Court is whether the accused was a member of unlawful assembly and not whether he actually took active part in the crime or not. Their lordships have further held that common object of the assembly must be one of the five objects mentioned in Section 141 IPC. Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It has been held as follows:

> "8. Section 149 I.P.C. provides that if an offence is com- mitted by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person, who at the time of committing of that offence is a member of the same assembly, is guilty of that offence. As has been defined in Section 141 I.P.C., an assembly of five or

more persons is designated an 'Unlawful Assembly', if the common object of the persons composing that assembly is to do any act or acts stated in clauses 'First', 'Second', 'Third', 'Fourth', and 'Fifth' of that section. An assembly, as the explanation to the section says, which was not unlawful when it assembled, may subsequently become an unlawful assembly. Whoever being aware of facts which render any assembly an unlawful assembly intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. Thus, when- ever so many as five or more persons meet together to sup- port each other, even against opposition, in carrying out the common object which is likely to involve violence or to produce in the minds of rational and firm men any reasonable apprehension of violence, then even though they ultimately depart without doing anything whatever towards carrying out their common object, the mere fact of their having thus met will constitute an offence. Of course, the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm person of reasonable firmness and courage. The two essentials of the section are the commission of an offence by any member of an unlawful assembly and that such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Not every person is necessarily guilty but only those who share in the common object. The common object of the assembly must be one of the five objects mentioned in Section 141 I.P.C. Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

9. Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus this section created a specific and distinct offence. In other words, it created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common object of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person fails within the ingredients of the section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hands commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary that all the persons forming an unlawful assembly must do some overt act. When the accused persons assembled together, armed with lathis, and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful

assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under section 149. It must be noted that the basis of the constructive guilt under section 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge.

10. Thus, once the Court hold that certain accused persons formed in unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly is to be held guilty of that offence. After such a finding it would not be open to the Court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it.

13. In an appeal by persons convicted under Section 302 with the aid of 149 I.P.C., the question whether a particular person was a member of that unlawful assembly at the rele- vant time may of course be examined; and if it is found from the evidence on record that he was not a member of the unlawful assembly, he could not be convicted with the aid of section 149. The question to be examined by us in the in- stant case is whether Milkhi and Bhagwati were members of the unlawful assembly at the relevant time and not whether there was enough corroboration for their individual partici- pation in the commission of the offence.

15. From the above evidence on record it could not be held that Milkhi and Bhagwati were not members of the unlawful assembly at the relevant time. Whether any specific injury could individually be attributed to them or not could not at all be material. The submission that the two be acquitted on ground of lack of corroboration has, therefore, to be rejected."

27. In the instant case also, the accused formed the unlawful assembly and the object of the unlawful assembly was to commit the murder of Hunny. Accused chased Hunny and he was kidnapped and brought back to Jhiri. In the meantime, the accused have also informed Hem Raj to come to the spot. Hem Raj came to the spot with sword. Thus, the accused had kidnapped Hunny by bringing him back to the spot in order to kill him.

28. Their lordships of the Hon'ble Supreme Court in the case of ***Kaki Ramesh and others vrs. State of A.P.,*** reported in ***(1994) 4 SCC 397,*** have held that for fastening of liability with the aid of Section 149 of the Penal Code, commission of overt act is not necessary. It has been held as follows:

"9.Both these submissions have no cutting edge. This is for the reason that for fastening of liability with the aid of Section 149 of the Penal Code, commission of overt act is not necessary. This proposition in law is well settled. Even so, we would refer to the decision of this Court in Sherey v. State of U.P.1 in which on the facts of that case this Court desired evidence of overt act to satisfy its mind about the involvement of appellants before it. The perusal of that judgment shows that this was felt necessary because the

court was concerned with as many as 25 appellants who had been convicted under Section 302 with the aid of Section 149. The genesis of the occurrence was a dispute between Hindus and Muslims relating to a place which the Hindus claimed as a cremation ground; whereas according to the Muslims, the same was their graveyard. On a Hindu dying his dead body was carried to the aforesaid place when the 25 appellants along with another came armed with lathis and assault took place. It was observed that in such a case to assure the mind of the court about presence of the person concerned as a member of unlawful assembly, attribution of overt act 'is necessary. We do not read decision in Sherey1 to have laid down that in every case under Section 149 overt act has to be established.

11.As regards the two other appellants, we would observe the mere fact that only in the course of trial they had been named as those who had dragged the deceased out from inside the room, cannot create reasonable 1 1991 Supp (2) SCC 437 : 1991 SCC (Cri) 1059 401 doubt about these appellants having really done so on the face of clear statement in the FIR about dragging the deceased and naming of these two appellants also in the FIR as members of the unlawful assembly; who in particular had dragged the deceased was not required to be stated in the FIR."

29. In the case of ***Ranbir Yadav vrs. State of Bihar,*** reported in ***(1995) 4 SCC 392,*** their lordships of the Hon'ble Supreme Court have held that it is sufficient if it is proved that the accused persons shared the common objects of the unlawful assembly and in furtherance of those common objects some members of that unlawful assembly committed offences attributed to them. It has been held as follows:

"46. In view of the above, interpretation given to Section 149 IPC we need not delve into or decide the contention raised by Mr. Jethmalani that the evidence regarding the specific overt acts ascribed to each of the three appellants herein is not reliable, for the Courts below considered and accepted conclusively prove that all the three appellants shared the common object of the unlawful assembly to commit the offences of loot arson and murder and causing the disappearance of the evidence of murder and that in furtherance of those common objects some members of that unlawful assembly committed those offences for which the appellants are also liable to the convicted under section 149IPC. Even if we leave aside the evidence of Suresh Singh (P.W.46) who testified about the overt acts committed by all the three appellants, of P.C. P.W.2 who spoke about the overt acts of appellants Pandav Yadav and Sukhdeo Yadav and of P.C. P.W.1 and P.W. 19 who deposed about the overt acts of Sukhdeo Yadav there are the testimonies of the other eye-witnesses, to whom reference has already been made, and found to be trustworthy, who identified the three appellants, besides others, as having been members of the unlawful assembly. Having sifted their evidence and considered the same in the backdrop of the events proceeding the incident that took place in the afternoon of 11.11. 1985 we find that the following conclusions are inevitable: (1) a mob of 500/600 people, most of whom belonged to Yadav com- munity and were residents of different villages came to and attacked the neighbouring village Laxmiour Taufin Bind Toli to exterminate the Bind community :(ii) the three appellants who belong to Yadav community and are residents of three separate

adjoining villages came on horse back armed with fire arms, and led the mob along with some, others; and(iii) the appellants were also amongst the rioters who chased the villagers and committed the murders at Tisrasia Dhad and the bank of the River.

47.In drawing the above conclusions we have taken note of the following passage from the judgment of this Court in., Bajwa & Ors. v. State of UP. (1973) 3 S.C.R. 571 to which our attention was drawn by Mr. Jethmalani.

> "The evidence through which we have been taken by the learned counsel at the bar has been examined by us with care and anxiety because in cases like the present where there arc party factions, as often observed in authoritative decisions there is a tendency to include the innocent within the guilty and it is extremely difficult for the Court to guard against such a danger. The only real safeguard against the risk or condemning the innocent with the guilty lies in insisting on acceptable evidence which in some measure implicates such accused and satisfies the con- science of the Court. (See Kashmira Singh vs. State of M.P. and Bhaban Sahu vs. The King). In the case in hand, Do doubt the prosecution witnesses claiming to have seen the occurrence have named all the appellants and the approver has even named those acquitted by the High Court., but in our view it would be safe only to convict those who are stated to have taken active part and about whose. identity there can be no reasonable doubt"

30. In the case of ***Yunis alias Karia etc. vrs. State of Madhya Pradesh,*** reported in ***AIR 2003 SC 539,*** their lordships of the Hon'ble Supreme Court have held that the presence of accused as part of unlawful assembly is sufficient for conviction. The fact that accused was a member of unlawful assembly and his presence at the place of occurrence has not been disputed, it is sufficient to hold him guilty even if no overt act is imputed to him. It has been held as follows:

> "9. The learned counsel appearing for appellant - Liyaquat argued that no overt act is imputed to his client and he was being implicated only on the basis of Section 149 IPC. This argument, in our view, has no merit. Even if no overt act is imputed to a particular person, when the charge is under Section 149 IPC, the presence of the accused as part of unlawful assembly is sufficient for conviction. The fact that Liyaquat was a member of the unlawful assembly is sufficient to hold him guilty. The presence of Liyaquat has not been disputed."

31. Their lordships of the Hon'ble Supreme Court in the case of ***Amerika Rai and others vrs. State of Bihar,*** reported in ***(2011) 4 SCC 677,*** have held that even presence in unlawful assembly but with an active mind to achieve the common object makes such a person vicariously liable for the acts of the unlawful assembly under Section 149 IPC. It has been held as follows:

> "13. The law of vicarious liability under Section 149 IPC is crystal clear that even the presence in the unlawful assembly, but with an active mind, to achieve the common object makes such a person vicariously liable for the acts of the unlawful assembly. In that light, when the evidence is examined, it is obvious that Amerika Rai (A-1) who was the elder in the family and

> father of Darbesh Rai (A-2), Mithilesh Rai (A-4) and Chulhan Rai (A-3), instead of acting in a responsible manner and preventing any unpleasant incident, exhorted the accused persons to bring the gun. The guns are normally not brought for making a show. The exhortation to bring the gun definitely speaks about the guilty mind of Amerika Rai (A-1), so also the use of guns by Mithilesh Rai (A-4), Sanjay Rai (A-5) and Sipahi Rai (A-6) is very clear that they also had guilty mind. Mithilesh Rai (A-4) went to the extent of injuring Dineshwar Rai (PW-7). Therefore, even their presence and part played by them was obviously pointing towards the common object of committing murder of Shankar Rai. Unfortunately, Shankar Rai became the victim of the circumstances. The accused persons had nothing to do with Shankar Rai. Their main ire was directed at Ram Babu (PW-6). But, perhaps because Shankar Rai took side of Ram Babu (PW-6), he became the victim of circumstances and had to pay with his own life. Therefore, at least insofar as these persons are concerned, their presence and their active participation would make them guilty under Section 149 IPC, though the author of the injury to Shankar Rai was Chulhan Rai (A-3) whose appeal has already been dismissed."

32. In the case of ***Waman and others vrs. State of Maharashtra,*** reported in ***(2011) 7 SCC 295,*** their lordships of the Hon'ble Supreme Court have held that if members of unlawful assembly knew or were aware of likelihood of a particular offence being committed in prosecution of a common object, they would be liable for the same under Section 149 IPC.

33. In the instant case, the accused after forming the unlawful assembly have restrained Hunny. They have kidnapped him by chasing him and bringing him back in the Van to Rafting point, Jhiri. He was criminally intimidated by the accused. The accused have constituted unlawful assembly in furtherance of common object and have beaten Hunny resulting into his death. Accused Hem Raj has rightly been convicted under Section 25 of the Arms Act, being in possession of the sword.

34. Now, the moot question to be decided by this Court is whether the accused, more particularly accused Hem Raj, had the intention to kill the deceased. Accused Hem Raj has given sword blows on the thighs of the deceased, resulting into the injuries. The other accused have also beaten him up which resulted in injury on stomach of the deceased. However, it cannot be said that Hem Raj had intention to kill the deceased and if he had the intention to kill him, he would have given sword blow on the vital part of the body of the deceased instead of hitting him on the thighs. The other co-accused except Sanjeev Kumar were not armed with any weapon. Sanjeev Kumar was armed with stick which he got recovered. He has also not given any blow on the vital part of the body of the deceased. However, the fact of the matter is that all the accused had the knowledge that Hunny would die if he was collectively beaten up by them and the blow of sword could have caused grievous injuries. Thus, the case would fall under Section 304 (Part II) IPC read with Section 149 IPC, instead of Section 302 IPC read with Section 149 IPC.

35. In view of the observations and analysis made hereinabove, the appeals are partly allowed. The accused are convicted under Section 304 (part II) read with Section 149 IPC instead of Section 302 IPC read with Section 149 IPC. Their conviction and sentence under Section 148 IPC read with Section 149 IPC, 341 IPC read with Section 149 IPC, under Section 364 IPC read with Section 149 IPC and under Section 506 IPC read with Section 149

IPC and conviction of Hem Raj under Section 25 of the Arms Act are upheld. The accused be heard on the quantum of sentence for offence under Section 304 (part II) read with Section 149 IPC on 7.8.2015. The Registry is directed to prepare the production warrants and send the same to the concerned Superintendent of Jail for production of the accused on 7.8.2015.

****

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

Hiraban Sahani son of Sh.Bangali Shani. ...Appellant

Vs.

State of H.P. ...Respondent.

Cr. Appeal No.50 of 2011.
Judgment reserved on: 6.7.2015
Date of Judgment: July 31 , 2015.

Indian Penal Code, 1860- Section 302- PW-1 had gone to Chandigarh in connection with a Court case-accused and the deceased were present in the residential shed - when the complainant returned, he found that his wife was murdered with a hammer- it was found on investigation the accused had stolen money and other article and had murdered the deceased – it was duly proved that accused was employed as a servant by the complainant- postmortem report showed that head, face, skull bones, Nasal bones, brain tissues and eyes of the deceased were crushed and fractured- accused and the deceased were present in the room- the accused had absconded soon after the incident- accused had not given any explanation for the same – held, that in these circumstances, the accused was rightly convicted. (Para-11 to 18)

Cases referred:

Darbari Kumar Vs. State, AIR 1970 Orissa 54
Rama alias Dhaktu Worak Vs. State, AIR 1969 Goa Daman & Diu 116
C.Muniappan and others Vs. State of Tamil Nadu, 2010 (9) SCC 567
Sohrab and another Vs. The State of Madhya Pradesh, AIR 1972 SC 2020
State of UP Vs. M.K.Anthony, AIR 1985 SC 48
Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753
State of Rajasthan Vs. Om Parkash, AIR 2007 SC 2257
Prithu Chand and another Vs. State of HP, 2009 (11) SCC 588
State of UP Vs. Santosh Kumar and others, 2009 (9) SCC 626
State Vs. Saravanan and another, 2009 SC 151
Appabhai and another Vs. State of Gujarat, AIR 1988 SC 696
Rammi Vs. State of M.P, AIR 1999 SC 3544
State of H.P. Vs. Lekh Raj and another, 2000(1) SCC 247
Laxman Vs. Poonam Singh and others, 2004 (10) SCC 94
Dashrath Singh Vs. State of UP., 2004 (7) SCC 408
Kuriya and another Vs. State of Rajasthan, 2012 (10) SCC 433

Prakash Vs. State of Rajasthan, 2013 Cri.L.J 2040

For the appellant: Mr. Surender Verma, Advocate.
For the respondent: Mr.Ashok Chaudhary, Mr.V.S.Chauhan, Addl. Advocate Generals, Mr.Kush Sharma, Deputy Advocate General with Mr. J.S.Guleria, Asstt. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment and sentence passed by learned Additional Sessions Judge, Solan HP in Session Trial No. 06/NL/7 of 2009 titled State of HP Vs. Hiraban Sahani decided on 30.10.2010.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that accused was working as servant of PW1 Ajeet Singh in village Jharmajari where PW1 Ajeet Singh was having his shop of junk dealer. It is alleged by prosecution that PW1 Ajeet Singh was residing with his deceased wife Chhinder Kaur and accused was also residing in adjoining shed provided to accused by PW1 Ajeet Singh. It is further alleged by prosecution that on dated 26.11.2008 PW1 Ajeet Singh had gone to Chandigarh in connection with court proceedings and his deceased wife Chhinder Kaur and accused were present in the residential shed. It is further alleged by prosecution that PW1 Ajeet Singh came back at about 8.30 A.M on dated 27.11.2008 from Chandigarh and found that his wife was murdered with hammer. It is further alleged by prosecution that accused had committed murder of deceased Smt. Chhinder Kaur wife of PW1 Ajeet Singh with the help of hammer Ext P6. It is further alleged by prosecution that during investigation blanket Ext P2, bed sheet Ext P3, dhoti (Garment) Ext P8 and nip Ext P4 were recovered from place of incident and FIR Ext PW12/B was registered. It is further alleged by prosecution that thereafter investigating agency prepared inquest report Ext PW1/F and body of deceased was handed over vide memo Ext PW1/H. It is further alleged by prosecution that after committing murder of deceased Chhinder Kaur accused took away Rs.12,000/- (Twelve thousand), mobile phone Ext P9 and golden ear rings of deceased. It is further alleged by prosecution that on dated 26.11.2008 deceased met PW4 Varun Kumar at Barotiwala and accused told him that accused was going to Chandigarh. It is further alleged by prosecution that after arrest of accused on dated 19.7.2009 accused identified the spot in the presence of PW4 Varun Kumar and PW5 Vishal. It is further alleged by prosecution that call details of mobile phone were obtained and spot map Ext PW10/A was prepared and jamabandi Ext PW10/B was obtained. It is further alleged by prosecution that parcels were deposited in the office of FSL Junga. It is further alleged by prosecution that as per testimony of PW16 Dr. Anand Kumar who conducted post mortem of deceased Chhinder Kaur on dated 27.11.2008 the death of Chhinder Kaur could be possible with the help of hammer Ext P6. It is further alleged by prosecution that photographs of dead body Ext PW18/A to Ext PW18/H and Ext PW18/J to PW18/M were took with digital camera. Charge was framed against accused under Section 302 IPC by learned Additional Sessions Judge Solan camp at Nalagarh on dated 9.6.2010. Accused did not plead guilty and claimed trial.

3. Prosecution examined twenty one witnesses in support of its case.

Sr.No.	Name of Witness
PW1	Ajeet Singh
PW2	Lakhvinder Singh
PW3	Sahib Singh
PW4	Varun Kumar
PW5	Vishal
PW6	Ramesh Kumar
PW7	Satvir Singh
PW8	Devinder Verma
PW9	Meenu Rana
PW10	Sat Pal Patwari
PW11	Satpal Singh No.390
PW12	B.S. Rawat MHC
PW13	Bashir Mohd HC
PW14	Gurminder Singh
PW15	Hem Raj SHO
PW16	Dr. Anand Kumar
PW17	Raghuvir Singh Inspector
PW18	Arun Kumar Photographer
PW19	Bhajan Singh
PW20	Manpreet Singh
PW21	Heera Lal ASI

4. Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	Description:
Ex.PW1/A	Statement of Ajeet Singh under section 154 Cr.P.C.
Ex.PW1/B	Memo of recovery of blanket, blood clotted bed sheet & nip.
Ex.PW1/C	Memo of recovery of blood clotted hammer.
Ex.PW1/D	Sketch of hammer
Ex.PW1/E	Recovery of blood clotted Dhoti(Garment).
Ex.PW1/F	Inquest report dated 27.11.2008
Ex.PW1/G	Inquest report dated 27.11.2008
Ex.PW1/H	Memo qua handing of dead body.
Ex.PW4/A	Disclosure statement of accused under Section 27 of Indian Evidence Act 1872.
Ex.PW6/A	Memo relating to recovery of mobile phone.
Ex.PW8/A to	Call details of mobile number.

Ex.PW8/F	
Ex.PW9/A to Ex.PW9/G	Call details
Ex.PW10/A	Akas Shajra (field map)
Ex.PW10/B	Copy of jamabandi relating to khasra number 674/805/4
Ex.PW12/A	Rukka
Ex.PW12/B	FIR No.133 dated 27.11.2008
Ex.PW12/C	Daily diary report dated 27.11.2002
Ex.PW12/D	Extract of Malkhana register
Ex.PW12/E	Extract of Malkhana register
Ex.PW12/F	Endorsement Of Rukka
Ex.PW13/A	Copy of RC register.
Ex.PW14/A	Copy of daily station diary.
Ex.PW14/B	Certificate
Ex.PW14/C	Certificate
Ex.PW16/A	Post mortem report
Ex.PW17/A	Application to MO for post mortem
Ex.PW17/B	Spot Map
Ex.PW17/C	Sample of seal upon plain cloth
Ex.PW17/D	Spot map prepared as per disclosure statement of accused.
Ex.PW17/E	Statement of Satvir Singh.
Ex.PW17/F	Statement of Satpal
Ex.PW17/G & H.	Report of FSL Junga
Ex.PW18/A to H, Ex.PW18/I to M.	Photographs of dead body in residential shed.
Ex.PW20/A	Copy of DL of Manpreet
Ex.PW20/B	Customer application form given to Tata Indicom.
Ex.PW20/C	Acceptance by Tata Indicom.
Ex.PW20/D	Affidavit given by Manpreet.
Ext.PX	Comparison report.

5. Statement of accused was also recorded under Section 313 Cr PC. Accused has stated that he is innocent. Accused did not lead any defence evidence.

6. Learned trial Court convicted appellant under Section 302 IPC and sentenced accused to undergo life imprisonment. Learned trial Court also imposed fine to the tune of Rs.25,000/- (Twenty five thousand). Learned trial Court further directed that in default of payment of fine accused shall further undergo simple imprisonment for two years.

7. Feeling aggrieved against the judgment and sentence passed by learned trial Court appellant filed present appeal.

8. We have heard learned Advocate appearing on behalf of appellant and learned Additional Advocate General appearing on behalf of respondent and also gone through the entire record carefully.

9. Point for determination before us is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice to appellant.

10.ORAL EVIDENCE ADDUCED BY PROSECUTION:

10.1 PW1 Ajeet Singh has stated that he is working as junk dealer in village Jharmajari since last two years. He has stated that he had constructed temporary residential shed with the help of tin near Micro Turner Factory Jharmajari. He has stated that his deceased wife Chhinder Kaur was also residing with him in the shed. He has stated that accused Heeraban present in Court was employed by him as his servant and he was working with him since one month from incident. He has stated that accused was given small shed adjoining to his residential shed. He has stated that on dated 26.11.2008 at about 5 AM he had gone to Chandigarh to attend Court proceedings. He has stated that his wife and accused were present in residential shed. He has stated that on dated 27.11.2008 at about 8.30 AM he came from Chandigarh. He has stated that when he reached Jharmajari in his residential shed he noticed that dead body of his wife Chhinder Kaur was covered with blanket on the cot. He has stated that after removing blanket he noticed that his deceased wife was having several injuries on her head and face and dead body was lying in pool of blood. He has stated that accused had beaten his wife with the help of hammer and blood stained hammer was also lying in the residential shed. He has stated that half filled nip of liquor was also lying in the shed. He has stated that his deceased wife was having Rs.12,000/- (Twelve thousand) but money was not found. He has stated that he raised alarm thereupon people from market assembled at the place of incident. He has stated that police was called and his statement under Section 154 Cr.PC was recorded. He has stated that blanket, bed sheet and nip half filled were took into possession. He has stated that blanket Ext P2 and bed sheet Ext P3 are the same and he also identified nip Ext P4 in Court. He has stated that hammer Ext P6 was the same. He has stated that Dhoti (Garment) of accused stained with blood was also lying nearby the body of Chhinder Kaur. He has stated that police official also prepared inquest report and also took photographs pertaining to dead body of deceased Chhinder kaur at the place of incident. He has stated that post mortem of deceased Chhinder Kaur was conducted in civil hospital Nalagarh. He has stated that thereafter body of deceased Chhinder Kaur was handed over to him vide memo Ext PW1/H. He has stated that after committing murder of deceased accused took away Rs.12,000/- (Twelve thousand), mobile phone and golden ear rings of deceased Chhinder Kaur. He has stated that accused had committed murder of his wife for money. He has denied suggestion that he did not engage accused as his servant. He has denied suggestion that accused has been falsely implicated in present case. He has denied suggestion that Dhoti (Garment) Ext P8 did not belong to accused. He has denied suggestion that he had not gone to Chandigarh on the day of incident. He has denied suggestion that accused had not stolen anything. He has denied suggestion that accused had not called him on his mobile phone. He has denied suggestion that no photograph was obtained relating to dead body of Chhinder Kaur. He has stated that mobile phone Ext P9 is the same which the deceased used to operate in her life time. He has denied suggestion that mobile phone Ext P9 was not used by deceased Chhinder Kaur during her life time.

