THE
INDIAN LAW REPORTS
HIMACHAL SERIES, 2015

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

MARCH, 2015

Vol. LXV (II)

Pages: HC 1 to 113

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

Containing cases decided by the High Court of

Himachal Pradesh and by the Supreme Court of India

And

Acts, Rules and Notifications.

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

INDIAN LAW REPORTS

HIMACHAL SERIES

(March, 2015)

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'I'

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Indian Penal Code, 1860- Section 452- In order to prove the offence punishable under Section 452 IPC the prosecution is under legal obligation to prove house trespass with an intention to cause hurt or to commit assault or with an intention to wrongfully restrain any person or putting the person in a fear of hurt- accused entered into the residential house of prosecutrix with intention to commit the offence of sexual assault- he had put the prosecutrix in fear of hurt and had dragged her towards cattle shed- all these circumstances proved that accused had committed criminal trespass – accused convicted of the commission of offence punishable under Section 452 of IPC.
Title: State of Himachal Pradesh Vs. Vipan Kumar son of Shri Pritam Chand (D.B.)
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Title: State of Himachal Pradesh Vs. Vipan Kumar son of Shri Pritam Chand (D.B.) Page-44

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'N'

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not led any evidence to prove that premises was owned by 'G' – other persons beside accused were present in the room and therefore, it cannot be said that accused was in conscious possession of the contraband- accused acquitted.

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Title: State of Himachal Pradesh Vs. Vipan Kumar son of Shri Pritam Chand (D.B.) Page-44

Specific Relief Act, 1963- Section 38- Parties to the suit have their residential house over a portion of the suit land- plaintiff claimed that defendant was raising construction over the vacant portion of the land without getting it partitioned and without any right to do so- defendant claimed that the land stood partitioned and he was raising construction over the land which fell into his share - during the partition, instrument of the partition was produced but there is no evidence that possession was delivered -subsequent to the preparation of instrument of partition- parties were recorded to be in joint possession of the suit land- held, that parties are to be treated as joint owners- since, joint owner is not entitled to raise construction- therefore, defendant is restrained from raising construction over the suit land.

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

Joginder Singh & Others .....Appellants.
Versus
Suresh Kumar & Others .....Respondents.

RSA No. 516 of 2003.
Date of Decision: 24th February, 2015.

Specific Relief Act, 1963- Section 38- Parties to the suit have their residential house over a portion of the suit land- plaintiff claimed that defendant was raising construction over the vacant portion of the land without getting it partitioned and without any right to do so- defendant claimed that the land stood partitioned and he was raising construction over the land which fell into his share - during the partition, instrument of the partition was produced but there is no evidence that possession was delivered -subsequent to the preparation of instrument of partition- parties were recorded to be in joint possession of the suit land- held, that parties are to be treated as joint owners- since, joint owner is not entitled to raise construction- therefore, defendant is restrained from raising construction over the suit land. (Para-15 to 20)

Cases referred:
Nagesh Kumar versus Kewal Krishan, AIR 2000 HP, 116
Bachan Singh versus Swaran Singh, AIR 2001, Punjab and Haryana, 112
Lal Chand Bhardwaj versus Jagdish Kumar & Another Latest HLJ (HP) 777
Tarsem Singh & others versus Prakash Kaur, AIR 2002, Punjab and Haryana, 258

For the appellants:	Mr. Bhupender Gupta, Senior Advocate Ms. Charu Gupta, Advocate.
For the respondents:	Mr. G. D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate for respondents No. 1(a) to 1(f).

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (Oral)

Plaintiffs are in second appeal before this Court. They are aggrieved by the judgment and decree passed by learned Additional District Judge, Kangra at Dharamshala in Civil Appeal No.70-K/03 on 2.12.2003, whereby he reversed the judgment and decree passed by learned Sub-Judge 1st Class, Kangra, District Kangra in Civil Suit No.144/99 and dismissed the suit.

2. The subject matter of dispute in the present lis is a parcel of land measuring 0-07-96 hectares comprised under Khata No.26, Khatauni No.34 and Khasra No.187, 190, to the extent of 15/24 shares, situate in Mohal Pehgan, Mauza Sahoura, Tehsil and District Kangra as per entries in the Jamabandi for the year 1997-98 Ex.P-1/D-1.

3. The common ancestor of the parties to the suit was Sunka. Satya Devi Proforma respondent No.2 herein (plaintiff No.1 in the trial Court) is widow of one Rasila son of said Shri Sunka whereas deceased plaintiffs Likhu Ram and Tulsi Ram, predecessor-in-interest of appellants No.1 to 4 and 6 (a) to 6(e) were also sons of said Shri Sunka. Similarly, deceased defendant Dhani Ram, the predecessor-in-interest of respondents 1(a) to

1(f) was also son of said Shri Sunka. As per the entries in Jamabandi for the year 1997-98 Ex.P-1/D-1, the parties are joint owner-in-possession of the suit land to the extent of their respective shares as reflected in this document.

4. The suit land bearing Khasra No.190 is a big plot and is recorded as '*Ger Mumkin Abadi'* in the Jamabandi Ex.P-1/D-1. The parties to the suit admittedly have their residential houses already constructed in existence over a portion thereof. Besides this, vacant land is also available on the spot adjoining to the houses of the parties to the suit when the plaintiffs claim the same to be in their joint possession with defendants, as per the version of the later, the same stands partitioned and the vacant land as per the possession of the parties to the suit fell in their respective shares during the partition. He, therefore, has claimed that whatever construction he intends to raise is over that portion of the suit land, which in the partition fell in his share. The plaintiffs, however, have come forward with the version that the suit land is still un-partitioned and as such in joint possession of the parties to the suit.

5. The defendant with a view to grab the same over and above his share started collecting construction material to start construction work over a portion thereof. They objected to such unlawful activities on his part and when he refused to desist from carrying out construction, they filed the suit and obtained ad interim injunction. He allegedly raised construction upto plinth level forcibly and in utter disregard to the ad interim injunction passed by learned trial Court.

6. It is with the above pleadings, the parties had undergone trial and learned Trial Court has framed the following issues:

"1. Whether the plaintiffs are entitled to injunction, as prayed for? OPP

2. Whether the suit has been properly valued? OPP

3. Whether the plaintiffs have no cause of action? OPD

4. Whether the plaintiffs have no locus standi to sue? OPD

5. Whether the suit is barred on account of act, conduct and acquiescence on the part of the plaintiffs? OPD.

6. Whether the plaintiffs have suppressed the material facts? OPD

7. Whether the plaintiffs have not come to the Court with clean hands? OPD

8. Whether the suit is bad for multifariousness and mis-joinder of cause of action? OPD

9. Relief.

7. One of the plaintiffs namely Shri Tulsi Ram himself has stepped in the witness-box as PW-1 and also placed reliance on the documentary evidence.

8. On the other hand, the defendant has himself stepped in the witness box as DW-2 and also examined Shri Kripal Singh, Superintendent, office of Tehsildar Shahpur, District Kangra as DW-1 to prove the partition proceedings and order of partition.

9. Learned trial Court on appreciation of the pleadings of the parties and evidence produced on both sides has held that the suit land is un-partitioned and joint property of the parties to the suit and as the defendant was found to have started raising

construction of a house over a portion thereof forcibly, hence decreed the suit for the relief of permanent Prohibitory Injunction.

10. Aggrieved by the judgment and decree passed by learned trial Court, the defendant had assailed the same in the lower appellate Court. Learned lower appellate Court while arriving at a conclusion that the suit land stands partitioned amongst the co-sharers and that the suit could have not been decreed has reversed the judgment and decree passed by the trial Court and dismissed the suit vide judgment and decree under challenge before this Court in the present appeal.

11. The legality and validity of the judgment and decree under challenge has been assailed on several grounds, however, mainly that the oral as well as documentary evidence produced by the parties on both sides has not been appreciated in its right perspective and rather misconstrued and misinterpreted. The nature of the suit land bearing Khasra No.190 being Abadi could have not been partitioned. The lower appellate Court is stated to have erroneously relied upon the documents Ex.DW-1/A to DW-1/G to conclude that the suit land stood partitioned. The instrument of partition Ex.DW-1/G speaks about the joint-ness of the suit land between the parties, however, this document is stated to be misconstrued and mis-appreciated.

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

> "1. Whether the Lower Appellate Court has taken erroneous view of law in holding that Khasra No.190, subject matter of the suit, which was classified as "Ger Mumkin Abadi", stood partitioned between the parties as per the order of partition and instrument of partition, ignoring the provisions of HP Land Revenue Act that the jurisdiction to partition such land does not lie with the revenue authorities?
>
> 2. Whether the Lower Appellate Court has acted with material illegality and irregularity in misreading the material documents which proved that Khasra No.190, even after drawing of instrument of partition was kept joint? Has not the Lower Appellate Court acted beyond its jurisdiction to set aside the decree for injunction, whereby the plaintiffs-appellants claimed the restraint order for changing the suit land by raising permanent structure by the defendant-respondent?

13. Mr. Bhupender Gupta, learned Senior Advocate, assisted by Ms. Charu Gupta, Advocate has vehemently argued that the suit land bearing Khasra No.190 being '*Ger Mumkin Abadi*' could have not been ordered to be partitioned by Assistant Collector 1st Grade and also that as per the so called instrument of partition Ex.DW-1/G, the same as well as the suit land bearing Khasra No.187 is joint of the parties to the suit i.e. Rasila Ram, the husband of plaintiff No.1, five shares, Likhu Ram, Tulsi Ram, plaintiffs No.2 and 3 together with their brother Brij Lal to the extent of 15 shares and Jhadu Ram, predecessor-in-interest of the defendant to the extent of 4 shares.

14. On the other hand, Shri G.D. Verma, learned Senior Advocate assisted by Mr. B.C. Verma, Advocate, while repelling the contentions so raised by Mr. Gupta, has strenuously argued that a co-sharer has a legal right to raise construction over the joint land even if the same is un-partitioned and the construction so raised shall abide by the partition thereof ultimately takes place. According to Mr. Verma, the suit land stands

partitioned and defendant intends to raise the construction over a portion thereof in his exclusive possession. He has also placed reliance on the judgments in ***Nagesh Kumar*** versus ***Kewal Krishan, AIR 2000 HP, 116***, ***Bachan Singh*** versus ***Swaran Singh, AIR 2001, Punjab and Haryana, 112, Lal Chand Bhardwaj*** versus ***Jagdish Kumar & Another Latest HLJ (HP) 777*** and ***Tarsem Singh & others*** versus ***Prakash Kaur, AIR 2002, Punjab and Haryana, 258.***

15. Admittedly, as per the statement Ex.DW-1/B, dated 18.1.1975, the land including the suit land was agreed to be partitioned having due regard to the possession of each share holders over the same. The instrument of partition Ex.DW-1/G speaks about the order of partition passed by Assistant Collector 1st Grade on 22.10.1975. Though the said order has not been produced in evidence by either party, however, the order Ex.D-3 passed by learned Divisional Commissioner, Dharamshala in revision petition reveals that the said petition was filed against this order. The revision petition was dismissed on 24.9.1982 with the observations that the aggrieved party may file an appeal, if so advised. However, no appeal seems to be preferred and as such Assistant Collector closed the proceedings vide order dated 15.3.1983 Ex.DW-1/C. The proceedings, no doubt, seem to have attained the finality, however, there is no evidence that the partition so arrived at was given effect in the revenue record for the reason that in the Jamabandi Ex.P-1/D-1, the suit land is still shown joint of the parties to the suit along with other co-sharers to the extent of their respective shares. Even if Ex.DW-1/G is to be taken as instrument of partition, it is not known that on the basis thereof possession was delivered to the parties on the spot and the instrument of partition prepared thereafter as required under Sections 133 & 134 of the H.P. Land Revenue Act. There is also a considerable force in the arguments addressed on behalf of the appellants-plaintiffs that even if Ex.DW-1/G is to be taken as the instrument of partition, the parties to the suit are still in joint possession of the suit land to the extent of their respective shares though it stands partitioned so far as other co-sharers therein were concerned.

16. Learned Trial Court, therefore, has not committed any illegality and irregularity while arriving at a conclusion that the suit land is joint of the parties and the plaintiffs are also owners thereof to the extent of their respective shares. Learned Trial Court has mis-construed and mis-appreciated the documentary evidence more particularly Ex.DW-1/A to DW-1/G because no evidence is forth coming to suggest that the parties to the suit are in exclusive possession of the suit land to the extent of their shares on the basis of the so called instrument of partition Ex.DW-1/G. This document specifies only their respective shares in the suit land and no where establish their exclusive and separate possession over the suit land.

17. It is well settled that a co-sharer has every right, title and interest in the joint property even if not in actual and physical possession thereof. The possession of one co-sharer in joint property amounts to possession of all even if the other co-sharers are not in actual and physical possession thereof. Even a co-sharer in exclusive possession of any portion of joint property cannot be permitted to raise construction and to change the nature thereof because every other co-sharer is joint owner in respect of every inch thereof.

18. In the case in hand, no doubt, the parties on both sides have constructed their houses over the suit land bearing Khasra No.190. The defendant, however, is not justified in claiming that since the plaintiffs have their house in existence over the suit land, therefore, he has a right to raise construction over the land lying vacant that too when he has also constructed his house over a portion thereof and such house already in existence on the spot. He may raise further construction but only after getting his share separated from that of other co-sharers and occupying the same in exclusion of such other co-sharers.

19. The defendant admittedly has raised the construction upto plinth level over a portion of the suit land, without getting the same partitioned. He, by doing so, has threatened to evade the rights of other co-sharers including the plaintiffs therein. He, being not in exclusive possession of the vacant suit land over which he intends to raise the construction, hence cannot be permitted to go ahead with construction in violation of the rights and interest of other co-sharers therein.

20. The plaintiffs have, therefore, successfully pleaded and proved the interference over the suit land by the defendant and thereby threatened their rights and interest therein. The clear-cut case for grant of decree for permanent prohibitory injunction is, therefore, made out in favour of the plaintiffs. The contentions raised to the contrary by Mr. G.D. Verma, learned Senior Advocate, on behalf of the respondents-defendants, however, are without any substance. The case law as cited at the bar is also not applicable in the given facts and circumstances of the case. Learned Trial Court was, therefore, absolutely justified in decreeing the suit. The findings to the contrary recorded by Lower Appellate Court are, therefore, the result of misappreciation of the oral as well as documentary evidence available on record. Consequently, the judgment and decree under challenge is neither legally nor factually sustainable. Both the questions of law stands answered accordingly.

21. In view of what has been stated hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, the judgment and decree passed by learned trial Court is upheld and that passed by learned lower appellate Court quashed and set aside. The parties, however, are left to bear their own costs.

****

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

The Narcotics Control Bureau .....Appellant.

Versus

Ganga Ram Thakur & another .....Respondent.

Cr. Appeal No. 22 of 2008
Reserved on: February 25, 2015.
Decided on: February 26, 2015**.**

N.D.P.S. Act, 1985- Sections 8, 18, 25 and 27-A- Accused 'Y' was found in possession of 4.800 Kg of charas and 500 gms of Opium- he told on inquiry that recovered charas and opium were given to him by accused 'G' for further sale in Dhaba owned by 'G'- search of the Dhaba and residential premises was conducted during which 50 gms of opium was recovered- independent witnesses did not support the prosecution version- prosecution had not led any evidence to prove that premises was owned by 'G' – other persons beside accused were present in the room and therefore, it cannot be said that accused was in conscious possession of the contraband- accused acquitted. (Para-12 to 22)

Cases referred:

Ram Rattan vrs. State of Punjab, (1979) 4 SCC 344
Mohd. Alam Khan vrs. Narcotics Control Bureau, (1996) 9 SCC 462

Om Prakash @ Baba vrs. State of Rajasthan, (2009) 10 SCC 632,
State of Punjab vrs. Gurnam Kaur & ors., (2009) 11 SCC 225
State of Orissa vrs. Laxman Jena, (2009) 16 SCC 332
State of Karnataka vrs. Dondusa Namasa Baddi, (2010) 12 SCC 495

For the appellant: Mr. Ashwani Pathak, Advocate.
For the respondents: Mr. Anup Chitkara, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 20.7.2007, rendered by the learned Special Judge, Shimla, in Complaint Case No. 1-S/2 of 2005, whereby the respondents-accused (hereinafter referred to as the accused), who were charged with and tried for offences punishable under Sections 8, 18, 25, 27-A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), have been acquitted.

2. The case of the prosecution, in a nut shell, is that PW-5 O.P.Sharma, Superintendent, Narcotics Control Bureau, Chandigarh, received a secret information on 25.9.2004 at Kullu that Yuvraj Gurang, residing as a tenant at Hari Bhawan, Shoghi (Shimla), is in possession of charas. He was stated to be employee of co-accused Gulshan Kumar, owner of Sharma Dhaba at Shoghi. PW-5 O.P.Sharma, conveyed the information telephonically to the Zonal Director, Narcotics Control Bureau, Chandigarh. The witnesses were instructed to proceed to Shoghi. He reduced the information into writing in Ext. PW-5/A. He proceeded to Shoghi in the evening of 25.9.2004. At about 6:00 AM on 26.9.2004, PW-5 O.P.Sharma, reached Shoghi and went to the Police Barrier. He contacted the local police for assistance to conduct the raid. Rapat Rojnamcha was recorded vide Ext. PW-3/A. The request for police assistance was processed. In the meantime, the Narcotics Control Bureau team also reached there alongwith independent witnesses Mohan Singh and Ashok Kumar who were issued notice under Section 100(8) of the Code of Criminal Procedure. They proceeded to the residence of Yuvraj Gurung. PW-5 Sh. O.P.Sharma, issued authorization Ext. PW-5/A to Balwinder Kumar I.O. of the NCB. Thereafter they entered in the premises occupied by Yuvraj Gurang who was present there. The Investigating Officer introduced himself and the team of the N.C.B. Yuvraj Gurang put his signatures on the search authorization in token of having seen and understood the same. The team offered personal search to Yuvraj Gurung, to which he denied. The search of the premises was undertaken. Charas weighing 4.800 Kg and Opium 500 gms were recovered. During inquiry, Yuvraj Gurang told the team of NCB that the recovered Charas and Opium was given to him by accused Gulshan Kumar for further sale in Sharma Dhaba owned by Gulshan Sharma. He used to get Rs. 200/- per kg as commission for selling the same to the customers.

3. After getting this information, a separate raiding party was formed to search the Dhaba-cum-residential premises. Sh. P.K.Sharma, Intelligence Officer, Balwinder Singh, Sepoy and Yuvraj Gurang remained in the premises of Yuvraj Gurang. The team comprising PW-5 Sh. O.P.Sharma, Balwinder Kumar, Intelligence Officer and other NCB and police officials proceeded to Sharma Dhaba-cum-residential premises situated at National Highway-22, Shoghi Bazar. Two independent witnesses, namely, Darshan Lal Gupta and Tej Lal Sharma were also associated. The search of Dhaba-cum- residential premises of accused Gulshan Kumar was undertaken in the presence of witnesses Darshan Lal and Tej

Lal Sharma. During search one small polythene packet kept in Cot occupied by accused Ganga Ram was recovered. It contained dark brownish greasy substance. Accused Ganga Ram told that the substance was Opium. The substance was tested and weighed by Balwinder Kumar, Intelligence Officer with the help of weighing scale and weights, carried by the NCB team. The weight of opium was found to be 50 gms. Out of the recovered Opium, two samples of 25 gms each were drawn by Balvinder Kumar in the presence of PW-5 O.P.Sharma. The same were sealed in small size two polythene bags Ext. C-1 and Ext. C-2. The polythene bags were signed by the accused Ganga Ram as well as the independent witnesses. The recovered contraband was taken into possession vide seizure memo Ext. PW-2/C. Panchnama Ext. PW-2/B was also prepared. The information about the seizure was sent to the Zonal Director, NCB Chandigarh by PW-5 O.P.Sharma. One sample Ext. C-1 of opium was sent vide memo Ext. PW-4/A to the Central Revenues Control Laboratory, New Delhi through Ramesh Chand, Sepoy. The sample was returned by the Chemical Examiner and re-dispatched through Ramesh Kumar, Sepoy on 29.9.2004. The report of the chemical Examiner Ext. PW-1/A was received by the NCB vide diary No. 1512, dated 14.2.2005. The case property Ext. PW-5/E and seal of NCB-06 remained in the possession of PW-5 O.P.Sharma. 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 5 witnesses. The accused were also examined under Section 313 Cr.P.C. The accused have denied the prosecution case. The learned trial Court acquitted the accused, as noticed hereinabove.

5. Mr. Ashwani Pathak, Advocate, appearing on behalf of the NCB, has vehemently argued that the prosecution has proved its case against the accused beyond reasonable doubt. On the other hand, Mr. Anup Chitkara, Advocate for the accused has supported the judgment of the learned trial Court dated 20.7.2007.

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

7. PW-1, D.K.Beri has proved the Chemical Examiner report Ext. PW-1/A.

8. PW-2 Darshan Lal, is the independent witness. He was declared hostile and cross-examined by the learned counsel for the complainant. In his cross-examination, he deposed that he was running a shop since 1990. His shop is adjacent to Dhaba of Gulshan Kumar. He did not inquire from the person who had asked about the name and address, as to who he was. His statement was not recorded by that man. On that day his signatures were not obtained. Rather, his signatures were taken on next morning on the third floor of the Dhaba of Gulshan where he was called. He was made to sign a back dated document. However, he has admitted his signatures on Ext. PW-2/A.

9. PW-3 Pritam Singh Head Constable deposed that the Superintendent of NCB Chandigarh came to Police Post Shoghi and sought police help for conducting search. He alongwith three other employees of the Police Post Shoghi went with the NCB Officer. The report was made in the daily diary vide Ext. PW-3/A.

10. PW-4 Constable Ramesh Kumar, NCB Chandigarh, deposed that they started from Chandigarh at 2:30 AM in the night and reached at 6:00 AM at Shoghi Barrier. PW-5 O.P. Sharma, met them at Shoghi Barrier. They went to Hari Bhawan alongwith the witnesses. Room of Yuvraj in the ground floor was checked. The person living in room introduced himself to be Yuvraj. Search of the room was carried out. From his bed room, 4 kg., 800 gms charas and 500 gms opium was recovered. Thereafter PW-5 O.P.Sharma,

Balvinder I.O and three Constables went to Sharma Dhaba. Two independent witnesses were also associated. The building of Sharma Dhaba is 4/5 storeyed. When they were checking second floor of Sharma Dhaba, few workers were sitting on the bed. There were ¾ beds in the room. When they were checking one bed on which Ganga Ram accused was sitting, they found 50 gms opium below the pillow. On 27th evening one sealed packet containing four seals of NCB were handed over to him for taking to CRCL, Delhi. The sample was given alongwith a covering letter. He handed over the sealed parcels in the laboratory at Delhi. While handing over the sealed parcel in the laboratory at Delhi, it was pointed out that in place of opium, charas was mentioned in Ext. PW-4/A and test memo Ext. PW-4/B. He brought back the samples to Chandigarh. After that, the mistake was corrected by Balvinder Kumar, I.O and made endorsement on letter Ext. PW-4/C.

11. PW-5 O.P.Sharma, deposed that he received a secret information at Kullu that one Yuvraj Gurang, residing on the basement of Hari Niwas, Shoghi was involved and was in possession of charas. He was a worker of Gulshan Kumar Sharma, owner of Sharma Dhaba, situated at NH-22, Shoghi. He informed his superior officer i.e. Zonal Director, NCB telephonically and on his instructions, he proceeded towards Shoghi for further action. He also instructed the NCB team at Chandigarh to reach Shoghi. He reduced this information in writing which is Ext. PW-5/A. He made an endorsement on Ext. PW-5/A which is encircled in B. The NCB team joined him at Police Naka Shoghi. The team proceeded towards Hari Niwas, Shoghi. They entered the premises of Yuvraj Gurang. He was present on the spot. Thereafter, search of the premises was undertaken. As a result, 4.800 Kg. of charas and 500 gms of opium was recovered. During the preliminary inquiry made from Yuvraj Gurang, he revealed that the recovered charas and opium was given to him by Gulshan Kumar Sharma for further sale in Sharma Dhaba which was owned by Gulshan Sharma. He also revealed that he used to get Rs. 200/- per kg as commission for selling the same to the customers. The separate team was constituted to undertake the search at the Dhaba-cum- residential premises of Gulshan Kumar Sharma. The team comprised of himself, Balwinder Kumar I.O and other NCB and police officials proceeded to Sharma Dhaba-cum- residential premises situated at NH 22, Shoghi. Two witnesses, namely, Darshan Lal Gupta and Tej Lal Sharma, were also associated as independent witnesses. On the second storey of the building, in a room, there were few cots on which few persons were sitting. The said room was searched by the NCB team in the presence of the independent witnesses. One cot, which was occupied by one Ganga Ram, below the pillow a small polythene packet was found containing dark brownish greasy substance, which was emitting a characteristic smell of opium. On asking, Ganga Ram informed that the packet contained opium. The recovered opium from the possession of accused Ganga Ram was weighed by Balwinder Kumar I.O with the help of weighing scale available with the NCB team. It weighed 50 gms. This substance was tested by Balwinder Kumar, I.O. with the help of Drug Field Detection Kit available with the NCB team and the same tested positive for opium. Thereafter, two representative samples of 25 gms each were drawn and were put in two separate polythene packets which were sealed with the help of a candle. Both the packets were then put in two separate white packets i.e. paper envelopes which were pasted with white paper slip on the opening side of each envelope. The I.O. Balwinder Singh took the seal bearing impression Narcotic Control Bureau 06. This seal was taken from him. He affixed four seals on the four corners of the paper slip pasted on the envelopes. These envelopes were marked as C-1 and C-2, respectively. The impressions of the seals were also taken on Ext. PW-1/B. The recovery memo was prepared. The original test sample C-1 was sent to Chemical Examiner CRCL, New Delhi through Ramesh Kumar, Sepoy by him vide Ext. PW-4/A. The test memo in duplicate was also sent through Ramesh Kumar, Sepoy. Sample C-1 was returned by the Chemical Examiner and re-dispatched through Ramesh Kumar, Sepoy on 29.9.2004. The report of Chemical Examiner is Ext. PW-1/A which was

received by NCB on 14.2.2005. In his cross-examination, he deposed that he did not remember as to who was the owner of the premises searched by the team. He also admitted that Yuvraj Gurang had nowhere stated that he at any point of time had given the opium to accused Ganga Ram. He did not remember the exact number of persons present in the room of Ganga Ram. However, so far he remembers, there were 3-4 persons. They did not search any person and the search was conducted only of the room. He did not remember the exact number of beds in the room. However, it could be 3-4 beds. He did not remember that whose bed was searched first of all. He admitted categorically that no record has been placed on record of this case to show that the information which he sent vide Ext. PW-5/A was received by the Zonal Director. According to him, the information was given on the mobile number of the Zonal Director. He did not remember the mobile number of the Zonal Director. No telephone record was placed on the record of this case. He did not remember from where the witness Tej Lal Sharma was called. Volunteered that he was there in the vicinity of the Dhaba. The independent witness Darshal lal Gupta was shop keeper at Shoghi. He did not have any idea about his profession.

12. The independent witness PW-2 Darshan Lal Gupta has not supported the version of the prosecution. He was declared hostile. According to him, as noticed by us hereinabove, his statement was recorded on the next date. PW-5 O.P. Sharma, has categorically deposed that he received a secret information when he was at Kullu. He has sent this information to his immediate superior officer vide memo Ext. PW-5/A. However, it has come in his cross-examination that he has not mentioned the time in Ext. PW-5/A to the effect that at what time the information was received and at what time the Zonal Director was further informed. He also admitted in his cross-examination that the information was given on the mobile number of the Zonal Director. But, he did not remember the mobile number. No telephone record has been placed on record of this case. It is surprising that though PW-5 O.P.Sharma, has stated that he has informed the immediate superior officer i.e. Zonal Director on his mobile number, but he did not remember his telephone number. He has also admitted that no record was placed on record to establish that the information which he has sent vide memo Ext. PW-5/A was received by the Zonal Director. Since, it was a case of prior information, the compliance of Section 42 of the ND & PS Act, was mandatory.

13. The prosecution has not led any evidence to prove that the premises were owned by co-accused Gulshan Kumar. No efforts have been made by the prosecution to establish whether the premises were owned by co-accused Gulshan Kumar or not. PW-5 Sh. O.P.Sharma, has admitted in his cross-examination that he did not remember that in whose name the ownership of the premises was which were searched in this case. It is reiterated that the prosecution ought to have proved the ownership and possession of the Dhaba-cum-residential premises of co-accused Gulshan Kumar.

14. Their lordships of the Hon'ble Supreme Court in the case of ***Ram Rattan vrs. State of Punjab,*** reported in ***(1979) 4 SCC 344,*** have held that when there was nothing on record to indicate that quantity of opium recovered from the house was in the conscious possession of appellant or that even the house was in his possession as a tenant, the High Court committed an error of law in maintaining conviction of appellant.

15. Similarly, their lordships of the Hon'ble Supreme Court in the case of ***Mohd. Alam Khan vrs. Narcotics Control Bureau,*** reported in ***(1996) 9 SCC 462,*** have held that the recovery of contraband was from a flat and in the absence of evidence that the flat was owned and possessed by the accused, the accused was acquitted. Their lordships have held as under:

"6. The learned counsel appearing for the appellant raised several contentions in assailing the judgment under appeal. However, we do not propose to deal with all the contentions raised before us as it may not be necessary in view of the fact that one of the contentions finds acceptance at our ends. That contention is that the prosecution has miserably failed to establish the ownership and possession of the premises namely, flat now 102 in building no.8A1, Quba Co- operative Housing Societies Millat Nagar, Andheri, Bombay from which the contraband tablets were seized as belonging to the appellant.

7. According to the learned counsel for the appellant, except the information received by the officials (Exhbt. No.34) panchnama (Exhbt, No. 33) report and the alleged agreement containing the alleged signature of the appellants no other acceptable evidence was let in by the prosecution to prove that the appellant was the owner and in actual possession of the said building, He also submitted that the reliance. placed by the prosecution on the statements of the appellant obtained under Section 108 of the Customs Act and 67 of the NDPS Act will be of no avail as the appellant has retracted the same without loss of time. He further submitted that a careful perusal of the statements of the appellants viz., Exhbt, 83 and 84 will clearly show that such statements would not have been given voluntarily by the appellant.

8. The learned Additional Solicitor General submitted that the agreement executed by the appellant found in the Premises in question and recovered by the officials containing the signature of the appellant is sufficient to establish that the appellant was the owner and in possession of the premises. In this connection, he invited our attention to Section 66 of the NDPS Act and submitted that the prosecution has established the case beyond doubt. He also submitted That the admission of the appellant during the course of interrogation under Section 67 of the NDPS Act is admissible in evidence and coupled with the fact of seizure of agreement containing the signature of the appellant, it is not open to the learned counsel for the appellant to contend that the prosecution has failed to establish the ownership of the appellant regarding the premises in question.

9. We have considered the rival submissions. We do not think that the learned Additional Solicitor General is right in invoking the aid of Section 66 of NDPS Act for Section 66(i) visualizes the production of a document which has been seized from the custody or control of any person or furnished by any person. In i this case, the document namely the agreement has not been seized from the custody of the appellant or it has been furnished by him. In order to invoke the aid of Section 66, the prosecution should have established that the appellant is the owner and was in actual possession of the flat in question. Therefore, we are not able to accept the argument of the learned Additional Solicitor General. It is not in dispute that the appellant did not admit his signature in the agreement in question. The prosecution did not bother to produce any independent evidence to establish that the appellant was the owner of the flat in question by producing documents from concerned Registrar's office or by examining the neighbors. No statement has been made by the prosecution that inspite of the efforts taken by them, they could not produce the document or examine the neighbors to prove the ownership of the appellant relating to the flat in question. It is relevant to

note here that two independent witnesses attested the panchnama. Only one of them was examined as PW 5 who did not support the prosecution version and therefore was treated as hostile. In this case except the retracted statements of the appellant to connect the appellant with the house in question, no other independent evidence is available to sustain the finding of the learned Special Judge extracted in the beginning and confirmed by the High Court.

10. The High Court was not right in holding that 'the learned Trial Judge was therefore right in holding that in view of Section 66 of the NDPS Act, the said document can be admitted in evidence and it goes to show that the said flat was owned by the appellant'. Again the High Court observed that 'even assuming' that the said agreement is excluded from consideration, there remains the specific information received,Exhbt. 33 and his own statement recorded by the Authority under Section 313, Exhbt. 83 and 84 and all of them go to show that the appellant was the owner of the said flat. Ns pointed out earlier that nobody has identified the flat in question as belonging to the appellant and in the absence of corroborating evidence, one cannot come to a confirmed conclusion regarding ownership and possession on the basis of the retracted statements of the appellant alone."

16. Their lordships of the Hon'ble Supreme Court in the case of ***Om Prakash @ Baba vrs. State of Rajasthan,*** reported in ***(2009) 10 SCC 632,*** have held that when the recovery of contraband is effected from the house of the accused, the prosecution has to prove that the accused was owner of house and he was in the possession of the same. It has been held as under:

"6. A bare perusal of the evidence aforementioned would reveal that the ownership and possession of the house and the place of recovery is uncertain. As a matter of fact PW.3 has categorically stated that the house from where the recovery had been made belonged to one Durga Bhanji and not to the appellant. Even assuming for a moment that the house did belong to the appellant and was in his possession, the prosecution was further required to show the appellant had exclusive possession of the contraband as a very large number of persons including the appellant and five of his brothers, their children and their parents were living therein. Admittedly, there is no evidence as to the appellants exclusive possession. In this situation we find that the judgment cited by the learned counsel that is Mohd. A.Khan's case fully supports the plea on behalf of the appellant, we observe that in addition to the ocular evidence, the prosecution had also put on record a document pertaining to the ownership of the house, but despite this, the Court held as under:

"The prosecution did not bother to produce any independent evidence to establish that the appellant was the owner of the flat in question by producing documents from concerned Registrar's office or by examining the neighbours. No statement has been made by the prosecution that in spite of the efforts taken by them, they could not produce the document or examine the neighbours to prove the ownership of the appellant relating to the flat in question. It is relevant to note here that two independent witnesses attested the panchnama. Only one of them was examined as P.W.5 who did not support the prosecution version and therefore was treated as hostile. In this case except the retracted statements

> of the appellant to connect the appellant with the house in question, no other independent evidence is available to sustain the finding of the learned Special Judge extracted in the beginning and confirmed by the High Court."

17. In the instant case also, besides the accused, other persons were also present in the room and were sitting on different beds. Thus, it cannot be said that the accused was in exclusive possession of the contraband.

18. In the case of ***State of Punjab vrs. Gurnam Kaur & ors.,*** reported in ***(2009) 11 SCC 225,*** their lordships of the Hon'ble Supreme Court have held that the recovery of contraband from beneath a bed by itself does not establish that all of them were in conscious possession of the narcotics. It has been held as follows:

> "14. Respondent Gurnam Kaur admittedly is an old lady. Respondent Nos.2 and 3 are her daughters-in-law. Curiously all of them were found sitting on the same bed beneath whereto the contraband had allegedly been kept. That by itself does not establish that all of them were in conscious possession of the narcotics. They were not even asked any question in regard thereto. Prior to lodging of the first information report, the respondents did not point out the place where the narcotics were found kept. How the raiding party found the same has not been disclosed. The ladies in natural course were in their house. No explanation has been furnished, nor the statement of the respondent was recorded. The investigating officer DSP Baldev Singh PW3 was to prove as to where contraband had been kept not the respondents."

19. In the instant case, PW-5 O.P. Sharma, has not even tried to ascertain the names of the persons who were occupying the room. The prosecution has also failed to prove that the bed from where the recovery was effected, belonged to accused Ganga Ram.

20. Their lordships of the Hon'ble Supreme Court in the case of ***State of Orissa vrs. Laxman Jena,*** reported in ***(2009) 16 SCC 332,*** have held that the requirements of proviso of Section 42 must be strictly complied with. Their lordships have held as under:

> "6. However, in exercising a power under the second part of Section 42(1) the designated officer is under a legal obligation to comply with the mandate of the proviso to Sub-section (1) providing for recording of grounds of his belief to make the search in terms of the powers conferred upon him. In the instant case the High Court has found on facts that before making the search, the officer concerned had not recorded reasons or grounds for his belief to make the search in terms of proviso to Section 42(1) of the Act.
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> 7. The mandate of law, as incorporated under the Act, is required to be strictly compiled in view of the grave consequences which are likely to be followed on proof of illicit article under the Act. The legislature had enacted and provided certain safeguards in various provisions of the Act including Sections 42 and 50, in all cases which must be proved to have been strictly followed. The harsh provisions of the Act cast a duty upon the prosecution to strictly follow the procedure and comply with of safeguards, Our constitution bench of this court In the State of Punjab v. Baldev Singh, JT1999 (4) SC 595 ; 1999 (6) SCC 172 has held:
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> > "Prior to the passing of the NTPS Act 1985 control over narcotic drugs was being generally exercised through certain central enactment though some of the states also had enacted certain

statutes with a view to deal with illicit traffic in drugs. The Opium Act, 1857 related mainly to preventing illicit cultivation of poppy, regulating cultivation of poppy, and manufacture of opium. The Opium Act, 1878 supplemented the Opium Act, 1857 and made possession, transportation, import, export, sale, etc. of opium also an offence. The Dangerous Drugs Act, 1930, was enacted with a view to suppress traffic in contra band and abuse of dangerous drugs, particularly derived from opium, Indian hemp and coca leaf, etc. The Act prescribed maximum punishment of imprisonment for 3 years with or without fine, in so far as the first offence is concerned and for the second Or the subsequent offence, the punishment could go upto four years RI. these Acts, however, fail to control illicit drug traffic and drug abuse on the other hand exhibited an upward trend. New drugs of addiction known as psychotropic substances also appeared on the scene causing serious problems. It was noted that there was absence of comprehensive law to enable effective control over psychotropic substances in the manner envisaged by the international convention on psychotropic substances, 1971. The need for the enactment of some comprehensive legislation on narcotic drugs and psychotropic substances was therefore felt, Parliament with a view to meet our social challenge of great dimensions enacted the NDPS Act, 1985 to consolidate and amend existing provisions relating to control over drug abuse etc. and to provide for enhanced penalties particularly for trafficking and various other offences. The NDPS Act, 1985 provides stringent penalties for various offences. Enhanced penalties are prescribed for the second and subsequent offences. The NDPS Act. 1985 was amended in 1988 w.e.f.... 29.5.1989 with minimum punishment of ten years imprisonment which may extend upto 20 and a minimum fine of 1 lakh rupees which may extend upto Rs. 2 lakhs have been provided for most of the offences under the NDPS Act, 1985. For the second and subsequent offences, minimum punishment of imprisonment is 15 years which may extend to 30 years while minimum fine is Rs. 1.5 lakhs which may extend to Rs. 3 lakhs. Section 31(a) of the Act, which was inserted by the Amendment Act of 1988, has even provided that for certain offences, after previous convictions, death penalty shall be imposed without leaving any discretion in the court to avoid imprisonment for life in appropriate cases. Another amendment of considerable importance introduced by the Amendment Act, 1988 was that all the offences under the Act were made triable via special court. Section 36 of the Act provides for constitution of special courts manned by a person who is a sessions judge or an additional sessions judge. Appeals from the orders of the special courts lie to the High Court. Section 37 makes all the offences under the Act to be cognizable and non-bailable and also lays down stringent conditions for grant of bail, However despite the stringent provisions of the NDPS Act, 1985 as amended in 1988, drug business is booming: addicts are rapidly rising; crime with its role in narcotics is galloping and drug trafficking network is ever growing. While interpreting various provisions of the statute, the object of the

legislation has to be kept in view but at the same time, the interpretation has to be reasonable and fair."

9. The learned counsel appearing for the appellant state could not refer to any record or evidence to show that the mandate of proviso to Sub-section (1) of Section 42 was followed by the officer concerned before making the search. The High Court in the absence of cogent evidence, rightly concluded that the aforesaid provision had not been followed which entitled the accused the benefit of the acquittal."

21. In the case of ***State of Karnataka vrs. Dondusa Namasa Baddi,*** reported in ***(2010) 12 SCC 495,*** their lordships of the Hon'ble Supreme Court have held that the oral evidence of police officials will not be in compliance with the provisions of Section 42(2) of the Act. Their lordships have held as under:

"3. This matter was referred to the Constitution Bench owing to an apparent conflict between two judgments of this Court, Abdul Rashid Ibrahim Mansuri v. State of Gujarat wherein it was held by a three Judge Bench that compliance with Section 42(2) of the Act was mandatory and failure of the police officer to take down the information received by him in writing and to forthwith send a report to his immediate official superior would cause prejudice to the accused whereas in Sajan Abraham v. State of Kerala which had also been decided by a three Judge Bench it had been held that substantial compliance with the provisions of Section 42 was sufficient.

5. Concededly in the present matter, no information was taken down in writing by the police officer or conveyed to the immediate police officer. Shri A.K. Mishra, the learned State counsel has, however, forcefully argued that there was evidence in the oral evidence of P.W. 10, the investigating officer, that he had complied the formalities enjoined by Section 42(2). It is not the case of the prosecution that sufficient time was not available to record the information in writing and send it to the superior officer and in the face of it, we are of the opinion that any oral evidence of the police officer will not be in compliance with the provisions of Section 42(2) of the Act."

22. The prosecution has also failed to prove that the contraband has been recovered from the exclusive possession of the accused Ganga Ram. PW-5 O.P. Sharma, has admitted in his cross-examination that he did not remember the exact number of persons present in the room of Ganga Ram. However, so far he remembers, there were 3-4 persons. They did not search any person and the search was conducted only of the room. He did not remember the exact number of beds in the room. However, it could be 3-4 beds. He did not remember that whose bed was searched first of all.

23. Accordingly, there is no occasion for us to interfere with the well reasoned judgment of the trial Court and the appeal is dismissed. Bail bonds are discharged.

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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
Shashi Pal Singh & another .....Respondents.

Cr. Appeal No. 570 of 2008
Reserved on: February 26, 2015.
Decided on: February 27, 2015.

Indian Penal Code, 1860- Sections 307 and 506- Accused came to the room of the victim and gave beating to him and his friend- matter was reported to police on which FIR was registered- accused sent a message that he wanted to compromise the matter- complainant was called to Restaurant- when the complainant went to the Restaurant, accused aimed a gun at the complainant and threatened him- he asked the complainant to execute a writing that the matter had been compromised between him and the accused- accused subsequently fired gunshot towards complainant- accused threatened to kill the complainant- there were contradictions in the testimonies of prosecution witnesses regarding the place from where the gun was fired- according to the complainant and the PW-2, pellets had hit the tree, however, pellets were not recovered- PW-4 did not support the prosecution version- prosecution witnesses also contradicted themselves regarding taking of gun and cartridge to FSL – held, that in these circumstances, acquittal of the accused was justified. (Para-17 to 21)

For the appellant: Mr. Ramesh Thakur, Asstt. AG.
For the respondents: Mr. Anand Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 28.3.2008, rendered by the learned Addl. Sessions Judge, Fast Track Court, Kullu, Sessions Trial No. 34 of 2006, whereby the respondents-accused (hereinafter referred to as the accused), who were charged with and tried for offences punishable under Sections 307, 506 of the IPC and under Sections 27 & 30 of the Arms Act, have been acquitted.

2. The case of the prosecution, in a nut shell, is that complainant Raju Thakur is a resident of Village Banjar. He is owner of Search India Adventure Group at Kasol. Bir Singh happens to be his partner. On 24.7.2005, accused Shashi Pal Singh, Raju and Rajesh alongwith 7 or 8 other persons came to his room located in his complex and administered beatings to him and his friend Dhiyan Singh. This incident was reported to the police by him and case was registered against accused Shashi Pal Singh. On 25.7.2005, accused Shashi Pal Singh sent a message to him through Dinesh Guleria to the effect that he wanted to effect compromise relating to the incident of yesterday night. He was called to Rain Bow Restaurant by the accused. He alongwith Dinesh, Bir Singh and Lal Chand reached at Rain Bow Restaurant at about 3:30 PM. Accused Shashi Pal Singh came in the upper storey of his house and aimed 12 bore gun at the complainant near the window of the house and threatened the complainant to execute writing to the effect that he would not pursue the criminal case before the police. The complainant told the accused that he

should come down in order to settle the dispute. Accused Shashi Pal Singh unloaded the gun and thereafter, loaded "round" in the gun and fired gun shot towards the complainant. The complainant and his companions fled from the scene and took shelter behind the bushes. Accused Shashi Pal Singh threatened to kill the complainant. The gun belonged to the father of the accused. The incident was narrated to SI Joginder Singh by the complainant Raju Thakur, who was present at Kasol in connection with the investigation of occurrence of previous night. The statement of the complainant Raju Thakur was reduced into writing by SI Joginder Singh under Section 154 Cr.P.C. It was sent to PS Kullu. Consequently, FIR was registered. Gun was recovered. The investigation was completed and challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 11 witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution case and their involvement in the incident. The learned trial Court acquitted the accused, as noticed hereinabove.

4. Mr. Ramesh Thakur, learned Asstt. Advocate General, appearing on behalf of the State, has vehemently argued that the prosecution has proved its case against the accused beyond reasonable doubt. On the other hand, Mr. Anand Sharma, Advocate for the accused has supported the judgment of the learned trial Court dated 28.3.2008.

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

6. PW-1 Raju Thakur, deposed that he alongwith Biri Singh, Dinesh and his friend whose name he had forgotten, had gone to Rainbow Restaurant at about 3:30 PM. When they reached at the Rainbow Restaurant, Shashi was called by him from his house. Shashi opened the window of his house and fired gun shot from his 12 bore gun. Gun shot did not hit them and they were saved. They fled from the spot. Police came on the spot. His statement was recorded vide memo Ext. PA. When the gun shot was fired by accused Shashi Pal Singh, window panes of the Rainbow Restaurant were got smashed. In his cross-examination, he deposed that when they reached at Rainbow Guest House-cum-Restaurant at about 3:30 PM, they were about 5-6 persons. He also deposed in his cross-examination that the distance between the place from where he was standing and accused was standing was about 150 feet. Pellets from the gun had also hit tree near the main gate of the Guest House. The police had also seen the pellets on the tree. The police had met them at Kasol Chowk. The police had also heard the sound of gun shot. The police met them at about 3:30 PM or 4:00 PM. His statement was recorded by the Police on 25.7.2006 at 8:00 PM.

7. PW-2 Dinesh Guleria, deposed that he received a telephonic message from accused Shashi Pal to the effect that he wanted to effect compromise relating to the incident of the previous night. He alongwith Raju Thakur and Bir Singh went to the Rainbow Guest House at about 3:30 PM. Two or three persons also accompanied them. Accused Shashi Pal was present in the second storey of the Guest House. Accused Shashi Pal fired gun shot from the second storey of the Guest House. The pellets did not hit them and they were saved. In his cross-examination, he deposed that the accused had not come down to effect compromise. He was standing in the second storey of the Guest House. According to him also, pellets had hit the tree and bushes. He also disclosed to the police that pellets had hit the tree and bushes.

8. PW-3 Jog Dassi deposed that she alongwith Rattan Lal were called by the police to Rainbow Guest House. One gun was recovered from the house of Kishan Singh by the police. The gun was taken into possession by the police and was sealed in parcel. She

identified gun Ext. P-1. In her cross-examination, she admitted that the gun Ext. P-1 was not sealed in parcel by police in her presence. Volunteered that the gun had already been sealed in a parcel. She also admitted that the house of accused Krishan Singh was not searched in her presence. She was not aware about the contents of memos Ext. PD and Ext. PE. She volunteered that memos Ext. PD and Ext. PE were already scribed and her signatures were obtained on the memos.

9. PW-4 Dule Ram has not supported the case of the prosecution. According to him, he was not associated as witness during the investigation by the police. Nothing was recovered in his presence. He was cross-examined by the learned Public Prosecutor. After being declared hostile, he denied the suggestion that one window frame was taken into possession by the police in his presence.

10. PW-5 HHC Jai Kishan, deposed that on 16.4.2006, one sealed parcel containing 12 bore gun and second sealed parcel containing empty cartridge was handed over to him by MHC Jia Lal with the direction to deposit the same at FSL Junga vide RC No. 90/06. He deposited the articles at FSL, Junga on 17.4.2006 under receipt of the same.

11. Statement of PW-6 SI Sohan Lal, is formal in nature.

12. PW-7 HC Jia Lal deposed that on 17.8.2005, SI Joginder Singh deposited one sealed parcel containing SBBL gun and one air gun alongwith one sealed parcel in which empty cartridge had been kept and one window frame with him at PS Kullu. On 16.4.2006, two sealed parcels were sent to FSL, Junga vide RC No. 90/06 through HHC Jai Krishan.

13. PW-8 Sudhir Gautam, deposed that the Superintendent of Police, Kullu had applied to District Magistrate, Kullu seeking sanction to prosecute accused Shashi Pal and the District Magistrate accorded the necessary sanction to prosecute accused Shashi Pal under Section 39 of the Arms Act.

14. Statement of PW-9 SI Mohinder Kumar is formal in nature.

15. PW-10 Lal Chand deposed that he went to the house of Shashi Pal. Dinesh Guleria, Bir Singh and Raju Thakur were also with him. Accused Shashi Pal fired a shot from his gun but they were saved. Shashi Pal had threatened them that in case they would not accept his terms, he would kill them. They took shelter in the bushes in order to save themselves. Gun shot fired by the accused Shashi Pal had hit window pane. In his cross-examination, he deposed that they had gone to the house of accused Shashi Pal at about 3:00 PM. They were present outside the gate of the house of accused Shashi Pal at the time of the incident. Accused Shashi Pal had come down to the compound of the house when they arrived near the gate of the house of accused Shashi Pal. They had a talk with accused Shashi Pal in the compound of the house.

16. PW-11 SI Joginder Singh has carried out the investigation of the case. He recorded the statement of the complainant under Section 154 Cr.P.C. vide Ext. PA. He prepared the site plan. He also took the photographs of the spot. He also searched the house of the accused in the presence of the witnesses Jog Dassi and Rattan Lal. One 12 bore gun was recovered from the almirah of the house of Kishan Chand. Gun was sealed in parcel with the aid of seal impression “B”. The gun alongwith the licence was taken into possession and recovery memo Ext. PD was prepared in this connection. In his cross-examination, he deposed that he reached the spot at about 5:00 PM.

17. According to PW-1 Raju Thakur, the accused has fired the shot from 12 bore gun from his house. However, PW-2 Dinesh Guleria deposed that the accused was present

on the second storey of his Guest House and he fired the gun shot from the second storey of the Guest House. PW-10 Lal Chand has given entirely a new version. According to him, they were talking with the accused in the compound of the house at the time of the incident. There are contradictions in the statements of PW-1 Raju Thakur, PW-2 Dinesh Guleria and PW-10 Lal Chand. It casts doubt on the case of the prosecution.

18. According to PW-1 Raju Thakur and PW-2 Dinesh Guleria, pellets from the gun had hit the tree. However, the police has not recovered the pellets. According to PW-1 Raju Thakur, the police has also seen the pellets. PW-10 Lal Chand has not testified that either pellets from the gun had hit the tree or the police had noticed the pellets on the tree. According to PW-1 Raju Thakur, the window panes of Rainbow Guest House were smashed. However, PW-2 Dinesh Guleria is ignorant of this aspect.

19. PW-4 Dule Ram has not supported the case of the prosecution. According to him, he was not even associated as a witness during the course of the investigation. He has denied that one window pane of Rainbow Guest House was taken into possession by the police in his presence. PW-1 Raju Thakur, has categorically deposed in his cross-examination that the police has also heard the gun shot at 3:30 PM. However, PW-11 Joginder Singh deposed that he reached the spot at 5:00 PM. In case the police official/officer had heard the sound of gun shot, he would have definitely reached the spot immediately.

20. Mr. Anand Sharma, Advocate, for the accused has drawn the attention of the Court to the report of the FSL Ext. PS. It is evident from the column No. 4 of Ext. PS that Constable Bahadur Singh No. 167 had taken the gun in question for the purpose of examination to FSL Junga. The Court has already taken into consideration the statement of PW-5 Jai Kishan. The version of PW-5 Jai Kishan is that he has taken the 12 bore gun in one sealed parcel and second sealed parcel containing cartridge vide RC No. 90/06 to FSL, Junga. PW-7 Jai Lal also deposed that he has handed over two sealed parcels to Jai Kishan for handing over the same to FSL, Junga. It makes the version of the prosecution doubtful and the possibility of tampering with the case property can be ruled out. The prosecution has failed to prove the case against the accused beyond reasonable doubt that the gun shot was fired by the accused with the intent to cause death of the complainant Raju Thakur.

21. The prosecution of only Shashi Pal was sanctioned under the Arms Act, 1959, as per Ext. PK by the District Magistrate, Kullu. There was no sanction to prosecute accused Kishan Singh for the alleged commission of offence. There is also, as noticed by us hereinabove, serious doubt whether the gun was used by the accused Shashi Pal in an illegal manner. According to Ext. PS, FSL report, the gun with the empty cartridge was handed over to FSL Junga by Constable Bahadur Singh but as per the statement of PW-7 Jia Lal, the gun and cartridge were handed over to Constable Jai Kishan (PW-5). PW-5 Const. Jai Kishan also deposed that he has taken the gun and the empty cartridge to FSL Junga. In case PW-5 Const. Jai Kishan has taken the 12 bore gun and empty cartridge to FSL, Junga then his name ought to have been mentioned in Ext. PS, report of the FSL instead of Constable Bahadur Singh. Thus, the prosecution has failed to prove the case against the accused.

22. Accordingly, we will not interfere with the well reasoned judgment of the learned trial Court and the appeal is dismissed. Bail bonds are discharged.

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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
Dharam Singh .....Respondent.

Cr. Appeal No. 411 of 2008
Reserved on: February 27, 2015.
Decided on: February 28, 2015.

Indian Penal Code, 1860- Sections 452, 376 read with Sections 511, 302 and 506-II- Accused went to the house of the deceased- he tried to commit rape on her- accused poured kerosene oil upon the deceased and put her on fire – she was taken to hospital and was found to have sustained thermal burns on 75% of body surface area – when she regained consciousness, she told her husband that accused had tried to rape her- when she resisted the accused, she was set on fire by accused- she also disclosed this fact to PW-6- Accused was also admitted in the Hospital and was found to have sustained burn injuries on his both hands to the extent of 4% to 5% - statement of the deceased was also recorded by JMIC, Chandigarh- she subsequently succumbed to her injuries- husband of the deceased deposed that on the way to PGI his wife had disclosed to him that she had sustained injuries by falling on the kerosene lamp- thus, there are variance in the testimonies of the PW-1 and PW-6- PW-18 specifically stated that deceased was not fit to make statement, hence the prosecution version regarding extra judicial confession to her husband was not reliable- held that in these circumstances, prosecution version was doubtful- accused acquitted.

(Para- 24 to 41)

Cases referred:
Smt. Kamla vrs. State of Punjab, AIR 1993 SC 374
Smt. Laxmi vrs. Om Prakash and others, AIR 2001 SC 2383
Uka Ram vrs. State of Rajasthan, (2001) 5 SCC 254
Arvind Singh vrs. State of Bihar, (2001) 6 SCC 407
State vrs. Vazir Hakki, 2005 Cri.L.J. 2719
Nallapati Sivaiah vrs. Sub Divisional Officer, Guntur, Andhra Pradesh (2007) 15 SCC 465
J. Ramulu vrs. State of Andhra Pradesh & connected matter, (2009) 16 SCC 432
Atbir vrs. Government of NCT of Delhi (2010) 9 SCC 1
Prempal vrs. State of Haryana, (2014) 10 SCC 336

For the appellant: Mr. Ramesh Thakur, Asstt. AG.
For the respondent: Mr. Deepak Kaushal, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 17.3.2008, rendered by the learned Addl. Sessions Judge, Sirmour at Nahan, H.P. in Sessions Trial No. 14-N/7 of 2006, whereby the respondent-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Sections 452, 376 read with Sections 511, 302 and 506-II of the IPC, has been acquitted.

2. The case of the prosecution, in a nut shell, is that on 4.4.2006 at about 11:00 PM at Rampur Banjaran, deceased Anuradha wife of PW-1 Rajinder Kumar and mother of Mrinal Gupta (PW-11) alongwith her son and daughter were present in her house. She was sleeping in her house alongwith children when the accused went there and knocked at the door of the house of the deceased. When the deceased opened the door of her house, the accused entered into the house and bolted the room from inside. The accused tried to commit rape and also gave beatings to her. Thereafter, the accused poured kerosene oil upon the deceased from kerosene bottle which he was carrying and lit the match stick setting the deceased on fire. In the meantime, Mrinal Gupta (PW-11) daughter of the deceased woke up and saw the deceased on fire. The accused ran away from the spot. The fire was extinguished by Mrinal Gupta (PW-11) by pouring water on the deceased and the clothes of the deceased were changed and kept on a gunny bag. One gent's underwear and belt were also found lying in the room by Mrinal Gupta (PW-11). There was smell of kerosene oil from the clothes of the deceased. The deceased alongwith Mrinal Gupta (PW-11) went to the house of Kusum Devi (PW-6), the mother of the deceased. They alongwith Sanjeev Kumar (PW-9), the brother of the deceased took the deceased to Pawar Clinic at Paonta Sahib where the deceased was examined by Dr. Inderjeet Singh (PW-2) who advised to take the deceased to better hospital having good facilities. Kusum Devi (PW-6) deputed her son Sanjeev Kumar (PW-9) to inform Rajinder Kumar (PW-1), the husband of the deceased, who was on duty at Mineral Water Factory, Dhaula Kuan. On receipt of such information, Rajinder Kumar (PW-1) went to Dhaula Kuan and saw the deceased to be badly burnt and lying in the vehicle. The deceased was accompanied by Kusum Devi (PW-6). The deceased was taken to hospital at Nahan at about 6:30 AM where she was examined by Dr. A.K.Gupta (PW-3). She was found to have suffered superficial burns grade one and two approximately 80% to 90% regarding which MLC Ext. PW-3/A was issued by him and the deceased was referred to PGI, Chandigarh.