10.2. PW2 Lakhvinder Singh has stated that his mother and father were residing at Jharmajri. He has stated that his father was dealing with the business of junk. He has stated that accused was engaged by his father as servant at Jharmajri. He has stated that on dated 26.11.2008 his father had gone to Chandigarh in connection with court case. He has stated that deceased and accused were in residential shed at Jharmajri. He has stated that his father came from Chandigarh early in the morning on dated 27.11.2008. He has stated that his father informed him that accused had murdered his mother Chhinder Kaur. He has stated that thereafter he came to Jharmajri. He has stated that he saw the dead body of his mother. He has stated that face and head of his mother was crushed. He has stated that his mother was having mobile phone. He has stated that accused absconded from the scene of incident on dated 26.11.2008. He has stated that police officials came at the spot and conducted proceedings. He has stated that photographs marked A to H and J to M were took into possession. He has stated that accused was arrested on dated 19.7.2009 at Kalram in Haryana. He has stated that accused was personally searched and mobile phone of his deceased mother was recovered from him and he identified mobile phone of his mother. He has stated that he had gifted mobile phone to his mother. He has denied suggestion that his deceased mother Chhinder Kaur was not having any mobile phone. He has denied suggestion that accused was not employed by PW1 Ajeet Singh. He has denied suggestion that accused was falsely implicated in present case. He has denied suggestion that mobile phone was not used by deceased. He has denied suggestion that mobile phone was not recovered from the possession of accused.

10.3. PW3 Sahib Singh has stated that PW1 Ajeet Singh is known to him. He has stated that on dated 27.11.2008 he remained associated in the investigation of case. He has stated that in his presence investigating agency lifted blood stained clothes from the spot i.e. one blanket and bed sheet. He has stated that half nip of liquor was also took into possession. He has stated that blanket Ext P2, bed sheet Ext P3 and nip Ext P4 are the same. He has stated that hammer was lying at the spot and same was also took into possession vide seizure memo. He has stated that dhoti (Garment) was also took into possession. He has stated that articles were sealed in a cloth parcel. He has stated that photographs placed on record are pertaining to dead body of deceased Chhinder Kaur and the place of occurrence. He has stated that PW1 Ajeet Singh had raised alarm and thereafter he reached at the spot of incident. He has denied suggestion that all the proceedings took place in police station. He has denied suggestion that his signatures were obtained upon documents in police station.

10.4. PW4 Varun Kumar has stated that he is running a khoka (Temporary shed) for the last three years at Jharmajari. He has stated that PW1 Ajeet Singh was performing business of junk at Jharmajari near his khoka (Temporary shed). He has stated that he used to sell cigarette etc. He has stated that on dated 27.11.2008 at about 10.30 AM when he came to open his shed he saw that many people were assembled near the residential shed of PW1 Ajeet Singh along with police officials. He has stated that on inquiry he came to know that wife of PW1 Ajeet Singh was murdered. He has stated that on dated 26.11.2008 his shop remained opened from 8 AM to 9 PM. He has stated that accused present in Court was servant of PW1 Ajeet Singh. He has stated that after closing his shop he went to his residence at Madawala. He has stated that accused met him at Barotiwala chowk in the night at 10.00 PM. He has stated that accused was wearing shawl. He has stated that he inquired from accused about his destination and accused told him that he would go to Chandigarh. He has stated that on dated 19.7.2009 accused came with police officials at the spot and identified the place of incident in his presence and memo Ext PW4/A was

prepared. He has denied suggestion that accused was not servant of PW1 Ajeet Singh. He has denied suggestion that accused did not meet him near Barotiwala chowk on dated 26.11.2008 at 10 PM. He has denied suggestion that no conversation took place between him and accused. He has denied suggestion that investigating agency did not visit at the place of incident of murder.

10.5. PW5 Vishal has stated that on dated 27.8.2007 he was running meat shop at Jharmajari. He has stated that PW1 Ajeet Singh was also running business in the shed. He has stated that PW1 Ajeet Singh was residing in the shed along with his wife and his servant. He has stated that accused present in Court was the servant of PW1 Ajeet Singh. He has stated that he came to know about murder of the wife of PW1 Ajeet Singh on dated 27.11.2008 at about 11.30 AM when he came to open his shed. He has stated that police officials and other people have assembled at the place of incident. He has stated that on dated 26.11.2008 he remained present in his shop. He has stated that PW1 Ajeet Singh had gone to Chandigarh on dated 26.11.2008. He has stated that deceased and accused were in the residential shed at Jharmajari. He has stated that he closed his shop at about 8.30 PM. He has stated that accused met him at bus stop Jharmajari. He has stated that bus did not come at 8.45 PM at Jharmajri and thereafter he called his uncle who came on his vehicle. He has stated that when they started moving from Jharmajri then accused also requested for the lift in vehicle which was declined because there was no space in the vehicle. He has stated that he inquired from accused then accused told him that he was going to his native place. He has stated that on dated 19.7.2009 in his presence accused led police officials to the place of incident and identified the shop. He has denied suggestion that accused had not located the place of incident. He has denied suggestion that accused did not meet him at bus spot at Jharmajri. He has denied suggestion that he signed documents in police station. He has denied suggestion that accused was not present at the spot.

10.6 PW6 Ramesh Kumar has stated that he is agriculturist. He has stated that accused present in Court came to him for plantation of paddy crop. He has stated that accused was engaged by him on contract for plantation of paddy crop. He has stated that investigating agency came in his village on 13th /14th July 2009. He has stated that accused was searched and mobile phone and a wrist watch was recovered from search of accused in his presence. He has denied suggestion that accused was not apprehended in his village. He has denied suggestion that signatures upon recovery memo obtained in police station.

10.7. PW7 Satvir Singh has stated that on 14.7.2009 investigating agency visited in his village. He has stated that accused told Ramesh that he would reach at bus stop Kelram at about 7.08 AM on dated 14.7.2009. He has stated that investigating agency searched accused and mobile phone, wrist watch and some money were recovered from accused. He has stated that mobile recovered from accused was of Tata company and its colour was black. He has stated that mobile phone Ext.P9 is the same which was recovered from accused. He has denied suggestion that memos were not prepared at the spot.

10.8. PW8 Devinder Verma has stated that for the last two and half years he was posted as Nodal officer Bharti Airtel Limited Kasumpti Shimla. He has stated that on the request of police officials he had supplied call details of mobile. He has stated that Ext. P8/A to Ext PW8/E are the print out copies taken from printer installed in his office which are true and correct as per data saved in computer under the system. He has stated that there was no technical fault in the computer. He has denied suggestion that he had tampered the details of telephone call.

10.9 PW9 Meenu Rana Assistant Nodal Officer has stated that on the request of investigating agency she had supplied name and address of subscriber of cell phone No.92562-85076 Ext.P9/A. She has stated that she had supplied call details of cell phone. She has stated that she took print out from computer and there was no technical fault in the computer. She has denied suggestion that documents were not issued from her office. She has denied suggestion that computer was not used in regular course of business. She has denied suggestion that statements were tampered. She has denied suggestion that no request was received from S.P Baddi for supply of documents.

10.10 PW10 Sat Pal has stated that since August 2006 to April 2010 he remained posted as Patwari Patwar Circle Bataulikalan. He has stated that village Jharmajri was in his jurisdiction. He has stated that on dated 25.7.2009 at the request of police officials he visited at the place of occurrence and prepared spot map Ext PW10/A and jamabandi Ext PW10/B which are correct as per spot and revenue records. He has denied suggestion that he did not prepare the record. He has denied suggestion that map was not prepared as per revenue record and spot position.

10.11. PW11 Constable Satpal Singh has stated that during December 2008 he was posted at police station Barotiwala. He has stated that on dated 8.12.2008 MHC Bashir Mohd. entrusted him three parcels containing hammer, Dhoti (Garment), blanket, bed sheet and viscera along with requisite documents and sample of seal. He has stated that he deposited articles in the office of FSL Junga on the same day and on return he deposited receipt with MHC vide RC No. 62 of 2008. He has stated that parcel remained intact during his custody. He has denied suggestion that no parcels were handed over to him. He has denied suggestion that he did not deposit parcel in the office of FSL Junga.

10.12 PW12 B.S.Rawat has stated that during the year 2008 and 2009 he was posted as MHC police station Barotiwala. He has stated that on dated 27.11.2008 statement of PW1 Ajeet Singh Ext PW1/A and rukka Ext PW12/A received in police station through constable Ashish Kumar. He has stated that FIR Ext PW12/B was registered in computer installed in police station. He has stated that thereafter case file was sent to investigating officer. He has stated that DD No.19-A Ext 12/C was entered in the computer and print was taken out from computer. He has stated that on dated 27.11.2008 SI Raghubir Singh deposited with him parcel containing hammer, dhoti (Garment), blanket and bed sheet. He has stated that a nip half filled with alcohol was also deposited with him. He has stated that on dated 28.11.2008 a jar containing viscera of deceased was also deposited. He has stated that copies of entry of malkhana register Ext PW12/D and Ext PW12/E are true and correct as per original record. He has denied suggestion that case property was not deposited with him. He has denied suggestion that entire record was manipulated to falsely implicate the accused.

10.13. PW13 Bashir Mohd. has stated that on dated 8.12.2008 he was working as MHC police station Barotiwala. He has stated that he handed over three parcels duly sealed with seal impression 'S' and also handed over five jars containing viscera of deceased duly sealed to constable Satpal vide RC No.62/2008 along with sample of seal and requisite documents with direction to deposit in FSL Junga. He has stated that articles were deposited in the office of FSL Junga and receipt was handed over to him. He has stated that copy of RC Ext.PW13/A is correct as per original record. He has denied suggestion that nothing was handed over to Satpal. He has denied suggestion that entire record was manipulated at later stage.

10.14. PW14 Gurminder Singh has stated that from April 2007 to May 2010 he remained posted as MC at police station Baddi. He has stated that on dated 27.11.2008 at 9.05 AM telephonic information was received from police station that wife of Ajeet Singh was killed. He has stated that thereafter SI Raghubir Singh along with other police officials rushed to the spot. He has stated that DD No.17-A was entered by him in computer. He has stated that he took print out of DD No.17-A Ext PW14/A and DD No.19-A Ext PW12/C which are true and correct as per original record. He has denied suggestion that Ext PW12/C and Ext PW14/A were not correctly prepared.

10.15. PW15 Hem Raj has stated that from August 2009 he was posted as SHO police station Barotiwala. He has stated that investigation in FIR No. 133 of 2008 was conducted by SI Raghubir Singh. He has stated that after completion of investigation FIR was handed over to him for preparation of challan. He has stated that challan was filed in Court and thereafter on receipt of I.D proof and call details supplementary challan was prepared by him and was filed in Court.

10.16. PW16. Dr. Anand Kumar has stated that he was posted as medical officer in FRU Nalagarh. He has stated that on dated 27.11.2008 he conducted post mortem of deceased Chhinder Kaur. He has stated that on examination he found that head, face, skull bones with maxilla bilateral lower jaw, nasal bones were fractured and broken into pieces. He has stated that brain tissue and eyes were also crushed. He has stated that tongue was proturding and lying between broken jaw bones and face was covered with clotted reddish brown blood. He has stated that blood soiled hairs were present on scalp tissue and brains and membrance were crushed. He has stated that injuries were anti mortem in nature. He has stated that death was caused due to head injuries. He has stated that probable duration between injury and death was few seconds and few minutes and between death and post mortem was more than three hours and less than 36 hours. He has stated that MLC is Ext PW16/A which bears his signature. He has stated that anti mortem injury could be possible by way of blow of hammer Ext P6.

10.17 PW17 Raghuvir Singh has stated that he was posted as SHO Barotiwala from July 2008 to August 2009. He has stated that he received telephonic call from un-identified person on dated 27.11.2008 that some person had committed murder of deceased Chhinder Kaur at Jharmajri. He has stated that rapat Ext PW14/A was recorded. He has stated that he along with other police officials visited at the spot. He has stated that statement Ext PW1/A of PW1 Ajeet Singh was recorded under Section 154 Cr.PC and thereafter he prepared rukka and same was sent to police station through constable Ashish Kumar. He has stated that rukka is Ext PW12/A. He has stated that thereafter FIR Ext PW12/B was recorded and photographs also obtained. He has stated that thereafter form No. 25 and 35 Ext PW1/F & G qua dead body were filled at the spot and dead body was took into possession and was taken to hospital for post mortem. He has stated that he filed application Ext.PW17/A with request to conduct post mortem of deceased. He has stated that blood stained hammer Ext P6 was lying at the spot which was took into possession and sealed in a cloth parcel. He has stated that he had also prepared sketch of hammer Ext PW1/D. He has stated that he also took into possession blood stained blanket and one double bed sheet. He has stated that he also took into possession one nip of alcohol containing some liquor in it. He has stated that bed sheet and blanket were sealed in a cloth parcel. He has stated that nip was also separately sealed with seal 'S'. He has stated that blanket Ext P2, bed sheet Ext P3 and nip Ext P4 are the same which were took into possession vide memo Ext PW1/B. He has stated that blood stained Dhoti (Garment)

belonging to accused was also took into possession and same was sealed in a cloth parcel. He has stated that he prepared spot map Ext PW17/B and fascimile was took on a piece of cloth. He has stated that accused was engaged as servant for the last one month. He has stated that accused was missing from the shed of PW1 Ajeet Singh. He has stated that thereafter accused was searched at Chandigarh and Bihar. He has stated that mobile phone of deceased was kept under observation to locate accused. He has stated that call details of mobile phone were obtained. He has stated that as per location mobile phone was used in District Kurukshetra in Haryana and thereafter accused was located. He has stated that accused came to Haryana for plantation of paddy crop in the field. He has stated that accused was apprehended and mobile phone of deceased was recovered from the possession of accused. He has stated that thereafter accused was arrested on dated 19.7.2009. He has stated that accused led investigating agency to the place of incident and identified the spot. He has stated that he recorded the statement of witnesses under Section 161 Cr.PC as per their versions. He has stated that nothing was added or deleted. He has stated that case property was deposited with MHC on dated 27.11.2008 and field map got prepared at the spot from Patwari. He has stated that he also obtained copy of jamabandi and field map. He has stated that dead body of deceased after post mortem was handed over to PW1 Ajeet Singh. He has stated that he also obtained post mortem report Ext PW16/A. He has stated that he had also received report of FSL Junga Ext PW17/G & H. He has stated that on his transfer he handed over case file to SHO Hem Raj Poswal. He has denied suggestion that he did not record the statement of witnesses as per their versions. He has denied suggestion that accused was not working as servant with PW1 Ajeet Singh. He has denied suggestion that he did not arrest accused from village Kailram. He has denied suggestion that dhoti (Garment) was not owned by accused. He has denied suggestion that dhoti (Garment) was not recovered from bed inside residential shed. He has denied suggestion that no case property was deposited with malkhana. He has denied suggestion that mobile phone was not recovered from accused. He has denied suggestion that spot map was not correctly prepared. He has denied suggestion that no requisition was made to obtain call details from mobile company. He has denied suggestion that accused was falsely implicated in present case.

10.18. PW18 Arun Kumar has stated that for the last four years he is running a photo studio at Burawala. He has stated that on dated 27.11.2008 on the request of police officials he visited place of incident at Jharmajri near Micro Turner Factory and clicked photographs of dead body Ext PW18/A to PW18/H and PW18/J to PW18/M from his digital camera. He has stated that photographs are true and correct as per situation prevailing at the spot. He has denied suggestion that he did not visit at the spot. He has denied suggestion that he did not take photographs.

10.19. PW19 Bhajan Singh has stated that he is junk dealer. He has stated that PW1 Ajeet Singh is known to him. He has stated that Ajeet Singh requested him to obtain mobile connection of Airtel company. He has stated that he procured SIM card No. 98166-46191 in his name. He has stated that SIM card was not used by him and SIM card was used by PW1 Ajeet Singh. He has denied suggestion that he did not obtain SIM card. He has denied suggestion that he did not hand over SIM card to PW1 Ajeet Singh for use.

10.20 PW20 Manpreet Singh has stated that he was holding driving licence No.1233 issued by District Transport Officer Samrala Ludhiana Punjab. He has stated that during January 2008 he lost his driving licence. He has stated that photocopy of driving licence is Ext PW20/A. He has stated that he did not apply for mobile connection of cell

No.92562-85076 nor the same was used by him. He has stated that forms Ext PW20/B and Ext PW20/C were not submitted by him to Tata Indicom company. He has stated that he had gone to police station for lodging missing report of his licence. He has stated that report could not be lodged for want of licence number which was not with him.

10.21. PW21 Heera Lal has stated that he remained posted as investigating officer in police station Barotiwala from June 2010 to August 2010. He has stated that during investigation case file was handed over to him on dated 10.6.2010 and he procured call details, identity proof Ext. PW20/B and Ext PW20/C and also procured affidavit of PW20 Manpreet Singh. He has denied suggestion that he did not conduct investigation. He has denied suggestion that he did not record the statements of Bhajana, Ajeet and Manpreet as per their versions.

11. Submission of learned Advocate appearing on behalf of appellant that accused was not employed as servant by the husband of deceased Chhinder Kaur and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that fact can be proved by way of oral evidence as per Section 59 of Indian Evidence Act 1872. PW1 Ajeet Singh has specifically stated in positive manner that accused was employed by him as servant one month prior to incident of murder. Testimony of PW1 Ajeet Singh is corroborated by PW2 Lakhvinder Singh relating to employment of accused as servant by husband of deceased. Testimony of PW1 is further corroborated by PW4 Varun Kumar who has stated in positive manner that accused was employed as servant by PW1 Ajeet Singh. Similarly testimony of PW1 is also corroborated by PW5 Vishal. PW5 has specifically stated in positive manner that accused was employed as servant by the husband of deceased on the day of incident of murder. Testimonies of PW1 Ajeet Singh, PW2 Lakhvinder Singh, PW4 Varun Kumar and PW5 Vishal that accused was employed as servant at the time of murder of deceased Chhinder Kaur are trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW1 Ajeet Singh, PW2 Lakhvinder Singh, PW4 Varun Kumar and PW5 Vishal to the effect that accused was employed as servant in the residential shed of deceased at the time of criminal offence of murder. Accused did not adduce any positive, cogent and reliable rebuttal evidence on record in order to prove that on dated 26.11.2008 accused was employed somewhere else.

12. Another submission of learned Advocate appearing on behalf of appellant that present case is based upon circumstantial evidence and it is not proved on record that accused had committed murder of deceased Chhinder Kaur and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that on dated 26.11.2008 after 5 PM husband of deceased namely Ajeet Singh went to Chandigarh in connection with court case. It is proved on record that murder of deceased Chhinder Kaur aged 45 years was committed on dated 26.11.2008 during night period upon the bed in residential shed of deceased situated at Jharmajri in brutal manner with hammer. It is proved on record that as per post mortem report head, face, skull bones, nasal bones, brain tissue and eyes of deceased Chhinder Kaur were crushed and fractured. It is proved on record that as per post mortem report and as per testimony of PW16 Dr. Anand Kumar that death was anti mortem in nature. It is proved on record that time period between injury and death was few seconds and few minutes. It is proved on record that death of deceased Chhinder Kaur was caused within four walls of residential shed. It is proved on record that at the time of death of deceased accused was present in the residential shed of deceased. It is proved on record that at the time of death of Chhinder

Kaur no other persons were present in residential shed of deceased except accused and deceased. There is no evidence on record in order to prove that some other persons entered inside the residential shed of deceased at the time of murder of deceased. Access of third person in four walls residential shed for commission of criminal offence is ruled out in present case on dated 26.11.2008. Hence offence against accused is proved in present case beyond reasonable doubt under Section 302 IPC on the concept of last seen theory.

13. Another submission of learned Advocate appearing on behalf of appellant that there is no positive, cogent and reliable circumstantial evidence against accused relating to murder of deceased and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that after committing murder of deceased Chhinder Kaur on dated 26.11.2008 during night period in four walls of residential shed accused absconded from residential shed of deceased despite the fact that accused was employed as servant. The factum of absconding of accused on dated 26.11.2008 immediately after the commission of offence of murder is proved as per testimony of PW4 Varun Kumar. Shed of PW4 Varun Kumar is also situated nearby the residential shed of deceased Chhinder Kaur and PW4 used to sell cigarette in the shed. PW4 Varun Kumar has specifically stated in positive manner that on dated 26.11.2008 accused met him at Barotiwala Chowk at 10 PM and told him that he would go to Chandigarh. As per testimony of PW4 Varun Kumar it is proved on record that accused on dated 26.11.2008 during night period at 10 PM had absconded from the scene of occurrence after committing murder. PW5 Vishal was also running meat shop near the residential shed of deceased. PW5 Vishal has specifically stated in positive manner that on dated 26.11.2008 during night period accused met him at bus stop Jharmajri. PW5 Vishal has stated that on dated 26.11.2008 accused requested for lift at Jharmajri but PW5 refused to give lift to accused due to non availability of space in the vehicle. PW5 Vishal has specifically stated in positive manner that accused told that he would go to his native place. As per testimonies of PW4 Varun Kumar and PW5 Vishal it is proved on record that accused had absconded immediately after the commission of offence of murder. It is proved on record that accused did not remain present at the place of incident after commission of crime and accused left the place of occurrence immediately after the commission of criminal offence. It is proved on record beyond reasonable doubt that accused had absconded immediately after commission of murder of deceased Chhinder Kaur with hammer during night period and after causing several brutal injuries to deceased upon her head, face, skull bones, nasal bones, brain tissues and eyes. As per section 8 of Indian Evidence Act 1872 subsequent conduct of accused of absconding is relevant fact under Section 8(1) of Indian Evidence Act 1872. Even disclosure statement of accused under Section 27 of Indian Evidence Act 1872 Ext PW4/A placed on record is proved as per testimony of PW4 Varun and as per testimony of PW5 Vishal. It was held in case reported in AIR 1970 Orissa 54 titled Darbari Kumar Vs. State that fact of absconding from the place of incident is itself a relevant incriminating circumstance against accused under Section 8(i) of the Indian Evidence Act 1872. Also see AIR 1969 Goa Daman & Diu 116 titled Rama alias Dhaktu Worak Vs. State.