3. ASI Shiv Ram (PW-15) the then Investigating Officer, Police Post, Gunnughat, Nahan went to Zonal Hospital, Nahan and obtained MLC of Anuradha and found that the deceased was not fit to make statement. The deceased was thereafter taken to PGI, Chandigarh by Rajinder Kumar (PW-1), Kusum Devi (PW-6) and Sanjeev Kumar (PW-9), where the deceased was examined by Dr. Ajay Kumar (PW-10), Senior Registrar on 6.4.2006. She was found to have sustained thermal burns on 75% of body surface area regarding which, case summary Ext. PW-10/A, was issued by him. On 9.4.2006, when the deceased regained some consciousness, she told her husband Rajinder Singh (PW-1) that the accused had tried to commit rape with her and when she resisted then she was set on fire by the accused by pouring kerosene oil. This fact was disclosed by Rajinder Singh to Kusum Devi (PW-6), his mother-in-law. The deceased in the evening of 9.4.2006 also disclosed the same fact to Kusum Devi (PW-6). She also disclosed that the accused has threatened the deceased not to disclose the incident to anyone otherwise the children of the deceased will meet the same fate. The accused was also admitted in the hospital at Paonta Sahib and was examined by Dr. Amitabh Jain (PW-5). He was found to have sustained burn injuries on both the hands 4% to 5%. He was discharged from the hospital on 20.4.2006, regarding which admission chart Ext. PW-5/A and OPD slip Ext. PW-5/B were issued. The statement of Rajinder Kumar (PW-1) under Section 154 Cr.P.C. Ext. PW-1/A was recorded on 9.4.2006 by ASI Krishan Kumar (PW-18). FIR Ext. PW-14/A was registered at Police Station Paonta Sahib. Insp. Khazana Ram (PW-14) submitted an application before Sh. R.K.Mehta (PW-19) the then JMIC, Chandigarh for recording the statement of deceased. After the deceased was declared fit to make statement by the Medical Officer, he recorded the statement of deceased Ext. PW-19/A, which is also signed by the doctor. The deceased died at PGI Chandigarh on 14.4.2006 due to burn injuries sustained by her. The post mortem examination of the body

of the deceased was conducted by Sanjeev Sehgal (PW-4). The investigation was completed and 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 was also examined under Section 313 Cr.P.C. He has denied the prosecution case and his involvement in the incident. The learned trial Court acquitted the accused, as noticed hereinabove.

5. Mr. Ramesh Thakur, learned Asstt. Advocate General, appearing on behalf of the State, has vehemently argued that the prosecution has proved its case against the accused beyond reasonable doubt. On the other hand, Mr. Deepak Kaushal, Advocate for the accused has supported the judgment of the learned trial Court dated 17.3.2008.

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

7. PW-1 Rajinder Kumar, testified that on 5.4.2006, his brother-in-law Babu came to him while he was on duty in the Mineral Factory. He told him that his wife has sustained burn injuries. He asked him to reach at Dhaula Kuan. He immediately rushed to Dhaula Kuan alongwith his brother-in-law. He saw his wife was badly burnt and was lying in the vehicle alongwith his mother-in-law. At about 6:30, he took her to Nahan hospital. The doctor at Nahan hospital referred her to PGI, Chandigarh and he took her to PGI, Chandigarh where she was admitted. On way to PGI, she told him that she has sustained injuries by felling of kerosene lamp and also stated that the fire was caught by candle. On 9.4.2006 at about 12 noon when she became conscious, she told her mother-in-law that Dharam Singh on 4.4.2006 at about 11:00 PM came to her house and forcibly attempted to commit rape with her. She also told that she refused his request for having sex due to which he sprinkled kerosene oil from a bottle and set her on fire by lighting match stick. The accused also threatened the deceased that if she would tell anybody about this incident he will also do the same thing with her children. In his cross-examination, he deposed that on 5.4.2006 when he went to Dhaula Kuan, his wife was conscious and talking. On his asking at Dhaula Kuan, his wife had told him that she had received injuries on account of felling of a kerosene lamp. He also stated that at Nahan Hospital also, the doctor has inquired that how she was burnt, on which she told that she had received injuries by accident. His wife has not told him that the accused had tried to commit rape with her or that he sprinkled kerosene oil on her. He had gone to purchase medicines and when he came back his mother-in-law told him as such.

8. PW-2 Dr. Inder Jeet Singh testified that on 5.4.2006 at about 4:30 AM, a lady was brought to his clinic having burn injuries over her body. Three-four persons were accompanying her. Her condition was very serious. He advised her to go to better hospital.

9. PW-3 Dr. A.K.Gupta, deposed that on 5.4.2006 at about 7:15 AM, he examined Anuradha wife of Rajinder Kumar and observed alleged history of accidental fire. She was having superficial injuries, grade one and two approximately 80-90%. The probable duration of burns was within 12 hours of examination. After first-aid and symptomatic treatment, she was referred to PGI, Chandigarh. He issued MLC Ext. PW-3/A.

10. PW-4 Dr. Sanjeev Sehgal, deposed that on 14.4.2006 at about 4:30 PM, he conducted the post mortem on the body of deceased Anuradha. According to his opinion, the deceased died due to heat injuries leading to infection, hypo-proteinemia and cardio respiratory arrest. The duration between the injury and the death was approximately 7 to 10 days and the death and the post mortem within 18 hours. He issued post mortem report Ext. PW-4/A.

11. PW-5 Dr. Amitabh Jain stated that he was posted as M.O. Civil Hospital, Paonta Sahib since November, 2004. On 5.4.2006, Dharam Singh was admitted in hospital Paonta at 10:55 AM with the alleged history of sustained burn injuries. OPD slip Ext. PW-5/B was prepared by him. He was having burn injuries on his both hands 4% to 5%.

12. PW-6 Kusum Devi is the mother of the deceased. She testified that on 4.4.2006, at about 1:30 in the night, she came to her house alongwith her children. She was badly burnt and frightened. They managed a vehicle and took her to Pawar Clinic, Poanta Sahib where doctor advised to take her to better hospital. At about 5:30 AM on 5.4.2006, they came to Dhaula Kuan. Thereafter, they left for Nahan hospital. After treatment at Nahan, Anuradha was referred to PGI Chandigarh. At about 12:00 noon, they reached at PGI. She died in PGI on 13.4.2006 in the night. On 9.4.2006, she regained some consciousness. She told his son-in-law that accused had tried to rape her and set her on fire when she resisted against his act. In the evening, his son-in-law told her about what Anuradha had told her. In the evening, Anuradha told her about the above incident. On 11.4.2006, her statement was recorded in the presence of Judicial Magistrate. In her cross-examination, she stated that Anuradha had not told her on 4.4.2006 when she came to Dhaula Kuan at about 1:30 that she got the burn injuries because of fire due to the candle stick. (Confronted with portion A to A wherein it is so recorded). She has also inquired from her the cause of the burn injuries. (Confronted with portion B to B wherein it is so recorded). She remained throughout at PGI to look after her daughter. She again reiterated in her cross-examination that her son-in-law had informed her that Anuradha had told him that the accused tried to rape her and when she resisted he set her on fire by sprinkling kerosene oil at about 5:00 PM on 9.4.2006. He informed her that Anuradha had informed him as such at about 12:00 noon on 9.4.2006. Anuradha had not made any statement to her husband in her presence. She has told the police in her statement recorded under Section 161 Cr.P.C. that Anuradha had told her that the accused tried to rape her and when she resisted, he poured kerosene oil and set her on fire. (Confronted with statement Ext. PW-6/A wherein it is not so recorded).

13. PW-7 Ashok Kumar deposed that on 9.4.2006 when they went to PGI, Anuradha told her husband that accused had set her on fire when she resisted while trying to rape her. On 10.4.2006, police visited the spot at Rampur Banjaran. The police got the photographs of the room and took into possession one lady shirt, one Chuni, one sweater and bra which were lying on the bed. The police wrapped these articles in a cloth and sealed it with seal bearing impression “A”. The police also took into possession clothes lying on the floor. These were one Salwar of blue colour, one shirt, another Salwar and one white cloth lying on the gunny bag. The police also wrapped these articles in a parcel and sealed it with seal impression “A”. From the spot, the police took into possession one plastic bottle and one match box. These articles were also sealed in a packet with seal bearing impression “A”. Underwear is Ext. P-12 and Belt is Ext. P-13. Scissor Ext. P-14, pieces of bangles Ext. P-15 and medicine tube Ext. P-16 were also taken onto possession. In his cross-examination, he deposed that on 9.4.2006, Anuradha had told her husband that accused on 4.4.2006 attempted to rape her and when she resisted, the accused poured kerosene oil on her and set her on fire. This statement was given by Anuradha at about 10:00 AM. Rajinder, husband of Anuradha is his real brother. The police had met him at PGI on 9.4.2006. He had told the police that on 9.4.2006, he was in PGI and Anuradha had told her husband all about it in his presence. (Confronted with statement Ext. PW-7/E wherein it is not so recorded).

14. PW-8 Surinder Kumar has only taken the photographs Ext. PW-8/A1 to Ext. PW-8/A9.

15. PW-9 Sanjeev Kumar deposed that the deceased was his sister. On the night of 4.4.2006 at about 1:30 AM, Anuradha came to their house. She was frightened and badly burnt. He took her to Paonta Sahib to a private Clinic. The doctor advised them to take her to some better hospital. They took her to Nahan hospital. She was referred to PGI, Chandigarh from Nahan hospital. On 9.4.2006, Rajinder told her that she had narrated the incident to him that she was burnt by accused Dharam Singh while she resisted against his will when he was trying to commit rape on her. He also told him that she was burnt by pouring kerosene oil by Dharam Singh accused. In his cross-examination, he denied that Anuradha had also told him that she caught fire due to felling of candle stick. (Confronted with portion A to A of her statement Ext. PW-9/A wherein it is so recorded).

16. PW-10 Dr. Ajay Kumar deposed that he was posted as Senior Registrar at PGI. On 6.4.2006 Anuradha wife of Rajinder Kumar was brought by her mother Kusum Devi. She was having thermal burn on 75% body surface area. She died on 14.4.2006 as per record. She was conscious at the time of admission. On 11.4.2006, she was also in fit state of mind. MLC summary Ext. PW-10/A was prepared and signed by him.

17. PW-11 Mrinal Gupta was 12 years old. According to her, on 4.4.2006 at about 11:00 PM, she was sleeping and her mother told her that she had caught fire. When she woke up, she saw her mother ablazed and one Dharam Singh was also present in the room. She extinguished the fire by pouring water on her mother. Dharam Singh ran away from the room. She changed the clothes of her mother. They kept the clothes on a gunny bag. There were one gent's underwear and belt present in the room. There was smell of kerosene oil from the clothes of her mother. Her brother was also present at that time and he was studying in the K.G. class. Thereafter, they all went to the house of her maternal grand mother at Dhaula Kuan on foot. Her mother told her maternal grand mother that she had sustained injuries by candle. In her cross-examination, she deposed that there was electricity break down on that day and they had burnt kerosene lamp for light. She woke up after hearing the cries of her mother. When she woke up, the accused ran away. Adjoining to their house at Rampur Banjaran, the elder and younger brother of her father resides in separate houses. They had not taken their help and also not informed them about the incident. She had not seen the accused after the date of the incident. Her mother told her maternal grand mother as to how she caught fire. After she woke up, they remained only for about 15 minutes in the house and thereafter left for Dhaula Kuan.

18. Statements of PW-12, PW-13, PW-16 and PW-17 are formal in nature.

19. PW-14 Insp. Khazana Ram deposed that he recorded FIR Ext. PW-14/A on the basis of *rukka* Ext. PW-1/A. He submitted an application to JMIC Chandigarh for recording the statement of Anuradha wife of Rajinder Kumar, who was admitted at PGI Chandigarh. In his cross-examination, he deposed that he has sent ASI Krishan Kumar to record the statement of Anuradha. ASI Krishan Kumar came back to Nahan on the night of 10.4.2006, since Anuradha was not fit to make the statement as per the version of ASI Krishan Kumar, her statement could not be recorded on 9.4.2006 and 10.4.2006. On 11.4.2006, he received a telephonic message from some person alleging to be attending to Smt. Anuradha requesting him to come to PGI, Chandigarh. He did not remember whether the telephonic message was received from the mother of Anuradha or her husband. On 11.4.2006, he straight away went to the ward in which Anuradha was admitted. On reaching there he found the mother of Anuradha sitting at her bed side. Thereafter, he inquired from the doctor whether she was fit to make the statement and the doctor replied in the positive. The Magistrate recorded the statement of Anuradha in the ward where she was admitted. When the statement was recorded, he was not present there. He did not remember if her mother was present at that time or not when her statement was recorded.

He also admitted that the first version of the mother and brother of Anuradha and other witnesses was that they were told by Smt. Anuradha that she caught fire by fall of candle stick.

20. PW-15 ASI Shiv Ram deposed that he was posted as I.O at Police Post Gunnu Ghat, Nahan. On 5.4.2006, he received an information from Zonal Hospital Nahan that one lady has been brought in burnt condition. He went to the hospital and obtained MLC of Anuradha Ext. PW-3/A. The doctor on duty opined that she was not fit to make statement due to this her statement could not be recorded.

21. PW-18 ASI Krishan Kumar deposed that he alongwith Const. Krishan Nand went to PGI and recorded the statement of Rajinder Kumar u/s 154 Cr.P.C. Ext. PW-1/A. He recorded the statement as per the version of Rajinder Kumar. The statement of Anuradha could not be recorded on the same day as she was not fit to make statement as per the opinion of SMO, PGI.

22. PW-19 R.K.Mehta, JMIC, deposed that on 11.4.2006, Insp. Khazana Ram moved an application for recording the statement of Anuradha, wife of Rajinder. He recorded the statement of Anuradha Ext. PW-19/A. He also enquired from the doctor as to whether she was fit to make her statement and after declaring her to be fit to give statement, he recorded her statement. On her statement, her right toe impression was taken as her both hand thumbs were burnt. The doctor had also signed the statement.

23. PW-20 SI Manish Chauhan deposed that initially the investigation of the case has been conducted by ASI Kishan, who was Incharge P.P. Majra. He visited the spot and prepared site plan Ext. PW-20/A. He clicked the photographs of the spot. He also took into possession the burnt clothes including lady shirt, Chuni, Sweater, Bra, Salwar, Kamij, another Salwar, white cloth, Gunny bag, Plastic bottle, Match Box etc. vide memo Ext. PW-7/A. These were sealed with seal impression "A" in the parcel. He also took into possession the underwear Ext. P-12 and belt Ext. P-13 vide memo Ext. PW-17/B. He also took into possession scissors Ext. P-14 and pieces of bangles Ext. P-15 from the spot vide memo Ext. PW-17/C. He also took into possession bed sheet vide memo Ext. PW-7/D.

24. The case of the prosecution, precisely, is that on 4.4.2006 at about 11:00 PM, accused has trespassed into the house of the deceased. He tried to rape her. She resisted and thereafter, she was put on fire by the accused. She was taken to private Clinic and after that to Nahan Hospital. She was referred to PGI, Chandigarh and she died there on 14.4.2006.

25. Anuradha was sleeping with her children at the time of the incident at 11:00 PM at Rampur Banjaran, Tehsil Paonta Sahib. PW-11 Mrinal Gupta, her daughter was sleeping with her. PW-1 Rajinder Kumar was not present in his house at the time of the incident. He was on night duty at Mineral Factory. He was informed about the incident by his brother-in-law. In his cross-examination, he deposed specifically that on way to PGI, his wife told him that she has sustained injuries by felling of kerosene lamp and also stated that the fire was caught by candle. On 9.4.2006 at about 12 noon when she became conscious, she told her mother-in-law that Dharam Singh on 4.4.2006 at about 11:00 PM came to her house and forcibly attempted to commit rape with her. She also told that she refused his request for having sex due to which he sprinkled kerosene oil from a bottle and set her on fire by lighting match stick. In his cross-examination also he deposed that on 5.4.2006 when he went to Dhaula Kuan, his wife was conscious and talking. On his asking at Dhaula Kuan his wife had told him that she had received injuries on account of felling of a kerosene lamp. PW-6 Kusum Devi in her examination-in-chief deposed that at about 12:00

noon, they reached at PGI. On 9.4.2006, she regained some consciousness. She told his son-in-law that accused had tried to rape her and set her on fire when she resisted against his act. In the evening, Anuradha told her about the incidence. PW-9 Sanjeev Kumar, brother of the deceased deposed that on 9.4.2006, Rajinder told her that she had narrated the incident to him that she was burnt by accused Dharam Singh while she resisted against his will when he was trying to commit rape on her. We have already noticed that PW-1 Rajinder Kumar has deposed that it was his mother-in-law to whom Anuradha had narrated the incident and not to him. PW-7 Ashok Kumar has deposed in his examination-in-chief that on 9.4.2006, when he went to PGI Chandigarh, Anuradha told her husband that accused had set her on fire when she resisted while he was trying to rape her. PW-9 has also deposed that on 4.4.2006, Anuradha came to their house. Her mother told him that at that time, Anuradha caught fire due to felling of candle. He denied the suggestion that Anuradha has told him that she caught fire due to felling of candle stick. (Confronted with portion A to A of his statement Ext. PW-9/A wherein it is so recorded). There is variance in the statement of PW-1 Rajinder Kumar and PW-6 Kusum Devi. As per PW-1 Rajinder Kumar, as noticed above, it was his mother-in-law to whom Anuradha had told that on 9.4.2006, at about 12 noon, when she became conscious, that Dharam Singh on 4.4.2006 at 11:00 PM came to her house forcibly and attempted to commit rape with her. However, PW-6 Kusum Devi has deposed that it was Rajinder Kumar to whom Anuradha had told the manner in which the incident had happened.

26. PW-18 ASI Krishan Kumar categorically deposed that he reached PGI at 9:00 PM on 9.4.2006 and the statement of Anuradha could not be recorded on the same day as she was not fit to make statement as per the opinion of SMO, PGI. PW-14 Khajana Ram has also deposed that he had deputed ASI Krishan Kumar to record statement of Anuradha. ASI Krishan Kumar came back to Nahan on the night of 10.4.2006. Since Anuradha was not fit to make statement as per the version of ASI Krishan Kumar, her statement could not be recorded on 9.4.2006 and 10.4.2006. It belies the statements of PW-1 Rajinder Kumar and PW-6 Kusum Devi that Anuradha had made oral dying declaration before them.

27. PW-3 Dr. A.K.Gupta, has also deposed that he has observed that it was alleged history of accidental fire when he examined Anuradha, wife of Rajinder Kumar. He issued MLC Ext. PW-3/A. In Ext. PW-3/A, it is specifically noted by Dr. A.K.Gupta, that it was a case of accidental fire. It is further stated in Ext. PW-3/A that the husband of Anuradha was on night duty in some factory and only in the morning when he came, found her burnt. According to PW-4 Dr. Sanjeev Sehgal, the deceased died due to heat injuries leading to infection, hypo-proteinemia and cardio respiratory arrest. The duration between the injury and the death was approximately 7 to 10 days and the death and the post mortem within 18 hours. He issued post mortem report Ext. PW-4/A.

28. Now, we will advert to dying declaration Ext. PW-19/A recorded by PW-19 R.K. Mehta, JMIC at the instance of ASI PW-14 Insp. Khazana Ram. According to PW-19/A, Anuradha was married in the year 1994 with Rajinder Kumar. At 11:00 PM, there was 'Jagran' in their house. They were dressed up. Her nephew Vijay Kumar was supposed to come to take them to "Jagran". However, he did not come. Then she went up to sleep. The children also went up to sleep. Somebody knocked the door. She thought her nephew had come. There was no electricity. She opened the door. Dharam Singh forcibly came inside. He bolted the door from inside. He tried to rape her. She was also beaten up. Her bangles were broken. The accused had brought the kerosene oil with him. He sprinkled oil on her. He put her on fire by match stick. She tried to hold Dharam Singh to save her. He did not do so. Perhaps, his hands were also burnt. She extinguished the fire with the help of gunny bag. She removed her clothes. Thereafter, she went to kitchen and put water on her. She

was threatened by Dharam Singh. PW-11 Mrinal Gupta, has testified that on 4.4.2006, at 11:00 PM, she was sleeping and her mother told her that she had caught fire. When she woke up, she saw her mother ablaze and one Dharam Singh was also present in the room. She extinguished the fire by pouring water on her mother. Dharam Singh ran away from the room. She changed the clothes of her mother. She also admitted in her cross-examination that there was electricity break down on that day. She woke up after hearing cries of her mother. When she woke up, accused ran away. She also stated in her cross-examination that adjoining to their house at Rampur Banjaran, the elder and younger brother of her father resides in separate houses. They had not taken the help of them and not informed them about the incident. She had not seen the accused after the date of the incident. Her mother told her maternal grand mother as to how she caught fire from candle stick on inquiry made by her grand mother. In case the deceased was beaten up by the accused and her bangles were also broken and she was crying, it would have attracted the attention of the family members, who were residing in the adjoining house. It is also intriguing to note that the children, who were sleeping in the same room, did not woke up after hearing commotion in the room.

29. According to the deceased, as per her statement Ext. PW-19/A, she extinguished the fire with the help of gunny bag and thereafter poured water. However, PW-11 Mrinal Gupta, stated that she extinguished the fire by pouring water on her mother and changed her clothes. There are contradictions and embellishments in the statements, as noticed by us hereinabove, of PW-1 Rajinder Kumar, PW-6 Kusum Devi and PW-9 Sanjeev Kumar, the manner in which the incident was narrated by Anuradha to them.

30. The matter is required to be considered from yet another angle. FIR was registered on the basis of statement of PW-1 Rajinder Kumar vide Ext. PW-1/A. According to the contents of PW-1/A, on 9.4.2006 at about 12 noon, when he was looking after his wife at PGI, his wife regained some consciousness. He inquired about the burn injuries then she told him that accused Dharam Singh son of Ram Prasad had entered the house on 4.4.2006 at about 11:00 PM and tried to rape her. She told him that she was on fast due to Navratras. She refused her advances and thereafter he poured kerosene oil on her and lit the match stick. This version is in contradiction to the statement made by him while deposing in the Court as PW-1. In his statement before the Court as PW-1 Rajinder Kumar has stated that his wife told his mother-in-law the manner in which the incident had happened. However, when PW-6 Kusum Devi appeared before the Court she stated that it was her son-in-law to whom the incident was narrated by her daughter. Thus, oral dying declaration made vide Ext. PW-19/A cannot be believed in view of the appraisal of the facts made hereinabove.

31. PW-18 has categorically stated that the deceased was not fit to make statement on 9.4.2006 and thus, it cannot be believed that the deceased made statement either before her husband i.e. PW-1 Rajinder Kumar or PW-6 Kusum Devi, her mother. Similarly, PW-14 Insp. Khazana Ram has also admitted in his cross-examination that the first version of mother and brother of Anuradha and other witness was that they were told by Anuradha that she caught fire by candle stick. It is also unbelievable that the accused would have carried the kerosene oil with him while entering into the house of the deceased in order to commit rape.

32. In the case of ***Smt. Kamla vrs. State of Punjab,*** reported in ***AIR 1993 SC 374,*** their lordships of the Hon'ble Supreme Court have held that the dying declaration should satisfy all the necessary tests and one such important test is that if there are more than one dying declaration they should be consistent particularly in material particulars. It has been held as follows:

"8. If we examine all these dying declarations one by one we notice glaring inconsistencies as to who exactly poured kerosene oil ad set fire or whether she caught fire accidentally. Suicide however is ruled out. In Ex. PB/2 recorded by P.W. 2 the deceased stated that her mother-in-law sprinkled kerosene oil from behind and burnt her. In the next statement Ex. DA recorded by Dr. Jaison Chopra, C.W. 1, she is alleged to have stated that her clothes got burnt catching fire from the stove, thereby indicating that it was an accident. In the third statement Ex. PJ recorded by C.W. 2 she was rather vague as to who exactly poured kerosene oil and set fire on her and she only stated that it could be possible that her mother-in-law and father-in-law might have set the fire after pouring kerosene oil. On 30.9.79 Ex.PD was recorded in the presence of three doctors, P.W. 7, P.W. 3 and C.W.I wherein she stated that she turned to the store and she heard her mother-in-law and father-in-law talking behind her and suddenly they poured kerosene oil and they set her on fire. The trial court and the High Court discarded the other statements and relied only on Ex.PB/2 recorded by P.W. 2 wherein she implicated only her mother-in-law. So far Ex. DA recorded by C.W.I is concerned, the High Court pointed out that C.W. 1 was also present when Ex.PD was recorded and that at any rate there was no occasion for C.W. 1 to record such statement and that he must have done the same at the instance of the accused. After having carefully examined the, record and facts and circumstances, we do not think that a remark of this nature against C.W. 1, a responsible doctor is called for. The mere fact that C.W. 1 Dr. Jaison Chopra was present when Ex. PD was recorded on the next day does not necessarily mean that he could not have recorded Ex. DA-on the previous day. As a matter of fact, even in Ex. PD recorded by a team of doctors, she implicated both mother-in-law and father-in-law whereas in Ex.PB/2 she implicated only her mother-in-law. This itself shows that she was bent upon implicating both of them at a later stage. In this context it is also noteworthy that D.W. 2, the husband of the deceased supported the plea of the accused. He deposed that both the accused namely his mother and father were away to Dandi Swami Mandir on the day of occurrence and that at about 8.15 A.M. he heard the shrieks raised by the deceased from the kitchen. He picked up a blanket and went running into the kitchen apprehending that she might have caught fire due to busting of the gas cylinder. He covered her with the blanket and brought her out and his clothes also caught fire and he became unconscious and regained consciousness in the hospital. In the cross-examination by the prosecution he denied the suggestion that he made a false statement with a view to save his parents. The deceased in all her dying declarations has clearly stated that her husband namely D.W. 2 came and rescued her. Therefore, D.W. 2's evidence cannot simply be brushed aside on the ground that he might have given such a version to save his parents and his evidence further shows that the occurrence could be due to accident. Viewed from this angle also the version given in the statement made before C.W. 1 in Ex. DA that it was due to accident, is not improbable. In Ex. PJ she only expressed a suspicion against both her mother-in-law and father-in-law. The accused examined D.W. 1 Satpal an attesting witness of the statement Ex. PJ. He supported the defence version. Thus it can be seen that there are glaring inconsistencies in these dying declarations. Both the courts below, however, held that P.W. 2 Dr. Rupinder Singh is a reliable and independent witness, therefore the statement recorded by him has to be

> accepted and accordingly convicted the appellant. We must observe that P.W. 2 simply recorded the statement of the deceased but the contents of that statement have to be subjected to a close scrutiny in the light of many other circumstances since the conviction has to be based on the sole dying declaration Ex.PB/2. A dying declaration should satisfy all the necessary tests and one such important test is that if there are more than one dying declaration they should be consistent particularly in material particulars. Just like P.W. 2, P.W. 7, P.W. 3 and C.W.I are also respectable doctors and independent witnesses who spoke about the contents of Ex. PD in which she implicated both her father-in-law and mother-in-law specifically as having participated in the crime. Under these circumstances, the irresistible conclusion is that the dying declarations are inconsistent and in such a situation we just cannot pick out one statement namely Ex.PB/2 and base the conviction of the appellant on the sole basis of such a dying declaration. The courts have cautioned that in view of the fact that the maker of the statement cannot be cross-examined, the dying declaration should be carefully scrutinised. In the instant case the deceased was wavering for the reasons best known to her. The inconsistency between Ex.PB/2 and Ex. PD is enough to manifest the same. That being so, we do not think that either Dr. Jaison Chopra, C.W. 1 or S.I. Vidya Sagar, C.W. 2 who claimed to have recorded Ex. DA and Ex. PJ should be blamed. Having given our earnest consideration, we feel that under these circumstances it is highly unsafe to convict the appellant on the sole basis of the dying declaration Ex.PB/2 recorded by P.W. 2. In the result the conviction and sentence passed against the appellant are set aside and the appeal is allowed. If she is on bail, her bail bonds shall stand cancelled."

33. Their lordships of the Hon'ble Supreme Court in the case of ***Smt. Laxmi vrs. Om Prakash and others,*** reported in ***AIR 2001 SC 2383,*** have held that the Court should be satisfied that the deceased was in the fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made and/or recorded. Their lordships have further held that it is not the number of dying declarations which will weigh with the Court. A singular dying declaration not suffering from any infirmity and found worthy of being relied on may form the basis of conviction. On the other hand if every individual dying declaration consisting in a plurality is found to be infirm, the Court would not be persuaded to act thereon merely because the dying declarations are more than one and apparently consistent. It has been held as follows:

> "1. Nemo moriturus praesumitur mentire __ No one at the point of death is presumed to lie. A man will not meet his Maker with a lie in his mouth __ is the philosophy in law underlying admittance in evidence of dying declaration. A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Courts, it becomes a very important and a reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying

declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration__is the statement of law summed up by this Court in Kundula Bala Subrahmanyam Vs. State of A.P., (1993) 2 SCC 684. The Court added - such a statement, called the dying declaration, is relevant and admissible in evidence provided it has been made by the deceased while in a fit mental condition. The above statement of law, by way of preamble to this judgment, has been necessitated as this appeal, putting in issue acquittal of the accused respondents from a charge under Section 302/34 IPC, seeks reversal of the impugned judgment and invites this court to record a finding of guilty based on the singular evidence of dying declaration made by the victim. The law is well settled: dying declaration is admissible in evidence. The admissibility is founded on principle of necessity. A dying declaration, if found reliable, can form the basis of conviction. A court of facts is not excluded from acting upon an uncorroborated dying declaration for finding conviction. A dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in the light of the surrounding circumstances and its weight determined by reference to the principles governing the weighing of evidence. It is, as if the maker of the dying declaration was present in the court, making a statement, stating the facts contained in the declaration, with the difference that the declaration is not a statement on oath and the maker thereof cannot be subjected to cross-examination. If in a given case a particular dying declaration suffers from any infirmities, either of its own or as disclosed by other evidence adduced in the case or circumstances coming to its notice, the court may as a rule of prudence look for corroboration and if the infirmities be such as render the dying declaration so infirm as to prick the conscience of the court, the same may be refused to be accepted as forming safe basis for conviction. In the case at hand, the dying declarations are five. However, it is not the number of dying declarations which will weigh with the court. A singular dying declaration not suffering from any infirmity and found worthy of being relied on may form the basis of conviction. On the other hand if every individual dying declaration consisting in a plurality is found to be infirm, the court would not be persuaded to act thereon merely because the dying declarations are more than one and apparently consistent.