14. Another submission of learned Advocate appearing on behalf of appellant that there is contradiction between the testimony of prosecution witnesses and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. In the present case it is proved on record that criminal offence of heinous murder was committed on dated 26.11.2008 during night period in the four walls of residential shed. It is proved on record that deceased Chhinder Kaur was master of accused at the time of her death. It is proved on record that death of deceased was

caused in four walls of residential shed upon a bed on dated 26.11.2008. It is proved on record that on dated 26.11.2008 only deceased Chhinder Kaur and accused were in the residential shed during night period. It is proved on record that residential shed where the criminal offence of heinous murder was committed was covered with four walls and there was no possibility of any third person entering into the residential shed of deceased at the time of her death. It is proved on record that immediately after committing criminal offence of heinous murder of master accused who was servant absconded from the place of incident during night period on dated 26.11.2008 and thereafter accused was arrested on dated 19.7.2009 from Haryana and thereafter statements of prosecution witnesses were recorded on dated 30.9.2010, 1.10.2010, 6.10.2010, 19.10.2010 and 26.10.2010 after sufficient gap of time. It is well settled law that minor contradictions are bound to come in criminal case when testimony of witnesses recorded after a gap of sufficient time. Learned Advocate appearing on behalf of appellant did not point out any major contradiction in present case which goes to the root of case. It is well settled law that minor contradictions in criminal case should be ignored when testimony of prosecution witnesses recorded after a gap of sufficient time. See 2010 (9) SCC 567 titled C.Muniappan and others Vs. State of Tamil Nadu. See AIR 1972 SC 2020 titled Sohrab and another Vs. The State of Madhya Pradesh, see AIR 1985 SC 48 titled State of UP Vs. M.K.Anthony, see AIR 1983 SC 753 titled Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, see AIR 2007 SC 2257 titled State of Rajasthan Vs. Om Parkash, see 2009 (11) SCC 588 titled Prithu Chand and another Vs. State of HP, see 2009 (9) SCC 626 titled State of UP Vs. Santosh Kumar and others, see AIR 2009 SC 151 titled State Vs. Saravanan and another,see AIR 1988 SC 696 titled Appabhai and another Vs. State of Gujarat, see AIR 1999 SC 3544 titled Rammi Vs. State of M.P, see 2000(1) SCC 247 titled State of H.P. Vs. Lekh Raj and another, see 2004 (10) SCC 94 titled Laxman Vs. Poonam Singh and others also See 2004 (7) SCC 408 titled Dashrath Singh Vs. State of UP. See 2012 (10) SCC 433 titled Kuriya and another Vs. State of Rajasthan.

15. Another submission of learned Advocate appearing on behalf of appellant that learned trial Court did not properly appreciate oral as well as documentary evidence placed on record is also rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused judgment and sentence passed by learned trial Court. Learned trial Court had discussed oral as well as documentary evidence placed on record with positive, cogent and reliable reasons. Present case is a case of circumstantial evidence and in circumstantial evidence there are five golden principles. (1) That circumstances from which the conclusion of guilt is to be drawn should be fully established (2) That facts so established should be consistent only with the hypothesis of the guilt of accused.(3) That circumstances should be of a conclusive nature.(4) That chain of circumstantial evidence should be completed. (5) That innocence of accused should be ruled out. See 2013 Cri.L.J 2040 Apex Court titled Prakash Vs. State of Rajasthan. We are of the opinion that in circumstantial cases there are two kinds of murder (1) Murder committed in four walls of house. (2) Murder committed in open place. It is well settled law that when murder is committed in open place then Court should be very conscious in connecting the accused with commission of offence. It is well settled law that when murder is committed inside the four walls of house then Court should consider the access of accused and court should rule out the access of third person in the commission of crime. In the present case murder of deceased was committed inside the four walls of residential shed and in the present case only access of accused who was servant of deceased at the time of commission of criminal offence is proved and the access of third person from outside is ruled out at the time of commission of criminal offence. Involvement of accused in the commission of offence of murder in present case is proved beyond reasonable doubt because accused had

immediately absconded from the residential shed of deceased on dated 26.11.2008 after commission of criminal offence of murder of deceased Chhinder Kaur. No explanation has been given by accused that why he did not report the matter of death of deceased Chhinder Kaur to police station which was situated at a distance of about 2 Km. from the place of incident. Accused who was servant instead of informing the heinous murder of master to investigating agency on dated 26.11.2008 preferred to abscond from residential shed of deceased and thereafter accused was caught at Haryana on dated 19.7.2009. We are of the opinion that no leniency should be shown to dishonest person who left alone the dead body of deceased master without informing investigating agency despite fact that police station was situated at a distance of about 2 Km. from the place of incident of heinous murder. It is well settled law that servant is under legal obligation to protect his female master when female master was alone in her residential shed during night period at the time of heinous murder.

16. We have also carefully perused the photographs placed on record Ext PW18/A to Ext PW18/M. It is proved on record that deceased was brutally murdered in the residential shed of deceased on dated 26.11.2008 during night period. As per testimony of PW16 Dr.Anand Kumar who conducted post mortem of deceased death was caused due to anti mortem injuries. As per post mortem report time gap between injuries and death was few seconds to few minutes. As per post mortem report head, jaws, skull bones, nasal bones, brain tissues and eyes of master deceased were crushed and were broken into pieces. Even as per chemical analyst report Ext PW7/G placed on record human blood of group 'A' was found upon hammer, blanket and bed sheet of deceased Chhinder Kaur. Even as per SFSL report hairs of deceased Chhinder Kaur found upon hammer were matched with the hairs of deceased. Hence it is proved on record that murder of deceased was committed in heinous manner with hammer by accused when accused was servant in the residential shed of deceased and when deceased Chhinder Kaur was alone in her residential shed during night period on dated 26.11.2008. In the present case murder of deceased Chhinder Kaur was not committed in open place and dead body of deceased was also not found in open place which was accessible to all. On the contrary in the present case heinous murder of deceased Chhinder Kaur aged 45 years was committed in four walls of residential shed on dated 26.11.2008 when only access of accused was available in the residential shed. In the present case it is proved on record that on dated 27.11.2008 at 8.30 AM husband of deceased Chhinder Kaur came from Chandigarh and he found dead body of deceased in the residential shed and the statement of husband of deceased was recorded under Section 154 Cr.PC. It is proved on record that accused is permanent resident of Nepal and it is also proved on record that after absconding on dated 26.11.2008 accused did not join service of the husband of deceased but on the contrary after absconding accused who was servant of deceased at the time of heinous murder of deceased joined service at Haryana and performed paddy work. In the present case seizure memo of blanket, double bed sheet stained with blood and hammer clotted with blood proved on record beyond reasonable doubt.

17. Another submission of learned Advocate appearing on behalf of appellant that as per prosecution case three mobile SIM cards were used i.e. SIM Nos.98166-46191, 92562-85076 and 97291-75175 and prosecution has not given any explanation as to why primary evidence was not brought on record and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. PW8 Devinder Verma Nodal officer Bharti Airtel Limited Kasumpti Shimla and PW9 Meenu Rana Assistant Nodal Officer Tata Tallies Service Shimla have specifically stated in positive

manner that call details of mobile were supplied strictly as per available record in the computer. The fact of supply of call details is proved on record by prosecution as per testimony of PW8 Devinder Verma and PW9 Meenu Rana. It is well settled law that facts can be proved by way of oral evidence as per section 59 of Indian Evidence Act 1872.

18. Another submission of learned Advocate appearing on behalf of appellant that no motive is proved on record in order to commit murder of deceased and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. In the present case PW1 Ajeet Singh has specifically stated when he appeared in witness box that accused had committed heinous murder of deceased Chhinder Kaur aged 45 years for money. Testimony of PW1 Ajeet Singh that accused had committed murder of deceased for money remains un-rebutted on record. It is proved on record that accused had committed murder of deceased for money when deceased was alone in her residential shed during night period.

19. In view of above stated facts it is held that learned trial Court has properly appreciated oral as well documentary evidence placed on record and it is held that no miscarriage of justice has been caused to appellant. Appeal filed by appellant is dismissed and judgment and sentence passed by learned trial Court are affirmed. Appeal is disposed of. Pending applications if any also disposed of.

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

M/s Century Vision Organic Farms Private Limited ...Petitioner

Versus

Pushpa Bhanot.

...Respondent

Cr.MMO No. 170 of 2015

Date of decision: 31.7.2015

Constitution of India, 1950- Article 227- **Code of Criminal Procedure, 1973-** Section 482- **Negotiable Instruments Act, 1881-** Section 138- Accused contended that no notice was served upon him and the proceedings against him were not maintainable- held, that complainant needs to make a demand and the complaint would lie only after the non-payment of the amount despite the receipt of valid notice of demand- mere issuance of notice to incharge and authorized signatory cannot amount to the issuance of the notice to the company- petition allowed. (Para-4 to 11)

For the Petitioner: Mr.Vijay Chaudhary, Advocate.

For the Respondent: Mr.Imran Khan, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

This petition under Section 482 of the Code of Criminal Procedure read with Article 227 of the Constitution of India is directed against the summoning order passed by the learned Judicial Magistrate, Ist Class, Chamba.

2. Shorn of all unnecessary details, the case of the petitioner is that it is arraigned as an accused in complaint under Section 138 of the Negotiable Instruments Act (for short "Act"), though no notice as mandatorily required under the Act been served upon it.

3. Therefore, the short question which arises for determination is as to whether in absence of notice under Section 138 of the Negotiable Instruments Act to the petitioner, can the complaint be maintained?

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

4. Section 138 of the Act was enacted to penalize those unscrupulous persons who purported to establish their liability by issuing cheques without really intending to do so. To make the provisions contained in Chapter XVII of the Act to more effective, some more sections were inserted in the Chapter and some amendments in the existing provision were also made.

5. Section 138 of the Act reads thus:-

> *"138.* ***Dishonour of cheque for insufficiency, etc., of funds in the account.****---- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:*
>
> *(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*
>
> *(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*
>
> *(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."*

5. The condition pertaining to the notice to be given to the drawer have been formulated and incorporated in clause (b) to (c) of the proviso to Section 138 of the "Act". On the part of payee, he has to make a demand by "giving a notice" in writing to the drawer of the cheque within a period of thirty days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. In clause (c), the drawer is given fifteen days time from the date of receipt of notice to make the payment and only after he fails to make payment, a complaint may be filed against him.

6. The words in clause (b) to proviso of Section 138 of the "Act" show that the payee has the statutory obligation to 'make a demand' by giving notice. The thrust in the clause is on the need to "make a demand". It is only the mode for making such demand which the legislature has prescribed. Once it is dispatched, his part is over and the next depends what the sendee does.

7. Thus it is absolutely clear that making of a demand by giving a notice is *sina-qua-non* and it is only thereafter that the complainant can be maintained, that too after it is proved that the notice of such demand was served or deemed to have been served upon the sendee.

8. The learned counsel for the respondent would however argue that since a notice had been issued to one Vijay Kumar, who is none other than the incharge and authorized signatory of the petitioner, therefore, there was sufficient compliance of the provisions of the Act.

9. I am afraid that this contention cannot be accepted for the simple reason that there is a distinction between a natural and jurist person and issuance of notice upon the natural person would not ipso facto notice upon the jurist person.

10. Offences by the company has been separately dealt with under Section 141 of the "Act", which essentially means that the offences committed by the company is different from the once which have been committed by its employees. In such situation the company is deemed to be the principal offender and the remaining persons are made offenders by virtue of legal fiction created by the legislature as per the Section, hence the actual offence should have been committed by the company. If that was so, then the notice as mandatorily required under Section 138 ought to have been served upon the company, but in the instant case undisputedly the notice has been served only upon its incharge and authorized signatory Sh. Vijay Kumar.

11. Thus from the aforesaid discussion, it can safely be concluded that the learned trial Magistrate has failed to take into consideration this distinction, which vitiate the entire proceedings as the Company can only be tried, in case there is a notice served upon it, that too after satisfying the provisions of Section 141 (1) of the Act, but the Company in no event can be prosecuted in absence of a legal and valid notice to this effect as envisaged under the Act. Having said so, I find merit in this petition. Therefore, the proceedings initiated by the learned Magistrate on the basis of complaint case under NIA Act No. 789 of 2013, titled as Smt. Pushpa Bhanot Vs. M/s Century Vision Organic Farms Private Limited is quashed for want of legal and valid notice and accordingly set aside.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Monika Sharma ...Appellant.

Versus

Kuldeep Kumar Dogra. ...Respondent.

FAO (HMA) No. 70 of 2013
Judgment reserved on: 13.05.2015
Date of Decision: July 31, 2015

Hindu Marriage Act, 1955-Section 13- Husband filed a petition for Restitution of Conjugal Rights- wife pleaded that husband was having illicit relations with his sister-in-law, these allegations were also repeated in a petition filed by the wife for claiming maintenance under Section 125 of Cr.P.C.- the husband filed a petition for divorce claiming that these allegations were false and had caused cruelty to him- no finding was recorded by the Court regarding the correctness or otherwise of the allegations leveled by the wife in the petitions for seeking restitution and maintenance – it was established in those proceedings that husband was subjecting his wife to mental harassment and physical cruelty- he was physically assaulting her- he had disconnected the electricity and telephone connection from the premises where the parties were residing jointly- he shifted and started residing with his parents and brother at his native place-wife had not left matrimonial home without any reasonable excuse or justifiable cause – the allegation of illicit relations leveled by the wife were vague, unspecific regarding time, place and manner - name of sister-in-law- with whom the husband had illicit relations was also not mentioned- the allegations of unchastity against the husband or the wife amount to cruelty and they will cause mental agony to the person against whom they were directed- the husband cannot be expected to live with a wife, who had leveled such allegations. (Para 16-31)

Cases referred:

K. Srinivas Rao Versus D.A. Deepa, (2013) 5 SCC 226
Samar Ghosh Versus Jaya Ghosh, (2007) 4 SCC 511
V. Bhagat Versus D. Bhagat, (1994) 1 SCC 337
Vijaykumar Ramchandra Bhate Versus Neela Vijaykumar Bhate, (2003) 6 SCC 334
Naveen Kholi Versus Neelu Kohli, (2006) 4 SCC 558
U. Sree Versus U. Srinivas, (2013) 2 SCC 114
Vishwanath Agrawal, S/O Sitaram Agrawal Vs Sarla Vishwanath Agrawal, (2012) 7 SCC 288
Suman Kapur Versus Sudhir Kapur, (2009) 1 SCC 422
N.G. Dastane Versus S. Dastane, (1975) 2 SCC 326

For the Appellant: Mr. N.K. Thakur, Sr. Advocate with Ms. Ishita Bhandari, Advocate.
For the Respondent: Mr. Bimal Gupta, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral)

Appellant Monika Sharma (hereinafter referred to as the wife) was wedded to respondent Kuldeep Kumar Dogra (hereinafter referred to as the husband) on 26.04.1993 as per Hindu customary rights. Two children were born out of the wedlock. Incompatibility prompted the parties to reside separately. With the passage of time discord widened with the husband filing a petition under Section 9 of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act), wherein wife pleaded infidelity on the part of her husband. Unequivocally it stood averred that the husband was having illicit relationship with his Bhabhi (sister-in-law). Such allegations were also repeated in a petition filed by the wife under Section 125 Cr.P.C. Claiming the allegations to be false, having caused grave mental cruelty and the marriage having broken out irretrievably, husband filed a petition for divorce on the ground of cruelty. This in crux is the averments made in the petition adjudicated by the Court below.

2. In response thereto wife reiterated her allegations.

3. On the basis of the evidence led by the parties, trial Court decided the issues in favour of the husband and allowed the petition by passing a decree of divorce on the ground of cruelty.

4. Such judgment and decree dated 01.11.2012 passed by District Judge, Hamirpur, H.P., in HMA Petition No. 03 of 2010 titled as *Kuldip Kumar Dogra Versus Smt. Monika Sharma,* is subject matter of challenge before this Court.

5. This Court, made several attempts in making the parties understand the advantage and benefit of having their dispute amicably resolved. Regretfully parties could not arrive at any amicable settlement.

6. That wife levelled false allegations of infidelity stand categorically pleaded by the husband in his divorce petition. Such allegations were made in response to a petition No.28 of 2004/RBT No.35/05, titled as *Kuldeep Kumar Dogra Versus Smt. Monika Sharma,* so filed under Section 9 of the Act; petition for maintenance filed under Section 125 Cr.P.C. and in response to the petition in question, she has *inter alia* reiterated such allegations and pleaded cruelty through the hands of her husband.

7. Certain facts are not in dispute. Parties to the *lis* were married on 26.04.1993 and two children Shubham Dogra and Praful Dogra were born out of the wedlock. Since 10.01.2004 parties have been residing separately. Husband shifted to his native village Khasgran, whereas wife continued to reside with her children at Anu, District Hamirpur, H.P. On 04.03.2004, husband filed a petition under Section 9 of the Act (Ex.R-3), seeking restitution of conjugal rights, in which wife filed her response clearly pleading cruelty meted out by her husband. In fact, she categorically pleaded that disharmony *inter se* the parties started after she observed illicit relationship, which her husband was having with his sister-in-law (Bhabhi). In the said petition, on 18.02.2006, even on oath she made statement (Ex.P-2) to this effect. The said petition came to be dismissed vide judgment and decree dated 30.04.2008 (Ex.R-1). Appreciating the testimonies of the wife and her son as also official witnesses Pawan Kumar and Mohinder Singh, Court found that since the wife stood subjected to cruelty by her husband, who had also disconnected the electricity and telephone connections, so installed in the premises occupied by her, it was a case of constructive desertion. Appeal, so filed by the husband stood dismissed by this Court vide judgment dated 08.12.2009 in FAO (HMA) No.303 of 2008, titled as *Shri Kuldeep Kumar Dogra Versus Smt. Monika Sharma* (Ex.R-4).

8. Incidentally the Court, made no observation with regard to the correctness or otherwise of the allegations of the alleged illicit relationship. Thus the issue of restitution of conjugal rights comes to an end.

9. On 28.06.2005, the wife sought maintenance by filing a petition under the provisions of Section 125 Cr.P.C., which was objected to by her husband. When she stepped into the witness box on 27.02.2007 she again deposed (Ex.P-3), that her husband was having an illicit relationship with his sister-in-law (Bhabhi). Said petition came to be allowed vide order dated 28.06.2008 (Ex.R-5). Even here the Court made no observation with regard to the correctness or otherwise of the allegations of the alleged illicit relationship.

10. Careful perusal of judgment/order passed in both the aforesaid cases would reveal that: (a) the husband had been subjecting his wife to extreme mental harassment and physical cruelty; (b) he had been physically assaulting her; (c) he had disconnected the electricity and telephone connections from the premises where the parties had been jointly residing; (d) he alone shifted and jointly started residing with his parents and brother at his native place; (e) he neglected his immediate family; (f) wife had not left the matrimonial house without any reasonable excuses or justifiable cause or had voluntarily started residing separately or withdrawn from the company of her husband; (g) wife was leading a life of an ascetic and after constructing a temple managing its affairs.

11. With the dismissal of appeal No.303 of 2008 (Ex.R-4) by this Court, on 02.01.2010, husband filed a petition under Section 13 of the Act on the ground that after solemnization of marriage, he had been treated by his wife with cruelty.

12. In the aforesaid factual backdrop, it would be appropriate to reproduce herein under, the relevant averments made in the petition in question:-

> "5. That the respondent has levelled false allegations of adultery in her reply to the petition under section 9 of Hindu Marriage Act in which the respondent has specifically made false and frivolous allegation against the petitioner that the petitioner is having illicit relations with his sister-in-law (BHABI).
>
> 6. That these allegations are totally false and there is no proof of it. Similarly, allegations were made or levelled by the respondent in petition under section 125 Cr.P.C. and also the statements of the respondent recorded as PWs in both the proceedings.
>
> 7. That these are the false allegations which amount to cruelty and the same has given reasonable apprehension in the mind of petitioner that it is not possible to live with her. Thus the respondent is guilty of cruelty."

13. Narrating past history and litigation *inter se* the parties, wife responded by making following averments, which stand refuted by the husband in the replication so filed by him:-

> "...In fact the disharmony inter-se the parties started, <u>when the Respondent came to observe the illicit relations between the petitioner and his sister-in-law (Bhabi) and therewith when the Respondent took strong exception to their illicit relationship,</u> the petitioner became crazy and resultantly he started abusing, humiliating and maltreating the Respondent and even started giving beatings and thrashings etc. without any rhyme or reasons, leading consequently to the deterioration of the relationship between them to an irreparable extent and therefore the Respondent was left with no alternative than to arrange for separate accommodation for herself and her two minor children with the help and assistance of her parents."..... (Emphasis supplied)

14. Record reveals that the factum of previous litigation *inter se* the parties and disconnection of electricity and telephone connections, stands proved by the wife through

the testimonies of Ajay Kumar (RW-1), Pradeep Kumar (RW-2), Vijay Kumar (PW.3), Rita Devi (PW.4) and Manoj Kumar (RW-5), the witnesses examined in the instant case.

15. It be only observed that electricity and telephone connections stood disconnected prior to the year 2004.

16. In the instant case, the factum of cruelty and harassment and illicit relationship is sought to be proved by the wife through her statement (RW-6) as also statement of her son (RW-7). Careful perusal of their testimonies would only reveal that allegations of cruelty and harassment pertain to the period prior to the year 2004/2005. There is nothing on record to establish any subsequent act or conduct of cruelty meted out by the husband to the wife or the children. Yes, husband can be said to have dragged his wife into unnecessary litigation, deserted her, subjected her to harassment and cruelty.

17. But the crucial question which still arises for consideration is as to whether such person can be allowed to make false, vague and reckless allegations of infidelity against her husband and as to whether such false allegations can be said to have caused cruelty to the husband, entitling him for a decree of divorce.

18. Perusal of their testimonies would only reveal that allegations of illicit relationship with sister-in-law are absolutely vague and unspecific with regard to time, place and manner. In fact, who is this sister-in-law (Bhabhi) has also not been named or particulars disclosed by the witnesses. Though it stands clearly established through the testimony of the husband and the wife that the husband's family is joint and as such residing in their native village, but however, husband has how many brothers? how many of them are married? who are their wives? has not been disclosed at all. Their testimonies are conspicuously unspecific, in fact, vague in that regard.

19. Master Shubham (RW-7) has only deposed that once he had seen his Tai (here he is referring to sister-in-law-Bhabhi) sitting on the lap of his father. But then when, where and which one of the "*tai*" did he see, he is absolutely silent on this aspect. In any case this part of his testimony does not inspire confidence in view of non disclosure of such fact in his statement dated 01.10.2007 (Ex.PX), so made in the earlier proceedings instituted by his mother seeking maintenance under the provisions of Section 125 Cr.P.C.. In fact, he admits to have been staying with his mother since the year 2003 and thereafter never visited his father's house. It is not that only thereafter he had noticed his father in compromising position

20. In so far as the wife is concerned, she admits not to have vented out any grievances in that regard with any person except her father-in-law, which fact also cannot be said to have been proved. Most significantly she admits that her allegations of illicit relationship are only on her impression and are hearsay in nature. Thus, wife has not been able to prove her allegations of illicit relationship which her husband was having with his Bhabhi.

21. The Hon'ble Supreme Court of India in its various judicial pronouncements has endeavoured to interpret and define the word "cruelty" in the context of Section 13(1) (i-a) of the Act.

22. The Hon'ble Supreme Court of India in *K. Srinivas Rao Versus D.A. Deepa,* (2013) 5 SCC 226 considering its earlier decision rendered in *Samar Ghosh Versus Jaya Ghosh,* (2007) 4 SCC 511, *V. Bhagat Versus D. Bhagat,* (1994) 1 SCC 337; *Vijaykumar*

Ramchandra Bhate Versus Neela Vijaykumar Bhate, (2003) 6 SCC 334; and *Naveen Kholi Versus Neelu Kohli,* (2006) 4 SCC 558, *inter alia,* has held cruelty to be both physical and mental. 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 continuous period of time, has been held to be mental cruelty. Disgusting accusations of unchastity and indecent familiarity with a third person made in the written statement, causing deep hurt has been termed to be mental cruelty.