30. The principal accused Om Prakash had himself informed the police of the incident. In fact, he was the first to give any information relating to the incident to the police. Unfortunately, none of the accused could have escorted the victim to the hospital nor could remain present by her side as the case diary revealed (as has been noticed by the trial court) that the accused persons were arrested on the same day. The house of the accused persons which is the site of the incident is situated in a thickly populated locality in a narrow lane where the houses are located like a cluster. The neighbours must have collected soon at the place of the incident. This is borne out from the statement of Shiv Charan, ASI who had made on the spot inquiries. None of the neighbours has been examined excepting Trishla Kumari, PW1 to whom the injured Janak Kumari has not made any statement implicating the accused persons although she had the opportunity of doing so. We have also dealt with each of the five dying declarations to find out their worth. We have found the second dying declaration to be no dying declaration, the first and third ones having been made to police officers associated with investigation and also not worthy of credence. We have

disbelieved the fifth dying declaration said to have been made to PW3, Krishan Lal. We have found it not safe to act on the fourth dying declaration said to have been made to a Magistrate as we entertain grave doubts if the injured Janak Kumari was in a position to make any statement at the time at which this fourth, as also the third and the fifth dying declarations are alleged to have been made. We have found some inconsistency between the statements said to have been made by the injured Janak Kumari and recorded as third and fourth dying declaration. We have also found that from the beginning there was an effort to develop a story of Janak Kumari having been attempted to be stragulated which story finds a mention in the record as prepared by Dr. Khanijau but which story has been found to be false. None of the five statements attributed to Janak Kumari and coming from the mouth of different witnesses has been held worthy of being accepted and acted upon as dying declaration so as to form a safe basis to base conviction of the accused thereon. We find ourselves not persuaded to reverse the well-reasoned finding of not guilty recorded by the trial court and convert the same into a finding of guilty simply because the statements alleged to be dying declarations are five in number. Needless to say there is no other shred of evidence connecting the accused with the crime."

34. Their lordships of the Hon'ble Supreme Court in the case of ***Uka Ram vrs. State of Rajasthan,*** reported in ***(2001) 5 SCC 254,*** have held that the Court should be satisfied about its trustworthiness and voluntary nature and fitness of mind of the deceased. It has been held as follows:

"6. Statements, written or verbal of relevant facts made by a person who is dead, or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts under the circumstances enumerated under sub-sections (1) to (8) of Section 32 of the Act. When the statement is made by a person as to cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that persons death comes into question is admissible in evidence being relevant whether the person was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. Such statements in law are compendiously called dying declarations. The admissibility of the dying declaration rests upon the principle that a sense of impending death produces in a mans mind the same feeling as that of a conscientious and virtuous man under oath - Nemo moriturus praesumuntur mentiri. Such statements are admitted, upon consideration that their declarations made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced and the mind induced by the most powerful consideration to speak the truth. The principle on which the dying declarations are admitted in evidence, is based upon the legal maxim Nemo moriturus praesumitur mentire i.e., a man will not meet his maker with a lie in his mouth. It has always to be kept in mind that though a dying declaration is entitled to great weight, yet it is worthwhile to note that as the maker of the statement is not subjected to cross- examination, it is essential for the court to insist that dying declaration should be of such nature as to

inspire full confidence of the court in its correctness. The court is obliged to rule out the possibility of the statement being the result of either tutoring, prompting or vindictive or product of imagination. Before relying upon a dying declaration, the court should be satisfied that the deceased was in a fit state of mind to make the statement. Once the court is satisfied that the dying declaration was true, voluntary and not influenced by any extraneous consideration, it can base its conviction without any further corroboration as rule requiring corroboration is not a rule of law but only a rule of prudence.

10. After going through the whole of the evidence, perusing the record and hearing the submissions of the learned counsel for the parties, we are of the opinion that the prosecution had not proved, beyond doubt, that the dying declaration was true, voluntary and not influenced by any extraneous consideration. Despite knowing the fact that the deceased was a mental patient, the investigating agency did not take any precaution to ensure that the incident was suicidal or homicidal. The probability of the deceased committing suicide has not been eliminated. There also exist a doubt about the mental condition of the deceased at the time she made dying declaration (Exhibit P- 27). Exhibit P-26, the medical certificate only states to her physical condition to make a statement but does not refer to her mental condition even at that time. The trial as well as the High Court appear to have ignored this aspect of the matter while convicting and sentencing the appellant. We are satisfied that it is a fit case in which the appellant is entitled to the benefit of doubt.

11. As the dying declaration, the sole evidence upon which the conviction is based, is not reliable beyond all reasonable doubts, the conviction and sentence of the appellant is not justified. Accordingly, the appeal is allowed by setting aside the impugned judgment. The appellant is acquitted of all the charges and is directed to be set at liberty forthwith unless required in some other case."

35. In the case of ***Arvind Singh vrs. State of Bihar,*** reported in ***(2001) 6 SCC 407,*** their lordships of the Hon'ble Supreme Court have held that care and caution must be exercised in accepting a dying declaration as trustworthy evidence. It has been held as follows:

"Dying declarations shall have to be dealt with care and caution and corroboration thereof though not essential as such, but is otherwise expedient to have the same in order to strengthen the evidentiary value of the declaration. Independent witnesses may not be available but there should be proper care and caution in the matter of acceptance of such a statement as trustworthy evidence. In our view question of the dying declaration to the mother is not worth acceptance and the High Court thus clearly fell into an error in such an acceptance. Significantly, the High Court has set aside the conviction and sentence under Section 304 B read with Section 34 and 120 B of the Indian Penal Code so far as the father-in-law, the mother-in-law and the brother-in-law are concerned though maintained the conviction under 498A. So far as the husband is concerned the High Court converted the charge from 304 B to 302 on the ground that the only motive of the murder could be attributed to the husband who must be interested in committing such offence so that he can perform another marriage This is rather a far-fetched assumption without any cogent

evidence available on record. Needless to record here that excepting one of the very keenly interested witness, the episode of the applicant being married again does not come from any other witness and the factum of marriage also though stated but devoid of any particulars even as regards the name, the date of marriage etc. It is on record that on arrival of the mother and the brother of the deceased, they found an assembly of large number of mahalla people but none of them were called to even have a corroboration to this part of the evidence of the accused marrying after the death of the deceased: No independent witness was thought of, though the factum of marriage could have been corroborated by an outside agency. The FIR and the other oral evidence available if read together and full credence is attributed to the same but that itself does not and cannot permit the High Court to come to such an assumption. The assumption is faulty and is wholly devoid of any substance. As a matter of fact no special role was even ascribed to the appellant herein for apart leading any evidence thereon. Presumptions and assumptions are not available in criminal jurisprudence and on the wake of the aforesaid we are unable to lend concurrence to the assumptions of the High Court as recorded herein before in this judgment. Significantly, even the dying declaration whatever it is worth, has implicated all the four accused in the manner similar. There is no additional piece of evidence implicating the husband which would permit the High Court to convert the charge of 304 B to 302 True punishment of life imprisonment is available under 304 B but that is the maximum available under the Section and for Section 302 the same is the minimum available under the Section. Though discretion to a further award minimum cannot be taken away from the Court. Section 302 is a much more heinous offence and unfortunately there is no evidence of such heinous activities attributable to the husband. The factum of the husband, if interested in committing such offence so that he can perform another marriage has not been put to the witnesses and in the absence of which, assumption to that effect, cannot be said to be an acceptable assumption since without any evidentiary support. The assumption by itself in our view is untenable."

36. In the case of ***State vrs. Vazir Hakki,*** reported in ***2005 Cri.L.J. 2719,*** the Division Bench of the Bombay High Court has laid down the cardinal rules required to be followed in appeal against acquittal. It has been held as follows:

"6. In an appeal against acquittal, we are required to see whether the view taken by the learned Additional Sessions Judge is plausible and in fact, we find that from the evidence produced by the prosecution and the defence the view held by the Additional Sessions Judge was a probable view. It is now well settled with a catena of decisions of the Supreme Court that in an appeal against acquittal certain cardinal rules are required to be kept in mind, namely, (a) that there is a presumption of innocence in favour of the accused which has been strengthened by the acquittal of the accused by the trial Court, (b) if two views are possible, a view favourable to the accused should be taken, (c) that the trial Judge had the advantage of looking at the demeanour of the witnesses and (d) the accused is entitled to a reasonable benefit of doubt, a doubt which a thinking man will reasonably, honestly and consciously entertain."

37. In the case of ***Nallapati Sivaiah vrs. Sub Divisional Officer, Guntur, Andhra Pradesh*** reported in ***(2007) 15 SCC 465,*** their lordships of the Hon'ble Supreme Court have traced out and explained the principles for accepting dying declaration. It has been held as follows:

> "20. There is a historical and a literary basis for recognition of dying declaration as an exception to the Hearsay Rule. Some authorities suggest the rule is of Shakespearian origin. In "The Life and Death of King John", Shakespeare has Lord Melun utter what a "hideous death within my view, retaining but a quantity of life, which bleeds away,..lose the use of all deceit" and asked,"Why should I then be false, since it is true that I must die here and live hence by truth?" William Shakespeare, The Life and Death of King John act. 5, scene.4, lines 22-29.
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> 21. In passing upon admissibility of an alleged dying declaration, all attendant circumstances should be considered, including weapon which injured the victim, nature and extent of injuries, victim's physical condition, his conduct, and what was said to and by him. This Court has consistently taken the view that where a proper and sufficient predicate has been established for the admission of a statement under dying declaration, Hearsay exception is a mixed question of fact and law.
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> 22. It is equally well settled and needs no restatement at our hands that dying declaration can form the sole basis for conviction. But at the same time due care and caution must be exercised in considering weight to be given to dying declaration in asmuch as there could be any number of circumstances which may affect the truth. This court in more than one decision cautioned that the courts have always to be on guard to see that the dying declaration was not the result of either tutoring or prompting or a product of imagination. It is the duty of the courts to find that the deceased was in a fit state of mind to make the dying declaration. In order to satisfy itself that the deceased was in a fit mental condition to make the dying declaration, the courts have to look for the medical opinion.
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> 23. It is not difficult to appreciate why dying declarations are admitted in evidence at a trial for murder, as a striking exception to the general rule against hearsay. For example, any sanction of the oath in the case of a living witness is a thought to be balanced at least by the final conscience of the dying man. Nobody, it has been said, would wish to die with a lie on his lips. A dying declaration has got sanctity and a person giving the dying declaration will be last to give untruth as he stands before his creator.
>
> 24. There is a legal maxim "Nemo Morituros Praesumitur Mentire" meaning, that a man will not meet his maker with lie in his mouth. Woodroffe and Amir Ali, in their treatise on Evidence Act state : "when a man is dying, the grave position in which he is placed is held by law to be a sufficient ground for his veracity and therefore the tests of oath and cross- examination are dispensed with."
>
> 25. The court has to consider each case in the circumstances of the case. What value should be given to a dying declaration is left to court, which on assessment of the circumstances and the evidence and materials on record, will come to a conclusion about the truth or otherwise of the version, be it written, oral, verbal or by sign or by gestures.

> 26. It is also a settled principle of law that dying declaration is a substantive evidence and an order of conviction can be safely recorded on the basis of dying declaration provided the court is fully satisfied that the dying declaration made by the deceased was voluntary and reliable and the author recorded the dying declaration as stated by the deceased. This court laid down the principle that for relying upon the dying declaration the court must be conscious that the dying declaration was voluntary and further it was recorded correctly and above all the maker was in a fit condition - mentally and physically - to make such statement.
>
> 52. The Dying Declaration must inspire confidence so as to make it safe to act upon. Whether it is safe to act upon a Dying Declaration depends upon not only the testimony of the person recording Dying Declaration be it even a Magistrate but also all the material available on record and the circumstances including the medical evidence. The evidence and the material available on record must be properly weighed in each case to arrive at proper conclusion. The court must satisfy to itself that the person making the Dying Declaration was conscious and fit to make statement for which purposes not only the evidence of persons recording dying declaration but also cumulative effect of the other evidence including the medical evidence and the circumstances must be taken into consideration.
>
> 53. It is unsafe to record conviction on the basis of a dying declaration alone in cases where suspicion is raised as regards the correctness of the dying declaration. In such cases, the court may have to look for some corroborative evidence by treating dying declaration only as a piece of evidence."

38. Their lordships of the Hon'ble Supreme Court in the case of ***J. Ramulu vrs. State of Andhra Pradesh & connected matter,*** reported in ***(2009) 16 SCC 432,*** have held that in a case where suspicion can be raised as regards the correctness of the dying declaration, the Court before convicting an accused on the basis thereof would look for some corroborative evidence. It has been held as follows:

> "26. This Court in P. Mani v. State of T.N. [(2006) 3 SCC 161], while dealing with the question of dying declaration, held that conviction can be recorded on the basis of the dying declaration alone but the same must be wholly reliable. In a case where suspicion can be raised as regards the correctness of the dying declaration, the Court before convicting an accused on the basis thereof would look for some corroborative evidence. Suspicion is no substitute for proof. If evidence brought on records suggests that such dying declaration does not reveal the entire truth, it may be considered only as a piece of evidence in which event conviction may not be rested only on the basis thereof. The question as to whether a dying declaration is of impeccable character would depend upon several factors; physical and mental condition of the deceased is one of them."

39. Their lordships of the Hon'ble Supreme Court in the case of ***Atbir vrs. Government of NCT of Delhi*** reported in ***(2010) 9 SCC 1,*** have reiterated the factors to be taken into account while recording dying declaration. It has been held as follows:

> "14. It is true that in the case on hand, conviction under Section 302 was based solely on the dying declaration made by Sonu @ Savita and recorded by Investigating Officer in the presence of a Doctor. Since we have already narrated the case of prosecution which led to three deaths, eliminating the

second wife and the children of one Jaswant Singh, there is no need to traverse the same once again. This Court in a series of decisions enumerated and analyzed that while recording the dying declaration, factors such as mental condition of the maker, alertness of mind and memory, evidentiary value etc. have to be taken into account.

15) In Munnu Raja and Another vs. The State of Madhya Pradesh, (1976) 3 SCC 104, this Court held:-

> "....It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subject to cross- examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated...."

It is true that in the same decision, it was held, since the Investigating Officers are naturally interested in the success of the investigation and the practice of the Investigating Officer himself recording a dying declaration during the course of an investigation ought not to have been encouraged.

16) In Paras Yadav and Ors. vs. State of Bihar, (1999) 2 SCC 126, this Court held that lapse on the part of the Investigation Officer in not bringing the Magistrate to record the statement of the deceased should not be taken in favour of the accused. This Court further held that a statement of the deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can also be treated as dying declaration after the death of the injured and relied upon if the evidence of the prosecution witnesses clearly establishes that the deceased was conscious and was in a fit state of health to make the statement.

17) The effect of dying declaration not recorded by the Magistrate was considered and reiterated in Balbir Singh & Anr. Vs. State of Punjab, (2006) 12 SCC 283. Paragraph 23 of the said judgment is relevant which reads as under:

> "23. However, in State of Karnataka v. Shariff, (2003) 2 SCC 473, this Court categorically held that there was no requirement of law that a dying declaration must necessarily be made before a Magistrate. This Court therein noted its earlier decision in Ram Bihari Yadav v. State of Bihar, (1998) 4 SCC 517, wherein it was also held that the dying declaration need not be in the form of questions and answers. (See also Laxman v. State of Maharashtra, (2002) 6 SCC 710)."

It is clear that merely because the dying declaration was not recorded by the Magistrate, by itself cannot be a ground to reject the whole prosecution case. It also clarified that where the declaration is wholly inconsistent or contradictory statements are made or if it appears from the records that the dying declaration is not reliable, a question may arise as to why the Magistrate was not called for, but ordinarily the same may not be insisted upon. This Court further held that the statement of the injured, in event of her death may also be treated as FIR.

18) In State of Rajasthan vs. Wakteng, (2007) 14 SCC 550, the view in Balbir Singh's case(supra) has been reiterated. The following conclusions are relevant which read as under:

> "14. Though conviction can be based solely on the dying declaration, without any corroboration the same should not be suffering from any infirmity.
>
> 15. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lie or to concoct a case so as to implicate an innocent person but the court has to be careful to ensure that the statement was not the result of either tutoring, prompting or a product of the imagination. It is, therefore, essential that the court must be satisfied that the deceased was in a fit state of mind to make the statement, had clear capacity to observe and identify the assailant and that he was making the statement without any influence or rancour. Once the court is satisfied that the dying declaration is true and voluntary it is sufficient for the purpose of conviction."

19) In Bijoy Das vs. State of West Bengal, (2008) 4 SCC 511, this Court after quoting various earlier decisions, reiterated the same position.

20) In Muthu Kutty & Anr. Vs. State By Inspector of Police, T.N., (2005) 9 SCC 113, the following discussion and the ultimate conclusion are relevant which read as under:

> "14. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on the deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.
>
> 15. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence."

21) The same view has been reiterated by a three Judge Bench decision of this Court inPanneerselvam vs. State of Tamil Nadu, (2008) 17 SCC 190 and

also the principles governing the dying declaration as summed up in Paniben vs. State of Gujarat , (1992) 2 SCC 474.

22) The analysis of the above decisions clearly shows that,

(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the Court.

(ii) The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii) Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(v) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration."

40. Their lordships in the case of ***Prempal vrs. State of Haryana,*** reported in ***(2014) 10 SCC 336,*** have held that the Court must be satisfied that dying declaration is true, voluntary and not as a result of either tutoring or prompting or a product of imagination and the Court must be further satisfied that deceased was in a fit state of mind. It has been held as follows:

"12. When reliance is placed upon dying declaration, the court must be satisfied that the dying declaration is true, voluntary and not as a result of either tutoring or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind. In State of Uttar Pradesh vs. Ram Sagar Yadav And Ors. AIR 1985 SC 416 = (1985) 1 SCC 552, this Court held that if the Court is satisfied that the dying declaration is true and voluntary, it can base conviction on it without corroboration. In this context, the observations made in para (13) of the judgment are relevant to be noted:-

"13. It is well settled that, as a matter of law, a dying declaration can be acted upon without corroboration. (See Khushal Rao vs. State of Bombay, 1958 SCR 552; Harbans Singh vs. State of Punjab, 1962

Supp.1 SCR 104; Gopalsingh vs. State of M.P. (1972) 3 SCC 268). There is not even a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. The primary effort of the court has to be to find out whether the dying declaration is true. If it is, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear or convincing that the court may, for its assurance, look for corroboration to the dying declaration"

13. In Bapu vs. State of Maharashtra (2007) 2 SCC (Crl.) 545 = (2006) 12 SCC 73, this Court in paras (14) and (15) observed as under:-

"14. In Ravi v. State of T.N. [(2004) 10 SCC 776] the Supreme Court observed that : (SCC p.777, para 3)

[I]f the truthfulnessâ€¦ of the dying declaration cannot be doubted, the same alone can form the basis of conviction of an accused and the same does not require any corroboration, whatsoever, in law.

15. In Muthu Kutty v. State [(2005) 9 SCC 113] vide para 15 the Supreme Court observed as under : (SCC p. 120-121)

"15. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in Paniben v. State of Gujarat [(1992) 2 SCC 474]: (SCC pp. 480-81, paras 18-19)

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See Munnu Raja v. State of M.P)[(1976) 3 SCC 104].

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See State of U.P. v. Ram Sagar Yadav [(1985) 1 SCC 552] and Ramawati Devi v. State of Bihar[(1983) 1 SCC 211].

(iii) The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the

declaration. (See K. Ramachandra Reddy v. Public Prosecutor [(1976) 3 SCC 618].)

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See Rasheed Beg v. State of M.P [(1974) 4 SCC 264]).

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See Kake Singh v. State of M.P [(1981) Supp. SCC 25]).

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See Ram Manorath v. State of U.P [(1981) 2 SCC 654]).

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (See State of Maharashtra v. Krishnamurti Laxmipati Naidu[(1980) Supp. SCC 455]).

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See Surajdeo Ojha v. State of Bihar [(1980) Supp. SCC 769]).

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See Nanhau Ram V. State of M.P. [(1988) Supp. SCC 152]).

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See State of U.P. v. Madan Mohan [(1989) 3 SCC 390]).

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See Mohanlal Gangaram Gehani v. State of Maharashtra [(1982) 1 SCC 700]).”

41. In the instant case, the deceased has remained in the company of PW-6 Kusum Devi and her husband PW-1 Rajinder Kumar. Their earlier version that the deceased has told them the manner in which the incident has taken place has not been found trustworthy by us. The deceased was not found fit to make any statement on 9.4.2006 or 10.4.2006, as per the statement of PW-18 Krishan Kumar. According to the material placed on record, firstly she got burnt due to an accident, secondly she has told her husband and mother about the manner in which she was put on fire by the accused, which we have disbelieved. Thus, in view of the facts and circumstances of the case, the dying declaration made on 11.4.2006 required corroboration, more particularly, when there is inherent contradiction in Ext. PW-19/A and statement of PW-11 Mrinal Gupta. The prosecution has thus failed to prove the case against the accused beyond reasonable doubt and there is no reason for us to interfere with the well reasoned judgment of the learned trial Court.

42. Consequently, there is no merit in this appeal, the same is dismissed. Bail bonds are discharged.

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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
Piar Singh ...Respondent.

Cr.Appeal No.328 of 2010.
Reserved on: 26.2.2015
Decided on: 28.02.2015

Indian Evidence Act, 1972- Section 32- Deceased had gone to the Nalla to attend the call of nature- his son heard cries from Nalla- he rushed to the spot where the deceased was found in an injured condition- he was brought to the house, his clothes were changed and he was taken to Hospital- prosecution relied upon oral dying declaration made by deceased to PW-5 and PW-6 – PW-1, son of the deceased, stated that when his father was brought home from Nalla PW-5, PW-6 and other persons were present – however, no mention of dying declaration was made in the FIR lodged by son - this shows that false dying declaration was propounded by the prosecution- further, medical evidence shows that deceased would have become unconscious within10 minutes of infliction of injuries- held, that in these circumstances dying declaration was not reliable- accused acquitted. (Para-10 to 13)

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

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

This appeal is directed against the judgment, rendered on 22.12.2009 by the learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, H.P., in RBT SC No.14.G/VII/09 whereby the respondent has been acquitted of the offence punishable under Section 302 of the Indian Penal Code.

2. The brief facts, of the case, are, that on 20.04.2009 at about 6.00 A.M. in the morning, deceased Rai Singh had gone to nearby jungle/nallah to attend the call of nature at Village Dohag, Tehsil Dehra, District Kangra, H.P. His son Pritam Singh (PW-1) was out of house as he had gone to bring ropes. At about 6.25 a.m., Pritam came back to his house when his wife was preparing tea. Pritam asked his wife about his father to which she told that his father had not come back from the Nallah. In the meantime, Pritam heard alarm of ladies from the Nallah and rushed to Nallah and found Rai Singh in an injured condition in the Nallah. Rai Singh had sustained injuries on different parts of his body. Pritam Singh brought Rai Singh to his house and his clothes were changed. Thereafter injured was taken to the hospital at Jawalamukhi in a vehicle for medical treatment. Rai Singh had told his son Pritam Singh that his body had been cut. In Jawalamukhi hospital at about 8.50 a.m.,

Rai Singh expired. Consequently, police was informed and upon the statement of Pritam Singh, FIR was registered. During the investigation of the case, post mortem of Rai Singh was got conducted. It was transpired during investigation that when Rai Singh was brought from the Nallah to the house by the complainant, he had told Anil and Paras Ram that he was given blows by Piar Singh. Consequently, accused was arrested and upon his disclosure statement made to the police under Section 27 of the Indian Evidence Act, one Darat was recovered by the police. The police visited the spot and took into possession the blood stained bamboo leaves. The blood stained clothes of the deceased were also taken into possession and all the aforesaid articles including the darat were sent for chemical examination and Chemical examiner's report was obtained. The spot map was also prepared by the police during the course of investigation of the case.

3. On conclusion of investigation into the offence, allegedly committed by the accused/respondent, challan was filed under Section 173 of the Code of Criminal Procedure.

4. The accused was charged for his having committed offences punishable under Section 302 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 as many as 19 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.

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

7. The State of H.P. is aggrieved by the judgment of acquittal, recorded by the learned trial Court. Shri Ramesh Thakur, 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 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.

8. 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.

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 F.I.R Ext. PW-18/A is anchored upon the statement of the complainant Prittam Singh (PW-1) comprised in Ext.PW-1/A. The complaint stands recorded by the son of the deceased. The learned Assistant Advocate General vociferously concerts to fasten criminal liability upon the accused, on the strength of a purported oral dying declaration made by the deceased Rai Singh to both Anil Kumar (PW-5) and Paras Ram (PW-6), wherein he attributed an inculpatory role to the accused. The inculpatory role attributed by the deceased Rai Singh in his oral dying declaration purportedly made to PW-5 and PW-6, articulated and communicated therein the fact of the accused having assaulted him. In pursuance to the oral dying declaration purportedly made by the deceased Rai Singh to both

PW-5 and PW-6, weapon of offence Ext.P-2 was recovered under recovery memo Ext.PW-2/A at the instance of the accused. Its recovery under Ext.PW-2/A is canvassed to be forcefully nailing the guilt of the accused. Even an oral dying declaration attains sanctity besides acquires veracity only in the face of it having been potently and fervently established by clinching evidence that it acquires probative worth inasmuch as it inspires trust and unbreached the confidence of the Court. In gauging whether the prosecution had relied upon a tenable and probative piece of evidence, inasmuch, as its implicit reliance upon the oral dying declaration of deceased Rai Singh before PW-5 and PW-6 is creditworthy, it is imperative to advert to the testimony comprised in the examination in chief of PW-1, the complainant. He in his examination in chief has deposed that when his father was brought home from the Nala where his body was found lying then at his home both PW-5 and PW-6 besides Baldev and Babu Ram, were present. However, the deceased succumbed to his injuries at Jawalamukhi hospital. If, in the deposition on oath of PW-1 there is a marked articulation of the factum of both PW-5 and PW-6 being available at his house when his deceased father was brought there, then the factum of the disclosure of the name of the accused to both PW-5 and PW-6 at the time when he was imminently facing death, through his purported oral dying declaration made to them qua the occurrence ought to have found occurrence, even in Ext.PW-1/A on the strength whereof F.I.R. Ext.PW-18/A was registered. Its non occurrence or non-communication in Ext.PW-1/A fosters an inference that PW-1 has endeavoured to, when he came to depose on oath before the Court, improve and embellish upon his previous statement recorded in writing. Besides, an inference which is fomented is that through PW-1, the prosecution has endeavoured to maneuver as well as engineer, through concoction and after thought the factum of the deceased father of PW-1 having made an oral dying declaration before PW-5 and PW-6. The said ingenuity stands baulked as well as come to be torn to smithereens in the apparent face of it constituting a dire and stark improvement and embellishment. Moreover what further renders the purported oral dying declaration qua the incident made by deceased Rai Singh before PW-5 and PW-6 to be ridden with inveracity, is the factum of PW-6 having, as emanating from a reading of his testimony on oath, stood interrogation by the police for 3-4 days. It appears that on his having stood interrogation for 3-4 days, he took to attribute an inculpatory role to the accused in the garb of the deceased Rai Singh having, in his presence and in the presence of PW-5, made an oral dying declaration qua the occurrence. Now, if as is unraveled by the reading of the deposition on oath of PW-1, he alongwith PW-5 was present at the house of PW-1 when the latter's father was brought home from the Nala then if at that stage any purported oral dying declaration was made in his presence and in the presence of PW-5 qua the occurrence, then its making would have found occurrence in Ext.PW-1/A. Its non occurrence in Ext.PW-1/A upsurges an inference that, hence the deceased did not make any oral dying declaration in presence of PW-6 at his home when he was brought there from the Nala rather PW-6 invented the making of the purported oral dying declaration of deceased Rai Singh to him only after his having undergone interrogation for 3-4 days. Hence his reticence for 3-4 days pointedly conveys that he too engineered the oral dying declaration of the deceased. Consequently, an engineered oral dying declaration of the deceased cannot assume any truth nor can occupy the pedestal of sanctity. Besides, the occurrence in mark B of the statement of PW-6 of the deceased having recorded/made his oral dying declaration to him while he was in an unconscious state of mind rips apart the effect if any of the oral dying declaration purportedly made by the deceased qua the occurrence before PW-6. Even otherwise, the purported oral dying declaration qua the occurrence made by the deceased to PW-5 and PW-6 stands ripped of its veracity in the face of PW-1 deposing in his examination in chief of his father having discussed the entire incident with him prior to his succumbing to his injuries at Jawalamukhi hospital. If it be so, then the deceased Rai Singh obviously would have in the natural course taken to confide in his son qua the truth

of the occurrence through his oral dying declaration made to the latter. Nonetheless as is apparent on a reading of PW-1/A and on a reading of deposition of PW-1 on oath, no revelation qua the occurrence by the deceased to PW-1 appears to be made. In face thereof, it appears that both PW-1 and PW-6 have connived to attribute a false oral dying declaration to the deceased qua the occurrence. As a concomitant, then it does not inspire confidence nor does it enjoy any veracity. Moreover, even an incisive scanning of the testimony of PW-5 unveils the factum of this witness having improved upon as well as contradicted the testimony of PW-6, inasmuch as he in stark contradiction to the testimony of PW-6 has proceeded to depose in his examination-in-chief, that the deceased had disclosed to him the factum of the accused having delivered a drat blow, besides PW-5 has deposed that the deceased had communicated to him in his oral dying declaration that the accused had given five blows. However his statement in para materia to the one deposed on oath by PW-5 does not find occurrence in the deposition on oath of PW-6. Obviously, then PW-5 hence has improved upon and has also contradicted the deposition of PW-6. As a corollary then for existence of intra-se contradiction inter-se the testimonies of PW-5 and PW-6, both stand, hence discredited. Besides, obviously then their testimonies are rendered incredible. The sequelling effect is that the purported oral dying declaration made by the deceased Rai Singh before PW-5 and PW-6 looses truth in its entirety.

11. The effect of this Court concluding that the oral dying declaration attributed by PW-5 and PW-6 to the deceased has no grain of truth, is that then the recovery of Darat Ex. P-2 under memo Ex. PW-2/A looses both its probative force as well as its legal worthwhileness. Necessarily it stands to be discarded.

12 Preponderantly, the deposition of PW-13 who in MLC comprised in Ex.PW-13/B prepared by him qua the injuries noticed by him on the person of the deceased which injuries are extracted hereinafter:-

> *"1. On skull incised wound of 12x12 cm with clear margin underline bone was exposed and was obliquely cut through and through. Exposing underline membranes of brain. Fresh blood was coming from the wound.*
>
> *2. Incised wound 8x5 cm on left arm medial aspect and lower part of arm was just above the joint. Exposing underlying muscles and soft tissues. Wound was actively bleeding.*
>
> *3. Incised wound left hand 13x5 cm ventortral aspect cutting muscles and soft tissues. Second, third and fourth metacarpal bones proximal part and incised wound on right hand middle finger, bone deep 5 cm exposing soft tissues.*
>
> *4. Incised wound 1x1.5 cm on left side of neck.*
>
> *5. 6 cm long curved wound on right shoulder. Muscles exposed. Red in colour.*
>
> *6. Incised wound 12x3 cm across and interior aspect of mid thigh. Muscles bruised.*
>
> *7. Incised wound 4x1 cm interior part of left thigh. Bright red in colour."*

has deposed that the imminent effect of the aforesaid injuries would be that the victim/injured would be rendered unconscious. He has also proceeded to depose that it would consume about 10 minutes from the time of infliction of injuries upon the injured/victim for befallment of an unconscious state of mind upon him. Easily, then it can be inferred that more than 10 minutes were consumed by PW-1 to bring the deceased Rai Singh to home and change his clothes. Now given the formation of the above inference then,

the effect of the deposition of PW-13 of the injuries purportedly inflicted/sustained on the head of the deceased taking its toll on the conscious state of mind of the deceased within 10 minutes, when entwined with the germination of an inference of a period of 10 minutes having been consumed in the deceased being carried home from the Nala, where his body was found, upsurges a concomitant inference, that at the purported stage of its making, before PW-5 and PW-6, he was unfit while being in an unconscious state of mind, to make a dying declaration qua the occurrence either before PW-5 or PW-6. In aftermath the purported oral dying declaration is rendered incredible.

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 misappreciated 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 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 SANJAY KAROL, J. AND HON'BLE MR.JUSTICE P.S.RANA, J.

State of Himachal Pradesh .....Appellant.

Vs.

Vipan Kumar son of Shri Pritam Chand ...Respondent.

Cr. Appeal No. 493 of 2009
Judgment reserved on: 28th October 2014
Date of Decision: 8th January, 2015.

Indian Penal Code, 1860- Sections 376 (1)- Accused trespassed into the house of the prosecutrix and raped her- medical evidence showed that hymen of the prosecutrix was intact- held, that case of the prosecution for the commission of offence punishable under Section 376 of IPC was not proved against the accused beyond reasonable doubt.(Para-11)

Indian Penal Code, 1860- Section 376 read with Section 511- Prosecutrix stated that accused dragged her from her house and took her to cattle shed where he tried to rape her- she had sustained injuries- medical evidence found injuries on the person of the prosecutrix- she had narrated the incident to her mother immediately after the incident- mother of the prosecutrix narrated the same to Panchayat and the police- held, that accused had entered into the house of the prosecutrix with an intention to commit criminal offence- he had made preparation for the commission of offence- he had attempted to commit crime when he dragged the prosecutrix from her room to nearby cattle shed- human semen was found on shirt, underwear and vaginal swab of prosecutrix – held that offence punishable under Section 511 read with Section 376 of IPC was proved beyond reasonable doubt.

(Para-12)

Indian Penal Code, 1860- Section 452- In order to prove the offence punishable under Section 452 IPC the prosecution is under legal obligation to prove house trespass with an

intention to cause hurt or to commit assault or with an intention to wrongfully restrain any person or putting the person in a fear of hurt- accused entered into the residential house of prosecutrix with intention to commit the offence of sexual assault- he had put the prosecutrix in fear of hurt and had dragged her towards cattle shed- all these circumstances proved that accused had committed criminal trespass – accused convicted of the commission of offence punishable under Section 452 of IPC. (Para-13)

SC and ST (Prevention of Atrocities) Act 1989 - Section 3 (1) (xii)- Prosecutrix belonged to Lohar caste which falls under scheduled caste category and accused belonged to Rajput caste- accused was in a position to dominate the prosecutrix who belonged to scheduled caste- accused used that position to exploit the prosecutrix sexually to which she would not have otherwise agreed- held, that prosecution had succeeded in proving its case beyond reasonable doubt- accused convicted of the commission of offence punishable under Section 3(1)(xii).

Cases referred:

Abhayanand Mishra vs.State of Bihar, AIR 1961 SC 1698
T. Munirathnam Reddi and another (accused-petitioners), AIR 1955 AP 118
State of Punjab vs. Gurmit Singh and others (1996)2 SCC 384,
State of Rajasthan vs. N.K. the accused (2000)5 SCC 30
State vs. Lekh Raj and another, (2000)1 SCC 247,
Madan Gopal Kakkad versus Naval Dubey and another, (1992)3 SCC 204,
Jose vs. State of Kerala AIR 1973 SCC 944 (Full Bench)
State of M.P. vs. Surendra Singh AIR 2015 SC 398

For the Appellant:	Mr. Ashok Chaudhary Additional Advocate General with Mr. Vikram Thakur, and Mr. Puneet Rajta Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.
For the Respondent:	Mr. Bhupinder Gupta, Sr. Advocate with Ms. Charu Gupta, Advocate

The following judgment of the Court was delivered:

P.S.Rana, J.

Present appeal is filed against the judgment of acquittal passed by learned Sessions Judge-cum-Special Judge Hamirpur in Sessions trial No. 12 of 2009 titled State of H.P. vs. Vipan Kumar.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on dated 25.2.2009 at about 2.30 PM at village Lohakhar accused had committed sexual intercourse with prosecutrix without her consent. It is alleged by prosecution that on the aforesaid date time and place accused criminally trespassed into the house of prosecutrix after having made preparation to wrongfully restrain the prosecutrix with a view to commit rape on prosecutrix. It is also alleged by prosecution that on the same date time and place accused criminally intimidated the prosecutrix to kill her. It is alleged by prosecution that on the same date time and place accused was not the member of Scheduled Caste or Scheduled Tribe and was member of Rajput caste and was in position to dominate the prosecutrix who belonged to Scheduled Caste and exploited her sexually without her consent. It is alleged by prosecution that at the time of incident the prosecutrix aged 20 years was student of BBA in

Vallabh Government College Mandi and prosecutrix was all alone in her house. It is alleged by prosecution that accused came in the house of prosecutrix and when prosecutrix inquired from accused about his presence then accused told that he came in the search of his dog. It is alleged by prosecution that at about 2.30 PM when prosecutrix was all alone in the house and was watching the television accused again came and knocked the door and asked the prosecutrix to open the door. It is alleged by prosecution that when prosecutrix declined to open the door thereafter accused 2/3 times pulled the door from outside and thereafter entered into the room of prosecutrix. It is alleged by prosecution that thereafter accused threw the prosecutrix on bed and gagged her mouth with his hands and thereafter removed the salwar and underwear of prosecutrix. It is alleged by prosecution that when prosecutrix tried to cry the accused gagged the mouth of prosecutrix and took the prosecutrix to cowshed which was situated nearby residential room. It is alleged by prosecution that in cowshed the accused removed his pant and underwear and committed forcible sexual intercourse with prosecutrix. It is alleged by prosecution that prosecutrix suffered injuries on her feet, back and towards right side of leg and also on her private parts in the process of rape. It is alleged by prosecution that immediately mother of prosecutrix came and accused immediately fled away and in hurry left his underwear Ext.P7 in cowshed. It is alleged by prosecution that when mother of prosecutrix came and when she saw salwar Ext.P5 and underwear Ext.P6 of prosecutrix inside the residential room she got confused and puzzled and she started crying. It is alleged by prosecution that in the meanwhile PW2 Roshani Devi saw the accused running away from cowshed and when she abused the accused the accused told her that he was not afraid of anybody. It is alleged by prosecution that in the meanwhile prosecutrix came from cowshed to her mother in the courtyard of residential house in weeping stage and narrated the entire incident to her. It is alleged by prosecution that thereafter Roshani Devi telephoned her son-in-law Rajesh Kumar and also her daughter at Hamirpur and also telephoned a member of Mahila Mandal and also collected other villagers in the house. It is alleged by prosecution that thereafter Rajesh Kumar son-in-law of Roshani Devi telephoned Shri Gulab Singh Thakur Dy.S.P. and Mr. Gulab Singh Thakur Dy.S.P. had informed the police of P.S. Sujanpur. It is alleged by prosecution that thereafter SI Anil Verma SHO P.S. Sujanpur proceeded to the spot along with other some police officials and recorded the statement of prosecutrix under Section 154 Cr.P.C. Ext.PW1/A and thereafter FIR Ext.PW13/A was registered. It is alleged by prosecution that thereafter PW16 Gulab Singh Thakur Dy.S.P. went to the spot and took into possession salwar Ext.P5 and underwear Ext.P6 of prosecutrix from room of prosecutrix vide memo Ext.PW1/C in presence of Roma Devi and Karam Chand and sealed them in a parcel with seal 'A' and seal impression was took on a piece of cloth. It is alleged by prosecution that underwear of accused Ext.P7, gunny bag Ext.P16 were took into possession from cowshed by SI Anil Verma vide memo Ext.PW1/D. It is alleged by prosecution that Gulab Singh Thakur PW16 took into possession V shape slippers Ext.P8 of accused from the room of prosecutrix vide recovery memo Ext.PW1/E. It is alleged by prosecution that in the meanwhile application Ext.PW4/A was moved to SMO R.H. Hamirpur for medical examination of prosecutrix which was conducted vide MLC Ext.PW4/C by PW4 Dr. Rajneesh Thakur and it was found that prosecutrix was subjected to sexual intercourse. It is alleged by prosecution that medical officer had collected vaginal swab of prosecutrix and sent to FSL Junga and also obtained FSL report Ext.PW4/B according to which human blood and semen was found on vaginal swab of prosecutrix. It is alleged by prosecution that accused was also medically examined by medical officer CHC Sujanpur by PW5 Dr. Rakesh Kumar Sharma who issued MLC Ext.PW5/B and accused was found capable of performing sexual intercourse. It is alleged by prosecution that photographs were also obtained and site plan of house of prosecutrix and cowshed was also prepared by Investigating Officer. It is alleged by

prosecution that caste certificate of prosecutrix was obtained and as per caste certificate prosecutrix belonged to SC caste and accused belonged to Rajput caste.

3 Accused was charged by learned Sessions Judge Hamirpur on dated 16.5.2009 under Sections 376 (1), 452, 506-II of Indian Penal Code and 3(1) (xii) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act 1989. Accused person did not plead guilty and claimed trial.

4. Prosecution examined the following witnesses in support of its case:-

Sr.No.	Name of Witness
PW1	Prosecutrix aged 20 years
PW2	Roshani Devi
PW3	Ishro Devi
PW4	Dr. Rajnish
PW5	Rakesh Kumar
PW6	Shiv Dev Singh
PW7	Rattan Chand
PW8	MHC Ranjit Singh
PW9	C. Malkiat Singh
PW10.	C. Suresh Kumar
PW11	LC Himani
PW12	MC Suresh Kumar
PW13	Braham Dass
PW14	Meean Kumari Patwari
PW15	SI Anil Verma
PW16	IO Gulab Singh Thakur

4.1 Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	*Description:*
Ex.PW1/A.	*Statement of prosecutrix*
Ex.PW1/B.	*Recovery memo*
Ex.PW1/C	*Recovery memo*
Ext.PW1/D	*Recovery memo*

Ext. PW1/E	*Recovery memo*
Ext.PW1/F	*Recovery memo*
Ext.PW4/A	*Application to SMO*
Ex.PW4/B	*FSL report*
Ex.PW4/C	*MLC*
Ext.PW5/A	*Application to Medical Officer*
Ext.PW5/B	*MLC*
Ext.PW6/A	*Letter to Tehsildar*
Ex.PW6/B and Ext.PW6/C	*Caste certificates*
Ext.PW6/D and Ext.PW6/E	*Copies of pedigree table*
Ext.PW8/A	*Abstract of malkhana register*
Ext.PW8/B	*Copy of RC*
Ext.PW8/C	*FSL report*
Ext.PW12/A & Ext.PW12/B	*DDRs*
Ext.PW13/A	*Copy of FIR*
Ext.PW15/A-1 to Ext.PW15/A-26	*Photographs/negatives*
Ext.PW15/B	*Letter to FSL*
Ext.PW16/A	*Site plan*
Ext.PW16/B and Ext.PW16/C	*Samples seal impressions on cloth*
Ext.DA	*Statement of Roshani Devi*
Ext.DB	*Statement of Ishro Devi*

5. Statement of the accused recorded under Section 313 Cr.P.C. Accused has stated that prosecutrix and witnesses are inimical towards him as his brother Vinay Kumar was prosecution witness against Jamna Devi elder sister of prosecutrix in a criminal case pending in the Court of JMIC Hamirpur prior to this incident. He has stated that prosecutrix and her mother have stated against him due to enmity. He has further stated that he is innocent and false case has been planted against him. No defence evidence was adduced by accused. Learned trial Court acquitted the accused of the charges framed against him.

6. Feeling aggrieved against the judgment passed by learned Trial Court State of H.P. filed present appeal under Section 378 of Code of Criminal Procedure.

7. We have heard learned Additional Advocate General appearing on behalf of the State of H.P. and learned Advocate appearing on behalf of the respondent and also perused the entire record carefully.

8. Question that arises in present appeal is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice as mentioned in memorandum of grounds of appeal.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

9.1. PW1 prosecutrix has stated that she has three elder sisters who are married. She has stated that she is the youngest daughter of her parents. She has stated that her elder sister has qualified diploma course in electronics and another elder sister has completed diploma course in civil engineering and her third sister has qualified B.Sc. course. She has stated that she was doing the course of BBA at Vallabh Government College Mandi at the time of incident. She has stated that her father is a labourer and she belonged to Scheduled Caste community known as Lohar. She has stated that on dated 20.2.2009 she came to her native village from Mandi on holidays and on the day of incident i.e. 25.2.2009 her father had gone out of village for his work and her mother had gone to Tauni Devi for exchange of CFL bulbs and she was all alone in the house. She has stated that at about 2 PM one Ishro Devi came to her house and she came to her house to see her mother. She has stated that she told Ishro Devi that her mother has gone to Tauni Devi and asked her to sit inside the residential house. She has stated that while they both were sitting in the residential house in the meanwhile accused present in Court who is residing in her village came and Smt. Ishro Devi asked accused and accused told that he was looking for his dog and further stated that thereafter accused left. Prosecutrix further stated that thereafter her mother did not return and Smt. Ishro Devi left her residential house at about 2.15/2.20 PM and thereafter she started watching television. She has stated that at about 2.30 PM present accused came and called the prosecutrix from outside. She has stated that she asked the accused to come later on when her mother would come from Tauni Devi but accused was adamant to enter into the house. She has further stated that thereafter accused pulled the door from outside due to which door was opened. Prosecutrix has stated that she tried to escape from the door but she was pushed back by accused inside. She has stated that she was wearing salwar, shirt and sweater at the time of incident. She has stated that thereafter accused caught hold her and thereafter left arm of her sweater was torn by accused and thereafter accused threw her on bed and when she tried to cry accused gagged her mouth with his hand. She has stated that thereafter accused removed her salwar and underwear and then accused caught hold her with his arm from her back side with his one hand and took her to nearby cattle shed. She has stated that thereafter accused closed the door of cattle shed. She has stated that her mother used to keep gunny bags in the cow shed to cover the grass. She has stated that thereafter accused threw her on gunny bags in the cattle shed and thereafter committed forcible sexual intercourse with her. She has further stated that while the accused was taking her from residential room to cattle shed she suffered injuries on the feet, back side and legs towards the right side. She has stated that thereafter accused inserted his penis forcibly in her vagina parts. She has stated that thereafter accused after committing rape ran away leaving behind his underwear in the cowshed. She has stated that thereafter she returned to her residential house. She has stated that V shape slippers of accused remained in her residential house. She has stated that her mother came back by that time and prosecutrix came from cowshed to courtyard

where her mother was present. She has stated that she hugged her mother and started weeping and told that accused had committed forcible sexual intercourse with her. She has stated that thereafter her mother telephoned her brother-in-law and her sister. She has stated that her brother-in-law did not respond to the call. She has stated that thereafter she called her sister. She has further stated that thereafter telephone call was given to Kamla Devi member of Mahila Mandal and also asked her to inform the villagers. She has stated that thereafter some women of village came to her house. She has stated that she tried to cry but accused did not allow her to cry and caught hold her mouth. She has stated that in the meantime information was given to the police about incident and police came at her house at 3.30/4 PM. She has stated that thereafter her statement Ext.PW1/A was recorded. She has stated that she produced her shirt, vest, brassiere, sweater, underwear and salwar to police which were sealed by police at the spot. She has stated that police also took into possession underwear and slippers of accused. She has stated that sweater Ext.P1, shirt Ext.P2, undershirt Ext.P3 and brassiere Ext.P3 took into possession by police vide memo Ext.PW1/B. She has stated that these clothes were worn by her when accused had committed rape upon her. She has stated that her shirt and sweater were torn. She has stated that salwar Ext.P5, and underwear Ext.P6 are the same which were worn by prosecutrix at the time of incident and the same were took into possession vide seizure memo. She has stated that underwear Ext.P7 of accused is the same which was took into possession by police vide Ext.PW1/D. She has stated that pair of slippers Ext.P8 left by accused also took into possession vide seizure memo Ext.PW1/E. She has stated that police also took into possession the buttons of her sweater and two strings of her salwar and stated that buttons are Ext.P9 and Ext.P10 and strings are Ext.P11 and Ext.P12 and further stated that same were took into possession vide memo Ext.PW1/F. She has stated that thereafter she was brought to Zonal Hospital Hamirpur and she was medically examined by doctor on dated 25.2.2009. She has stated that accused is married person having his wife and children and is residing with his family. She has stated that accused was known to her earlier because accused was resident of her village. She has denied suggestion that she has filed false case against the accused due to enmity. She has stated that she does not know whether Vinay Kumar brother of accused appeared as a prosecution witness against her sister. She has denied suggestion that her family members were asking Vinay Kumar not to appear as a witness. She has denied suggestion that false case filed against accused due to enmity.

9.2 PW2 Roshani Devi mother of prosecutrix has stated that she is residing in village Lohakhar along with her family and she has stated that she has four daughters. She has stated that her three daughters are married and prosecutrix aged 20 years is unmarried. She has stated that prosecutrix was doing BBA at Mandi and she came to village on dated 20.2.2009 on holidays. She has stated that on dated 25.2.2009 she had gone to Tauni Devi for collecting CFL bulbs and prosecutrix was all alone in residential house and her husband had gone out in the morning for his work. She has stated that she opened the door of her residential room and found that bolt of outer door was broken. She has stated that bolt of inner door was also disturbed due to push and has further stated that underwear and salwar of prosecutrix were lying on the floor of residential house. She has stated that she became puzzled and confused and she started calling the prosecutrix loudly. She has stated that thereafter she called her son-in-law on telephone and then she telephoned her daughter Suman. She has stated that thereafter when she came out in the courtyard of her residential house she saw accused present in Court running from her cowshed and when accused saw her accused shouted *"main nee darda lohareya tere tey".* (I do not afraid from you Lohareya.) She has stated that wife of accused also left the accused about 20 days prior to the incident. She has stated that thereafter prosecutrix came from the cowshed in weeping condition and told that accused had committed rape upon her. She

has stated that thereafter she telephoned her son-in-law, her daughter and members of Mahila Mandal. She has stated that many villagers also came and police officials also came. She has stated that police officials collected the clothes of prosecutrix, underwear of accused from the cattle shed and slippers from the residential room. She has stated that she belonged to scheduled caste community known as Lohar and has stated that accused is Rajput by caste. She has stated that her husband also came after the arrival of police. She has stated that her cattle shed is situated at a distance of 10-15 metres from her residential house. She has denied suggestion that she is deposing falsely against the accused due to enmity.

9.3 PW3 Ishro Devi has stated that in the month of January-February 2009 she had gone to the house of prosecutrix and prosecutrix was all alone in the residential house. She has stated that she went to the house of prosecutrix at about 1.45 PM and inquired about her mother because she was to take grass from her for her cattle. She has stated that prosecutrix told her that her mother had gone to Tauni Devi and also told her to wait for her mother. She has stated that she waited for about 10-15 minutes and in the meanwhile accused present in Court came to the residential house of prosecutrix and told that he was searching his dog. She has stated that thereafter she left residential house of prosecutrix after about 10 minutes. She has stated that when she was going back the accused was present in his verandah. She has stated that after sometime her neighbour told her that accused had committed rape upon prosecutrix. She has stated that thereafter they came to house of prosecutrix and other villagers also came. She has stated that her son Anil Kumar is a BDC member. She has stated that brother of accused is Ward Panch. She has stated that younger brother of accused namely Vinay Kumar had contested the elections for the office of Up-Pardhan of Gram Panchayat and her son campaigned against him. She has stated that brother of accused had got conducted inquiry against her son about cremation ground. She has stated that she is not in good terms with accused. She has denied suggestion that accused did not come to residential house of prosecutrix.

9.4 PW4 Dr. Rajneesh Thakur has stated that he is posted in Regional Hospital Hamirpur since March 2007 and on application moved by police Ext.PW4/A he had medically examined the prosecutrix aged 20 years student of BBA Mandi College resident of village Loharkhar Tehsil and District Hamirpur on dated 25.2.2009 at 11 PM. He has stated that prosecutrix was brought with alleged history of sexual assault on dated 25.2.2009 at about 2.30 PM and according to history the prosecutrix was alone at home and was in her room when accused asked her to open the door and when prosecutrix refused then accused forcibly entered into the room by breaking the door and assaulted the prosecutrix in drunken stage. He has stated that prosecutrix had already changed her clothes and according to prosecutrix her clothes worn at the time of incident including underwear were took by police officials. He has stated that secondary sex characters of prosecutrix were well developed and menstruation started at the age of 13 years. He has stated that prosecutrix was unmarried and her gait was normal. He has stated that prosecutrix was average built female and well oriented to time place and person and her pulse was found 68 per minutes and vitals were stable. He has stated that he has observed the following injuries on the person of prosecutrix. (1) A linear abrasion of the length of 2.5 cm was present on right side of back just below scapula and 8 cm from spine, reddish in colour. (2) There was a contusion of the size of 2 cm x 1.5 cm over medial side of right thigh just above knee, reddish blue in colour. (3) An abrasion of the size of 0.25 cm x 0.25 cm was present over right third toe on medial side reddish in colour. He has stated that after local examination he observed linear superficial abrasion 0.5 cm in length starting from vaginal mucosal margin to skin outside at 7 O'clock position over vaginal orifice. He has stated that hymen was intact and no injury was seen and as per Exhibit 9/B vaginal slides of prosecutrix

showed human blood and human semen. He has stated that his opinion was that prosecutrix was subjected to sexual intercourse. He issued MLC Ext.PW4/C which bears his signatures and bears the signatures of prosecutrix. He has stated that there was no history of previous sexual intercourse in this case and further stated that had the girl been exposed to sexual intercourse earlier there would have been no injury on her private parts due to incident. He has denied suggestion that injury sustained by prosecutrix could be self inflicted. He has stated that presence of semen in the vaginal and posterior fornix is indicative of sexual intercourse.

9.5 PW5 Dr. Rajesh Kumar has stated that he is posted as Medical Officer in CHC Sunjanpur since June 2007 and further stated that application Ext.PW5/A was moved by police for medical examination and he issued MLC Ext.PW5/B. He has stated that at the time of medical examination the accused was conscious cooperative and well oriented to space and time and was responding to verbal commands. He has stated that genitalia organs were found well developed and testis of accused were well developed and pubic hairs were also well developed. He has stated that no semen stains were found upon penis and no abrasion was seen on the face and no laceration was seen on the face. He has stated that no blood stains were seen on the face and scrotum area of genitalia. He has further stated that there were marks of laceration on right thumb palmer aspect which was brownish in colour which showed scaring process with probable duration of more than 72 hours. He has stated that accused was capable for performing sexual intercourse. He has stated that clothes worn by accused were sent for chemical examination. He has stated that as per Chemical Analyst reports Ext.PW7/B and Ext.PW7/C no blood or semen were found on exhibits. He has stated that shirt Ext.P13, pant Ext.P14 and vest Ext.P15 were handed over to police. He has stated that at the time of examination of accused he was not found under the influence of alcohol.

9.6 PW6 Shiv Dev Singh has stated that on the receipt of application Ext.PW6/A he issued caste certificate of prosecutrix Ext.PW6/B and that of accused Ext.PW6/C based on the revenue record. He has stated that pedigree table of prosecutrix is Ext.PW6/D and that of accused is Ext.PW6/E.

9.7 PW7 Rattan Chand has stated that he was associated in investigation of case and he was Ward Member of Panchayat. He has stated that two buttons were collected by police from spot between the house of prosecutrix and cowshed. He has stated that buttons are Ext.P9 and Ext.P10 and two strings were also collected which are Ext.P11 and Ext.P12. He has denied suggestion that he has signed the seizure memo at the instance of police without any recovery.

9.8 PW8 MHC Ranjit Singh has stated that he is posted as MHC in P.S. Sujanpur since 2006 and has stated that Investigating Officer Dy.S.P. Gulab Singh Thakur deposited with him four sealed parcels on dated 25.2.2009 duly sealed with seal 'A' and seal impressions. He has stated that on dated 26.2.2009 C. Suresh Kumar deposited with him one sealed parcel with seal MO and further stated that Lady C. Himani deposited with him one sealed parcel duly sealed with seal DHH on dated 25.2.2009. He has stated that on dated 27.2.2009 Dy.S.P. G.S. Thakur again deposited with him one parcel duly sealed with seal H with seal impressions and all these parcels were entered by him in the Malkhana register which he had brought. He has stated that abstract is Ext.PW8/A and he has brought original RC Ext.PW8/B. He has stated that later on chemical report Ext.PW8/C was received from FSL Junga. He has stated that as long as case property remained in his custody it was not tampered with. He has denied suggestion that sample parcels were tampered with in police station.

9.9 PW9 C. Malkiat Singh has stated that he is posted as Constable in P.S. Sujanpur for the last one year and further stated that MHC Ranjit Singh on dated 2.3.2009 handed over to him seven parcels duly sealed for depositing the same with FSL Junga and he had taken the same on same day to FSL Junga vide RC No. 26 of 2009 and deposited the same and obtained receipt on RC. He has further stated that on his return he handed over the RC duly received to MHC in P.S. and so long as the parcels remained in his custody these were not tampered with.

9.10, PW10 C. Suresh Kumar has stated that he is posted as Constable in P.S. Sujanpur since 2008 and on dated 25.2.2009 he was deputed by SHO for getting the accused medically examined at CHC Sujanpur. He has stated that he took the accused along with application Ext.PW5/A and got the accused medically examined vide MLC Ext.PW5/B. He has stated that medical officer handed over to him one parcel containing clothes of accused and he deposited the same along with MHC and handed over the MLC to Investigating Officer. He has denied suggestion that he did not take the accused to CHC Sujanpur for his medical examination. He has also denied suggestion that nothing was handed over to him by medical officer.