23. The Hon'ble Supreme Court of India in *U. Sree Versus U. Srinivas,* (2013) 2 SCC 114, had the occasion to deal with a case where the wife, by her consistent conduct of ill-treatment had meted out cruelty by exhibiting her immense dislike towards husband's sadhna in music, showing total indifference and contempt to the tradition of teacher and disciple. Wild allegations were made by the wife casting aspersions on the character of her husband with an intent to malign the reputation of the family. In this backdrop, Court held cruelty to be an inseparable nexus in human conduct/behaviour.

24. The Hon'ble Supreme Court of India in *Vishwanath Agrawal, S/O Sitaram Agrawal Versus Sarla Vishwanath Agrawal,* (2012) 7 SCC 288 held as under:-

> "24. In Shobha Rani v. Madhukar Reddi [(1988) 1 SCC 105], while dealing with 'cruelty' under Section 13(1)(ia) of the Act, this Court observed that the said provision does not define 'cruelty' and the same could not be defined. The 'cruelty' may be mental or physical, intentional or unintentional. If it is physical, the court will have no problem to determine it. It is a question of fact and degree. If it is mental, the problem presents difficulty. Thereafter, the Bench proceeded to state as follows:-
>
> > "4. ....First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted."
>
> 25. After so stating, this Court observed in *Shobha Rani Versus Madhukar Reddi,* (1988) 1 SCC 105, about the marked change in life in modern times and the sea change in matrimonial duties and responsibilities. It has been observed that:
>
> > "5. ....when a spouse makes a complaint about treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social

conditions. It may also depend upon their culture and human values to which they attach importance."

26. Their Lordships in *Shabha Rani case* referred to the observations made in Sheldon v. Sheldon [(1966) 2 All ER 257] wherein Lord Denning stated, "the categories of cruelty are not closed". Thereafter, the Bench proceeded to state thus (Shobha Rani case): -

> "5. .....Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty.
>
> 6. These preliminary observations are intended to emphasise that the court in matrimonial cases is not concerned with ideals in family life. The court has only to understand the spouses concerned as nature made them, and consider their particular grievance. As Lord Ried observed in Gollins v. Gollins [(1963) 2 All ER 966 (HL)] :
>
> > 'In matrimonial affairs we are not dealing with objective standards, it is not a matrimonial offence to fall below the standard of the reasonable man (or the reasonable woman). We are dealing with this man or this woman.'"

27. In V. Bhagat v. D. Bhagat, (1994) 1 SCC 337, a two-Judge Bench referred to the amendment that had taken place in Sections 10 and 13(1)(i-a) after the (Hindu) Marriage Laws (Amendment) Act, 1976 and proceeded to hold that the earlier requirement that such cruelty has caused a reasonable apprehension in the mind of a spouse that it would be harmful or injurious for him/her to live with the other one is no longer the requirement. Thereafter, this Court proceeded to deal with what constitutes mental cruelty as contemplated in Section 13(1)(ia) and observed that mental cruelty in the said provision can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. To put it differently, the mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It was further observed, while arriving at such conclusion, that regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances. What is cruelty in one case may not amount to cruelty in another case and it has to be determined in each case keeping in view the facts

> and circumstances of that case. That apart, the accusations and allegations have to be scrutinized in the context in which they are made. Be it noted, in the said case, this Court quoted extensively from the allegations made in the written statement and the evidence brought on record and came to hold that the said allegations and counter allegations were not in the realm of ordinary plea of defence and did amount to mental cruelty."

25. The Hon'ble Supreme Court of India in *Suman Kapur Versus Sudhir Kapur,* (2009) 1 SCC 422, has held continuous cessation of marital intercourse or total indifference on the part of the wife towards marital obligations to be the legal cruelty.

26. The Hon'ble Supreme Court of India in *Samar Ghosh (supra)* illustrated though not exhaustively, when a person can be said to have caused cruelty in the following terms:-

> "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."

27. Conscious and deliberate statement delivered with pungency placed on record through pleadings cannot be ignored lightly or brushed aside while determining acts of cruelty in a petition for divorce. (See: *Vijaykumar Ramchandra Bhate Versus Neela Vijaykumar Bhate,* (2003) 6 SCC 334).

28. The Hon'ble Supreme Court of India in *V. Bhagat (supra)* while taking into account its earlier decision rendered in *N.G. Dastane Versus S. Dastane,* (1975) 2 SCC 326 has held as under:-

> "16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live

> together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. while arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a mater to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."

29. Cruelty is dependent upon social strata or the milieu to which party belong, there ways of life, relationship, temperament and emotions so conditioned by the social status

30. The allegations of unchastity be it against the husband or the wife certainly amounts to cruelty.

31. In the instant case allegations are not made once but repeatedly. Parties are educated. Family of the husband is well reputed. They jointly reside in the village. Undoubtedly such allegations have caused trauma, anguish and pain not only to the husband but entire family. Allegations made out of vengeance are unverified and unsubstantiated, much less proved. There was no adjudication with regard to the same in the earlier litigation *inter se* the parties. In fact even subsequently with vehemence, they were repeated both in the pleadings and oath. There is no denial to the same. It is not by mistake. It is also not unintentional. In fact, they are made in justification of opposing the petition. Such false or unproven allegations, impeaching the character and fidelity of her husband undoubtedly has affected his reputation. The conduct of the wife, leads to no other inference other than that she has subjected her husband to cruelty. There is reasonable apprehension in the mind of the petitioner that it would be harmful and injurious to live with his wife. With the allegation of infidelity, husband cannot be reasonably expected to live with his wife. The allegations are serious in nature and cannot be taken lightly. Unsubstantiated allegation of infidelity/adultery does amount to cruelty and such acts of cruelty were never condoned by the husband.

32. In this view of the matter, no error can be found with the Judgment and decree dated 01.11.2012 passed by District Judge, Hamirpur, H.P., in HMA Petition No. 03 of 2010 titled as *Kuldip Kumar Dogra Versus Smt. Monika Sharma.* As such, present appeal stands dismissed.

33. Before parting I must place on record, with appreciation, the efforts put in by Ms.Ishita Bhandari, learned counsel, in assisting the Court.

34. Pending application(s), if any, also stand disposed of accordingly.

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

National Insurance Company Ltd. .....Appellant.
Versus
Smt. Nibha Sharma and others ...Respondents

FAO (MVA) No. 559 of 2008.
Date of decision: 31st July 2015.

Motor Vehicles Act, 1988- Section 149- Tribunal had awarded compensation of Rs. 50,000/- along with interest for the injuries sustained by the claimant– insurer pleaded the driver did not have a valid and effective driving license on the day of the accident- the record showed driver had a valid and effective driving license to drive the vehicle at the time of the accident- petition dismissed. (Para-3)

For the appellant: Mr. Jagdish Thakur, Advocate.
For the respondents: Mr. Harsh Khanna, Advocate, for respondent No.1.
Mr.Manoj Thakur, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The insurer has questioned the judgment and award dated 22.7.2008, made by the Motor Accident Claims Tribunal (Forest), Shimla in MAC Case No. 85-S/2 of 2006, titled *Smt. Nibha Sharma versus Shri Rajinder Kumar and others,* whereby compensation to the tune of Rs.50,000/- with 9% interest was awarded in favour of the claimant and insurer/appellant herein came to be saddled with the liability, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The claim petition was outcome of accident in which claimant, namely, Nibha Sharma, sustained injuries and sought compensation as per break-ups given in the claim petition.

3. I wonder why the insurance company has filed the appeal against a meager amount of compensation. It appears that the insurer has questioned the impugned award on the ground that the driver was not having a valid and effective driver license. Records do disclose that the driver was having a valid and effective driving license to drive the offending vehicle at the time of accident.

4. Having said so, the impugned award is upheld and the appeal is dismissed, alongwith pending applications, if any.

5. Registry is directed to release the amount in favour of the claimant strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

6. Send down the record, forthwith, after placing a copy of this judgment.

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

National Insurance Company Ltd. .....Appellant.
Versus
Rohit Thakur and others ...Respondents

FAO (MVA) No. 575 of 2008.
Date of decision: 31st July 2015.

Motor Vehicles Act, 1988- Section 149- Insurer contended that the claimant had received some amount from another Insurance Company and the insurer is liable to pay the rest of the amount- held that claimants right to claim compensation cannot be defeated even if he had received the compensation from the Insurance Company with which he had entered into an contract. (Para-3 to 5)

Cases referred:
Dr. A.C. Mehra vs. Behari Lal and another 1998 ACJ 379
Union of India versus Deoria Sugar Mills ltd. 1980 ACJ 140

For the appellant: Mr. Suneet Goel, Advocate.
For the respondents: Mr.D.S. Nainta, Advocate, for respondent No.1.
Mr. Neeraj Gupta, 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 judgment and award dated 30.6.2008, made by the Motor Accident Claims Tribunal, Solan in MAC Petition No. 14-S/2 of 2007, titled *Sh. Rohit Thakur versus M.N. DAV Dental College and others,* whereby compensation to the tune of Rs.68,852/- was awarded in favour of the claimant and insurer/appellant herein came to be saddled with the liability, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. Mr. Suneet Goel, Advocate, for the appellant argued that the claimant has received Rs.48912/- from another insurance company and rest amount has to be paid by the appellant. The argument is misconceived for the following reasons.

3. The Tribunal has discussed the issue in para 13 of the impugned award and has relied upon the judgment delivered by the Delhi High Court in case titled ***Dr. A.C. Mehra vs. Behari Lal and another*** reported in ***1998 ACJ 379***. It is apt to reproduce para 9 of the said judgment herein:

> *"9. Refuting the arguments of Mr. Salwan that once Insurance Company of the appellant paid to M/s. Saran Motors, the right of the appellant stood subrogated, Mr. Dhanda contended that the question of subrogation in this case did not arise. The present case is covered by the provisions of Motor Vehicles Act, hence the doctrine of subrogation does not apply automatically. It will come into operation only when there has*

been express agreement of transfer of rights. This has been so held by the King's Bench in the case of Nelson (James) & Sons Ltd. v. Nelson Line (Liverpool) Ltd.,1906 2 MB 217. Actions, therefore, to enforce such rights must be brought in the name of the assured as a rule, any defence which is valid against the assured as, for example, that he has released or compromised his right of action, is available to the defendant in such proceedings. Nothing has been placed on record in this case by the respondent to show that the appellant gave away his right of filing claim under the Act. In fact the Supreme Court in the case of Union of India v. Sri Sarda Mills Ltd., 1973 AIR(SC) 281 held that subrogation does not confer any independent right on underwriters to maintain in their own name and without reference to the persons assured an action for damage to the thing insured. Supreme Court in that case went to the extent of justifying the filing of the suit by the mill. In that case the mill which was insured against fire and the fire having taken place, lodged a claim for loss and damages. The Insurance Company with which the mill was insured against fire on claim being lodged satisfied the claim of the mill, insurer subrogated to the right of the mill. Suit in that case was filed by the mill against the Railway Administration. Railway Administration took the plea that right of the mill stood subrogated. Negating these contentions the Supreme Court held that such a claim by the mill was not barred. Relying on the above observations of Apex Court it can safely be said that even if there had been a subrogation, which fact has not been proved on record, still one right of the appellant to file a claim under the Act did not get barred."

4. The above referred judgment finds support from the judgment delivered by the Allahabad High Court in ***Union of India versus Deoria Sugar Mills ltd.*** reported in ***1980 ACJ 140***. It is apt to reproduce paras 9 and 10 of the said judgment herein:

"9. Arnold in his classic on Marine Insurance (British Shipping Laws Vol. 10, page 1193) has stated the position thus:

"..... it is entirely foreign to the spirit of contracts of indemnity that a person damnified should recover his loss more than once; it is, therefore, clear that if he has already recovered from a third party, there can be no liability under the contracts of indemnity; on the other hand, if he has not previously recovered from such third party, but has the right to do so, there is no reason why such third party should be allowed to allege that his liability has been satisfied or reduced by a payment made by a stranger to him, under a contract with which he has nothing to do. The third party remains liable to the person indemnified just as if there had been no contract of indemnity. But the person indemnified can only take the sum recovered from the third party as

trustee for the indemnifier, and similarly, if he has not himself received any sum to which he is entitled he is bound to afford the latter all facilities for doing so. In practice, the commonest way in which the principle of subrogation is applied to insurance is for the insurer to pay the claim of the assured and then to institute proceedings in the name of the latter, but for his own benefit against the parties ultimately liable."

In Macgillivary on Insurance Law, 5th Edition para 1882, the learned author has pointed out that the right of subrogation is a corollary of the general principle that insurance is only a contract to indemnify the assured, that the insurer's right of subrogation arises whenever he pays a loss for which he is liable under his policy, and that it arises upon payment of a partial as well as upon payment of a total loss. The learned author states in para 1886:

"The legal right to compensation remains in the assured, and, therefore, unless there hag been an express assignment of the legal right, actions at law brought for the benefit of the insurer are brought in the name of the assured. In courts of Equity or of Admiralty the insurer has always been allowed to sue in his own name."

Another instructive passage from Porters' Laws Insurance, 8th Edition, at page 232 the position is stated thus:

"The insurer, having contracted to indemnify, could not insist on others being sued first who were primarily liable or on consolidation of his action with others by the same assured against other insurers in respect of the same loss. The mere payment of a loss by the insurer does not afford any defence to a person whose fault has been the cause of the loss in an action brought against the latter by the assured but the insurer required by such payment a corresponding right in any damages recoverable by the assured against the wrong-doer or other party responsible for the loss."

A perusal of the aforesaid authorities shows that the position of the insurance company in the circumstances was, that of an indemnifier. The railway company continues to be primarily liable for the damages sustained by the plaintiff and it not being a party to the contract of indemnity, cannot be absolved of its liability to pay the damages to consignor merely because the consignor had already recovered the money from the insurance company, under a contract of insurance. In such a case the consignor will receive the compensation for damage suffered by him in trust for the insurance

company. After the consignor receives the amount from the railway company, he will have to make it over to the insurance company to the extent to which it had already indemnified him. This is how the consignor is prevented from being doubly compensated in respect of the loss suffered by him i.e. once by receiving the compensation from the insurance company and again receiving the same directly from the railway company. Viewed in this light the observations of Natesan, J. in Trustees of the Port of Madras case (AIR 1970 Mad 48) (supra) relied upon by the learned counsel for the appellant do not support his submission.

10. We are accordingly of opinion that the right of the plaintiff to claim compensation to the extent of Rupees 37,860.94 was not in any way affected because the plaintiff had received a sum of Rs. 33,135 from the insurance company. Of course from out of a sum of 'Rs. 37,860 which the plaintiff would receive from the Union of India, a sum of Rs. 33,135 would be held by him as a trustee for the insurance company which had insured the machinery involved in the suit. We, therefore, find no force even in the second submission made by the appellant."

5. Applying the test, the claimant's right to claim compensation for the third party under different contracts, cannot be taken away or defeated even if he has already received compensation from the insurance with whom he has contracted.

6. Having said so, the Tribunal has rightly made the impugned award. The impugned award is upheld and the appeal is dismissed, alongwith pending applications, if any.

7. Registry is directed to release the amount in favour of the claimant strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

8. Send down the record, forthwith, after placing a copy of this judgment.

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

National Insurance Company Limited ...Appellant

VERSUS

Shashiwala and others ...Respondents.

FAO No.490 of 2008
Decided on: 31.07.2015.

Motor Vehicles Act, 1988- Section 166- Tribunal had awarded a lump sum compensation of Rs. 12,40,000/- with interest @ 7.5 % from the date of filing the claim petition till

realization – held that the Tribunal had fallen in error in awarding lump sum compensation without giving detail – the deceased was pursuing Engineering in N.I.T. Hamirpur- he had a bright carrier- he would have become a Gazetted Officer and his income would not be less than Rs. 35,000/- per month - by excising guess work, the monthly income of the deceased can be taken as Rs. 10,000/- per month- the deceased was a bachelor and 50 % of the amount is to be deducted towards the personal expenses – the claimants had lost the dependency of Rs. 5,000/- per month- he was aged 20 years and multiplier of 15 would be applicable- thus the claimants are entitled to Rs. 9,00,000/-(5,000/- x 12x15) towards the loss of dependency. (Para 15-19)

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
Munna Lal Jain and another vs. Vipin Kumar Sharma and others, JT 2015(5) SC 1

For the Appellant:	Mr.Suneet Goel, Advocate.
For the Respondents:	Mr.S.D. Gill, Advocate, for respondents No.1 and 2. Mr.Vinay Mehta, Proxy Counsel, for respondent No.3. Respondents No.4 and 5 ex-parte.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.(Oral):

Subject matter of this appeal is the award, dated 17th May, 2008, passed by the Motor Accident Claims Tribunal, Hamirpur, (for short, the Tribunal), in Claim Petition No.46 of 2006, titled Shashiwala and others vs. Parveen Kumar and others, whereby a lump sum compensation to the tune of Rs.12,40,000/-, 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 insurer-appellant was saddled with the liability, (for short, the impugned award).

2. The claimants, the owner and the driver have not questioned the impugned award, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the insurer has challenged the impugned award by the medium of present appeal.

4. Facts of the case, in brief, are that on 25th April, 2006, at about 1.35 p.m., deceased Anil Kumar, aged 20 years, who was a student of engineering in National Institute of Technology at Hamirpur, while coming from Bhatta to NIT, Hamirpur on motorcycle No.HP-22A-1132, was hit by a bus bearing registration No.HP-39A-4715 at a place known as Bhumpal, as a result of which the deceased suffered multiple injuries and died on the spot. Thus, the claimants, being parents of the deceased, invoked the jurisdiction of the Tribunal on 16th May, 2006 and claimed compensation to the tune of Rs.10.00 lacs or more, as per the break-ups given in the Claim Petition.

5. The Claim Petition was resisted by the respondents by filing replies.

6. On the pleadings of the parties, the following issues were settled by the Tribunal:

"1. Whether Anil Kumar died due to rash and negligent driving of Bus No.HP-39A-4715 by respondent No.2? OPP

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

3. Whether Bus No.HP-39A-4715 was insured with respondent No.37? OPR 1 & 2.

4. Whether respondent No.2 was not holding valid and effective driving licence to drive the bus in question? OPR-3.

5. Whether the bus in question was being driven in contravention of the terms and conditions of insurance Policy? OPR-3.

6. Relief."

7. In order to prove their claim, as set out in the Claim Petition, the claimants led their evidence. However, the respondents have chosen not to lead any evidence. Therefore, the evidence led by the claimants remained unrebutted.

8. On the last date of hearing, the learned counsel for the appellant was asked to seek instruction to settle the claim at Rs.12.00 lacs in lump sum, for which the matter was adjourned. Today, Mr.Goel, learned counsel for the appellant, stated that he is under instructions to make a statement that the appellant is not ready to settle the claim at Rs.12.00 lacs. His statement is taken on record.

9. I have gone through the impugned award. The Tribunal has fallen in error in awarding lump sum compensation under the head 'loss of source of dependency', without giving details.

10. In the given circumstances, I deem it proper to determine the Claim Petition as follows.

Issue No.1

11. There is no dispute about this issue. However, I have gone through the record. The claimants have proved by leading evidence that the driver of the offending bus was driving the bus rashly and negligently and caused the accident. Accordingly, the findings recorded by the Tribunal under this issue are upheld.

12. Before issue No.2 is dealt with, I deem it proper to deal with Issues No.3, 4 and 5.

Issues No.3, 4 and 5:

13. Onus to prove these issues was upon the insured/owner, the driver and the insurer. They have not led any evidence to prove these issues, thus, have failed to discharge the onus. The driver and the owner have not questioned the impugned award. Even the insurer-appellant has not questioned the findings recorded by the Tribunal on issue No.3. Thus, the said issue rightly came to be decided in favour of the claimants and accordingly, the findings recorded by the Tribunal on this issue are upheld.

14. Onus to prove issues No.4 and 5 was on the insurer. The insurer has not led any evidence to prove that the driver of the offending vehicle was not having a valid and effective driving licence or that the offending bus was being driven in contravention to the terms and conditions contained in the insurance policy. The learned counsel for the

appellant has also not been able to show how the findings recorded under these issues are illegal. Therefore, the said findings are upheld.

Issue No.2:

15. Admittedly, the deceased was pursuing engineering from National Institute of Technology, Hamirpur, was having a bright career ahead, may have become a gazetted officer after passing out engineering and would have earned not less than Rs.35,000/- per month, which a gazetted officer normally earns.

16. However, by exercising guess work, I deem it proper to take monthly income of the deceased at Rs.10,000/- per month.

17. Applying the ratio of the decision of the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** 50% has to be deducted towards personal expenses of the deceased. Accordingly, it is held that the claimants have lost source of dependency to the tune of Rs.5,000/- per month.

18. Coming to the multiplier, admittedly, the deceased was 20 years of age at the time of accident. Therefore, keeping in view the age of the deceased and the dictum of the Apex Court in its latest decision in **Munna Lal Jain and another vs. Vipin Kumar Sharma and others, JT 2015(5) SC 1,** multiplier 15 is appropriate.

19. In view of the above, the claimants are held entitled to Rs.9,00,000/- (Rs.5,000/- x 12 x 15) under the head loss of source of dependency. In addition, the claimants are also held entitled to Rs.10,000/- each under the heads 'loss of estate', 'loss of consortium', 'loss of love and affection' and 'funeral expenses'. Thus, the claimants are held entitled to Rs.9,40,000/- (Rs.9,00,000 + 40,000), as total compensation. The above amount shall carry interest at the rate of 7.5% per annum from the date of the claim petition till realization.

20. It is beaten law of the land that the compensation is to the awarded in favour of the claimants as early as possible. The claimants in the instant case approached the Tribunal in the year 2006 and by now, around 9 years have passed, however, the claimants were not able to reap the fruits of the welfare legislation and the impugned award. This is how the aim and object of granting compensation in vehicular accident cases stands defeated. The insurer has tried to evade its liability for such a long period. Therefore, the insurer-appellant is saddled with Rs.50,000/- as costs payable to the claimants.

21. The Registry is directed to release the award amount, after making calculations and proper identification, in favour of the claimants, and the excess amount, if any, be released in favour of the insurer through account payee's cheque.

22. The appeal stands disposed of accordingly.

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

Oriental Insurance Company ...Appellant
Versus
Nitu Sharma & others ...Respondents

FAO No. 579 of 2008
Decided on : 31.07.2015.

Motor Vehicles Act, 1988- Section 157- It was contended that offending vehicle was transferred and the insurer was not liable- held, that mere transfer of the vehicle is not sufficient to absolve the insurer of his liability and the insurer has to satisfy the award. (Para-15 to 21)

Cases referred:
G. Govindan versus New India Assurance Company Ltd. and others, AIR 1999 SC 1398
Rikhi Ram and another versus Smt. Sukhrania and others, AIR 2003 SC 1446
United India Insurance Co. Ltd., Shimla versus Tilak Singh and others, (2006) 4 SCC 404
Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

For the appellant : Mr. G.C. Gupta, Senior Advocate with Ms. Meera, Advocate.
For the respondents: Mr. Vijay Chaudhary, Advocate, for respondents No. 1 to 4.
Mr. Sunil Chaudhary, Advocate, for respondent No. 5.
Nemo for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award, dated 31st May, 2008, made by the Motor Accidents Claims Tribunal, Presiding Officer, Fast Track Court, Mandi, H.P. (hereinafter referred to as "the Tribunal") in Claim Petition No. 96/2002, 19/05, titled as Nitu Sharma & others versus Oriental Insurance Company & others, whereby compensation to the tune of Rs. 9,89,200/- with interest @ 7.5% per annum from the date of the claim petition till its realization, came to be awarded in favour of the claimants-respondents No. 1 to 4, herein and the insurer-appellant herein, was saddled with liability (for short, the "impugned award").

2. The claimants, owner and driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. Learned Senior Counsel appearing on behalf of the appellant argued that the Tribunal has fallen in an error in dismissed two applications, i.e. one, moved under Order 6 Rule 17 of the Code of Civil Procedure and another, under Section 170 of the Motor Vehicles Act. He further argued that the award amount is excessive.

4. In order to return findings on these issues, it is necessary to give a brief summary of the case, the womb of which has given birth to the present appeal.

5. The claimants being victims of the motor vehicular accident, had invoked the jurisdiction of the Tribunal, in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988, for short "the Act", for grant of compensation to the tune of Rs. 20,00,000/-, as per the break-ups given in the claim petition, on the ground that driver, namely, Govind Ram, had driven the vehicle-Bus bearing registration No. HP-33-2986, rashly and negligently, on 23.09.2002, near Tail Control Sundernager, hit it against scooter bearing registration No. HP-31-1279 which was being driven by Kamal Kumar, as a result of which, he sustained injuries and succumbed to the injuries.

6. The claim petition was resisted by the respondents on the grounds taken in their memo of objection.

7. Following issues came to be framed by the Tribunal:

"1. Whether the deceased died as a result of rash or negligent driving of the respondent No. 3? ...OPP

2. In case Issue No. 1 is proved, to what amount the petitioners are entitled and from which of the respondents? ....OPP

3. Whether the respondent No. 3 was not having a valid and effective driving licence as alleged? OPR-1

4. Whether the petition is bad for non-joinder of necessary parties? ...OPR-1

5. Relief."

8. During the pendency of the claim petitions, two applications, i.e. one under Order 6 Rule 17 of the Code of Civil Procedure and another under Section 170 of the Act, were filed by the insurer before the Tribunal, as discussed hereinabove.

9. The claimants have led evidence which has remained unrebutted.

10. Before I deal with the issues raised by the learned Senior Advocate, I deem it proper to deal with issues No. 1, 3 and 4.

Issue No. 1.

11. There is ample evidence on the record led by the claimants to prove that on 23.09.2002, near Tail Control Sundernager, driver, namely, Govind Ram, has driven the offending vehicle, rashly and negligently, caused the accident, as a result of which deceased Kamal Kumar sustained injuries and succumbed to the injuries. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

Issue No. 3.

12. Now coming to Issue No. 3, it was for the insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence at the relevant time. But it has failed to prove that the driver was not having any valid and effective driving licence at the relevant time or that the owner has committed willful breach.

Issue No. 4.

13. It was for the insurer to plead and prove that the petition is bad for non-joinder of necessary parties, has not led any evidence. Accordingly, the findings returned by the Tribunal on Issue No. 4 are upheld.

Issue No. 2.

14. The two applications, as referred to above, revolve around Issue No. 2. In the application under Order 6 Rule 17 of the Code of Civil Procedure, it is averred that the offending vehicle was transferred and the insurer was not liable.

15. The transfer of the vehicle cannot be a ground to absolve the insurer from its liability in terms of the mandate of Section 157 of the Act.

16. 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.

17. The insurance policy was valid and the insurer has to satisfy the award.

18. 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.

13. .....

14. .....

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."

19. 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."

20. 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."

21. The appellant-insurer has not led any evidence before the Tribunal. Thus, filing of the said two applications was a mere formality and came to be rightly rejected.

22. The Tribunal has rightly assessed the income of the deceased and made the deductions keeping in view the ratio laid down by the apex Court in ***Sarla Verma's*** case, *supra.*

23. The awarded amount is excessive for the following reasons.

24. Admittedly, the deceased was 32 years of age at the time of accident. The multiplier of '15' was applicable in this case, keeping in view of the Schedule appended to the Act and the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104** read with **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.** But, the Tribunal has fallen in an error in applying the multiplier of '17'. Accordingly, it is held that claimants are entitled to compensation to the tune of Rs. 4800 x 12 = 57,600/- x 15 = Rs. 8,64,000/- under the head 'loss of dependency'.

25. The claimants are also held entitled to Rs. 10,000/- under the head 'loss of love and affection', Rs. 10,000/- under the head 'funeral expenses', Rs. 10,000/- under the head 'loss of consortium' and Rs. 10,000/- under the head 'loss of estate'.

26. Having said so, the claimants are held entitled to compensation to the tune of Rs. 8,64,000/- + 10,000/- + 10,000/- + 10,000/- + 10,000/-, total amounting to Rs. 9,04,000/- with interest @ 7.5% per annum.

27. Accordingly, the impugned award is modified to the above extent and the appeal is disposed of.

28. The Registry is directed to release the awarded amount in favour of the claimant, strictly as per the terms and conditions contained in the impugned award and the excessive amount be refunded to the insurer through payees' account cheque.

29. Send down the records after placing a copy of the judgment on the Tribunal's file.

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

FAOs No. 630 & 665 of 2008
Decided on: 31.07.2015

FAO No. 630 of 2008

Oriental Insurance Company Ltd. ...Appellant.

Versus

Tapas Madhok and others ...Respondents.

FAO No. 665 of 2008

Oriental Insurance Company Ltd. ...Appellant.

Versus

Noor Ahmed and others ...Respondents.

Motor Vehicles Act, 1988- Section 149- It was held by M.A.C.T. that the accident was outcome of contributory negligence- the insurer had not led any evidence to disprove this fact- appeal dismissed. (Para 7)

FAO No. 630 of 2008

For the appellant: Mr. G.D. Sharma, Advocate.

For the respondents: Mr. Lalit K. Sharma, Advocate, for respondent No. 4.
Mr. Vishal Mohan, Advocate, for respondent No. 6.
Nemo other respondents.

FAO No. 665 of 2008

For the appellant: Mr. G.D. Sharma, Advocate.

For the respondents: Mr. Jagdish Thakur, Advocate, for respondent No. 4.
Mr. Vishal Mohan, Advocate, for respondent No. 6.
Nemo other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Both these appeals are outcome of a vehicular accident, which was caused by the contributory negligence of the drivers of both the offending vehicles, thus, I deem it proper to determine both these appeals by this common judment.

2. Challenge in both these appeals is to the judgments and awards, dated 08.04.2008, made by the Motor Accident Claims Tribunal, Fast Track Court, Solan, H.P. (for short "the Tribunal") in two claim petitions, whereby compensation to the tune of Rs.9,99,200/- and Rs.7,93,000/- with interest @ 7½% per annum from the date of the petition till its realization was awarded in favour of the claimants-injured and insurers of both the offending vehicles came to be saddled with liability in equal shares (for short "the impugned awards").

3. One of the insurance company, i.e. Oriental Insurance Company, has questioned the impugned awards whereas the other insurance company, i.e. National Insurance Company, has satisfied the same.

4. The claimants-injured, the owners-insured, the drivers of both the offending vehicles and National Insurance Company have also not questioned the impugned awards on any count, thus, have attained finality so far it relate to them.

5. It is apt to record herein that the National Insurance Company is the insurer of truck bearing registration No. HP-13-0518. The driver and the owner-insured of the said vehicle have not questioned the findings returned by the Tribunal to the effect that the accident was outcome of the contributory negligence. Then, how can it lie in the mouth of the insurer that the driver of the offending vehicle was not rash and negligent.

6. Having said so, on this count only, both these appeals merit to be dismissed. However, I have gone through the impugned awards and the evidence on record and am of the considered view that the Tribunal has rightly held that the accident was outcome of the contributory negligence. The insurers have not led any evidence to that effect, thus, have rightly been saddled both the insurer with liability.

7. Viewed thus, no case for interference is made out Accordingly, both the impugned awards are upheld and the appeals are dismissed.

8. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the respective impugned awards after proper identification.

9. Send down the record after placing copy of the judgment on Tribunal's file.

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

Rajinder Kumar ...Appellant.

Versus

Sh. Watan Singh and others ...Respondents.

FAO No. 602 of 2008
Decided on: 31.07.2015

Motor Vehicles Act, 1988- Section 173- The insured was held to have committed breach of the terms and conditions of the Insurance Policy – insurer was held liable to pay compensation with a right of recovery– the insured contended that sufficient opportunities

were not given to him to prove that the driver of the vehicle had a valid and effective driving license and the owner had not committed any willful breach- held that the insured had ample opportunity to lead evidence during three years – he did not do so- he filed an appeal and the claimant was deprived of his right to get the compensation – the appeal dismissed with cost of Rs. 25,000/-. (Para 5-6)

For the appellant:	Mr. Tara Singh Chauhan, Advocate.
For the respondents:	Ms. Anita Jalota, Advocate, vice Mr. Manohar Lal Sharma, Advocate, for respondent No. 1. Mr. Vijay Bir Singh, Advocate, for respondent No. 2. Mr. Jagdish Thakur, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The owner-insured has called in question the judgment and award, dated 01.08.2008, made by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala (H.P.) (for short "the Tribunal") in MACT Petition No. 33-P/11/2005, titeld as Shri Watan Singh versus Shri Rajinder Kumar and others, whereby compensation to the tune of Rs.3,48,000/- with interest @ 8% per annum from the date of the petition till its realization came to be awarded in favour of the claimant-injured and the insurer was saddled with liability with right of recovery (for short "the impugned award").

2. The claimant-injured, the driver and the insurer of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-owner-insured has questioned the impugned award on the ground that sufficient opportunities were not granted to him to prove that the driver of the offending vehicle was having a valid and effective driving licence to drive the same and he has not committed any willful breach.

4. I have gone through the impugned award and the minutes of the file.

5. The appellant-owner-insured has chosen to remain in deep slumber and now, how can it lie in the mouth of the owner-insured, who has committed a willful breach, that he has not been granted sufficient opportunities to lead evidence in support of his defence. He has contested the claim petition before the Tribunal for three years and has dragged the claimant-injured into the lis, which is on the dockets of this Court for the last seven years. The claim has been deprived of his legitimate rights because of the appellant-owner-insured, is against the concept of granting of compensation and is to defeat the aim and object of the Legislation.

6. Virtually, the appellant-owner-insured has defeated the very purpose of granting compensation, is liable to be saddled with costs, is accordingly saddled with costs quantified at Rs.25,000/- to be paid to the claimant-injured.

7. Having said so, no case for interference is made out. Accordingly, the impugned award is upheld and the appeal is dismissed.

8. At this stage, Mr. Jagdish Thakur, learned counsel for the insurer, stated at the Bar that the awarded amount has already been released in favour of the claimant-injured. His statement is taken on record.

9. The Registry is directed to release the amount of Rs.25,000/- deposited by the appellant-owner-insured in favour of the claimant-injured through payees' account cheque.

10. Send down the record after placing copy of the judgment on Tribunal's file.

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

Ravi Kumar ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Criminal Appeal No.4012 of 2013
Reserved on : 21.7.2015
Date of Decision : July 31, 2015

Indian Penal Code, 1860- Section 302- Complainant was residing with his wife N (deceased)- the accused had an evil eye on her- he followed her to the jungle and murdered her- when the wife did not return search parties were constituted, on which the dead body was recovered- the prosecution had not explained the circumstances in which the accused was arrested- the complainant himself had stated that his wife was murdered by some unknown person- a blood stained sickle was recovered by the police but no effort was made to get the finger prints on the same analyzed- the complainant had not raised any suspicion against the accused- the circumstance that accused had followed the deceased on the day of incident was not established- simply because the dead body was recovered by the search party of which the accused was a member is not sufficient to infer the guilt of the accused – Medical Officer stated the injury could have been caused by means of darat but darat was not shown to her- the finger prints of the accused were not found on the weapon of the offence – the disclosure statement was also not proved- held that in these circumstances the accused was wrongly convicted by the Trial Court. (Para-11 to 69)

Cases referred:
Nidhia Ram v. State of H.P., 2007(1) Shim.L.C. 201
Prabhoo v. The State of Uttar Pradesh, AIR 1963 SC 1113
Chandran v. State of Madras, (1978) 4 SCC 90
Narsinbhai Haribhai Prajapati v. Chhatrasinh and others, AIR 1977 SC 1753
Vijay Thakur v. State of Himachal Pradesh, (2014) 14 SCC 609
Musheer Khan @ Badshah Khan v. State of M.P., (2010) 2 SCC 748
Babboo v. Sgtate of M.P., (1979) 4 SCC 74

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

Appellant-convict Ravi Kumar, hereinafter referred to as the accused, has assailed the judgment dated 30.4.2013, passed by Additional Sessions Judge, Kangra at Dharamshala, District Kangra, Himachal Pradesh, in Sessions Case No.38-G/VII/12, titled as *State v. Ravi Kumar*, whereby he stands convicted of the offence punishable under the provisions of Section 302 of the Indian Penal Code and sentenced to undergo imprisonment for life and pay a fine of Rs.10,000/- and in default thereof to further undergo rigorous imprisonment for a period of one year.

2. It is the case of prosecution that complainant Ramesh Chand (PW-7) was living with his wife Nisha Devi (deceased) and two children in village Bari. Accused Ravi Kumar, nephew of Ramesh Chand, who had an evil eye on Nisha Devi, went to the jungle with her on 21.12.2011. On 22.12.2011, when Nisha Devi went to the jungle, commonly known as Ridian wala Jungle, he followed and murdered her. Not finding his wife at home, Ramesh Chand was informed that she had gone to the jungle for fetching fuel wood. When she did not return till late evening, villagers constituted two search parties, one of which was headed by the accused. Pretending that he was not aware of anything, accused led the search party to the place where the dead body was lying. On a telephonic information of the deceased being murdered, after preparing Rapt (Ex. PW-11/A), police party, headed by ASI Suresh Kumar (PW-16) reached the spot, where statement of Ramesh Chand, under the provisions of Section 154 of the Code of Criminal Procedure (Ex.PW-7/A), was recorded, on the basis of which FIR No.191, dated 22.12.2011 (Ex.PW-12/A), for offence under the provisions of Section 302 of the Indian Penal Code, was registered at Police Station Dehra, District Kangra, Himachal Pradesh. On the spot, inquest report (Ex.P-13 & Ex.PW-16/M) was prepared; spot was got photographed; vide Memo (Ex. PW-1/D), police took into possession a pair of *chappals* (Ex.P-8), one blood stained *Drat* (Ex.P-2) and shawl (Ex.P-4), lying near the dead body, which were identified to be that of the deceased by Ramesh Chand. On 23.12.2011, Suresh Kumar got the spot examined from Dr. Arun Sharma (PW-17), Deputy Director, RFSL Dharamshala, who prepared his report (Ex.PW-16/P). On 25.12.2011, investigation was taken over by SHO Tilak Raj (PW-19), and on 31.12.2011 accused was arrested. On 1.1.2012, accused made a disclosure statement (Ex.PW-4/A), in the presence of Ramesh Chand (PW-4) and Tilak Raj (PW-9), to the effect that he could get his blood stained clothes and the weapon of offence recovered. In the presence of very same witnesses, from his house, accused got recovered blood stained *Drat* (P-15), his pant (P-16), shirt (P-17), vide recovery Memo (Ex. PW-4/B). The incriminating articles were sent for chemical analysis and reports of the Regional Forensic Science Laboratory, Dharamshala (Ex.PW-19/F and 19/G) were taken on record. Investigation further revealed that on 22.12.2011, Ranjana Kumari (PW-6), a co-villager had seen the accused coming from the jungle. He was walking hurriedly. Also, he had asked Sanjay Kumar (PW-3) and Batan Singh (PW-5) to mislead the police, by furnishing false information. 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 302 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 19 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 defence of innocence and false implication. No evidence in defence was led.

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

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 Mr. Anoop Chitkara, Advocate, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution.

7. It be only observed that trial Court has not separately culled out the circumstances leading to the conviction of the accused. Reasoning adopted by the trial Court can be summarized as under:

(a) Accused made a disclosure statement (Ex.PW-4/A) in the presence of respectable persons of the Panchayat, which further led to recovery of the incriminating articles.

(b) Accused did not lead any evidence to establish that blood stains found on his *pyjama*, so recovered by the police, were his.

(c) Testimony of independent prosecution witnesses fully inspired confidence.

(d) *Drat* (Ex.P-15), so recovered from the possession of the accused, contained blood stains.

8. In our considered view, the circumstances emanating from record are as follows:

1. Accused had an evil eye over the deceased, which according to the prosecution was the motive for crime.
2. On 21.12.2011, accused had visited the jungle alongwith the deceased. Next day, he again went and murdered her.
3. Accused was last seen coming from the direction, where the dead body was found.
4. Accused led the search party to the place where he had kept the dead body in the jungle.
5. Accused prompted and threatened the witnesses to mislead the police, by giving a different version.
6. Accused made a disclosure statement, which led to the recovery of weapon of offence and other incriminating articles.
7. Medical evidence supported the crime to have been committed with the weapon of offence so recovered from the possession of the accused.
8. Scientific evidence corroborating the substantive evidence.

9. Before we deal with the testimonies of the prosecution witnesses, we may only record certain undisputed facts, which emerge on record. Accused is the nephew of complainant Ramesh Chand (PW-7); he was member of the search party, so constituted by the villagers for searching the deceased; in relation to the crime in question, accused as also other villagers, including Batan Singh (PW-5) and Ramesh Chand (PW-4) were interrogated by the police; none suspected complicity of the accused in the crime till the investigation was taken over by SI Tilak Raj (PW-19) on 25.12.2011 and even thereafter till 31.12.2011, when the accused was arrested.

10. What were the grounds on which the accused was arrested on 31.12.2011 are not emanating from the record. We find the arrest Memo not to have been produced in the Court. This fact acquires significance, in view of the statement (Ex.PW-7/A), wherein the complainant himself got recorded that his wife had been murdered by "*some unknown person*". We find that one blood stained sickle (*Drat*) (Ex.P-2), which was lying next to the dead body, stood recovered by the police on 22.12.2011 itself, however, no effort was made by the prosecution to have the finger prints on the sickle analyzed. To whom did this sickle belong to and whether it was used by the accused or someone else, for committing murder, has not been established on record. The genesis of the prosecution story, to some extent, is rendered to be doubtful.

Circumstance No.1: Accused had an evil eye over the deceased, which according to the prosecution was the motive for crime.

11. Ramesh Chand (PW-7), in his examination-in-chief, states that one year prior to the incident, accused, who is his nephew, had concealed himself in the first floor of his house, on the pretext of taking a pump. Again about three months prior to the incident, when the deceased was taking bath, accused peeped in. The witness states that accused, who had an evil eye on his wife, would frequently visit his house.

12. We do not find such version of the witness to be inspiring in confidence, for the reason that in the cross-examination part of his testimony, he admits to have informed the police about the murder having been committed by some unknown person. He never raised any suspicion against the accused. His version in Court is an afterthought and mere exaggeration as we find it not to gave been recorded in his previous statement (Ex.PW-7/A), with which he was confronted. Crucially, witness admits that police had interrogated witnesses Sanjay Kumar (PW-3), Batan Singh (PW-5), Ranjana Kumari (PW-6) as also his children, yet no finger of suspicion was ever raised against the accused or any previous conduct brought to the notice of the police. Also, the witness admits not to have reported the same to anyone.

13. That Ramesh Chand (PW-7) had no suspicion against any person, muchless the accused, stands uncontrovertedly admitted by Onkar Singh (PW-1), Jagdish Chand (PW-2), Sanjay Kumar (PW-3), Batan Singh (PW-5) as also police officials HHC Sushil Kumar (PW-15) and SI Tilak Raj (PW-19).

14. It is not the case of prosecution that the deceased resisted any overt acts of the accused, which prompted him to commit the crime. No motive, in particular, has been ascribed to the accused. Also, medical evidence reveals that deceased was not subjected to sexual assault and it is also not the case of prosecution that after committing rape, accused murdered the deceased.

15. Also, the theory of motive, of whatever it may be, is just an afterthought. In the instant case, as has been observed, Ramesh Chand (PW-7) maintained stoic silence with

regard to the evil intent of the accused, for more than ten days. Hence, this circumstance cannot be said to have been proved.

Circumstance No.2: On 21.12.2011, accused had visited the jungle alongwith the deceased. Next day he again went and murdered her.

16. For establishing such fact, prosecution relies upon the testimonies of Komal (PW-8), daughter of the deceased, as also Ramesh Chand (PW-7).

17. According to Ramesh Chand, he was informed by his son Saurav, about the deceased and the accused having gone together to the forest on 21.12.2011. Not only this part of his testimony is hearsay, but we also find it not to have been recorded in any one of his previous statements, with which he was confronted. That apart, Saurav has not been examined in Court by the prosecution. Crucially, witness admits that his children were interrogated by the police, yet such fact was not disclosed. Not much credit can be lent to his version.

18. When we peruse the testimony of Komal, we find her to depose that on 21.12.2011, her mother and the accused had gone to the forest for fetching fuel wood. At that time, both she and her brother Saurav were also present. Well, that is all the witness states with regard to the visit to the forest. We find this part of her testimony to be a mere exaggeration and improvement. Even otherwise, what does it lead to remains unexplained. This witness did not find, in any manner, conduct of the accused or for that matter her mother to be suspicious in nature. And it is not the case of the prosecution that the accused and the deceased were having any intimacy or that they were found in a compromising position.

19. In any event, this circumstance does not lead to the inference that on 22.12.2011 also, deceased had gone to the jungle with the accused, more so in the teeth of admission made by Ramesh Chand that the deceased used to go to the jungle for fetching fuel wood with other ladies and gents of the village. There was nothing abnormal for the accused to have gone to the jungle with the deceased on 21.12.2011. As such, this circumstance does not lead the prosecution anywhere.

Circumstance No.4: Accused led the search party to the place where he had kept the dead body in the jungle.

20. It has come in the testimony of Ramesh Chand (PW-7) that on 22.12.2011, when he returned home at about 4.20 p.m., he found his wife not to be home. His children informed that the deceased may have gone to the jungle for fetching fuel wood. He made enquiries from the villagers and was informed by Tilak Raj (PW-9) that he had seen the deceased go to the jungle, carrying *Drat*, shawl and rope, at 9 a.m. Later in the evening, different groups were formed by the villagers for searching the deceased. Accused led the group, in which he, Sanjay Kumar, Amin Chand and Saurav were there. In the jungle, accused called him informing that he had found the deceased. He immediately went there and identified the dead body to be that of his wife.

21. We find that Amin Chand and Saurav have not been examined in the Court and the version of Ramesh Chand stands corroborated by Sanjay Kumar, who further goes to state that just before the place where the dead body was lying, accused handed over the torch and thus by going ahead, he was the first one to have noticed the dead body. Immediately, he called Ramesh Chand (PW-7) to the place where the dead body was lying. Accused had asked him to depose truth to the police, or else all would be involved in the crime. In fact, accused had threatened the witnesses to do so. We notice that at this stage

the witness was declared hostile and cross-examined, but nothing incriminating could be elicited from his testimony.

22. Onkar Singh (PW-1) and Jagdish Chand (PW-2), who went to the jungle searching the deceased, have only corroborated the version of Ramesh Chand (PW-7).