9.11 PW11 LC Himani has stated that PW11 is posted in P.S. Sujanpur since 2006 and as per direction of SHO PW11 took prosecutrix to SMO, Regional Hospital Hamirpur for getting her medically examined vide application Ext.PW4/A. PW11 has stated that PW11 got her medically examined from the doctor vide MLC Ext.PW4/C and obtained MLC. PW11 has stated that doctor had handed over to him one parcel containing wooden stick and cotton swab and PW11 deposited the same with MHC and handed over the MLC to I.O. PW11 has denied suggestion that no sample was handed over to PW11 by medical officer.

9.12 PW12 Suresh Kumar has stated that he is posted in P.S. Sujanpur since 2007 and he has brought original roznamcha register and DD No. 11-A Ext.PW12/A and DD No. 26-A Ext.PW12/B are true copies of original.

9.13 PW13 Braham Dass has stated that he remained posted as I.O. in P.S. Sujanpur from 2001 to April 2009 and on dated 25.2.2009 he was working as SHO P.S. Sujanpur. He has stated that ruka Ext.PW1/A was received through C. Bhupinder Singh on dated 25.2.2009 and on basis of same FIR Ext.PW13/A was registered against the accused. He has stated that endorsement on ruka is Ext.PW13/B and FIR bears his signatures.

9.14 PW14 Meena Kumari Patwari has stated that she is posted as Patwari in Patwar Circle Lohakhar since September 2007 and on application which was forwarded by Tehsildar to her she prepared caste certificate of accused Ext.PW6/C, sajra of prosecutrix Ext.PW6/D and sajra of accused Ext.PW6/E as per revenue record which she has brought in Court. She has stated that certificates bear her signatures.

9.15 PW15 SI Anil Verma SHO P.S. Nadaun has stated that during the year 2009 he remained posted as SHO P.S. Sujanpur and on dated 25.2.2009 he along with ASI Karam Singh, C. Suresh Kumar, Lady C. Himani was in the area of Uhal in connection with investigation of case FIR No. 22 of 2009. He has stated that at about 4.20 PM he had received information regarding the commission of offence at Lohakhar and he proceeded to spot along with other police officials. He has stated that on reaching the spot prosecutrix made statement under Section 154 Cr.P.C. Ext.PW1/A which was recorded by him. He has stated that thereafter he sent the same along with endorsement to P.S. Sujanpur through C. Bhupinder Singh and has stated that he also informed SDPO Barsar for investigation. He has stated that since the case was under Section 3 of Scheduled Caste and Scheduled Tribe

Act and under Sections 452, 376 (1) and 506 IPC he handed over the file to SDPO Barsar for investigation. He has stated that later on he prepared challan after completion of investigation and presented the same in Court. He has stated that after receipt of reports of Chemical Examiner Ext.PW8/C and Ext.PW4/B he prepared supplementary challan and sent the same to Hon'ble Court. He has stated that he also prepared letter Ext.PW15/B to Director, FSL Junga for chemical analysis and he also clicked photographs Ext.PW15/A-1 to Ext.PW15/A-13 and negatives of which are Ext.PW15/A-14 to Ext.PW15/A-26. He has stated that Supervisory officer of P.S. Sujanpur was Dy.S.P. Headquarters who was on foreign tour at Italy during those days and therefore SDPO was having additional charge of police station. He has stated that he reached on spot at about 5/5.15 PM and later on he had summoned other police officials from police station namely ASI Manjit, HC Sher Singh, HC Ranjit Singh to the spot and he stayed on spot till midnight. He has stated that SDPO Gulab Singh Thakur had reached on spot at 8.15 PM and after that he handed over the investigation to him. He has stated that again on dated 26.2.2009 he had gone to spot along with SDPO and he recorded statements of prosecution witnesses and also took the photographs. He has denied suggestion that statement of prosecutrix was not recorded as per her version.

9.16 PW16 Gulab Singh Thkaur SDPO has stated that he is posted as SDPO Barsar since the year May 2007 and in February 2009 he was holding the additional charge of Dy.S.P. Headquarters who was supervisory officer of P.S. Sujanpur. He has stated that he was informed regarding registration of case under Section 3 (1) (xii) of SC & ST Act along with one under Sections 376(1), 452 and 506 IPC and he went to spot and reached there at about 8.15 PM. He has stated that SHO P.S. Sujanpur along with other police officials was already present at spot and he took over the investigation of case from SHO. He has stated that he prepared site plan Ext.PW16/A and took into possession sweater Ext.P1, shirt Ext.P2, underwear Ext.P3, bra Ext.P4 vide memo Ext.PW1/B in presence of witnesses handed over by prosecutrix. He has stated that salwar Ext.P5, underwear Ext.P5 were also took into possession vide seizure memo Ext.PW1/C from room in presence of witnesses and seizure memo was signed by prosecutrix also. He has stated that underwear Ext.P7 and gunny bag Ext.P16 were also took into possession from cowshed vide memo Ext.PW1/D in presence of witnesses and identified by prosecutrix. He has also stated that V-shape slippers Ext.P8 of accused also took into possession vide memo Ext.PW1/E in presence of witnesses and further stated that SHO present at spot also clicked the photographs. He has stated that two buttons Ext.P9 and Ext.P10 along with strings Ext.P11 and Ext.P12 were also took into possession from spot which were lying between the house and cowshed vide memo Ext.PW1/F in presence of witnesses. He has stated that he moved application Ext.PW6/A to Tehsildar for obtaining caste certificates of prosecutrix and of accused. He has stated that on completion of investigation the file was handed over to SHO. He has stated that son-in-law of mother of prosecutrix had telephoned him about incident. He has stated that Anil Verma also informed him at about 7 PM about incident. He has stated that S.P. was on leave and he was present in the Headquarter. He has stated that he also got the appointment letter of investigation in this case. He has stated that site plan was prepared by him at about 8/8.30 PM. He has stated that cowshed of father of prosecutrix was situated at a distance of 10 metres away from residential house. He has stated that when he reached at the spot Pardhan of Gram Panchayat was also present and 15-20 people were also present. He has stated that house of accused was about 50-60 metres away from house of complainant on the lower side. He has denied suggestion that present case has been filed due to enmity of complainant, her mother and Ishro Devi against the accused and his family members.

10. Statement of accused recorded under Section 313 Cr.P.C. Accused has stated that prosecutrix and witnesses are inimical towards him as his brother Vinay Kumar was prosecution witness against Jamna Devi elder sister of prosecutrix in criminal case pending in Court of JMIC Hamirpur which was instituted prior to alleged incident. He has stated that his brother had appeared as prosecution witness against Jamna Devi on dated 3.10.2008.

11. Submission of learned Additional Advocate General appearing on behalf of the State that prosecution proved its case beyond reasonable doubt against the accused under Section 376(1) of Indian Penal Code is rejected being devoid of any force. We have carefully perused the oral as well as documentary evidence adduced by prosecution. PW4 medical officer has specifically stated in positive manner that hymen of prosecutrix was intact. We have carefully perused the medical certificate placed on record. As per medical certificate placed on record, hymen of prosecutrix was intact. In view of the fact that hymen of prosecutrix was intact we are of the opinion that no criminal offence of rape is proved against the accused beyond reasonable doubt in present case. Even prosecution did not obtain the report of some other medical officer in order to prove that hymen of prosecutrix was not intact. Fact that hymen of prosecutrix remained intact we are of the opinion that offence punishable under Section 376 IPC is not proved against the accused beyond reasonable doubt.

12. Submission of learned Additional Advocate General appearing on behalf of State that offence under Section 511 IPC read with Section 376 IPC is proved on record is accepted for the reasons hereinafter mentioned. As per testimony of prosecutrix it is proved on record beyond reasonable doubt that accused dragged the prosecutrix from her residential room and took the prosecutrix in the cattle shed and thereafter forcibly tried to commit rape upon the prosecutrix in the cattle shed. As per testimony of PW4 medical officer there was linear abrasion of the length of 2.5 cm on the right side of back just below scapula 8 cm from spine reddish in colour. It is proved on record that prosecutrix had sustained contusion of the size of 2 cm x 1.5 cm over medial side of right thigh just above knee reddish blue in colour. It is also proved on record beyond reasonable doubt that prosecutrix had also sustained abrasion of the size of 0.25 cm x 0.25 cm over right third toe on medial side reddish in colour. Prosecutrix has specifically stated in positive manner that accused caught hold and sweater of prosecutrix was torn. Prosecutrix has specifically stated in positive manner that thereafter accused threw the prosecutrix on bed and when she tried to cry the accused gagged her mouth with his hand and then removed her salwar and underwear. Prosecutrix has further stated in positive manner that thereafter accused took the prosecutrix to adjoining cattle shed. Prosecutrix has specifically stated in positive manner that thereafter accused threw the prosecutrix on gunny bags which were kept in cattle shed and thereafter accused committed sexual assault. Above stated testimony of prosecutrix is trustworthy reliable and inspires confidence of Court. It is proved on record that immediately after the incident mother of prosecutrix came and prosecutrix narrated the entire incident to her mother in weeping stage and thereafter matter was reported to members of Panchayat and members of Panchayat also came at the spot and thereafter matter was also reported to the police. It is also proved that thereafter underwear of accused and underwear and salwar of prosecutrix were took into possession by Investigating Officer vide seizure memos. It is also proved on record that prosecutrix had also sustained injuries as mentioned supra. Prosecutrix was student of BBA and age of prosecutrix at the time of alleged incident was 20 years and accused was a married person having children and age of accused was 29 years at the time of incident. It is also proved on record that accused belongs to Rajput caste at the time of incident and prosecutrix was belonging to scheduled caste at the time of incident. It is also proved on record that residential house of prosecutrix

and residential house of accused are situated nearby. It is also proved on record that accused also came in residential house of prosecutrix in presence of Ishro Devi PW3 on the pretext that he came in residential house of prosecutrix in search of his dog. It is well settled law that attempt of committing criminal offence comprises four stages. (1) Forming an intention to commit crime. (2) Making preparation for the commission. (3) Attempting to commit the crime. (4) Actual commission of crime. ***(See AIR 1961 SC 1698 titled Abhayanand Mishra vs.State of Bihar, AIR 1955 AP 118 titled In re T. Munirathnam Reddi and another (accused-petitioners)*** In the present case it is proved on record as per testimony of PW3 Ishro Devi that accused came in residential house of prosecutrix with criminal intention to commit the criminal offence. It is also proved on record that accused also made preparation for commission of offence and it is also proved on record that accused attempted to commit crime when accused dragged the prosecutrix from her residential room to nearby cattle shed. It is also proved on record that accused also actually attempted to commit the crime by way of opening his pant and underwear and by way of opening the underwear of prosecutrix forcibly. We are of the opinion that sexual assault upon the unmarried girls are increasing in the society day by day. It is well settled law that in rape cases testimony of prosecutrix must be appreciated in the back ground of entire case. It is well settled law that trial Court should be sensitive while dealing with cases involving sexual molestation. ***(See (1996)2 SCC 384, titled State of Punjab vs. Gurmit Singh and others Also see (2000)5 SCC 30, titled State of Rajasthan vs. N.K. the accused. Also see (2000)1 SCC 247, titled State vs. Lekh Raj and another, (1992)3 SCC 204, titled Madan Gopal Kakkad versus Naval Dubey and another)*** It is well settled law that facts can be proved by way of testimonies of oral witnesses. Testimony of prosecutrix inspires confidence of Court qua attempt to commit rape. There is no reason to disbelieve the testimony of prosecutrix qua attempt to commit rape. Testimony of prosecutrix is further corroborated by medical evidence placed on record and is also corroborated by testimony of PW3 Ishro Devi who proved the factum of presence of accused in sehan of residential house of prosecutrix and presence of accused is also proved as per testimony of PW2 Roshani Devi who saw the accused running from cattle shed. Even as per Chemical Analyst report Ext.PW4/B placed on record human semen was found on shirt and underwear of prosecutrix and human blood and semen was found in vaginal swab of prosecutrix aged 20 years. Hence we are of the opinion that offence punishable under Section 511 read with Section 376 IPC is proved on record against the accused beyond reasonable doubt.

13. Submission of learned Additional Advocate General appearing on behalf of the State that offence under Section 452 IPC house trespass is proved against the accused beyond reasonable doubt is accepted for the reasons hereinafter mentioned. In order to prove the offence under Section 452 IPC the prosecution is under legal obligation to prove (1) House trespass with intention to cause hurt or to cause any assault or with intention to wrongfully restrain any person or putting the person in any fear of hurt or assault. In present case it is proved on record beyond reasonable doubt as per testimony of prosecutrix that accused entered into the residential house of prosecutrix aged 20 years with criminal intention to commit the offence of sexual assault. It is proved on record that accused put the prosecutrix in fear of hurt in her residential house and thereafter accused dragged the prosecutrix in cattle shed and attempted to commit rape upon the prosecutrix. We are of the opinion that offence under Section 452 IPC is proved against the accused beyond reasonable doubt,

14. Submission of learned Additional Advocate General appearing on behalf of State that prosecution proved beyond reasonable doubt that accused had committed the offence punishable under Section 506 (1) IPC is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the testimony of prosecutrix.

Prosecutrix did not state in her testimony in positive manner that accused criminally intimidated her or threatened her to kill her or threatened her to cause hurt. In absence of the fact that accused did not threat the prosecutrix in any manner we are of the opinion that it is not expedient in the ends of justice to convict the accused under Section 506 IPC. We are of the opinion that learned trial Court has rightly acquitted the accused for offence under Section 506 IPC.

15. Another submission of learned Additional Advocate General that prosecutrix proved beyond reasonable doubt the offence under Section 3 (1) (xii) of SC and ST (Prevention of Atrocities) Act 1989 is accepted for the reasons hereinafter mentioned. It is proved on record beyond reasonable doubt that in present case prosecutrix belonged to scheduled caste. As per certificate issued by competent authority Ext.PW6/C prosecutrix belonged to Lohar caste which falls under scheduled caste category and accused belonged to Rajput caste which falls under non-scheduled caste category. Certificate Ext.PW6/C issued by competent authority remained unrebutted on record. It is also proved on record that residential houses of prosecutrix and accused are situated nearby and it is also proved on record beyond reasonable doubt that accused belonging to Rajput caste was in position to dominate the prosecutrix who belonged to scheduled caste and it is also proved on record that accused used that position to exploit the prosecutrix sexually to which she would not have otherwise agreed. It is proved on record that prosecutrix was student of BBA and age of prosecutrix at the time of incident was 20 years and age of accused at the time of incident was 29 years and accused was also a married person. Even accused did not put any question to prosecutrix or any prosecution witness that present case was consent case of prosecutrix. It is well settled law that Courts are under legal obligation to frame the opinion as per facts proved on record and it is well settled law that trial Court cannot frame opinion as per assumption and presumption in criminal case.

16. Submission of learned defence Advocate appearing on behalf of accused that there were two doors in the residential room of prosecutrix. One door was of iron wire and other was of wooden and prosecutrix voluntarily opened the wire door as well as wooden door and present case is a case of consent and on this ground appeal filed by State be dismissed is rejected being devoid of any force. Accused did not put any suggestion to prosecutrix when she appeared in witness box that prosecutrix had opened the outer wire door and inner wooden door voluntarily in order to permit the accused to enter into her residential house. It is not the case of accused that prosecutrix voluntarily opened outer wire door and inner wooden door. We are of the opinion that forcible entry of accused in room of prosecutrix is proved as per testimony of prosecutrix and testimony of prosecutrix that accused forcibly entered into her residential house is also trustworthy reliable and inspire confidence of Court. There is no reason to disbelieve the testimony of prosecutrix to this effect.

17. Another submission of learned defence Advocate appearing on behalf of accused that photographs placed on record clearly prove that salwar and underwear of prosecutrix thrown on floor were kept in very orderly manner and one pair of slippers of accused were also kept in orderly manner inside the room clearly prove the case of consent and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. We are of the opinion that as per Section 59 of Indian Evidence Act 1872, all facts except the contents of documents could be proved by way of direct oral evidence. In present case prosecutrix in her testimony proved beyond reasonable doubt that when accused entered into her room prosecutrix aged 20 years struggled with accused for 10-15 minutes and thereafter accused gagged the mouth of prosecutrix and threw the prosecutrix on bed. It is proved beyond reasonable doubt that thereafter accused

who was married person removed the salwar of prosecutrix and underwear of prosecutrix who was aged 20 years and who was student at the time of incident and on these facts testimony of prosecutrix remained unrebutted on record. Even accused did not appear in witness box in order to rebut the above said testimony of prosecutrix. Accused did not appear in witness box as a defence witness as required under Section 315 of Code of Criminal Procedure 1973 in order to rebut testimony of prosecutrix. It is well settled law that photographs are only corroborative evidence in order to prove the facts and it is well settled law that direct oral eye evidence is substantive evidence. It is well settled law that when there is conflict between direct substantial oral evidence and corroborative evidence then direct substantial oral evidence always prevails.

18. Submission of learned Advocate appearing on behalf of accused that as per prosecution story there was struggle between accused and prosecutrix for 10-15 minutes in the room and prosecutrix did not sustain any injury and accused also did not sustain any injury and on this ground appeal filed by State be dismissed is rejected being devoid of any force. It is not the case of prosecution that prosecutrix was in possession of some sharp edged weapon. It is not the case of prosecution that accused was also holding any sharp edged weapon in his hand. In present case it is proved on record that prosecutrix had sustained linear abrasion of the length of 2.5 cm on the right side of back just below scapula 8 cm from spine reddish in colour. It is proved on record that prosecutrix had sustained contusion of the size of 2 cm x 1.5 cm over medial side of right thigh just above knee reddish blue in colour. It is also proved on record beyond reasonable doubt that prosecutrix had also sustained abrasion of the size of 0.25 cm x 0.25 cm over right third toe on medial side reddish in colour. Age of prosecutrix at the time of incident was 20 years and prosecutrix was student of BBA in Mandi College and age of accused was 29 years at the time of incident. We are of the opinion that abrasions and contusions sustained by prosecutrix at the time of incident clearly prove that prosecutrix had struggled with accused as alleged by prosecution to save her dignity.

19. Another submission of learned defence Advocate appearing on behalf of accused that if the intention of accused was to commit the rape he would commit the rape inside the room itself and he would not drag the prosecutrix to cowshed and on this ground appeal filed by State be dismissed is rejected being devoid of any force. We are of the opinion that accused had dragged the prosecutrix to cattle shed because entry of any other person in cattle shed at the time of committing rape was not possible and we are of the opinion that entry of any third person in residential house of prosecutrix at any point of time was possible. We are of the opinion that accused had dragged the prosecutrix in cattle shed just to avoid intervention of any third person during the period of commission of rape.

20. Another submission of learned Advocate appearing on behalf of accused that there was no occasion that buttons of sweater of prosecutrix and laces of shirt of prosecutrix would broken on the way to cowshed from residential house of prosecutrix and on this ground appeal filed by State be dismissed is rejected being devoid of any force. Prosecutrix has specifically stated in her testimony that when accused dragged prosecutrix forcibly from residential room to cattle shed which was situated nearby then buttons of sweater of prosecutrix and laces of her shirt were broken. Even as per seizure memo broken buttons of sweater and laces of shirt were took into possession and on this fact testimony of prosecutrix inspires confidence of Court. There is no reason to disbelieve the testimony of prosecutrix. Prosecution has proved the facts of broken buttons of sweater and laces of shirt of prosecutrix by way of oral testimony of prosecutrix and other recovery witnesses. There is no evidence on record that buttons of sweater and laces of shirt were planted by any other person in order to falsely implicate the accused in present case because immediately after

incident many villagers assembled in the residential house of prosecutrix and police officials also reached at the spot on the same day of incident after short interval.

21. Another submission of learned Advocate appearing on behalf of accused that there are about 20 houses at a distance of 100 metres from the residential house of prosecutrix and it was broad day light and time was 2.30/3 PM and it was not possible that accused would remove the salwar and underwear of prosecutrix and then would take her to a cowshed at a distance of 10 metres in naked position is rejected being devoid of any force for the reasons hereinafter mentioned. There is no evidence on record that some other person was also available at the spot or nearby the spot when accused removed the salwar and underwear of prosecutrix in room and dragged the prosecutrix to cowshed which was situated at a distance of 10 metres in naked position. We are of the opinion that findings cannot be given by criminal Court on the basis of assumption and presumption in criminal case but findings should be given on basis of proved facts only.

22. Another submission of learned Advocate appearing on behalf of accused that prosecutrix did not raise alarm when she dragged from her residential house to cattle shed to attract the villagers or neighbours and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. Prosecutrix has specifically stated in positive manner that she raised cries but her mouth was gagged by accused. Distance between residential room and cowshed is merely of 10 metres and a person can cover the distance of 10 metres within 3-4 minutes and there is no evidence on record in order to prove that within those 3/4 minutes when prosecutrix was dragged from her residential house to cattle shed some other person was also present in the path or nearby her residential house.

23. Another submission of learned Advocate appearing on behalf of accused that there were no bite marks on face and breast and prosecutrix did not resist in cowshed and no injury is caused on face, breast or other part of body of prosecutrix and there was no disturbance of gunny bags and grass kept in cowshed and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. Accused did not cross examine the prosecutrix on the theory of consent and no cross examination has been conducted by accused upon prosecution witnesses that present case was a case of consent and even under Section 313 Cr.P.C. accused did not state that present case was a case of consent. We are of the opinion that criminal Courts are under legal obligation to take out grain from the chaff. We are of the opinion that in absence of any suggestion to prosecution witnesses that case was of consent case it is not expedient in the ends of justice to automatically hold that present case was a case of consent case. On the contrary accused had given the suggestion that present case was a case of enmity because brother of accused namely Vinay Kumar had given statement in criminal case against Jamna Devi who is elder sister of prosecutrix. Accused has given suggestion of enmity in his defence and defence of accused is not that present case is a case of consent.

24. Another submission of learned Advocate appearing on behalf of accused that underwear of accused and slippers of accused were planted against the accused and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. We are of the opinion that simple suggestion of plantation is not sufficient as plantation against the accused qua underwear and slippers should be proved in positive cogent and reliable manner. There is no positive cogent and reliable evidence on record that underwear and slippers of accused were planted just to falsely implicate the accused in present case.

25. Another submission of learned Advocate appearing on behalf of accused that mother of prosecutrix came from Tauni Devi and accused immediately ran away from cowshed and thereafter as per prosecution story prosecutrix came to courtyard in naked condition and narrated the incident to her mother which was highly improbable in view of age of prosecutrix is rejected being devoid of any force for the reasons hereinafter mentioned. We are of the opinion that prosecutrix aged 20 years was so much horrified due to criminal act of accused that she immediately came to her mother and narrated the incident. We are of the opinion that prosecutrix was of high reputed character because hymen of prosecutrix was intact. Hence integrity of prosecutrix could not be doubted by Court. It is proved on record that prosecutrix was not a girl of easy virtue but it is proved on record that prosecutrix was a girl of high moral character keeping in view the proved facts that hymen of prosecutrix even at the age of 20 years was intact.

26. Another submission of learned Advocate appearing on behalf of accused that as per prosecution story PW2 Roshani Devi mother of prosecutrix saw the accused running from cowshed and thereafter verbal altercation took place between the two but Investigating Officer did not say about it when he appeared in witness box and on this ground appeal filed by State be dismissed is rejected being devoid of any force. We are of the opinion that Investigating Officer is not eye witness of incident. Investigating Officer came at the place of incident when the offence was completed by accused. On the contrary Roshani Devi was eye witness of incident and she saw the accused running from cattle shed. Testimony of PW2 Roshani Devi is trustworthy reliable and inspire confidence of Court.

27. Another submission of learned Advocate appearing on behalf of accused that as per prosecution story when mother of prosecutrix came then house was opened and when she entered the room she saw underwear and salwar of prosecutrix and she got confused disturbed and puzzled and thereafter she called her daughter proved case of consent on the part of prosecutrix is rejected being devoid of any force for the reasons hereinafter mentioned. No suggestion of consent of prosecutrix was given to prosecutrix or any other prosecution witness by accused. No reason has been assigned by accused as to why he did not plead the case of consent theory before learned trial Court. On the contrary accused has simply pleaded the case of false implication and enmity.

28. Another submission of learned Advocate appearing on behalf of accused that location of wire door and wooden door showed that room was voluntarily opened by prosecutrix and present case is consent case on part of prosecutrix and on this ground appeal filed by State be dismissed is rejected being devoid of any force for reasons hereinafter mentioned. No suggestion has been given by accused to prosecutrix when prosecutrix appeared in witness box that present case was of consensual sexual intercourse. Even no suggestion has been given to any other prosecution witness that present case was a case of consensual sexual intercourse between prosecutrix and accused. It is not defence of accused that present case was of consensual intercourse. There is no positive cogent and reliable evidence on record in order to prove that present case is of consensual sexual intercourse between accused and prosecutrix. We are of the opinion that findings of learned trial Court qua consensual sexual intercourse are contrary to proved facts placed on record and are based upon assumption and presumption. We are of the opinion that learned trial Court has given wrong findings that present case is a case of consensual sexual intercourse between prosecutrix and accused.

29. Another submission of learned Advocate appearing on behalf of accused that there are material contradictions between testimonies of prosecution witnesses which go to the root of case and on this ground appeal filed by State be dismissed is rejected being devoid of any force. We are of the opinion that minor contradictions are bound to come in

criminal case when testimony of witness is recorded after a gap of time. In present case incident took place on dated 25.2.2009 and testimonies of prosecution witnesses were recorded in the month of June 2009 after a gap of four months. Proved recovery of sweater, salwar and proved recovery of underwear of prosecutrix and underwear and V shape slippers of accused proved on record beyond reasonable doubt that accused attempted to commit rape upon prosecutrix. Recovery of buttons of sweater and strings of shirt of prosecutrix also proved beyond reasonable doubt that accused attempted to rape upon prosecutrix. Even as per Forensic Science Laboratory Himachal Pradesh Junga human semen was found upon shirt of prosecutrix and human blood and semen was also found upon vaginal swab of prosecutrix and blood was also deducted in the vaginal slides of prosecutrix. Even as per Forensic Science Laboratory report Ext.PW8/C placed on record broken buttons and laces matches with buttons and laces of sweater of prosecutrix. Even as per site plan Ext.PW16/A placed on record residential house of prosecutrix and cattle shed and house of accused are situated nearby.

30. Another submission of learned Advocate appearing on behalf of accused that testimonies of prosecutrix and other witnesses are not sufficient to convict the accused in present case is rejected being devoid of any force. It was held in case reported in ***AIR 1973 SCC 944 (Full Bench) titled Jose vs. State of Kerala*** that conviction could be based upon sole testimony of witness if it inspires confidence of Court and if testimony of witness is reliable and trustworthy. Attempt is direct movement towards commission of offence after preparations are made. It is an intentional preparatory action which fails in its object which fails through circumstances independent of the person who seeks its accomplishment. Concept 'Acta exteriora indicant interiora secreta' applies in criminal cases. The fact that prosecutrix aged 20 years was virgin intracta upon date of incident is very strong proof against consent. Finding of learned trial Court that present case is based upon consent on part of prosecutrix in para No. 30 of judgment is illegal and is not based upon proved facts because defence of accused is not based upon consent theory and accused did not cross examine the prosecutrix and other prosecution witnesses on the consent theory on the part of prosecutrix in present case. On the contrary defence of accused is that false case filed on the ground of enmity is not proved on record.

31. In view of above stated facts and case law cited supra appeal is partly allowed. We affirmed the acquittal of accused under Section 376 and 506 IPC and set aside the acquittal of accused under Sections 452 IPC and Section 3 (1) (xii) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act 1989. In addition we convict the accused qua offence punishable under Section 511 read with Section 376 IPC and we also convict the accused under Section 452 IPC and under Section 3 (1) (xii) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act 1989. We modify the judgment passed by learned trial Court to this extent only. Now convict be heard on quantum of sentence qua offences punishable under Sections 511 read with Section 376 IPC and 452 IPC and under Section 3 (1) (xii) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act 1989. Bailable warrants be issued against convict Vipan Kumar in the sum of Rs.50,000/- with two sureties in the like amount and he be produced before us on 2.3.2015 for hearing on quantum of sentence.

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Cr. Appeal No. 493 of 2009

QUANTUM OF SENTENCE

02.03.2015

Present:- Mr. Ashok Chaudhary, Additional Advocate General with Mr.V.S. Chauhan, Additional Advocate General, for the appellant.

Mr. Bhupinder Gupta, Sr. Advocate with Ms.Charu Gupta, Advocate, for the convicted person.

32. We have heard learned Additional Advocate General appearing on behalf of the State and learned defence counsel appearing on behalf of the convicted person upon quantum of sentence.

33. Learned Additional Advocate General appearing on behalf of the State submitted before us that convicted person has committed heinous offence under Sections 511 read with Section 376 IPC and 452 IPC and under Section 3(1) (xii) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act 1989 and deterrent punishment be awarded to the convicted person in order to maintain majesty of law in the society. On the contrary learned defence counsel appearing on behalf of convicted person submitted before us that convicted person is first offender and further submitted that he has two minor children to support and lenient view be adopted in present case.

34. We have considered the submissions of learned Additional Advocate General appearing for the State and learned defence counsel appearing on behalf of convicted person carefully upon quantum of sentence.