23. When we peruse the testimony of Batan Singh (PW-5), who was member of the search party, we find there is contradiction to the effect that it was Sanjay Kumar who had called the villagers to the place where dead body of Nisha was lying, unlike the version of Onkar Singh and Ramesh Chand, who state it was the accused who had called the villagers to that place.

24. In his statement, Ramesh Chand (PW-7) had categorically got recorded that both the accused and Sanjay Kumar had called him to the place where the dead body was lying.

25. Contradictions apart, we do not find the version of the witnesses to be implicating the accused in the crime. No finger of suspicion is pointed out towards the accused. Submission that the accused knew the place where the dead body was lying and just short of ten feet before reaching that place, he ensured that Sanjay Kumar head the search party, cannot be inferred from the testimony of the witnesses.

26. Accused admitted to be member of the search party. But then this fact alone does not prove his culpability. After all other villagers were also there. Noticeably, while the search operation was going on, none observed any unusual conduct and/or behaviour of the accused. Thus, prosecution has not been able to establish this circumstance.

Circumstance No.5:Accused prompted and threatened the witnesses to mislead the police, by giving a different version.

27. Through the testimonies of Sanjay Kumar (PW-3) and Batan Singh (PW-5), prosecution wants the Court to believe that accused had not only threatened these witnesses but had also asked them to mislead the Investigating Officer(s).

28. We do not find such fact, emerging from the testimony of the witnesses, for we find that both the witnesses were suspect and interrogated by the police till the time accused was arrested.

29. According to Batan Singh, accused had wanted him to state before the police that both of them were together at the time when search was conducted. Well, it is not a disputed fact, as has emerged from the testimony of other witnesses that Batan Singh, was also a member of the search party. Hence, where is the question of the accused asking the witness to depose falsely.

30. As already discussed, Sanjay Kumar has not supported the prosecution. Hence, this circumstance has also not been proved by the prosecution.

Circumstance No.3: Accused was last seen coming from the direction, where the dead body was found.

31. To prove this circumstance, prosecution refers to and relies upon the testimony of Ranjana Kumari (PW-6), who states that on 22.12.2011, she had seen the accused walking hurriedly, carrying a bundle of fuel wood. This was at about 11 a.m. Day after the postmortem was conducted, accused asked her not to disclose to the police about the clothes which he was wearing on 22.12.2011.

32. Now, the witness does not state that the accused was coming from the direction where the dead body was recovered. She also does not state that in fact he was coming from the jungle. She met him near her house, which is neither inside the jungle, near the jungle or in the direction from where dead body was recovered. Her version that on 22.12.2011, accused had asked her not to disclose about the clothes he was wearing, is a mere exaggeration and improvement, for we find it not to have been recorded in her previous statement (Ex. D-2), with which she was confronted. We are of the view that the witness is absolutely unreliable and her version unbelievable. She is an educated lady and can read and write in English language. She admits that on 22.12.2011, police had carried out investigation in the village and yet she did not disclose such fact either to the police or Ramesh Chand (PW-7). This is despite the fact that the deceased was her real aunt. That her version is not truthful is apparent from the fact that she is trying to protect her real brother Batan Singh, who himself was a suspect. Thus, this circumstance cannot be said to have been proved.

Circumstance No.7: Medical evidence supported the crime to have been committed with the weapon of offence so recovered from the possession of accused.

33. Through the testimony of ASI Suresh Kumar (PW-16) and Onkar Singh (PW-1), it stands established that dead body of the deceased was taken into possession by the police on 22.12.2011 itself. Postmortem was conducted by Dr. Anita Mahajan (PW-10) on 23.12.2011. According to the doctor, following injuries were found on the body of the deceased:

> "(i) Spindle shaped incised wound 4cm x 1.5 cm on right side of chin having clear margins and bone deep.
>
> (ii) Spindle shaped incised wound 8 cm x 2 cm x 2 cm below right ear lobule and lateral part of neck extending into facial region with clear margins.
>
> (iii) Spindle shaped incised wound with clear cut margins 8 cm x 2 cm on lateral part on neck right side extending into posterior part of neck cutting deep structures of neck exposing underlying bony cervical vertebra.
>
> (iv) Spindle shaped incised wound with clear cut margins 3cm x 1 cm muscles deep on upper part of neck left side.
>
> (v) spindle shaped incised wound with clear cut margins 4.5cm x 1 cm muscle deep over clavicular region left side.
>
> (vi) Spindle shaped incised wound 2cm x 1.5 cm muscle deep over left anterior axillary fold with clear cut margins. No other injury was seen on the rest of the body."

No external or internal injuries were found on private parts of the deceased. Cause of death was opined to be haemorrhagic shock due to incised wound on neck.

34. The doctor opined that injuries found on the body of the deceased could have been sustained with *Drat* (Ex. P-15). But for unexplainable reasons, *Drat* (Ex. P-2) was not shown to her. Also, doctor admits that the incised wounds could have been first caused with a sickle. Also what is crucial is that all the incised wounds were spindle in shape, which in fact is in the shape of sickle (Ex. P-2), which was lying near the dead body of the deceased. Prosecution has not ruled out the possibility of use of this sickle in the crime. Spindle shape injuries could have been inflicted even with weapon (Ex. P-2). That accused used this sickle has not been proved. On the weapon (Ex. P-2) or Ex. P-15 finger prints of the accused were not proved.

35. At the time of spot inspection by Dr. Arun Sharma (PW-17), he also noticed a blood stained *Drat* (Ex.P-2). Significantly, both the weapons, i.e. Ex. P2 and Ex. P-15 are almost of same size and shape. Possibility of the deceased sustaining injuries with weapon (Ex. P-2) has not been ruled out.

Circumstance No.6: Accused made a disclosure statement, which led to the recovery of weapon of offence and other incriminating articles.

36. Through the testimonies of Ramesh Chand (PW-4), Tilak Raj (PW-9) and SI Tilak Raj (PW-19), prosecution wants the Court to believe that accused first made a disclosure statement (Ex.PW-4/A) and then led the police and got recovered *Drat* (Ex. P-15), so concealed by him in the second storey of his house. Also his blood stained *Pyjama* (Ex. P-16) and other clothes were recovered.

37. Having perused the testimonies of these witnesses, we find the version to be contradictory, rendering the factum of disclosure statement to be absolutely doubtful.

38. SI Tilak Raj (PW-19) states that on 1.1.2012, in the presence of witnesses Tilak Raj (PW-9) and Ramesh Chand (PW-4), accused made a disclosure statement (Ex. PW-4/A). Thereafter, accused led the police party to his house in village Bari, from where Drat (Ex. P-15) and clothes, kept under a box, were recovered. According to the witness, accused was interrogated for 25 minutes and the questions were put in Hindi language. The articles recovered vide Memo (Ex. PW-4/B) were wrapped in the cloth kept in the investigation kit for making parcels.

39. Ramesh Chand (PW-4) states that on 1.1.2012, he of his own went to the Police Station where the accused was being interrogated by the SHO in his room. Accused disclosed that not only could he get the spot identified, but also get the *Drat* and the clothes recovered from the place where he had concealed the same. Statement of accused (Ex.PW-4/A) was recorded to such effect. Witness further states that the accused led the police to his house and got recovered *Drat* and clothes so kept in a box, in the inner room of his house. In cross-examination, witness admits that prior to his reaching the Police Station, accused was being interrogated by the SHO. He states that except for the disclosure statement (Ex. PW-4/A), no question was put by the SHO to the accused and "*it took only 2-3 minutes for recording the above statement*" and thereafter *"we went to the house of the accused in a police vehicle at about 3-4 P.M."*

40. The witness was confronted with his previous statement (Ex. D-1), wherein the factum of recovery of the pant at the instance of the accused was not recorded. Also, according to this witness, the incriminating articles were kept in the box (made of tin), which was neither taken into possession nor sealed by the police. Crucially, witness admits that the house is in joint possession of the brother and parents of the accused. Specifically, this witness does not record presence of Tilak Raj (PW-9) at the time of recording of disclosure statement.

41. But when we peruse the testimony of Tilak Raj (PW-9), we find him to have deposed that both he and Ramesh Chand (PW-4) went to the Police Station, where, in their presence, accused made such disclosure statement. But the witness clarifies that he reached the Police Station ten minutes after arrival of Ramesh Chand.

42. Not only his version is self contradictory, but also witnesses have contradicted themselves.

43. The witnesses have contradicted not only themselves but also each other.

44. Initially, Tilak Raj (PW-9) states that both he and Ramesh Chand had gone to the Police Station together. He used the expression "*I alongwith Ramesh Chand*". In the later part of his testimony, he states that "*I cannot tell as to how many questions were put by the I.O. to the accused. I cannot tell whether the I.O. was writing the questions and thereafter the answers made by the accused. Volunteered that whatever the accused had told it was written by the I.O.*".

45. Further, according to the Investigating Officer, accused was interrogated for 25 minutes, whereas according to Ramesh Chand, it took 2-3 minutes for recording the statement and except for the disclosure statement so recorded, no other "investigation" (here he means interrogation) was conducted in his presence. He does not even record presence of Tilak Raj (PW-9).

46. Further, according to SI Tilak Raj (PW-19), the accused was interrogated in Hindi, which version stands contradicted by Tilak Raj (PW-9), according to whom it was so done in *Pahari* language but then the document prepared is in Hindi language. What is this *Pahari* dialect? has not been explained. What questions were put? no evidence is forthcoming in this regard. Tilak Raj (PW-9) is not even aware as to how many questions were put to the accused and who scribed the same. Significantly, Ramesh Chand (PW-4) states that before he reached the Police Station, accused already stood interrogated by the SHO. All this renders the factum of accused making the disclosure statement, in the presence of the witnesses, to be doubtful.

47. In similar circumstances, where the accused had made disclosure statement in *Chambyali* language, which was recorded in Hindi, a Division Bench of this Court in *Nidhia Ram v. State of H.P.*, 2007(1) Shim.L.C. 201, expressed doubts about the genuineness and admissibility.

48. Further, SI Tilak Raj (PW-19) states that the recovered articles were sealed with the cloth kept in the investigation kit, whereas according to Tilak Raj (PW-9), cloth was purchased from the market by the police and was got stitched with a machine. Who purchased the cloth? Who paid the money? Where did it come from? Where was it stitched? remain unexplained.

49. Further, according to Tilak Raj (PW-9), accused had concealed the incriminating articles in an iron box. Now, where is this box? Why was it not seized and sealed? remain unexplained. This fact becomes important, for the reason that house from where recovery was effected, is jointly possessed by the accused, his brother and father, who also reside there. Only accused had access to the place where the alleged incriminating articles were concealed, has not been established by the prosecution.

50. It be only observed, as has come in the testimony of most of the prosecution witnesses, that police had suspected Batan Singh and Ramesh Chand (PW-4) in the crime. Investigation was conducted by the police in the village and on certain occasions, police had also visited the house of the accused. Possibility of the articles being planted cannot be ruled out. Also had the accused been guilty, he had sufficient time of ten days (between 22.12.2011 and 31.12.2011) for disposing of the same.

51. If a blood stained *Drat* could be left on the spot, which was so recovered by the police the very same day, then why would a person conceal the second *Drat.*

52. The contradiction, in the backdrop of the aforesaid discussion, cannot be said to be minor. To our mind, there is doubt about the authenticity of the alleged disclosure statement made, if at all, by the accused. Hence, this circumstance also cannot be said to have been proved.

Circumstance No.8: Scientific evidence corroborating the substantive evidence.

53. The question, which arises, is as to how does the police link the accused to the weapon of offence or the articles so recovered on the behest of the accused.

54. When we peruse the scientific evidence, i.e. Report (Ex.PW-19/F), we find that Drat (Ex.P-15) so recovered from the house of the accused did have traces of human blood but then there is no conclusive report with regard to the blood group. Deceased had Blood Group 'B'. Drat (Ex. P-2) so recovered from the spot did have traces of flow of blood, as is so proved by the Scientific Officer, which matched with the blood group of the deceased. Now, there is no link evidence to establish use of this weapon by the accused in the crime. Also *Drat* (Ex. P-15) did not reveal finger prints of the accused.

55. It is contended by the prosecution that *Pyjama* (P-16), belonging to the accused, so recovered vide Memo (Ex.PW-4/B), contained blood, which matched with the blood group of the deceased. Significantly, prosecution has not ruled out that the blood group found on the *Pyjama* was not that of the accused. Trial Court erroneously assumed that in the absence of any injuries on the body of the accused, blood found on the *Pyjama* could have been only that of the deceased and none else. May be blood group of the accused is similar to that of the deceased. Assuming hypothetically that the Pyjama belonged to the accused, possibility of the same being stained with the blood of the deceased, who was his aunt, at the time of search operations, cannot be ruled out. As such, this circumstance also cannot be said to have been proved.

56. We find the factum of disclosure statement as also recovery of the *Pyjama* to be doubtful. The accused was not made to wear the *Pyjama* and except for the disclosure statement, there is no other evidence linking the accused to the same. In fact, best person, who could have testified in that regard, was Ranjana Kumari (PW-6), according to whom on 22.12.2011, she had seen the accused and the day after the postmortem was conducted, accused had asked her not to disclose to the police the clothes which he was wearing at that time. But then, this was not so done.

57. The Hon'ble Supreme Court of India in *Prabhoo v. The State of Uttar Pradesh,* AIR 1963 SC 1113, has observed as under:

> "9. The main difficulty in the case is that the evidence regarding the recovery of blood stained axe and blood stained shirt and dhoti is not very satisfactory and the courts below were wrong in admitting certain statement alleged have been made by the appellant in connection with that recovery. According to the recovery memo the two witness who were present when the aforesaid articles were produced by the appellant were Lal Bahadur Singh and Wali Mohammad. Lal Bahadur Singh was examined as prosecution witness No.4. He did give evidence about the production of blood stained articles from his house by the appellant. The witness said that the appellant produced the

articles from a tub on the eastern side of the house. The witness did not, however, say that the appellant made any statements relating to the recovery. Wali Mohammad was not examined at all. One other witness Debi Baksh Singh was examined as prosecution witness No 3. This witness said that a little before the recovery the Sub-Inspector of Police took the appellant into custody and interrogated him; then the appellant gave out that the axe with which the murdered been committed and his blood stained shirt and dhoti were in the house and the appellant was prepared to produce them. These statements to which Debi Baksh (P.W. 3) deposed were not admissible in evidence. They were incriminating statements made to a police officer and were hit by Ss. 25 and 26 of the Indian Evidence Act. The statement that the axe was one with which the murder had been committed was not a statement which led to any discovery within the meaning of S. 27 of the Evidence Act. Nor was the alleged statement of the appellant that the blood stained shirt and dhoti belonged to him a statement which led to any discovery within the meaning of S. 27. Section 27 provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved. In Pulukuri Kotayya v. Emperor, 74 Ind App 65: (AIR 1947 PC 67), the Privy Council considered the true interpretation of S. 27 and said:

> "It is fallacious to treat the 'fact discovered' within the Section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A'., these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant." (p. 77 of Ind App): (at p.70 of AIR).
>
> We are, therefore, of the opinion that the courts' below were wrong in admitting in evidence the alleged statement of the appellant that the axe had been used to commit murder or the statement that the blood stained shirt and dhoti were his. If these statements are excluded and we think that they must be excluded, then the only evidence which remains is that the appellant produced from the house is blood stained axe and some blood stained clothes. The prosecution gave no evidence to establish whether the axe belonged to the appellant or the blood stained clothes were his."

58. In a case where the incriminating articles were recovered from the house of the accused after 23 days of commission of crime of murder, the Hon'ble Supreme Court of India, in *Chandran v. State of Madras*, (1978) 4 SCC 90, expressed its doubt with regard to the prosecution case.

59. In *Narsinbhai Haribhai Prajapati v. Chhatrasinh and others*, AIR 1977 SC 1753, the Hon'ble Supreme Court of India, held as under:

> "2. We are prepared to assume in favour of the prosecution that the evidence in regard to the incident of the 23rd near the pond and the evidence in regard to the incident which took place near the Ota of the Pir shows that the respondents had some motive for committing the crime. We may also accept that blood-stained shirt and dhoti were seized from the person of respondent No.1 and dharias were seized from the houses of respondents 1 and 3. But those circumstances are in our opinion wholly insufficient for sustaining the charge of murder of which the respondents are accused."

60. Hon'ble the Supreme Court of India, in *Vijay Thakur v. State of Himachal Pradesh,* (2014) 14 SCC 609, held as under:

> "13. It is to be emphasized at this stage that except the so-called recoveries, there is no other circumstances worth the name which has been proved against these two appellants. It is a case of blind murder. There are no eyewitnesses. Conviction is based on the circumstantial evidence. In such a case, complete chain of events has to be established pointing out the culpability of the accused person. The chain should be such that no other conclusion, except the guilt of the accused person, is discernible without any doubt. Insofar as these two appellants are concerned, there is no circumstance attributed except that they were with Rajinder Thakur till Sainj and the alleged disclosure leading to recoveries, which appears to be doubtful. When we look into all these facts in entirety in the aforesaid context, we find that not only the chain of events is incomplete, it becomes somewhat difficult to convict the appellant only on the basis of the aforesaid recoveries.
>
> 14. In Mani v. State of Tamil Nadu, 2008 1 SCR 228, this Court made following pertinent observation on this very aspect:
>
> > "21. The discovery is a weak kind of evidence and cannot be wholly relied upon on and conviction in such a serious matter cannot be based upon the discovery. Once the discovery fails, there would be literally nothing which would support the prosecution case...." "

61. In *Musheer Khan @ Badshah Khan v. State of M.P.,* (2010) 2 SCC 748, the apex Court, held as under:

> "65. Therefore, reliability of the materials discovered pursuant to the facts deposed by the accused in police custody depends on the facts of each case. If the discovery is otherwise reliable, its evidentiary value is not diluted just by reason of non-compliance with the provision of Section 100(4) or Section 100(5) of the Code.

66. The reason is that Section 100 falls under Chapter VII of the Code which deals with processes initiated to compel the production of things on a search. Therefore the entire gamut of proceedings under Chapter VII of the Code is based on compulsion whereas the very basis of facts deposed by an accused in custody is voluntary and pursuant thereto discovery takes place. Thus, they operate in totally different situations. Therefore, the safeguards in search proceedings based on compulsion cannot be read into discovery on the basis of facts voluntarily deposed.

67. Section 27 starts with the word 'provided'. Therefore, it is a proviso by way of an exception to Sections 25 and 26 of the Evidence Act. If the facts deposed under Section 27 are not voluntary, then it will not be admissible, and will be hit by Article 20(3) of the Constitution of India. [See State of Bombay vs. Kathi Kalu Oghad, 1961 AIR(SC) 1808].

68. The Privy Counsel in Pulukori Kottaya vs. King Emperor, 1947 PC 67 held that Section 27 of the Evidence Act is not artistically worded but it provides an exception to the prohibition imposed under the preceding sections. However, the extent of discovery admissible pursuant to the facts deposed by accused depends only to the nature of the facts discovered to which the information precisely relates.

69. The limited nature of the admissibility of the facts discovered pursuant to the statement of the accused under Section 27 can be illustrated by the following example: Suppose a person accused of murder deposes to the police officer the fact as a result of which the weapon with which the crime is committed is discovered, but as a result of such discovery no inference can be drawn against the accused, if there is no evidence connecting the knife with the crime alleged to have been committed by the accused."

62. In *Babboo v. Sgtate of M.P.,* (1979) 4 SCC 74, the Hon'ble Supreme Court of India, held as under:

"13. The learned Additional Sessions Judge has also referred to the recovery of Katarnas on the information given by accused Nos.1,3 and 5. These recoveries hardly have any probative value in the facts and circumstances of this case. If there is no substantive evidence worth the name the recovery of Katarnas would hardly advance the prosecution case against the accused. Katarnas appear to have been stained with human blood....."

63. SI Tilak Raj (PW-19) wants the Court to believe that when Ramesh Chand made statement proceedings were videographed by ASI Ashok Kumar (PW-18). However, on this issue, when we peruse testimony of these witnesses, we find them to be absolutely uninspiring in confidence.

64. Ashok Kumar states that on 31.12.2011, he video recorded the statement of Ramesh Chand by using the official video camera. Which camera? he does not state. Also, who issued the camera, record is silent. He is not the official photographer. CD (Ex.PW-18/A) was prepared and not tampered with. Crucially, the witness admits that except for the police officials no independent witness was present at that time. He is not a trained videographer. He is also not engaged and appointed to undertake such job. He admits not to have claimed reimbursement towards the cost of the CD. Why would he not do so, has

not been explained. That apart, and what totally knocks down the prosecution case is his admission that "*I had not sealed the C.D. after the videography*". Ramesh Chand does not state that police had videographed any such statement made by him. As such possibility of the same being doctored cannot be ruled out. This is apart from the fact that document is inadmissible in evidence as per the provisions of the Indian Evidence Act.

65. Mr. V.S. Chauhan, learned Additional Advocate General, appearing on behalf of the State, refers to and relies upon a decision rendered by Hon'ble the Supreme Court of India, in Criminal Appeal No.569 of 2004, titled as *Prem Singh v. State of Haryana*, decided on 29.5.2015.

66. Having carefully perused the ratio laid down therein, we are of the considered view that the decision rendered is in the given facts, wherein the Court found the prosecution to have proved the accused to have an evil eye on the deceased; disclosure statement made by the accused, leading to the recovery of incriminating article to have been proved on record. The circumstances so relied upon by the prosecution formed a complete chain, unequivocally pointing out an accusing finger only towards the convict and none other. Absence of narration of motive or cause of crime in the statements so recorded by the police, in the given facts and circumstances was found to be not fatal, particularly when otherwise the testimony of the witness was found to be clear, cogent and convincing.

67. 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 intentionally and knowingly caused death of Nisha Devi (deceased).

68. The trial Court erred in presuming the version of the witnesses to be as a gospel truth and then erroneously convicted the accused.

69. 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.

70. Thus, findings of conviction and sentence, returned by the Court below, cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused.

71. Hence, for all the aforesaid reasons, the appeal is allowed and the judgment of conviction and sentence, dated 30.4.2013, passed by Additional Sessions Judge, Kangra at Dharamshala, District Kangra, Himachal Pradesh, in Sessions Case No.38-G/VII/12, titled as *State v. Ravi Kumar,* is set aside and the accused is acquitted of the charged offence. He be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to him accordingly. Release warrants be immediately prepared. Appeal stands disposed of, so also pending application(s), if any.

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

Royal Sundram Alliance Insurance Co. Ltd., ... Appellant
Versus
Sh. Holi Ram & others ...Respondents

FAO No. 593 of 2008
Decided on : 31.07.2015.

Motor Vehicles Act, 1988- Section 166- Tribunal held that the accident was outcome of contributory negligence of the offending vehicles–insurer of both the vehicles were saddled with liability to pay the compensation in equal shares- it was duly proved by the statement of Investigating Officer that the accident was the outcome of contributory negligence – the insurer of the car had not led any evidence to prove that there was no negligence on the part of the driver of the car or the car was not involved in the accident- the driver had not questioned the award and it was not permissible for the Insurance Company to say that accident was not outcome of the contributory negligence. (Para 7-11)

For the appellant : Mr. Atul Jhingan, Advocate.
For the respondents: Mr. G.R. Palsra, Advocate, for respondent No. 1.
Ms. Vandana Kuthiala, Advocate, for respondents No. 2 & 3.
Mr. J.S. Bagga, Advocate, for respondent No. 4.
Mr. Malay Kaushal, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Challenge in this appeal is to the award, dated 11th April, 2008, made by the Motor Accidents Claims Tribunal, Mandi, H.P. (hereinafter referred to as "the Tribunal") in Claim Petition No. 57 of 2005, titled as Shri Holi Ram versus New Prem Bus Service & others, whereby compensation to the tune of Rs.7,48,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization, came to be awarded in favour of the claimant, namely, Holi Ram-respondent No. 1, herein and the insurers of both the offending vehicles, i.,e. appellant and respondent No. 2 herein, were saddled with liability (for short, the "impugned award").