35. We are of the opinion that sexual offences are increasing in the society day by day. It is well settled law that murder destroys the body of victim but rapist degrades the soul of female. It was held in case reported in ***AIR 2015 SC 398 titled State of M.P. vs. Surendra Singh*** that sentence should commensurate with gravity of offence. Keeping in view the fact that convicted is first offence and keeping in view the fact that convicted has two minor children to support and keeping in view the offence committed by convicted person and in order to maintain majesty of law in the society we sentence the convicted person as follow:-

Sr. No.	Nature of Offence	Sentence imposed
1.	Offence under Section 511 read with Section 376 IPC	Convicted person is sentenced to undergo rigorous imprisonment for seven years and fine to the tune of Rs.25,000/- (Rupees twenty five thousand only). In default of payment of fine convicted person shall further undergo rigorous imprisonment for one year.

2.	Offence under Section 452 IPC	Convicted person is sentenced to undergo simple imprisonment for three years and fine to the tune of Rs.10,000/- (Rupees ten thousand only). In default of payment of fine convicted person shall further undergo simple imprisonment for six months.
3.	Offence under Section 3(1) (xii) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act 1989	Convicted person is sentenced to undergo simple imprisonment for six months and fine to the tune of Rs.10,000/- (Rupees ten thousand only). In default of payment of fine convicted person shall further undergo simple imprisonment for one month.

36. All sentences shall run concurrently. Period of custody during investigation, inquiry and trial will be set off. Certified copy of this judgment and sentence be also supplied to convicted person forthwith free of cost by learned Registrar (Judicial). Convicted person shall surrender before learned trial Court within one month from today. Case property will be confiscated to State of H.P. after the expiry of period of filing further legal proceedings before the competent Court of law. 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.

Banti .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 94 of 2013
Reserved on: March 03, 2015.
Decided on: March 03, 2015.

Indian Penal Code, 1860- Sections 458, 395, 342 and 120 B- PW-12 was alone in her house – some person came and demanded petrol from her on which was replied that she did not have any petrol- they told her that they were to make payment to her husband on which she requested them to come on the next day- later three persons entered her room- two persons caught hold of her by her arm and the third one from her hair and took her to the veranda outside- she raised hue and cry on which her daughter-in-law came on the spot- one of the persons put a knife on her neck and threatened to kill her- PW-11 and PW-12 were confined in a room and tied their hands with Chunni- they broke open the Almirah and removed all the jewellery, cash, clothes, one suit case, bed sheets, CD player, remote control and dish receiver- subsequently, they went to shop of PW-10 and removed shoes and cash lying in the shop- PW-10 also found that gold and silver ornaments worth Rs. 20,000/- were

missing and cash Rs. 80,000/- were also missing- PW-11 categorically stated that faces of the assailants were muffled below their eyes- she went to the police station where she identified accused 'B' and 'R'- PW-12 stated that she had identified accused 'B' and 'R' from many persons in the lock up- held, that identification in the police station is hit by Section 162 Cr. P.C and cannot be used as a piece of evidence against the accused- no test identification was conducted- since, assailants were not known, therefore, test identification was necessary. (Para-21 to 24)

Cases referred:
Ramkishan Mithanlal Sharma and ors. Vrs. State of Bombay, AIR 1955 SC 104
Gopal and others vrs. State of U.P. & connected matter, (2002) 9 SCC 744
Dilip Mahendra Thapa and others vrs. State of Maharashtra, 2003 Cri. L.J. 4280

For the appellant: Mr. Bhupinder Ahuja, Advocate.
For the respondent: Mr. Neeraj K. Sharma, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 27.11.2012, rendered by the learned Sessions Judge, Sirmour at Nahan, H.P. in Sessions Trial No. 18-ST/7 of 2009, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 458, 395, 342 and 120 B of the IPC, has been convicted and sentenced to undergo simple imprisonment for 6 months under Section 342 IPC. He was further sentenced to undergo RI for a period of 5 years and to pay find of Rs. 5000/- and in default to further undergo simple imprisonment for 6 months under Section 458 IPC. He was further sentenced to undergo rigorous imprisonment for 7 years and to pay a fine of Rs. 10,000/- and in default to undergo simple imprisonment for one year under Section 395 IPC. He was further sentenced to undergo rigorous imprisonment for 2 years and to pay a fine of Rs. 5000/- and in default to undergo simple imprisonment for 6 months under section 120 B IPC. All the substantive sentences awarded were ordered to run concurrently.

2. The case of the prosecution, in a nut shell, is that PW-10 Parma Nand was running a Karyana shop on the road side in his village Timbi. He was residing with his wife PW-12 Chemali, children and mother PW-11 Manso Devi. On 24.11.2008, PW-10 Parma Nand had gone to the house of his sister in Village Dharma. During the intervening night of 24/25.11.2008 at around 1:30 AM, two unknown persons called from outside for "lalaji" and demanded petrol. PW-12 Chemali Devi wife of PW-10 Parma Nand replied that they don't have petrol and then they told her that they were to make payment to her husband. She told them to come on the next day. Thereafter, they demanded water, which she provided through the door grill and took back the tumbler. Later three persons entered the room of PW-11 Manso Devi. Two of them caught hold of her by her arm and the third one from her hair and took her to the veranda outside. When she tried to raise hue and cry, she was threatened by them with dire consequences. On hearing commotion, her daughter-in-law Chemali came out. One of them put a knife on her neck and threatened to kill her if she made noise. Thereafter, both of them were taken inside the room. The assailants had muffled their faces below their eyes. Manso Devi PW-11 and Chemali Devi PW-12, both were confined in a room where children were sleeping and room was bolted from outside. After

some time, they entered again and tied their hands with Chunni. Then, they broke open the Almirah of one of the room and trunk in the third room. They removed all the jewellery, cash, clothes, one suit case, bed sheets, CD player, remote control and dish receiver. The assailants were also joined by their other 2/3 accomplices. After committing dacoity in their house, they went to the shop of PW-10 Parma Nand and broke open the lock of the shop. They removed the shoes and cash lying in the shop. Thereafter, they came down to the house of PW-11 Manso Devi, prepared tea in the kitchen and after taking tea, left the place. PW-11 Manso Devi heard the sound of starting of the vehicle. After coming to know about the theft in their house, in the morning at around 6/7 AM, villagers visited their house. PW-10 Parma Nand was telephonically contacted by the co-villagers and informed about the incident. He rushed to his village. He noticed the Almirah kept in the room of his mother was broken. The gold and silver ornaments worth Rs. 20,000/- were found stolen. Thereafter, he inspected the wooden Almirah of his room. Its bolt was found broken. Rs. 80,000/- were found missing. On 25.11.2008, PW-22 SI Jeet Singh received secret information about the dacoity in the village at the house of PW-10 Parma Nand. He effected the necessary recoveries from the spot. On 26.12.2008, he interrogated 8 accused persons who were arrested in another FIR No. 71 of 2008 in a bank dacoity case. Out of them, four accused, namely, Promod Kumar, Balbir Singh, Ramesh Kumar and Banti were found involved in this case. On 6.1.2009, accused Banti while in police custody made disclosure statement Ext. PW-1/B and on the basis of this disclosure statement, he got CD player Ext. P-6, shoes Ext. P-8 and sweater Ext. P-7 recovered vide memo Ext. PW-5/A. On completion of the investigation, challan was put up after completing all the codal formalities.

3. Accused persons were charge sheeted under Sections 342, 458, 395 and 120 B IPC. They pleaded not guilty and claimed trial. Accused Banti absconded and was declared as Proclaimed Offender. The remaining accused persons were tried and at the end of the trial, the trial Court convicted accused Balbir Singh, Suraj and Bablu alias Nona under Sections 342, 458, 395 and 120 B IPC. This Court vide judgment dated 30.9.2011, in Cr. Appeal No. 33/2011, 64/2011 and 204/2011 acquitted accused Balbir while the appeals filed by Suraj and Bablu were dismissed. Accused Banti was re-arrested and put to trial. During trial, 5 witnesses whose statements were earlier recorded in the absence of this accused were recalled for further examination. His statement was recorded under Section 313 Cr.P.C. He denied the case of the prosecution. The learned trial Court convicted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Bhupinder Ahuja, Advocate for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. Neeraj Sharma, learned Dy. Advocate General, appearing on behalf of the State, has supported the judgment of the learned trial Court dated 27.11.2012.

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

6. PW-1 Balbir Singh testified that the accused Banti had disclosed that he had concealed one CD player, one lady sweater and one sweater in his house. His statement Ext. PW-1/B was recorded by the police. He signed the same.

7. Statements of PW-2 Gulab Singh, PW-3 Jalam Singh and PW-4 Liaq Ram are formal in nature.

8. PW-5 Raju Ram deposed that he alongwith police and accused Banti went to Patiala Sarhind, where they went to the house of accused Banti. Banti produced one CD player, one pair of shoes and one sweater. The said articles were taken into possession vide

memo Ext. PW-5/A. He identified Ext. P-6 CD player, Ext. P-7 sweater and Ext. P-8 shoes. Banti also produced one Panna which was also taken into possession after sealing the same in a packet vide memo Ext. PW-5/B. He identified Panna Ext. P-9.

9. PW-6 Ram Sarup, did not support the case of the prosecution and he was declared hostile. According to him, none had come to him for selling the articles.

10. Statements of PW-7 to PW-9 are formal in nature.

11. PW-10 Parma Nand deposed that on 24.11.2008, he had gone to the house of his sister at village Dharma. He received the information of the dacoity. He returned to his house on the morning of 25.11.2008. The articles of gold and silver and cash of Rs. 20,000/- was found stolen. Cash of Rs. 80,000/- was kept in the Almirah which was also found stolen. The matter was was reported to the police. His mother made statement under Section 154 Cr.P.C. The police prepared the site plan of the house.

12. PW-11 Smt. Manso Devi and PW-12 Chameli are the material witnesses.

13. PW-11 Smt. Manso Devi deposed that his son runs a karyana shop. She was working as Beldar in the department of Horticulture for the last 20-25 years. Her son PW-10 Parma Nand had gone to the house of her sister at Village Dharma. On that night, she was with her daughter-in-law and children. On the intervening night of 24/25.11.2008, at about 1 or 1:30 AM, three persons entered the room in which she was sleeping. Two of them held her by arms and the third one by hair and took her in the verandah outside the room. On hearing her cries, they threatened to kill her. On hearing the commotion, her daughter-in-law Chameli Devi came out and they put a knife on her neck and threatened to kill her in case she also raised noise. They took both of them inside the house. Their faces were muffled just below their eyes. They were confined in a room alongwith the children and the room was bolted from outside. After some time, they tied their hands with Chunnis. Thereafter, they broke open the Almirah in one room and the trunk in the third room. They removed jewellery and cash and clothes and one suit case, bed sheet, CD player. Before that, 2-3 other persons had also joined them. After removing the articles from the rooms, they went in the shop and broke open the lock. They removed shoes and cash lying in the shop. Thereafter, they came down, consumed tea and milk lying in the kitchen. Thereafter, they went up and went away in a vehicle as she heard the noise of a vehicle. At about 6 or 7:00 AM, the villagers came to their house on knowing the commission of theft. According to her, the accused persons might have left at about 3:00 AM. The villagers rang up her son and he came after some time. The police was informed by the villagers. The police came at about 8 or 8:30 AM. Her statement Ext. PW-11/A was recorded. The police called her and her daughter-in-law Chameli to PS Paonta, upon which she alongwith her daughter-in-law and son Parma Nand visited PS Paonta. The police had arrested few persons and asked them to identify if any of them was involved in the commission of the theft. She identified accused Banti and Ramesh as persons involved in the theft. In her cross-examination, she deposed that after the occurrence, accused Banti was seen by her in the Police Station, Paonta.

14. PW-12 Chameli Devi deposed that on 24.11.2008, her husband had gone to Village Dharma to meet his sister. She alongwith her mother-in-law and children were at home. At about 12:00 in the mid-night, she heard the voice that "*Lala Ji Petrol Chaiaah".* At this, she said from inside the room that patrol is not with them. Then they said that they have come to make the payment to *'Lala'*. She told them that the payment be made tomorrow. One of them asked for water for drinking. She went to the kitchen and without opening the gate of the house, she gave glass of water to the said person. One person was

also standing behind him. There was moon light at that time. After taking glass from the unknown person, she got inside the room. After few minutes, she heard the cries of her mother-in-law and came out of her room. She came out in the verandah where two persons were found standing. One of them put knife or dagger type weapon on her neck and threatened her that in case she will raise noise, they will kill her and her family members. Then, she alongwith her mother-in-law and children were confined in a room and their hands were tied with chunnies. The accused started looting their house. In her examination-in-chief, she deposed that after about one month of the incident, she alongwith her mother-in-law was called to PS Paonta, where the police had detained few persons in the lock up and they were asked to identify among those persons, the persons involved in the commission of theft in their house. She identified accused Banti, present in the Court alongwith other accused Ramesh.

15. PW-13 Dalip Singh has taken the photographs Ext. P-13/A1 to Ext. P-13/A-10.

16. Statements of PW-14 to PW-20 are formal in nature.

17. PW-21 ASI Kamal Nain deposed that on 19.12.2008, at about 3:00 AM, he got a wireless message from PS Shillai regarding dacoity in H.P. Co-operative Bank at Shillai. He was informed that the accused persons had also taken away the chest of the bank alongwith cash in a vehicle. SDPO Paonta directed them to block the exit roads. He had blocked the road named Killore border Uttrakhand alongwith his employees at about 5:30 PM. A Pick-Up came from the side of Uttrakhand which was stopped by them. On inquiry, a person sitting nearby the driver disclosed his name as Ramesh Kumar and informed them that he deals in the trade of Buffalo and was resident of Punjab. He was holding a bag of black colour in his hands. On asking, the same was opened and found containing huge currency notes. Nine persons were sitting in the Pick-up van. Again stated that only 3 persons were the same named Ramesh Parmod etc. These persons attacked the Constables who were sitting in the Pick-up van. Three persons were apprehended and remaining had escaped from the spot.

18. PW-22 SI Jeet Singh, deposed that he reached at Village Timbi at about 8:00 PM along with other police officials on receipt of secret information from unknown person on 25.11.2008. The statement of Manso Devi was recorded under Section 154 Cr.P.C. He also recorded the statements of Parma Nand, Chameli Devi and Gulab Singh. He took into possession three small purses and a small jewellery box from the room in which dacoity was committed vide memo Ext. PW-11/C. He also got prepared the spot map.

19. PW-23 Hari Ram, testified that he received the file of the present case for further investigation on 25.12.2008. He recorded the statement of Parma Nand, Chameli Devi and Manso Devi. On 26.12.2008, he interrogated 8 accused who were arrested in connection with FIR No. 71/2008 in a Bank Dacoity case. Four accused, namely, Parmod, Balbir, Ramesh and Banti were found involved in the commission of this crime. On 8.1.2009, accused Banti led the police party to Roshan Colony, Old Rajpura in his house from where the Godrej Almirah, CD Player Ext. P-6, shoes Ext. P-8, ladies sweater Ext. P-7 were recovered and taken into possession vide memo Ext. PW-5/A. The accused also got recovered iron Panna from his house which was taken into possession vide memo Ext. PW-5/B. Iron Panna is Ext. P-9. In his cross-examination, he has categorically admitted that he did not call Manso Devi and Chameli Devi for identification of the accused.

20. According to the contents of *rukka* Ext. PW-11/A, recorded under Section 154 Cr.P.C., PW-11 was working as Beldar. She was staying with her son Parma Nand (PW-

10) and her daughter-in-law Chameli Devi (PW-12) and her children. Her son had gone to visit his sister Kamla Devi on 24.11.2008. She alongwith her daughter-in-law were in her house. At about 1:00 AM on 25.11.2008, her room was knocked by unknown persons. She was dragged out of the room towards the verandah. She was threatened. She aongwith her daughter-in-law and children were confined to one room. Thereafter, theft took place.

21. What emerges from Ext. PW-11/A is that the door was knocked by unknown persons. PW-11 Manso Devi in her examination-in-chief has categorically admitted that the faces of the accused persons were muffled below their eyes. After theft in their house, another theft took place in Shillai 25 days later. The police called her and her daughter-in-law Chameli to Police Station Paonta Sahib. She alongwith her daughter-in-law Chameli and son Parmanand visited PS Paonta. The police had arrested few persons and asked them to identify if any of them was involved in the commission of the theft. She identified accused Banti and Ramesh as persons involved in the theft. Similarly, PW-12 Chameli, stated in her examination-in-chief that after about one month of this incident, she alongwith her mother-in-law were called to PS Paonta where the police had detained few persons in the lock up and they were asked to identify among those persons, the persons involved in the commission of theft in their house. She identified accused Banti present in the Court alongwith other accused Ramesh. However, PW-23 SI Hari Ram in his cross-examination, has categorically admitted that he had never called Manso Devi and Chameli Devi for identification of the accused. The alleged identification of the accused is in the Police Station. Their identification in the Police Station is hit under Section 162 Cr.P.C. It could not be used as a piece of evidence against the accused. The learned trial Court has failed to take this vital question into consideration while convicting the accused. The learned trial Court has erred in relying heavily upon the disclosure statement made by the accused to convict him. PW-23 SI Hari Ram, as noticed hereinabove, has admitted that no test identification parade was conducted. The faces of the accused, as per PW-11 Manso Devi were muffled just below the eyes. They were called to the Police Station and they have been made to identify the accused in the Police Station at Paonta Sahib. Thus, the identification of the accused has not been proved and the subsequent disclosure statement could not be taken into consideration to convict the accused. Since, the accused were not known to the parties, the test identification parade was necessary in this case. The evidence of identification of the accused was inadmissible under Section 162 Cr.P.C. The matter is required to be considered yet from another angle. According to PW-11 Manso Devi, the villagers had informed the police and police came to their house at 8 or 8:30 AM. PW-10 Parma Nand deposed that the matter was reported to the police. However, PW-22 Jeet Singh has categorically stated that he visited the spot on the basis of the secret information received. It further casts doubt on the case of the prosecution.

22. Their lordships of the Hon'ble Supreme Court in the case of ***Ramkishan Mithanlal Sharma and ors. Vrs. State of Bombay,*** reported in ***AIR 1955 SC 104,*** have held that in a case where the whole of the identification parades were directed and supervised by the police officers and the role of the Panch witnesses was minor, the test identification attracted the operation of Section 162 and the evidence of identification at those parades was inadmissible against the accused. It has been held as follows:

> "19. .....The distinction therefore which has been made by the Calcutta and the Allahabad High Courts between the mental act of identification and the communication thereof by the identifier to another person is quite logical and such communications are tantamount to statements made by the identifiers to a police officer in the course of investigation and come within the ban of section 162. The physical fact of

identification has thus no separate existence apart from the statement involved in the very process of identification and in so far as a police officer seeks to prove the fact of such identification such evidence of his would attract the operation of section 162 and would be inadmissible in evidence, the only exception being the evidence sought to be given by the identifier him- self in regard to his mental act of identification which he would be entitled to give by way of corroboration of his identification of the accused at the trial. We therefore approve of the view taken by the Calcutta and Allahabad High Courts in preference to the view taken by the Madras High Court and the Judicial Commissioner's Court at Nagpur.

.....

21. This argument would have availed the learned Attorney- General if after arranging the test identification parade the police had completely obliterated themselves and the Panch witnesses were left solely in charge of the parade. The police officers would certainly arrange the parade, would call the persons who were going to be mixed up with the accused in the course of the parade and would also call the Panch witnesses who were to conduct the parade. But once the Panch witnesses were called for the purpose the whole of the process of identification should be under the exclusive direction and supervision of the Panch witnesses.

If the Panch witnesses thereafter explained, the purpose of the parade to the identifying witnesses and the process of identification was carried out under their exclusive direction and supervision, the statements involved in the process of identification would be statements made by the identifiers to the Panch witnesses and would be outside the purview of section 162.

In the case of the, identification parades in the present case however the police officers were present all throughout the process of identification and the Panch-witnesses appear only to have been brought in there for the purpose of proving that the requirements of law in the matter of holding the identification parades were fully satisfied. Not only were the police officers present when the identifying witnesses were brought into the room one after the other and identified the accused, they also prepared 'the Panchnama, read out and explained the contents thereof to the Panch witnesses, and also attested the signatures of the Panch witnesses which were appended by them at the foot of the Panchnama.

The whole of the identification parades were thus directed and supervised by the police officers and the Panch witnesses took a minor part in the same and were there only for the purpose of guaranteeing that the requirements of the law in regard to the holding of the identification parades were satisfied. We feel very great reluctance in holding under these, circumstances that the statements, if a any, involved in the process of identification were statements made by the indentifiers to the Panch witnesses and not to the police officers as otherwise it will be easy for the police officers to circumvent the provisions of section 162 by formally asking the Panch witnesses to be present and contending that the statements, if any, made by the identifiers' were to the Panch witnesses and not to themselves. We are therefore of the opinion that the test identification

parades in regard to the accused 4 which were held between the 16th January, and the 22nd January, 1952, attracted the operation of section 162 and the evidence of identification at those parades was inadmissible against accused 4."

23. In the case of ***Gopal and others vrs. State of U.P.*** & connected matter, reported in ***(2002) 9 SCC 744,*** their lordships have held that the test identification parade becomes necessary for the investigating officer if eye witnesses questioned by him had not given any indication of identity of the assailants. It has been held as follows:

> "12. Learned counsel, alternatively, contended that a test identification parade should have been conducted by the investigating officer and non-conduct of such a parade had impaired the worth of the evidence of the eyewitnesses. The test identification parade would have been necessary for the investigation officer if the eyewitnesses questioned by him had not given any indication of the identity of the assailants. In the present case we have noticed that PW-1 has given details of the names of the assailants in the FIR itself. In such a situation no investigating officer would normally resort to a test identification parade."

24. In the case of ***Dilip Mahendra Thapa and others vrs. State of Maharashtra,*** reported in ***2003 Cri. L.J. 4280,*** the learned Single Judge of the Bombay High Court has held that when no test identification parade was held and the witnesses claimed to have identified appellants when they were alighting from police van, it amounts to statement made to police and is hit by Section 162 Cr.P.C. and such an identification evidence is valueless. It has been held as follows:

> "5. In these three judgments, the Supreme Court has held that, when a witness identifies the accused in the Court, when he happens to be giving evidence in the trial and when the accused happens to be a stranger to him, such evidence of identification becomes valueless in the absence of test identification parade. In this case, no tests identification parade has been held. The evidence which has been adduced by the prosecution is that, P.W. Raju Chandwani saw all these appellants in Vakola Police station, when they were alighting from the police van and nothing more than that. In the matter of Ramkishan Mithanlal Sharma and Ors. v. State of Bombay, , the Supreme Court has held that the identification of the witnesses in the presence of police, which amounts to a statement made to such police officers during the course of investigation, is hit by provisions of Section 162 of Criminal Procedure Code. Thus, the evidence of P.W. Raju Chandwani in context with identification of the appellants before the police, as indicated above, is absolutely of no use for prosecution. If that is ignored, what remains is the statement made on oath by P.W. Raju Chandwani identifying the appellants in the Court. The incident pertains to the year 1994 and this witness was giving evidence in the year 1998. When this witness was giving evidence after nearly 4 years, and when all the appellants were strangers, it is not a good evidence for basing conviction.
>
> 6. The learned trial Judge has not considered the evidence in proper perspective and has dealt with the evidence in a sweeping way and therefore, he has landed in error of accepting that evidence and basing conviction on it. When the judgment is studded with such reasons leading to the conclusion of the guilt of the appellants, that judgment cannot be upheld. It will have to

be set aside. The appellants will have to be acquitted of the charge levelled against them."

25. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 27.11.2012, rendered by the learned Sessions Judge, Sirmaur at Nahan, H.P., in Sessions trial No. 18-ST/7 of 2009, is set aside. The accused is acquitted of the charges framed under Sections 458, 395, 342 and 120 B IPC, by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

26. The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

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

Kashmir Singh. ...Petitioner.
Versus
State of Himachal Pradesh and others. ...Respondents.

CWP No. : 8015/2014
Reserved on: 9.1.2015

Constitution of India, 1950- Article 226- Petitioner was convicted of the commission of offence punishable under Section 302 of IPC- he filed an application for premature release which was rejected- he filed a Writ Petition which was disposed of with a direction to the Competent Authority to reconsider his claim - the case of the petitioner was recommended by Sentence Review Board, however, his case was rejected by the Cabinet- petitioner had undergone 25 years 4 months and 27 days imprisonment with remissions as on 28.9.2014- his case is also covered under the Jail Manual- a life convict under Section 433-A of Cr.P.C. is required to undergo 14 years of actual imprisonment- total period cannot exceed 20 years- his case was rejected on the ground that he had committed a heinous crime – however, his case did not fall within the definition of heinous crime under the Jail Manual - therefore, petitioner ordered to be released on the production of the certified copy of the order.(Para- 4 to 15)

Administrative Law- Principle of natural justice- State Sentence Review Board should afford oral and personal hearing to the convict before taking a final decision- State directed to prepare suitable guidelines within three months. (Para-11 to 13) Decided on: 3.3.2015

Cases referred:

Laxman Naskar vs. Union of India and others, AIR 2000 SC 986

Oil and Natural Gas Corporation Limited vs. Western Geco International Limited, (2014) 9 SCC 263

Osborn V Parole Board, 2014 (1), The All England Law Reports 369, the U.K. Supreme Court

For the petitioner : Mr. Bimal Gupta, Advocate.
For the Respondents : Mr. Ramesh Thakur, Asstt. A.G.

The following judgment of the Court was delivered:

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

Petitioner was convicted by the learned Sessions Judge, Una on 30.11.1994 under section 302 of the Indian Penal Code for the commission of murder of Tilak Raj and sentenced to life imprisonment and to pay fine of Rs. 3,000/- and on failure to deposit the fine amount, he was further directed to undergo rigorous imprisonment for one year. Petitioner preferred an appeal against the judgment dated 30.11.1994 rendered by the Sessions Judge before this Court by way of Criminal Appeal No. 218/1994. It was dismissed by this Court on 30.11.1995.

2. Petitioner's case for premature release was rejected vide letter dated 13.7.2013. Petitioner feeling aggrieved by the order dated 13.7.2013, approached this Court by way of CWP No.8025 of 2013. Learned Single Judge disposed of the petition on 6.6.2014 and directed the competent authority to reconsider the claim of the petitioner by passing a speaking order. In sequel to judgment dated 6.6.2014, case of the petitioner was recommended by the State Sentence Review Board in its meeting held on 29.11.2014. The recommendations made by the State Sentence Review Board, qua the petitioner, read as under:

> **"Life convict Kashmir Singh son of Sh. Udham Singh aged 66 years R/O Village Nangal Jariala, P.S. Gagret, Tehsil and District Una, H.P. was convicted by the Ld. Sessions Judge, Una (H.P.) on 30.11.1994. On 15.4.1977 at about 8.00 P.M. while Smt. Harmesh Devi and her brother-in-law Tilak Raj were coming home after milking the cattle. On their reaching the village pond, the convict and his co-accused Raj Kumar were already standing there and started misbehaving with Harmesh Devi with an intention to molest her, when Tilak Raj intervened, the convict gave a knife blow in his abdomen, which resulted in instant death of Tilak Raj. The co-accused Raj Kumar inflicted injuries to Harmesh Devi. On raising alarm both convicts ran away from the spot. the matter was reported to the police. The police apprehended Raj Kumar but the convict Kashmir Singh evaded arrest and was declared proclaimed offender. On the conclusion of the trial, accused Raj Kumar was convicted and sentenced for an offence under section 324 IPC. However, the convict Kashmir Singh was arrested later on by the police and on completion of investigation was found guilty of murder and was sentenced to life imprisonment by the Ld. Sessions Judge, Una (H.P.) vide judgment dated 30.11.1994.**
>
> **The board, while considering the premature release case of the convict perused the copy of the judgment, the observations of the District authorities etc. The board, after considering the facts, as per record, observed that the convict has undergone 16 years, 02 months and 25 days of actual sentence as on 8.8.2014 and has also earned more than I years of remission. The District authorities, i.e. the District Magistrate and Superintendent of Police, Una (H.P.) concerned Gram Pachayat and the Addl. Director-cum-Chief Probation Officer, S.C., O.B.C. & Minority Affairs, Himachal Pradesh have favoured his premature release. Moreover, the conduct of the convict inside the jail**

is very good. Keeping in view all these circumstances, the Board, therefore, decided to recommend his case for premature release."

However, fact of the matter is that despite the petitioner's case favourably recommended by the State Sentence Review Board for premature release, his case was rejected by the Cabinet in its meeting held on 24.7.2014 and the petitioner was conveyed the decision on 6.8.2014.

3. Petitioner has undergone 25 years 4 months and 27 days with remissions as on 28.9.2014. Case of the petitioner was also covered under the Jail Manual for the Superintendence and Management of the Jails in Himachal Pradesh. According to the Jail Manaul, the case of premature release is to be considered provided the convict has maintained good conduct in jail and for this purpose good conduct means that he has not committed any jail offence for a period of five years prior to the date of his eligibility for consideration for release as per para 1.1 and the case for premature release is required to be considered if the Government is satisfied that in the event of release of the convict there is no likelihood of the convict committing a crime of breach of peace in any way connected with the circumstances of the crime for which he was originally convicted.