2. The claimant, drivers, owners and one of the Insurance Companies have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. The insurer of the offending car-Royal Sundran Alliance Insurance Co. Ltd. has challenged the impugned award on the ground that the Tribunal has fallen in an error in saddling it with the liability.

4. Claimant, namely, Holi Ram has invoked the jurisdiction of the Tribunal, in terms of the mandate of Section 166 of the Motor Vehicles Act, for short "the Act", for grant of compensation to the tune of Rs.8,80,000/-, as per the break-ups given in the claim petition, on the ground that drivers, namely, Desh Raj and Umesh Dhingra had driven the offending vehicles-Bus bearing registration No. HP-39-4665 and Car bearing registration No.

DL-3CW-4954, respectively, rashly and negligently, on 3.10.20104, at about 9.30 a.m., at village Talgahar near Joginder Nagar, caused the accident, in which he sustained injuries and suffered permanently disabled to the extent of 100%.

5. The claim petition was resisted by the respondents on the grounds taken in their memo of objection.

6. Following issues came to be framed by the Tribunal:

"1. Whether the respondent No. 2 was driving the bus bearing No. HP-39-4665 on 3.10.2004 at 9.30 a.m. at village Talgahar and respondent No. 4 was also driving the car bearing No. DL-3CW-4954 in rash and negligent manner resulting in injuries to the petitioner Holi Ram as alleged? ……OPP

2. If issue No. 1 is proved whether the petitioner is entitled for compensation. If so, to what amount and from whom?…OPP

3. Whether the respondent No. 4 was not holding a valid and effective D/L and the vehicle was being driven in violation of the terms and conditions of the insurance policy as alleged? ….OPR(5)

4. Whether the respondent No. 2 was also not holding valid and effective driving licence and the vehicle was being driven in violation of the terms and conditions of the insurance policy, as alleged? …..OPR(3)

5. Relief."

7. The claimant has examined Narender Kumar (PW-2), Chandermani (PW-3), Rajesh Pal (PW-4), Budhi Singh (PW-5) and Dr. Manoj Kumar Thakur (PW-6). Claimant also appeared in the witness box as PW-1. The insurers of both the offending vehicles have not led any evidence. However, drivers of the offending vehicles, i.e. Umesh Dhingra and Desh Raj have appeared in the witness box as RW-1 and RW-2, respectively. Even, A.S.I., Desh Raj, who conducted the investigation, also appeared in the witness box as RW-3. The parties also tendered in evidence the documents, mention of which has been given in the List of Exhibits, attached with the impugned award.

8. The Tribunal, after scanning the evidence, oral as well as documentary, came to the conclusion that the accident was outcome of the contributory negligence of the drivers of the offending vehicles, awarded compensation to the tune of Rs. 7,48,000/- with interest @ 7.5% per annum in favour the claimant from the date of the claim petition till its realization and saddled respondents No. 3 & 5 in the claim petitions, i.e. insurers of the offending vehicles, namely, National Insurance Company Ltd. and Royal Sundram Alliance Insurance Company Limited, with the liability in equal shares.

9. I have gone through the findings recorded by the Tribunal and the entire record and am of the considered view that the accident was outcome of the contributory negligence.

10. While going through the statement of the Investigating Officer, RW-3, A.S.I., Desj Raj, one comes to an inescapable conclusion that the accident was outcome of the contributory negligence.

11. It was for the appellant-insurer, i.e. Royal Sundram Alliance Insurance Company to plead and prove that the accident was not outcome of the contributory negligence and car bearing registration No. DL-3CW-4954 was not involved in the accident. Even, the driver of the offending car has not questioned the impugned award. How can it lie in the mouth of the appellant that the accident was not outcome of the contributory negligence.

12. The factum of insurance is not in dispute.

13. The claimant has not questioned the adequacy of compensation.

14. Having said so, the appeal merits dismissal. Accordingly, the impugned award is upheld and the appeal is dismissed.

15. The Registry is directed to release the awarded amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees account cheque.

16. Send down the records after placing copy of the judgment on the Tribunal's file.

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

Secretary Home, Government of Himachal Pradesh and others ...Appellant

VERSUS

Chanchlo Devi and others ...Respondents

FAO No.705 of 2008
Decided on: 31.07.2015.

Motor Vehicles Act, 1988- Section 166- Deceased was a Head Constable and his salary was Rs. 14,746- the tribunal had deducted 1/3rd amount towards his personal expenses and had held that claimants had lost source of dependency to the extent of 9,831 per month – Tribunal applied the multiplier to 12- held that the tribunal had rightly awarded the compensation. (Para 8-9)

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

For the Appellants:	Mr.Shrawan Dogra, Advocate General, with Mr.Vikram Thakur, Deputy Advocate General.
For the Respondents:	Mr.Amit Singh Chandel, Advocate, vice Mr.S.D. Gill, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.(Oral):

Appellants, by the medium of the instant appeal, have questioned the award, dated 6th August, 2008, passed by the Motor Accident Claims Tribunal, Hamirpur, (for short,

the Tribunal), in Claim Petition No.56 of 2007, titled Chanchlo Devi and others vs. The Commanding Officer and others, whereby compensation to the tune of Rs.10,16,776/-, 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 against the respondents, (for short, the impugned award).

2. The claimants have not questioned the impugned award, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the appellants (respondents before the Tribunal) have challenged the impugned award by the medium of present appeal.

4. Facts of the case, in brief, are that on 1st June, 2007, the deceased Amar Singh, Head Constable, was traveling by Bus bearing No.HP-33A-1177, which rolled down the road near Beas bridge at Sujanpur due to the rash and negligent driving of its driver, namely, Raj Kumar, as a result of which the deceased sustained multiple injuries and lateron, succumbed to the same at PGI, Chandigarh. Thus, the claimants filed the claim petition claiming compensation to the tune of Rs.25.00 lacs, as per the break-ups given in the Claim Petition.

5. Respondents (appellants herein) resisted the Claim Petition by filing reply.

6. On the pleadings of the parties, the following issues were settled by the Tribunal:

> "1.Whether the death of deceased Amar Singh was a result of rash and negligent driving on the part of late Shri Raj Kumar, deceased-driver of Mini Bus No.HP-33A-1177 while driving the said vehicle? 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. Relief."

7. In order to prove their claim, the parties led their respective evidence.

8. After examining the evidence, the Tribunal held that the driver of the offending bus, namely, Raj Kumar, had driven the bus rashly and negligently and caused the accident. The said findings recorded by the Tribunal on issue No.1 are borne out from the record and accordingly, the same are upheld.

9. Coming to issue No.2, the deceased was a Head Constable and his salary, as admitted by the respondents in their reply to the Claim Petition, was Rs.14,746/-. The Tribunal, after deducting 1/3rd amount towards his personal expenses, held that the claimants lost source of dependency to the tune of Rs.9,831/- per month and applied the multiplier of 12.

10. Admittedly, the age of the deceased at the time of accident, was 50 years. Therefore, keeping in view the 2nd Schedule attached to the Motor Vehicles Act, 1988 and the dictum of the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** multiplier of 12 has been correctly applied by the Tribunal and needs no interference.

11. In view of the above discussion, I am of the considered view that the amount of compensation awarded by the Tribunal is not excessive, rather the same is inadequate. However, the claimants have not questioned the impugned award. Accordingly, the impugned award is reluctantly upheld and the appeal is dismissed. The Registry is directed to release the award amount in favour of the claimants strictly in terms of the conditions contained in the impugned award.

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

United India Insurance Company Ltd. ...Appellant.

Versus

Himachal Pradesh Road Transport Corporation and another ...Respondents.

FAO No. 610 of 2008
Decided on: 31.07.2015

Motor Vehicles Act, 1988- Section 149- Insurer pleaded that driver did not have a valid driving license - it was proved that owner – insured had engaged the driver after going through the driving license- the owner is not supposed to go to the Registration and Licensing Authority to check the validity of the DL- the petitioner-H.R.T.C. was unable to ply the vehicle for 12 days and the Tribunal had rightly granted compensation for the loss of income. (Para 6-8)

Cases referred:

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

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

For the appellant: Mr. Ashwani K. Sharma, Advocate.

For the respondents: Mr. Jagdish Thakur, Advocate, for respondent No. 1.
Mr. B.S. Attri, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award, dated 10.04.2009, made by the Motor Accident Claims Tribunal (II), Shimla (for short "the Tribunal") in M.A.C. Petition No. 54-S/2 of 2004, titled as Himachal Road Transport Corporation versus Smt. Harbansi Devi and others, whereby compensation to the tune of Rs.54,325/- with interest @ 8% per annum from the date of the petition till its realization was awarded in favour of the claimant and the insurer came to be saddled with liability (for short "the impugned award").

2. The appellant-insurer has questioned the impugned award on two grounds, (i) that the driver of the offending vehicle was having a fake licence; and (ii) that the claimant was not entitled to compensation under the head 'loss of earning', are devoid of any force.

3. The appellant-insurer has moved an application, being CMP No. 849 of 2009, in terms of Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure (for short "CPC") before this Court seeking permission to produce additional evidence.

4. Much water has flown down from the year 2002 till today. If such application is allowed at this stage, that will amount to defeating the aim, object and purpose of granting the compensation, which is a social Legislation.

5. Having said so, no case for leading additional evidence is made out. Hence, CMP No. 849 of 2009 is dismissed.

6. Now coming to the facts of the case, the owner-insured had engaged the driver after going through the driving licence, which is on the file as Ext. RW-1/C. Then, how can it be said that she has committed breach of the provisions of Section 147 and 149 of the Motor Vehicles Act, 1988 (for short "the MV Act") read with the terms and conditions contained in the insurance policy, not to speak of willful breach.

7. The Tribunal has rightly made discussions on the issue in para 17 of the impugned award, needs no interference in view of the law laid down by the Apex Court in the case titled as **National Insurance Co. Ltd. versus Swaran Singh & others, reported in AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment herein:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or*
>
> *invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*

> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the*
>
> *relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

8. The Apex Court in another case titled as **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **2013 AIR SCW 6505,** held that the owner-insured is not supposed to go beyond verification to the effect that the driver was having a valid driving licence and the competence of the driver. It is profitable to reproduce para 10 of the judgment herein:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh's case (supra). If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault*

and, in such circumstances, the insurance company is not liable for the compensation."

9. Now coming to the second ground that the Tribunal has fallen in an error in awarding Rs.10,000/- under the head 'loss of income'. A perusal of the pleadings and the record does disclose that the HRTC was not in a position to play the vehicle for 12 days, meaning thereby, it has suffered loss of income for the said period and the Tribunal has rightly awarded compensation under this head.

10. Having said so, the impugned award is well reasoned, needs no interference.

11. Viewed thus, the impugned award is upheld and the appeal is dismissed.

12. 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 through payee's account cheque.

13. Send down the record after placing copy of the judgment on Tribunal's file.

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

United India Insurance Company Ltd. .....Appellant.

Versus

Smt. Rachna Devi and others ...Respondents

FAO (MVA) No. 533 of 2008.
Date of decision: 31st July 2015.

Motor Vehicles Act, 1988- Section 149- The driving license was renewed by Licensing Authority – the owner has to satisfy himself about the competence of the driver- he cannot be expected to go to the licensing authority to verify the validity of the license- the insurer had not pleaded and proved that owner had committed willful breach of the terms and conditions of the policy- held that the Insurance company is liable to pay the compensation. (Para 10)

Cases referred:

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

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

For the appellant: Mr. Ashwani K. Sharma, Advocate.

For the respondents: Mr. R.R. Rahi, Advocate, for respondents No. 1 and 2.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is the judgment and award dated 24.07.2008, made by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala, in MACP No. 50-

N/II-2004 titled *Rachna Devi and another versus Manoj Kumar and others,* whereby compensation to the tune of Rs.4,03,200/- with 9% interest was awarded in favour of the claimants and insurer/appellant herein came to be saddled with the liability, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. Owner, driver and claimants have not questioned the impugned award on any ground, thus, it has attained finality so far it relates to them.

3. The appellant has questioned the impugned award on three grounds:-

(i) *That the driver was not having a valid and effective driving license,*

(ii) That the accident was outcome of contributory negligence which was caused by driver and the deceased,

(iii) The amount awarded is excessive,

4. I have gone through the impugned award and have perused the entire record.

5. The Tribunal framed following issues in the claim petition:-

(i) Whether on 31.7.2003, respondent No.2 was driving Bus No. HP-19-5541 rashly and negligently, and had hit Sh. Kushal Kumar who sustained head injury and succumbed to injuries as alleged? OPP

(ii) If issue No. 1 is proved in the affirmative, tow hat amount of compensation, the petitioners are entitled to for and from whom ?OPP

(iii) Whether the respondent No. 2 was not holding a valid and effective driving license as alleged? OPR

(iv) Whether the vehicle in question was not insured with the respondent No. 3 as alleged? OPR

(v) Whether the petition is bad for non-joinder of necessary parties as alleged? OPR

(vi) Whether the deceased had contributed to the accident and liable for contributory negligence? OPR

(vii) Relied.

6. Parties have led the evidence before the Tribunal.

7. The Tribunal, after scanning the evidence, rightly held that the driver of the offending bus has caused the accident. The driver has not denied the averments contained in the claim petition wherein it has been specifically averred that the accident was outcome of the negligence of the driver of the bus. The insurer has not led any evidence to prove that the accident was outcome of contributory negligence. First Information Report (FIR) was lodged with the police against the driver which is *prima facie* proof of the fact that the driver was negligent. Thus, the findings returned by the Tribunal on issue No. 1 are upheld.

8. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 to 6. The onus to prove these issues was on the insurer, failed to discharge the same. The

Tribunal has discussed in paras 11 and 12 of the impugned award that the driving license of the driver was renewed in Local Licensing Authority Jawali.

9. While going through the record, it appears that the driving license was renewed and the factum of renewal is not in dispute. Therefore, the Tribunal has rightly made discussions in paras 11 and 12 of the impugned award. The findings so recorded in these paras are supported by the judgment delivered by the apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217.** It is apt to reproduce para 10 of the said judgment herein:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh 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."*

10. The insurer has also not pleaded and proved that the owner has committed willful breach. It was for the insure to plead and prove that the owner has committed willful breach in order to seek exoneration. The apex Court in **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531** has laid down the test how the owner can be said to have committed willful breach in terms of Sections 147 and 149 of the Motor Vehicles Act, for short "the Act" read with the insurance policy. But it is not the case here. It is apt to reproduce relevant portion of para 105 of the judgment herein:

> *"105. .....*

> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

11. Accordingly, the findings returned on these issues are upheld.

12. Now coming to the question of compensation. The insurer had sought permission under Section 170 of the Act and is within its right to question the adequacy of compensation.

13. Admittedly, the Tribunal has assessed the income of the deceased as Rs.3200/- per month and deducted 1/3rd towards his personal expenses. The multiplier applicable was "16" but, the Tribunal has applied the multiplier of "14". The claimants have not questioned the impugned award. It appears that the amount of compensation is neither excessive nor inadequate. The compensation awarded is just and appropriate.

14. Viewed thus, all the three questions are answered accordingly. The impugned award is upheld and the appeal is dismissed.

15. 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.

16. Send down the record, forthwith, after placing a copy of this judgment.

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

United India Insurance Company Ltd. ...Appellant.

Versus

Sh. Rama Nand and others ...Respondents.

FAO No. 467 of 2008
Decided on: 31.07.2015

Motor Vehicles Act, 1988- Section 166- Income of the deceased was Rs. 3,500/- per month-50% was to be deducted towards personal expenses of the deceased, being bachelor-claimants have lost the dependency to the extent of Rs. 1750/- the deceased was aged 30 years and multiplier of '14' is applicable- the claimants are entitled to the compensation of Rs. 1750x12x14=2,94,000/- for the loss of dependency.

Cases referred:

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

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

Munna Lal Jain and another versus Vipin Kumar Sharma and others, JT 2015 (5) SC 1

For the appellant: Mr. Ashwani K. Sharma, Advocate.

For the respondents: Mr. B.C. Verma, Advocate, for respondents No. 1 and 2.
Nemo for respondent No. 3.
Mr. Sanjeev Kumar, Advocate, for respondents No. 4 to 6.
Ms. Devyani Sharma, Advocate, for respondent No. 7.

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 01.05.2008, made by the Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr, H.P. (for short "the Tribunal") in M.A.C. Petition No. 100 of 2004, titled as Rama Nand and another versus Sh. Gulam Mohammad Lagoo and others, whereby compensation to the tune of Rs.3,18,000/- with interest @ 7.5% per annum from the date of the petition till its realization was awarded in favour of the claimants and the insurer came to be saddled with liability (for short "the impugned award").

2. The claimants, the owners, the drivers and one of the insurer have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-insurer of the offending vehicle, i.e. truck, bearing registration No. JK-01C-5356, has questioned the impugned award on the grounds taken in the memo of appeal.

4. In order to determine the dispute involved in this appeal, it is necessary to give a flashback of the facts of the case, the womb of which has given birth to the appeal in hand.

5. The claimants, i.e. the father and brother of deceased - Nihal Chand, filed claim petition before the Tribunal for grant of compensation to the tune of Rs.10,00,000/-, as per the break-ups given in the claim petition, on the ground that they have lost their bread earner in a vehicular accident, which was caused by the driver, namely Shri Ali Mohammad, while driving truck, bearing registration No. JK-01C-5356, rashly and negligently, on 30.09.2004, at about 12.30 A.M. at Araipura Chowk on G.T. Road, Gharaunda in District Karnal, Haryana. Deceased-Nihal Chand was a bachelor leaving behind unfortunate father and brother.

6. The claim petition was resisted by the respondents in the claim petition on the grounds taken in the respective memo of objections.

7. Following issues came to be framed by the Tribunal:

"1. Whether the accident has taken place due to rash and negligent driving of truck No. JK-01C-5356? OPP

2. If issue No. 1 is proved, whether the petitioner is entitled to the compensation, if so to what amount and at what rate of interest? OPP

3. Whether the petition is not maintainable in the present form? OPR-3 & 6

4. Whether the petitioner has no locus-standi to file this petition? OPR-6

5. Whether this petition is bad for non-joinder of necessary parties, as the owner-cum-driver of vehicle No. HR-55A-0601 as alleged? OPR-6

6. Whether there is violation of the mandatory terms and conditions of insurance policy i.e. permit as alleged, if so its effect? OPR-3 & 6

7. Whether the vehicle in question was not possessing valid and effective registration and fitness certificate, if so, its effect? OPR-3&6

8. Whether the vehicle in question was not possessing a valid and effective driving licence at the time of accident within the knowledge of insured, as alleged, if so its effect? OPR-3 & 6

9. Whether the deceased Nihal Chand was travelling in the vehicle in question as unauthorized/gratuitous passenger at the time of accident? OPR-3 & 6

10. Relief."

8. Claimants led evidence in support of their claim. The respondents in the claim petition have not led any evidence. Thus, the evidence led by the claimants has remained unrebutted.

Issue No. 1:

9. The Tribunal after scanning the evidence, oral as well as documentary, held that the accident was outcome of rash and negligent driving of the offending vehicle by its driver and accordingly decided issue No. 1 in favour of the claimants. The findings returned by the Tribunal on issue No. 1 has not been questioned by the appellant-insurer in the memo of appeal. Accordingly, the findings returned by the Tribunal on issue No. 1 is upheld.

10. Before I deal with quantum of compensation, I deem it proper to determine issues No. 3 to 9.

Issues No. 3 to 9:

11. It was for respondents No. 3 and 6-insurers of both the vehicles involved in the accident to prove issues No. 3 to 9, have not led any evidence, thus, have failed to discharge the onus. Thus, the Tribunal has rightly decided the said issues in favour of the claimants and against respondents No. 3 and 6 in the claim petition.

12. It is apt to record herein that during the pendency of the appeal, the appellant-insurer has moved an application, being CMP No. 692 of 2008, in terms of Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure (for short "CPC") before this Court seeking permission to place on record certain documents by way of additional evidence in order to prove that the owner-insured has committed breach of the terms and conditions of the insurance policy as the offending vehicle was being plied without valid route permit at the time of the accident.

13. The appellant-insurer has not led any evidence before the Tribunal, now, cannot be allowed to defeat the purpose of granting compensation, that too, at belated stage, by moving an application for leading additional evidence. Even otherwise, the application is not maintainable for the simple reason that the appellant-applicant has annexed certificate issued by Regional Transport Officer, Srinagar, Kashmir, issued on 10.01.2008, which discloses that the route permit of the offending vehicle was valid upto 17.06.2008. No such proof has been placed on record indicating that the route permit of the offending vehicle issued in the year 2004, i.e. at the relevant point of time, was for the said route. Thus, virtually, the application is misconceived. Hence, CMP No. 692 of 2008 is dismissed.

14. Having said so, I am of the considered view that the Tribunal has rightly saddled the appellant-insurer with liability. Accordingly, the findings returned by the Tribunal on issues No. 3 to 9 are upheld.

Issue No. 2:

15. The claimants have proved that the deceased was earning Rs.3,500/- per month and the Tribunal has accordingly upheld the same. The claimants have not questioned the same and have also not made a murmur about the same. Accordingly, it is held that the deceased was earning Rs.3,500/- per month. 50% was to be deducted towards personal expenses of the deceased, being bachelor, in view of the ratio laid down the Apex Court in **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported

in **2013 AIR SCW 3120.** Thus, it can be safely said that the claimants have lost source of income to the tune of Rs.1750/- per month.

16. While going through the impugned award, it appears that the Tribunal has fallen in an error while applying multiplier of '11'. The deceased was 30 years of age at the time of the accident. In view of the latest decision of the Apex Court in a case titled as **Munna Lal Jain and another versus Vipin Kumar Sharma and others,** reported in **JT 2015 (5) SC 1,** multiplier of '14' is applicable.

17. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.1750 x 12 x 14 = Rs.2,94,000/-. The amount awarded by the Tribunal under the head 'conventional charges' to the tune of Rs.10,000/- is maintained.

18. Accordingly, total compensation to the tune of Rs. 2,94,000/- + Rs. 10,000/- = Rs.3,04,000/- is awarded in favour of the claimants.

19. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification with a further direction to release the excess amount in favour of the appellant-insurer through payee's account cheque.

20. Send down the record after placing copy of the judgment on Tribunal's file.

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

United India Insurance Company Limited ...Appellant

Versus

Tripti Devi and others ...Respondents.

FAO No.532 of 2008
Decided on: 31.07.2015.

Motor Vehicles Act, 1988- Section 149- Driver was competent to drive a light motor vehicle- he was driving a jeep which falls within the definition of light motor vehicle- hence, it cannot be said that the driver did not possess a valid driving license- the deceased was travelling in the vehicle with vegetables and thus he will not fall within the definition of gratuitous passenger- Insurance Company was rightly held liable to pay compensation.

(Para 8-11)

Cases referred:

Kulwant Singh & Ors. versus Oriental Insurance Company Ltd., JT 2014 (12) SC 110

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121

Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

For the Appellant: Mr. Ashwani K. Sharma, Advocate.

For the Respondents: Mr.Tara Singh Chauhan, Advocate, for respondents No.1 to 4.
Mr.Aman Sood, Advocate, for respondents No.5 and 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.(Oral):

Appellant-insurer has invoked the jurisdiction of this Court in terms of Section 173 of the Motor Vehicles Act, 1988, (for short, the Act), by the medium of the present appeal, and has questioned the award, dated 31st July, 2008, passed by the Motor Accident Claims Tribunal, Mandi, (for short, the Tribunal), in Claim Petition No.89 of 2005, titled Tripati Devi and others vs. Pawan Kumar and others, whereby compensation to the tune of Rs.14,58,000/-, with interest at the rate of 9% from the date of filing of the Claim Petition till realization, was awarded in favour of the claimants, and the insurer-appellant was saddled with the liability, (for short, the impugned award).

2. The claimants, the owner and the driver have not questioned the impugned award, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the insurer has challenged the impugned award by the medium of present appeal.

4. Facts of the case, in brief, are that on 17th August, 2005, Surender Kumar Abrol was coming from Paura Kothi to his village Kanaid on vehicle No.HP-51B-0204 and when the said vehicle reached near Matoh, the driver of the said vehicle could not control the same while reversing it, as a result of which the vehicle fell in the gorge, Surender Kumar Abrol sustained injuries and died on the spot, constraining the claimants to file the Claim Petition in terms of Section 166 of the Act, for grant of compensation to the tune of Rs.20.00 lacs as per the break-ups given in the Claim Petition.

5. The averments contained in the Claim Petition were denied evasively by the respondents.

6. I have gone through the record and the impugned award. The Tribunal after making a detailed discussion has held and rightly so that the driver of the offending vehicle was driving the vehicle rashly and negligently. During the course of hearing, no argument was advanced to show that the said findings of the Tribunal are not borne out from the records. Accordingly, the findings returned by the Tribunal on issue No.1 are upheld.

7. The learned counsel for the appellant challenged the impugned award on three grounds, firstly that the driver of the offending vehicle was not having a valid and effective driving licence; secondly that the deceased, namely, Surender Kumar Abrol was traveling in the offending vehicle as gratuitous passenger; and thirdly that the compensation awarded by the Tribunal is on the higher side.

8. Coming to the first contention raised by the learned counsel for the appellant, it is borne out from the records that the offending vehicle was a Jeep and falls within the definition of Light Motor Vehicles. Licence of the driver has been proved on record as Ext.RD, a perusal of which discloses that the driver was competent to driver a Light Motor Vehicle.

9. This Court in FAO No.505 of 2007 and in catena of judgments, while relying upon the judgment of the Apex Court in **Kulwant Singh & Ors. versus Oriental Insurance Company Ltd.,** reported in **JT 2014 (12) SC 110,** has held that no "PSV" endorsement is required once the driver is having a valid licence to drive a Light Motor Vehicle and such

vehicle falls within the definition of Light Motor Vehicles. Therefore, the contention raised by the learned counsel for the appellant is devoid of any force and stands rejected accordingly and the findings returned by the Tribunal are upheld.

10. Coming to the second contention raised by the learned counsel for the appellant, admittedly, the deceased was traveling in the offending vehicle as owner of the vegetables, as discussed by the Tribunal in paragraphs 11 and 19 of the impugned award.

11. This Court in FAO No.638 of 2008, titled National Insurance Company vs. Sundri Devi and in series of judgments has held that when a person is traveling in a vehicle as owner of the goods, he cannot be said to be traveling as gratuitous passenger.

12. Having said so, the findings returned by the Tribunal on issue No.4 are also upheld.

13. As far as quantum of compensation is concerned, the Claimants have pleaded in the Claim Petition that the deceased was earning Rs.10,000/- per month. However, a perusal of the impugned award shows that the Tribunal has fallen in error while assessing the monthly income of the deceased at Rs.12,000/- per month.

14. In view of the pleadings of the claimants and the evidence led, the monthly income of the deceased can be said to be Rs.10,000/-. Admittedly, the claimants are four in number. Therefore, in view of the law laid down by the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** 1/4th amount was to be deducted towards the personal expenses of the deceased. Thus, the loss of source of dependency to the claimants can be said to be Rs.7,500/- per month.

15. The deceased, at the time of accident, was 41 years of age and the multiplier applicable was 13 in view of 2nd Schedule attached to the Act and the law laid down by the Apex Court in Sarla Verma's case (supra).

16. In view of the above, the claimants are held entitled to Rs.11,70,000/- (Rs.7,500/- x 12 x 13) under the head loss of source of dependency. The amount awarded under the other heads is modified by holding that the claimants are entitled to Rs.10,000/- each under the heads 'loss of estate', 'loss of consortium', 'loss of love and affection' and 'funeral expenses'. Thus, the claimants are held entitled to Rs.12,10,000/-, (Rs.11,70,000 + Rs.40,000/-), as total compensation. The above amount shall carry interest at the rate of 9% per annum from the date of the claim petition till realization.

17. Having said so, the impugned award is modified and the appeal is allowed, as indicated above. The Registry is directed to release the amount in favour of the claimants strictly in terms of the conditions contained in the impugned award and the balance amount, if any, deposited by the appellant-insurer be released in favour of the insurance Company through payee's account cheque.

18. The appeal stands disposed of accordingly.

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

United India Insurance Company Ltd. ...Appellant.
Versus
Sh. Satya Nand and others ...Respondents.

FAO No. 260 of 2009
Decided on: 31.07.2015

Motor Vehicles Act, 1988- Section 149 read with Section 173- Insurer contended that the insured had committed breach of the terms and conditions of the Insurance policy as the vehicle was being plied without route permit at the time of the accident-an application for additional evidence was filed before the High court to establish this fact- held that insurer having not led any additional evidence before the M.A.C.T. cannot be allowed to defeat the purpose of granting compensation at a belated stage by moving an application for leading evidence-further the certificate issued by R.T.O. Srinagar disclosed that the route permit was valid up to 17-06-2008- the accident had taken place on 30-09-2014 and therefore, the certificate will not help in determining whether the vehicle had valid route permit on the day of accident or not. (Para-12)

Cases referred:
Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120
Munna Lal Jain and another versus Vipin Kumar Sharma and others, JT 2015 (5) SC 1

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Mr. H.C. Sharma, Advocate, for respondents No. 1 and 2.
Nemo for respondent No. 3.
Mr. Sanjeev Kumar, Advocate, for respondents No. 4 to 6.
Ms. Devyani Sharma, Advocate, for respondent No. 7.

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 10.04.2009, made by the Motor Accident Claims Tribunal, Shimla (for short "the Tribunal") in M.A.C.C. No. 38-S/2 of 2005, titled as Sh. Satya Nand and another versus Gulam Mohammad Lagoo and others, whereby compensation to the tune of Rs.3,50,000/- with interest @ 9% per annum from the date of the petition till its realization was awarded in favour of the claimants and the insurer came to be saddled with liability (for short "the impugned award").

2. The claimants, the owners, the drivers and one of the insurer have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-insurer of the offending vehicle, i.e. truck, bearing registration No. JK-01C-5356, has questioned the impugned award on the grounds taken in the memo of appeal.

4. In order to determine the dispute involved in this appeal, it is necessary to give a flashback of the facts of the case, the womb of which has given birth to the appeal in hand.

5. The claimants, being the unfortunate parents of the deceased-Rajesh Hetta, filed claim petition before the Tribunal for grant of compensation to the tune of Rs.10,00,000/-, as per the break-ups given in the claim petition, on the ground that they have lost their son in a vehicular accident, which was caused by the driver, namely Shri Ali Mohammad, while driving truck, bearing registration No. JK-01C-5356, rashly and negligently, on 30.09.2004, at about 12.30 A.M. at Araipura Chowk on G.T. Road, Gharaunda in District Karnal, Haryana. Deceased-Rajest Hetta was a bachelor, who sustained injuries in the accident and succumbed to the injuries, leaving behind the unfortunate parents.

6. The claim petition was resisted by the respondents in the claim petition on the grounds taken in the respective memo of objections.

7. Following issues came to be framed by the Tribunal:

> *"1. Whether the death of Rajsh Heta has taken place due to rash and negligent driving of Truck bearing No. HP-09A-0573 by its driver respondent No. 5, Devi Dutt Sharma and JK-01C-5356 by its driver, namely Ali Mohammed, respondent No. 2, as alleged? OPP*
>
> *2. If issue No. 1 is held in affirmative, whether the petitioners/claimants are entitled to compensation, if so, to what amount and from which of the respondent? OPP*
>
> *3. Whether the petition is not maintainable in the present form, as alleged? OPR-3*
>
> *4. Whether the accident took place due to the sole negligence of driver of vehicle bearing No. HP-09A-0572, as alleged? OPR-3*
>
> *5. Whether the respondent No. 3 is not liable to make payments to the petitioners/claimants since there is violation of terms and conditions of the Insurance Policy, as alleged? OPR-3*
>
> *6. Whether the driver of the vehicle bearing No. JK-01C-5356 was not having valid and effective driving licence to drive the said vehicle at the time of accident, if so, its effect? OPR-3*
>
> *7. Whether the petition is collusive, if so, its effect? OPR-3*
>
> *8. Whether the petition is not maintainable, as alleged? OPR-4 and 5*
>
> *9. Whether the petition is bad for mis-joinder of necessary parties, as alleged? OPR-4 and 5*

10. Whether the claimants are estopped from filing the present petition as alleged? OPR-4 and 5

11. Whether the claim petition is not maintainable against the respondent No. 6, as alleged? OPR-6

12. Whether the driver of the vehicle bearing No. HP-09A-0572 was not having valid and effective driving licence at the time of accident, as alleged? OPR-6

13.Whether there was breach of terms and conditions of the Insurance Policy, if so, its effect? OPR-6

14. Relief."

8. Claimants led evidence in support of their claim. Shri Laxmi Nand, the General Power of Attorney of the owner of truck, bearing registration No. HP-09A-0572, appeared in the witness box as RW-1 and Smt. Shashi Saini, Administrative Officer of the insurer-United India Insurance Company appeared in the witness box as RW-2.

Issues No. 1, 4 and 9:

9. The Tribunal after scanning the evidence, oral as well as documentary, held that the accident was outcome of rash and negligent driving of the offending vehicle, i.e. truck, bearing registration No. JK-01C-5356, by its driver and accordingly decided issues No. 1, 4 and 9 in favour of the claimants. The findings returned by the Tribunal on issues No. 1, 4 and 9 have not been questioned by the appellant-insurer in the memo of appeal. Accordingly, the findings returned by the Tribunal on issues No. 1, 4 and 9 are upheld.

10. Before I deal with quantum of compensation, I deem it proper to determine issues No. 3, 5 to 8 and 10 to 13.

Issues No. 3, 5 to 8 and 10 to 13:

11. It was for the insurers of both the vehicles involved in the accident to prove these issues, have not been able to prove the same. Thus, the Tribunal has rightly decided the said issues in favour of the claimants and against the insurers.

12. It is apt to record herein that during the pendency of the appeal, the appellant-insurer has moved an application, being CMP No. 444 of 2009, in terms of Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure (for short "CPC") before this Court seeking permission to place on record certain documents by way of additional evidence in order to prove that the owner-insured has committed breach of the terms and conditions of the insurance policy as the offending vehicle was being plied without valid route permit at the time of the accident.

13. The appellant-insurer has not led any evidence before the Tribunal, now, cannot be allowed to defeat the purpose of granting compensation, that too, at belated stage, by moving an application for leading additional evidence. Even otherwise, the application is not maintainable for the simple reason that the appellant-applicant has annexed certificate issued by Regional Transport Officer, Srinagar, Kashmir, issued on 10.01.2008, which discloses that the route permit of the offending vehicle was valid upto 17.06.2008. No such proof has been placed on record indicating that the route permit of the offending vehicle issued in the year 2004, i.e. at the relevant point of time, was for the said route. Thus, virtually, the application is misconceived. Hence, CMP No. 444 of 2009 is dismissed.

14. Having said so, I am of the considered view that the Tribunal has rightly saddled the appellant-insurer with liability. Accordingly, the findings returned by the Tribunal on issues No. 3, 5 to 8 and 10 to 13. are upheld.

Issue No. 2:

15. The Tribunal has assessed the income of the deceased to be Rs.3,000/- per month. The claimants have not questioned the same and have also not made a murmur about the same. Accordingly, it is held that the deceased was earning Rs.3,000/- per month. 50% was to be deducted towards personal expenses of the deceased, being bachelor, in view of the ratio laid down the Apex Court in **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.** Thus, it can be safely said that the claimants have lost source of income to the tune of Rs.1,500/- per month.

16. The Tribunal has rightly applied the multiplier of '14', is just and appropriate in view of the latest decision of the Apex Court in a case titled as **Munna Lal Jain and another versus Vipin Kumar Sharma and others,** reported in **JT 2015 (5) SC 1,** read with the judgments (supra).

17. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.1,500 x 12 x 14 = Rs.2,52,000/-. The amount awarded by the Tribunal under the head 'conventional charges' to the tune of Rs.14,000/- is maintained.

18. Accordingly, total compensation to the tune of Rs.2,52,000/- + Rs.14,000/- = Rs.2,66,000/- is awarded in favour of the claimants.

19. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification with a further direction to release the excess amount in favour of the appellant-insurer through payee's account cheque.

20. Send down the record after placing copy of the judgment on Tribunal's file.

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

Vijay Singh & another ...Appellants

Versus

Sunil Kumar & another ...Respondents

FAO No. 4106 of 2013
Reserved on : 24.07.2015
Decided on : 31.07.2015

Motor Vehicles Act, 1988- Section 149- Insurer had failed to prove that vehicle was being driven without valid documents or the driver did not have a valid driving license at the time of accident-the claimant had asserted that he was requested by the driver to accompany him to repair the offending vehicle- he was coming to the workshop, when the vehicle had met with the accident- the owner filed the reply admitting this fact- held that it cannot be said

that claimant was travelling in the vehicle as a gratuitous passenger-insurer was rightly held liable to pay the compensation. (Para-17 to 24)

For the Appellants : Mr. Anil Chauhan, Advocate.
For the Respondents: M/s Bhuvnesh Sharma and Ramakant Sharma, Advocate, for respondent No. 1.
Mr. Bhunesh Pal, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This appeal is directed against the award, dated 22nd May, 2013, made by the Motor Accidents Claims Tribunal, Hamirpur, H.P. (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 12 of 2010, titled Sunil Kumar versus Vijay Singh & others, whereby compensation to the tune of Rs.5,45,200/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimant-respondent No.1 herein and owner and driver-appellants herein were saddled with liability (for short, "the impugned award").

2. The claimant and insurer have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. The owner and driver have questioned the impugned award on the ground that the Tribunal has fallen in an error in exonerating the insurer from liability and saddling them with the liability.

4. It is necessary to give a brief summary of the case, the womb of which has given birth to the present appeal.

5. Sunil Kumar, claimant had invoked jurisdiction of the Tribunal, in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988, for short "the Act", for grant of compensation to the tune of Rs.25,00,000/-, as per the break-ups given in the claim petition, on the ground that driver, namely, Dalip Singh, had driven the vehicle-Bolero Pick Up bearing registration No. HP-17A-9191, rashly and negligently, on 24th January, 2009, at about 9.30 a.m., at Village Pawari, P.O. Shiri Kiyari, Tehsil Shillai, District Sirmour (HP), caused the accident, as a result of which, he sustained injuries and became permanently disabled.

6. The claimant averred in the claim petition that he is a Motor Mechanic by profession and is running a shop at Shillai, District Sirmour. On the aforesaid date, he was requested by driver, Dalip Singh to accompany him in order to repair the offending vehicle. He had gone with him on the spot and made repairs of the offending vehicle. He came in the said vehicle, was met with an accident, which was caused by driver Dalip Singh. He sustained injuries on his head and various multiple injuries on other parts of the body. He was taken to Community Health Centre, Shillai, from where he was referred to P.G.I., Chandigarh. He was admitted in Indus Hospital Mohali from 26th January, 2009 to 12th February, 2009. Thereafter, he was under regular medical treatment and spent about Rs.2,48,467/- on his treatment.

7. The owner and driver contested the claim petition by filing joint reply. In their reply, they have admitted the accident, but submitted that since the vehicle was insured with the Insurance Company, it was liable to satisfy the award.

8. The insurer also resisted the claim petition by filing reply.

9. Following issues came to be framed by the Tribunal:

"1. *Whether the petitioner has suffered injuries due to use/rash and negligent driving of Bolero Pick Up No. HP-17A-9191 by its driver-respondent No. 2, as alleged? ....OPP*

2. If issue No. 1 is proved in affirmative, whether the petitioner/claimant is entitled to compensation, if so, to what amount and from which of the respondents? ...OPP

3. Whether the vehicle in question was being plied at the time of accident without valid registration and fitness certificate, as alleged? ...OPR-3

4. Whether the petitioner was traveling in the vehicle in question as a gratuitous passenger, if so, its effect?...OPR-3

5. Whether respondent No. 2 was not having valid and effective driving licence to drive the motor vehicle in question at the time of accident, as alleged? ...OPR-3

6. Relief."

10. The parties led evidence and tendered in evidence the documents, mention of which has been given in the List of Exhibits attached with the impugned award.

11. The Tribunal after scanning the entire evidence passed the impugned award, whereby the claimant was held entitled to compensation to the tune of Rs.5,45,200/- with interest @7.5% per annum from the date of the claim petition till its realization and the owner and driver were saddled with liability.

Issue No. 1

12. The claimants have proved by leading evidence that driver, namely, Dalip Kumar, had driven the vehicle-Bolero Pick Up bearing registration No. HP-17A-9191, rashly and negligently, on 24th January, 2009, at about 9.30 a.m., at Village Pawari, P.O. Shiri Kiyari, Tehsil Shillai, District Sirmour (HP) and caused the accident. The Tribunal has also recorded findings to that extent. These findings have not been questioned by any of the parties. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

13. Issues No. 2 to 5 are inter-linked. Before dealing with Issues No. 2 & 4, I deem it proper to deal with issues No. 3 & 5.

Issue No. 3.

14. It was for the insurer to prove that the offending vehicle was being driven without valid documents, i.e. registration and fitness certificate, but it has failed to do so. This issue was decided by the Tribunal against the insurer. Accordingly, the findings returned by the Tribunal on Issue No. 3 are upheld.

Issue No. 5.

15. The insurer has failed to prove that the driver was not having a valid and effective driving licence to drive the offending vehicle at the relevant time. The findings returned by the Tribunal on this issue are not in dispute. Accordingly, the findings on Issue No. 5 are upheld.

Issues No. 2 & 4.

16. Both these issues are inter-linked. Therefore, I deem it proper to determine both the issues together.

17. The Tribunal has held that the claimant was traveling in the offending vehicle as a gratuitous passenger. The said finding of the Tribunal is not legally correct for the following reasons.

18. The claimant was a Mechanic by profession. On the day of accident, he was requested by driver Dalip Singh to accompany him and to repair the offending vehicle, which he did. After repairing the same, while coming back to his workshop, the vehicle met with an accident, which was caused by the driver.

19. The appellants made an application under Order 6 Rule 17 of the Code of Civil Procedure for leave to amend the reply, which was not resisted by the claimant and the insurer. The application was allowed in terms of the order dated 15th May, 2015.

20. The learned Counsel for the claimant and insurer also made statements to the effect that they are under instructions not to file response to the amended reply and lead any evidence. Thus, their right to file response to the amended reply and adduce the evidence was closed in terms of the order, *supra*.

21. The appellants-owner and driver have specifically averred in their reply that the contents of paras 4 & 5 are 'admitted'.

22. The owner and driver have also admitted the contents of para-22 of the claim petition. It is apt to reproduce the relevant portion of para 22 of the reply herein:

> *"22. The contents of this para are admitted only to the extent that on 24-1-2009 at the request of the respondent no-2 the petitioner/mechanic visited the spot to repair the said vehicle and the petitioner did repair the same and sit in the said vehicle to check as to whether the vehicle was fit to run etc. The said vehicle was being driven by the Respondent No-2, but after going a few KM away, while getting the said vehicle back in order to give pass to the coming bus the brake of the vehicle did not worked and vehicle did not stop, but the driver jumped out of the vehicle and the said vehicle went out of the road, unfortunately, the petitioner went with the vehicle and got injured. Rest of the contents of this para (save and except specifically admitted) are wrong hence denied."*

23. Viewed thus, it cannot be said that the injured was traveling in the offending vehicle as a gratuitous passenger. He had gone to repair the offending vehicle at the request made by the driver and was coming back in the same vehicle.

24. Having said so, the impugned award is modified by holding that the insurer has to satisfy the award for the reason that the claimant was a third party, was not a gratuitous passenger and the risk was covered in terms of the insurance policy.

25. The quantum of compensation is not in dispute.

26. The insurer is directed to deposit the award amount with interest, within eight weeks from today before the Registry. On deposition, the Registry is directed to release the amount, in favour of the claimant, strictly as per the terms and conditions contained in the impugned award. The amount, if any deposited by the owner and driver, be refunded to them.

27. Accordingly, the impugned award is modified, as indicated above and the appeal is disposed of.

28. Send down the records after placing a copy of the judgment on the Tribunal's file.

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

Yogesh Kumar Sood ...Appellant
Versus
Mela Ram and others ...Respondents

FAO No.643 of 2008
Decided on: 31.07.2015.

Motor Vehicles Act, 1988- Section 149- Unloaded weight of the vehicle was 8,000 k.g. and it did not fall within the definition of light motor vehicle-the driver possessed the driving license to drive a light motor vehicle- thus the driver did not have a valid driving license and the owner was rightly held liable to pay compensation. (Para 3-4)

For the Appellant: Mr.Bhupender Thakur, Advocate.
For the Respondents: Ms.Ritta Goswami, Advocate, for respondent No.1.
Mr.B.M. Chauhan, Advocate, for respondent No.2.
Nemo for respondents No.3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.(Oral):

By the medium of instant appeal, the appellant-owner has questioned the award, dated 27th August, 2008, passed by the Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr, (for short, the Tribunal), in Claim Petition No.123 of 2005, titled Mela Ram vs. Duni Chand through LR's and others, whereby compensation to the tune of Rs.2,67,000/-, with interest at the rate of 9% from the date of filing of the Claim Petition till realization, was awarded in favour of the claimant, and the driver and the owner

(respondents No.1 and 2 in the Claim Petition) were saddled with the liability, (for short, the impugned award).

2. The appellant-owner has challenged the impugned award on the limited ground that the offending vehicle i.e. Tipper falls under the definition of Light Motor Vehicle and since the driver was having a valid and effective driving licence to drive a Light Motor Vehicle, therefore, the Tribunal has fallen in error while holding that the driver of the offending vehicle was not having a valid and effective driving licence and that the insurer has been wrongly exonerated.

3. I have gone through the impugned award and the record. A perusal of the registration certificate Ext.RW-2/A shows that the unladen weight of the offending vehicle i.e. Tipper was 8000 kg. Therefore, the offending vehicle does not fall within the definition of Light Motor Vehicle.

4. Admittedly, the driver of the offending vehicle was having driving licence to drive a Light Motor Vehicle and therefore, the Tribunal has rightly fastened the liability upon the owner and the driver.

5. Having said so, the impugned award is well reasoned and needs no interference. The appeal, being without merit, deserves dismissal and the same is dismissed accordingly.

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