4. Respondent-State had constituted State Sentence Review Board vide letter dated 12.8.1983 and the letter dated 12.8.1983 was superseded vide letter dated 28.2.2001 Annexure P-2. Para 3 of the letter dated 28.2.2001 has been substituted vide letter dated 15.2.2003 Annexure P-3. The State Sentence Review Board has discretion to release a convict at an appropriate time in all cases considering the circumstances in which the crime was committed and other relevant facts like:

a) Whether the convict has lost his potential for committing crime considering his overall conduct.

b) The possibility of reclaiming the convict as a useful member of the society; and

c) Socio-economic condition for the convict's family.

The life convict covered under section 433-A of the Code of Criminal Procedure is required to undergo 14 years of actual imprisonment before release. The total period of incarceration, including remissions in such cases, should ordinarily not exceed 20 years. The magnitude, brutality and gravity of offence for which the convict was sentenced to life imprisonment have also to be taken into consideration. In certain categories of convicted prisoners undergoing life sentence would be entitled to be considered for premature release only after undergoing imprisonment for 20 years, including remission. The period of incarceration, including remission even in such cases should not exceed 25 years. The detailed procedure for processing of the case for the State Sentence Review Board has been provided in letter dated 28.2.2001 Annexure P-2. The criteria and guidelines for the State Sentence Review Board have also been provided in letter dated 28.2.2001.

5. It is evident from the contents of the proceedings of the State Sentence Review Board dated 29.11.2014 that case of the petitioner has been recommended favourably for premature release taking into consideration his conduct inside the jail and all circumstances. Case of the petitioner has been rejected vide order dated 6.6.2014. The gist of order dated 6.6.2014 reads as under:

> **"The case of life convict Kashmir Singh was re-considered. It was observed that he is a life convict u/s 302 of the IPC, who had committed the heinous crime when he was stopped by the victim from molesting a woman. His premature release would send a wrong signal in the society. Therefore, his premature release was not approved in view of the gravity of the offence and circumstances in which the said offence had been committed."**

6. We have gone through the reasons assigned for not releasing the petitioner. Premature release case of the petitioner does not fall under heinous crime as per Jail Manual for the Superintendence and Management of the Jails in Himachal Pradesh. Petitioner's case has been rejected merely on the ground that he has committed heinous crime when he was stopped by the victim from molesting a woman. The heinous crime is one as described in the Jail Manual. The recommendations made by the State Sentence Review Board should be taken into consideration since a detailed procedure has been laid down the manner in which recommendations are to be made by the Board. The State Sentence Review Board before recommending the case has to take into consideration the recommendations made by the District Magistrate/Superintendent of Police after holding due inquiry. The Superintendent Jail is also required to make a reference to the Chief Probation Officer of the State. The Chief Probation Officer is required either to hold or cause to hold an inquiry through a Probation Officer in regard to the desirability of premature release of the prisoner having regard to his family members and the society prospects of the prisoner for rehabilitation and leading a meaningful life as a good citizen. After the receipt of the report/ recommendations of the District Magistrate/Superintendent of Police and Chief Probation Officer, the Superintendent of Jail is required to put up the case to the Director General/Addl. Director General/Inspector General of Prisons, as the case may be, at least one month in advance of the proposed meeting of the State Sentence Review Board. The State Sentence Review Board, thus, is required to take into consideration the recommendations of the District Magistrate/ Superintendent of Police and Chief Probation Officer. The Board is required to take into consideration general principles of amnesty/remission of the sentences as laid down by the State Government or by Courts as also the earlier precedents in the matter. The paramount consideration before the State Sentence Review Board is the welfare of the prisoner and the society at large. The Board ordinarily should not decline premature release of prisoner merely on the ground that the police has not recommended his release on certain farfetched and hypothetical premises. Though the Board is required to take into account the circumstances in which the offence was committed by the prisoner and whether he has the probability and is likely to commit similar or other offence again.

7. Their Lordships of the Hon'ble Supreme Court in ***Laxman Naskar*** vs. ***Union of India and others***, AIR 2000 SC 986 have held that rejecting prayer for premature release on extraneous consideration, i.e. on ground of objections by police is improper. Their Lordships have held as under:

> **"3. It is settled position of law that life sentence is nothing less than lifelong imprisonment and by earning remissions a life convict does not acquire a right to be released prematurely; but if the Government has framed any rule or made a scheme for early release of such convicts then those rules or schemes will have to be treated as guidelines for exercising its power under Article 161 of the Constitution and if according to the Government policy instructions in force at the relevant time the life convict has already undergone the sentence for**

the period mentioned in the policy instructions, then the only right which a life convict can be said to have acquired is the right to have his case put up by the prison authorities in time before the authorities concerned for considering exercise of power under Article 161 of the Constitution. When an authority is called upon to exercise its powers under Article 161 of the Constitution that will have to be done consistently with the legal position and the Government policy/instructions prevalent at that time.

5. All the "life convicts" before us have completed continued detention of 20 years including remission earned.

From the counter filed by the State, we find that the Government has also framed guidelines for this purpose. To consider the prayer for premature release of the "life convicts" , police report was called for on the following points :-

(i) Whether the offence is an individual act of crime without affecting the society at large;

(ii) Whether there is any chance of future recurrence of committing crime;

(iii) Whether the convict has lost his potentiality in committing crime;

(iv) Whether there is any fruitful purpose of confining this convict any more;

(v) Socio-economic condition of the convict's family.

6. Though the police report did not cover all the above points, the prayer of "life convicts" for premature release was rejected mainly on the ground of objections by police. The police had only reported about the chances of the petitioners committing crime again. It becomes apparent from the record that the Government did not consider the prayer for premature release as per the rules. The Government did not pay sufficient attention to the conduct-record of the petitioners while in jail nor did it consider whether they had lost their potentiality in committing crime. The relevant aspect, namely, that there is no fruitful purpose in confining them any more was also not considered nor the socio economic conditions of the convict's family were taken into account. Thus the orders of the Government suffer from infirmities and are liable to be quashed."

8. In the instant case, as noticed hereinabove, petitioner was entitled to premature release taking into consideration the recommendations made by the State Sentence Review Board. Petitioner has already undergone his mandatory minimum sentence required under the provisions of the Code of Criminal Procedure as well as Jail Manual framed by the State.

9. The decision taken by the competent authority must be supported by reasons.

10. Their Lordships of the Hon'ble Supreme Court in ***Oil and Natural Gas Corporation Limited*** vs. ***Western Geco International Limited***, (2014) 9 SCC 263 have held that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Their Lordships have further held that application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. Their Lordships have further held that perversity or irrationality of decisions is to be tested on the touchstone of the *Wednesbury* principle of reasonableness. Their Lordships have held as under:

> **"25. It is true that none of the grounds enumerated under Section 34(2)(a) were set up before the High Court to assail the arbitral award. What was all the same urged before the High Court and so also before us was that the award made by the arbitrators was in conflict with the "public policy of India" a ground recognised under Section 34(2)(b)(ii) . The expression "Public Policy of India" fell for interpretation before this Court in ONGC Ltd. v. Saw Pipes Ltd., 2003 5 SCC 705 and was, after a comprehensive review of the case law on the subject, explained in para 31 of the decision in the following words:**
>
> **"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case10 it is required to be held that the award could be set aside if it is patently illegal. The result would be award could be set aside if it is contrary to:**
>
> **(a) fundamental policy of Indian law; or**
>
> **(b) the interest of India; or**
>
> **(c) justice or morality, or**
>
> **[pic](d) in addition, if it is patently illegal.**
>
> **Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."**
>
> **35. What then would constitute the 'Fundamental policy of Indian Law' is the question. The decision in Saw Pipes Ltd. does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country.**

> **Without meaning to exhaustively enumerate the purport of the expression "Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi judicial determination lies in the fact so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge."**

11. We are also of the opinion that the State Sentence Review Board before taking a final decision should afford oral/ personal hearing to the convict. It is his legitimate right to bring all the relevant facts to the notice of the State Sentence Review Board. The decision to grant remission or not to grant remission affects the freedom of convict. The decision making process would have more effective if the oral hearing is provided. The convict can usefully contribute in the decision making process.

12. Recently, in ***Osborn*** V ***Parole Board***, 2014 (1) The All England Law Reports 369, the U.K. Supreme Court has held that in order to comply with common law standards of procedural fairness, the board should hold an oral hearing before determining an application for release, or for transfer to open conditions, whenever fairness to the prisoner required such a hearing in the light of the facts of the case and the importance of what was at stake for the purpose of release on licence. Their Lordships have held as under:

> **"In order to comply with common law standards of procedural fairness, the board should hold an oral hearing before determining an application for release, or for a transfer to open conditions, whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake. By doing so the board will also fulfill its duty under section 6(1) of the Human Rights Act 1998 to act compatibly with article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in circumstances where that article is engaged. The circumstances in which an oral hearing will be necessary, but such circumstances will often include a) Where facts which appear to the board to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility. b) Where the board cannot otherwise properly or fairly make an independent assessment of risk, or of the means by which it should**

be managed and addressed. c) Where it is maintained on tenable grounds that a face to face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary in order to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him. d) Where, in the light of the representations made by or on behalf of the prisoner, it would be unfair for a "paper" decision made by a single member panel of the board to become final without allowing an oral hearing. In order to act fairly, the board should consider whether its independent assessment of risk, and of the means by which it was to be managed and addressed, could benefit from the closer examination which an oral hearing could provide. The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute. The question whether fairness requires a prisoner to be given an oral hearing was different from the question whether he had a particular likelihood of being released or transferred to open conditions, and cannot be answered by assessing that likelihood. When dealing with cases concerning recalled prisoners, the board should bear in mind that the prisoner had been deprived of his conditional (freedom); when dealing with cases concerning post-tariff indeterminate sentence prisoners, the longer the time the prisoner had spent in prison following the expiry of his tariff, the more anxiously the Board should scrutinise whether the level of risk was unacceptable. The board had to be be, and appear to be, independent and impartial; it should guard against any temptation to refuse oral hearings as a means of saving time, trouble and expense; "Paper" decisions made by single member panels of the board were provisional. The right of the prisoner to request an oral hearing was not correctly characterised as a right of appeal. In order to justify the holding of an oral hearing the prisoner does not had to persuade the board that an oral hearing was appropriate, he did not have to demonstrate that the paper decision was or might have been wrong. It would be prudent for the board, in applying the instant guidance, to allow an oral hearing if it was in doubt that whether to do so or not. As it applied in the instant context, the common law duty to act fairly, was influenced by the requirement of art. 5 (2) that everyone who was arrested was to be informed promptly of the reasons for his arrest and of any charge against him, as interpreted by the court of Human Right; compliance with the common law duty should also result in compliance with the requirement of art. 5 (4) in relation to procedural fairness. A bench of those requirements would not normally result in an award of damage under the 1998 Act unless the prisoner had suffered a consequent deprivation of liberty. In the circumstances of the instant cases, the Board had breached its duty of procedural fairness at common law and was accordingly in breach of art. 5 (4) of the Convention. The appeals would therefore be allowed."

13. Hence in all the matters, the State Sentence Review Board would afford oral hearing to the convict or his advocate to facilitate effective decision making process. Guidelines in this regard be prepared by the State Government within three months.

14. Accordingly, in view of analysis and discussion made hereinabove, the writ petition is allowed. Annexure P-9 dated 6.8.2014 is quashed and set aside. In normal circumstances, we would have asked the State Government to reconsider the decision, but taking into consideration all the facts and circumstances, as enumerated hereinabove, we order the release of the petitioner forthwith on production of certified copy of this judgment before the concerned authorities. Pending application(s), if any, also stands disposed of. No costs.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Ajmer Singh son of Shri Roop Singh. ....Appellant/Plaintiff

Versus

Yusuf Khan (died) through LRs Bashiri widow of
Late Shri Yusuf Khan and others .Respondents/Defendants

RSA No. 408 of 2001
Judgment Reserved on 27th February, 2015
Date of Order 04th March, 2015

Code of Civil Procedure, 1908- Order 26 Rule 9- Trial Court had appointed a Retired Tehsildar as Local Commissioner to visit the spot and to demarcate the land- report was submitted to the Court- objections were preferred by the plaintiff- Court ordered that objections would be decided along with main case- Court neither affirmed nor dismissed the objections filed by objector- held, that when the objector had specifically prayed for examination of the Local Commissioner and had asserted that in order to judge the veracity of the report submitted by Local Commissioner, examination of the Local Commissioner is essential – Court is bound to examine the Local Commissioner and thereafter to affirm or reject the report- case remanded with a direction to examine the Local Commissioner and thereafter to decide the objections preferred by the plaintiff in accordance with law.

(Para-9 and 10)

For the Appellant:	Mr. K.S. Kanwar, Advocate.
For the Respondent Nos. 1(a) to 1(h):	Mr. Sanjay Sharma, Advocate.
For other Respondents:	None.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Order of limited remand under Section 107 of Code of Civil Procedure 1908 and under Order 41 Rule 23-A of Code of Civil Procedure 1908:-

Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure by the appellant against the judgment and decree dated 21.7.2001 passed by learned District Judge Sirmaur at Nahan in Civil Appeal No. 151-CA/13 of 2000 titled Yusuf Khan vs. Ajmer Singh and others.

2. Brief facts of the case as pleaded are that Ajmer Singh plaintiff filed a suit for injunction pleaded therein that plaintiff and proforma defendants are owners in possession of land comprised in Khata No. 14 min Khatauni No. 29 min, 30 min, 34 min Khasra Nos. 375/1 total measuring 335-6 situated at mauja Moginand Tehsil Nahan District Sirmaur H.P. as per jamabandi for the year 1988-89. It is pleaded that contesting defendant has no right title or interest in the suit land. It is pleaded that contesting defendant without any right title or interest in the suit land caused interference with the help of his family members and caused damage to the crop sown by plaintiff on the suit land. It is pleaded that house of defendant is situated in adjoining Khasra No. 379 and contesting defendant intended to encroach upon the suit land more particularly Khasra No. 375/1/1. It is pleaded that contesting defendant had collected construction material at the spot. It is further pleaded that plaintiff asked the contesting defendant not to interfere over the suit land but defendant did not accept the request of plaintiff. Prayer for decree of permanent prohibitory injunction sought in favour of the plaintiff and against the contesting defendant and in alternative relief of possession sought in favour of plaintiff and against the contesting defendant on the basis of title of plaintiff.

3. Per contra written statement filed on behalf of contesting defendant pleaded therein that plaintiff is not entitled to the relief of permanent prohibitory injunction and suit is not maintainable. It is pleaded that suit is not within limitation and is not maintainable in the present form. It is pleaded that contesting defendant was inducted as non-occupancy tenant over the suit land in the year 1947-1948 over the land comprised in Khasra No. 375/1/1 and 379/63/1. It is pleaded that entry in revenue record is contrary to factual position and it is further pleaded that contesting defendant is in settled possession of suit land. It is further pleaded that plaintiff has no cause of action and prayer for dismissal of suit sought.

4. Plaintiff also filed replication and re-asserted the allegations made in plaint. As per the pleadings of parties learned trial Court framed following issues on dated 5.8.1997:-

1. Whether plaintiff is entitled for the decree of permanent injunction as alleged? OPP
2. Whether plaintiff is entitled for decree of possession as alleged? OPP
3. Whether suit of the plaintiff is based on mala fide? If so its effect? OPD
4. Whether the suit is not maintainable in present form as alleged? OPD
5. Whether suit is not within time? OPD
6. Whether the defendants are non-occupancy tenant over a portion of the suit land measuring 10-15 bighas inclusive of suit land? If so its effect? OPD
7. Whether the revenue entries in the revenue record showing the plaintiff as owner in possession are contrary to the actual facts and are fraudulent and incorrect? If so, its effect?OPD
8. Relief.

5. Findings of learned trial Court on issue No. 1 was in favour of the plaintiff and learned trial Court decided issues Nos. 2,3,4 as redundant and learned trial Court decided issues Nos. 5, 6, 7 against contesting defendants. Learned trial Court decreed the suit filed by plaintiff and passed decree of permanent prohibitory injunction in favour of plaintiff and against contesting defendant No.1 and permanently restrained defendant No.1 from causing any sort of interference over the suit land comprised in Khasra No. 375/1/1 measuring 5/14 bighas as shown in tatima Ext.PB.

6. Feeling aggrieved against the judgment and decree passed by learned trial Court contesting defendant Yusuf Khan filed Civil Appeal No. 151-CA/13 of 2000 titled Yusuf Khan vs. Ajmer Singh and others before learned District Judge Sirmaur at Nahan. Learned first Appellate Court on dated 21.7.2001 accepted the appeal and set aside the impugned judgment and decree passed by learned trial Court on dated 14.3.2000.

7. Thereafter feeling aggrieved against the judgment and decree passed by learned first Appellate Court plaintiff Ajmer Singh filed present Regular Second Appeal No. 408 of 2001 titled Ajmer Singh and others vs. Yusuf Khan (died) through LRs namely Bashiri and others. Hon'ble High Court admitted the appeal on dated 4.9.2001 on the following substantial questions of law:-

> 1. Whether in view of revenue entries showing defendant-respondent Yusuf Khan in possession of land Khasra No. 62 could in lieu thereof he be held a tenant of the suit land which is shown as owned and possessed by the appellant-plaintiff?
>
> 2. Whether the lower appellate Court has misconstrued and misinterpreted Local Commissioner's report and has wrongly accepted it to pass the impugned judgment and decree whereas the appellant-plaintiff who has filed objections against the said report was not allowed to cross-examine the Local Commissioner?

8. Court heard learned Advocate appearing on behalf of parties and also perused the entire record carefully.

Findings on Point No. 2 of Substantial questions of law

9. Submission of learned Advocate appearing on behalf of the appellant that learned First Appellate Court had committed procedural illegality by way of non-examination of Local Commissioner upon objections filed by objector upon Local Commissioner's report is accepted for the reasons hereinafter mentioned. It is proved on record that learned trial Court vide order dated 24.11.1998 appointed Shri Prithi Singh Advocate a retired Tehsildar as Local Commissioner in present case to visit the spot and demarcate the land in dispute and submit the report. It is proved on record that on dated 30.3.1999 the report of Local Commissioner was received and learned trial Court directed the parties to file objections on report of Local Commissioner if any. It is proved on record that thereafter objections on report of Local Commissioner were filed on dated 1.4.1999 by plaintiff Ajmer Singh. There is recital in order sheet of learned trial Court dated 1.4.1999 that learned Advocate for the contesting defendant did not admit the objections and thereafter learned trial Court ordered that objections would be disposed of along with main case. It is also proved on record that thereafter on dated 14.3.2000 learned trial Court decided the civil suit and decreed the suit filed by the plaintiff. Learned trial Court did not affirm or dismiss the objections filed by objector over Local Commissioner's report. It is proved on record that thereafter learned first Appellate Court in Civil Appeal No. 151-CA/13 of 2000 titled Yusuf Khan vs. Ajmer Singh in para 14 of judgment rejected the objections filed by objector without giving the opportunity to objector to prove the objections mentioned in objection application upon Local Commissioner's report and without examination of Local Commissioner. As per Order 26 Rule 10 Sub-clause (2) Court or with permission of the Court any of the parties to the suit may examine the Local Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report or as to his report or as to the manner in which he had made the investigation. In objections petition objector has specifically mentioned that Local Commissioner did not demarcate the suit land in accordance with instructions of

Financial Commissioner Himachal Pradesh for conducting the demarcation. In objection petition the objector has specifically prayed for examination of Local Commissioner and there is special recital in objection petition that in order to judge the veracity of report submitted by Local Commissioner examination of Local Commissioner is essential to arrive at the just conclusion. No opportunity of examination of Local Commissioner was given to objector by learned trial Court or learned first Appellate Court. Court is of the opinion that Local Commissioner's report could not be discussed in judgment or in evidence unless same is not affirmed by the Court. Court is of the opinion that prior affirmation of Local Commissioner report is essential by Court for reading Local Commissioner report as evidence in civil suit. It is held that unless report of Local Commissioner is not affirmed by Court same could not be discussed in judgment. Court is of the opinion that learned first Appellate Court had committed procedural illegality in present case. Court is of the opinion that it is not expedient in the ends of justice to decide the RSA on merits unless procedural illegality is not rectified. It is well settled law that facts can be proved in civil suit by way of oral evidence or documentary evidence. In present case it is proved on record that learned first Appellate Court did not give any opportunity to the objector to prove the facts mentioned in objection petition by way of examination of Local Commissioner prior to rejection of Local Commissioner's report in para No. 14 of judgment. Court is of the opinion that allegations mentioned in objection petition could be proved only by way of examination of Local Commissioner in Court by objector. Court is of the opinion that limited re-trial is necessary in present case in the ends of justice in order to properly and effectively adjudicate the controversy inter se the parties. Hence point No. 2 of substantial question of law framed by High Court is answered in affirmative. RSA No. 408 of 2001 is not decided on merits. Hence point No. 1 of substantial question of law is not decided.

10. In view of above stated facts RSA No. 408 of 2001 titled Ajmer Singh vs. Yusuf Khan (died) through LRs namely Bashiri and others is accepted. Judgment and decree passed by learned first Appellate Court in Civil Appeal No. 151-CA/13 of 2000 titled Yusuf Khan vs. Ajmer Singh are set aside in the ends of justice and case is remanded back to learned District Judge Sirmaur at Nahan (H.P.) under Section 107 of Code of Civil Procedure 1908 and under Order 41 Rule 23-A of the Code of Civil Procedure 1908 for limited purpose only. Learned District Judge will decide the objections dated 1.4.1999 filed by objector upon Local Commissioner's report appointed under Order 26 Rule 9 of Code of Civil Procedure 1908 after examination of Local Commissioner in Court in accordance with law and thereafter learned District Judge will pass fresh judgment and decree in present case in accordance with law. Evidence already recorded will form part and parcel of evidence. Parties are left to bear their own costs. Memo of costs be drawn accordingly. Record of learned trial Court and learned first Appellate Court along with certified copy of order of limited remand be sent back forthwith. Since civil appeal is pending since 2000 learned District Judge Sirmaur at Nahan (H.P.) will dispose of the civil appeal expeditiously within one month after the receipt of file. Parties are directed to appear before learned District Judge Sirmaur at Nahan (H.P.) on ***31.3.2015.*** Observations of High Court will not effect merits of case in any manner. Appeal stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Katiani Educational Society, Mohal ..... Petitioner
Vs.
Union of India & ors. ..... Respondents.

CWP No. 7235 of 2012.
Judgement reserved on: 25.2.2015.
Date of decision: 4.3.2015.

Income Tax Act, 1961 - Section 10(23C) (vi)/ (via)- petitioner, an educational society registered under the Societies Act, applied for exemption which was declined on the ground that society was not existing solely for the purpose of education but was also existing for the purpose of profit- it was found that society had invested unaccounted income of the members or their relatives in creating a profit generating equipment in the form of commercial educational institution- after the creation of the institution there was a systematic siphoning out of income by inflating the expenses in the form of construction/ repairs expenses etc.- held, that predominant object of the activity was not educational but was generating profit and therefore, exemption was rightly denied to the petitioner. (Para- 5 to 8)

Cases referred:
Pine Grove International Charitable Trust vs. Union of India and others [2010] 327 ITR 73 (P&H),
Commissioner of Income Tax vs. Godwin Steels P. Ltd. [2013] 353 ITR 353 (Delhi)
Maa Saraswati Educational Trust vs. Union of India and another [2013] 353 ITR 312 (HP)

For the petitioner : Mr. Ajay Vaidya, Advocate.
For the respondents : Mr. Ashok Sharma, Assistant Solicitor General of India, for respondent No.1.
Mr. Vinay Kuthiala, Senior Advocate with Ms. Vandana Kuthiala, Advocate, for respondents No. 2 to 6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

By medium of present writ petition a direction has been sought for quashing the order passed by the Chief Commissioner of Income Tax, whereby the petitioner has been denied the benefit of exemption, as provided under section 10(23C) (vi)/ (via) of Income Tax Act (for short, the Act), for the assessment year 2011-2012.

2. The petitioner is an educational society registered under the Societies Act, 1860 at District Kullu and applied for exemption under section 10(23C) (vi)/(via) of the Act before the competent authority vide form No. 56 (D) on 10.6.2011. It is claimed that when the application was being processed, a number of queries were raised by the department, which were duly replied to by the petitioner and accordingly its case was recommended to respondent No.3 i.e. Chief Commissioner of Income Tax for further necessary action. However, the respondent No. 3 vide order dated 28.6.2012, (for short the impugned order),

denied exemption to the petitioner on the ground that the society does not exist solely for the educational purpose and it is existing for the purpose of profit.

3. This order has been challenged on the ground that respondent No. 3 has not appreciated the provisions of section 10(23C) (vi)/ (via) of the Act in its correct perspective and thereby reached to a wrong conclusion. It is also claimed that no reasonable opportunity of being heard had been afforded to the petitioner which is against the principles of natural justice and lastly it is claimed that impugned order is not only harsh and oppressive but against the aims and objectives of sections 10(23C) (vi)/ (via) and 139 of the Act.

4. The main contest is between the petitioner and the income tax authorities, who have been arrayed as respondents No. 2 to 4 and have in their reply stated that while adjudicating upon the application for exemption they have acted within the four corners of the law and the order of rejection being a self speaking and detailed one calls for no interference.

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

5. Before proceeding further, it would be necessary to refer to the provisions of Section 10 (23C) of the Act. The relevant extract of the said provision is quoted below:-

> "any income received by any person.....
>
> (vi) any university or other educational institution existing solely for educational purposes and not for purposes of profit, other than those mentioned in sub-clause (iiiab) or sub-clause (iiad) and which may be approved by the prescribed authority.
>
> Provided that the fund or trust or institution [or any university or other educational intuition or any hospital or other medical institution] referred to in sub- clause (iv) or sub- clause (v) [or sub-clause (vi) or sub-clause (via)] shall make an application in the prescribed form and manner to the prescribed authority for the purpose of grant of the exemption or continuance thereof, under sub- clause (iv) or sub- clause (v): [or sub-clause (vi) or sub-clause (via)]:
>
> [Provided further that the prescribed authority, before approving any fund or trust or institution or any university or other educational institution or any hospital or other medical institution, under sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via), may call for such documents (including audited annual accounts) or information from the fund or trust or institution or any university or other educational institution or any hospital or other medical institution, as the case may be, as it thinks necessary in order to satisfy itself about the genuineness of the activities of such fund or trust or institution or any university or other educational institution or any hospital or other medical institution, as the case may be, and the prescribed authority may also make such inquiries as it deems necessary in this behalf:]
>
> Provided also that the fund or trust or institution [or any university or other educational institution or any hospital or other medical institution] referred to in sub- clause (iv) or sub- clause (v) [or sub-clause (vi) or sub-clause (via)]-

[(a) applies its income, or accumulates it for application, wholly and exclusively to the objects for which it is established; and in a case where more than fifteen per cent of its income is accumulated on or after the 1st day of April, 2002, the period of the accumulation of the amount exceeding fifteen per cent of its income shall in no case exceed five years; and]

(b) does not invest or deposit its funds, other than-

(i) any assets held by the fund, trust or institution [or any university or other educational institution or any hospital or other medical institution] where such assets form part of the corpus of the fund, trust or institution [or any university or other educational institution or any hospital or other medical institution] as on the 1st day of June, 1973;

[(ia) any asset, being equity shares of a public company, held by any university or other educational institution or any hospital or other medical institution where such assets from part of the corpus of any university or other educational institution or any hospital or other medical institution as on the 1st day of June, 1998;]

(ii) any assets (being debentures issued by, or on behalf of, any company or corporation), acquired by the fund, trust or institution [or any university or other educational institution or any hospital or other medical institution] before the 1st day of March, 1983 ;

(iii) any accretion to the shares, forming part of the corpus mentioned in sub- clause (i), [and sub-clause (ia)], by way of bonus shares allotted to the fund, trust or institution [or any university or other educational institution or any hospital or other medical institution];

(iv) voluntary contributions received and maintained in the form of jewellers, furniture or any other article as the Board may, by notification in the Official Gazette, specify,

for any period during the previous year otherwise than in any one or more of the forms or modes specified in sub- section (5) of section 11:]

Provided also that the exemption under sub- clause (iv) or sub-clause (v) shall not be denied in relation to any funds invested or deposited before the 1st day of April, 1989, otherwise than in any one or more of the forms or modes specified in sub- section (5) of section 11 if such funds do not continue to remain so invested or deposited after the 30th day of March, [1993]:

Provided also that the exemption under sub- clause (vi) or sub-clause (via) shall not be denied in relation to any funds invested or deposited before the 1st day of June, 1998, otherwise than in any one or more of the forms or modes specified in sub-section (5) of section 11 if such funds do not continue to remain so invested or deposited after the 30th day of March, 2001;]

[Provided also that the exemption under sub-clause (iv) or sub-clause (v) [or sub-clause (vi) or sub-clause (via) shall not be denied in relation to voluntary contribution, other than voluntary contribution in cash or

> voluntary contribution of the nature referred to in clause (b) of the third proviso to this sub- clause, subject to the condition that such voluntary contribution is not held by the trust or institution, [or any university or other educational institution or any hospital or other medical institution], otherwise than in any one or more of the forms or modes specified in sub-section (5) of section 11, after the expiry of one year from the end of the previous year in which such asset is acquired or the 31st day of March, 1992, whichever is later:]
>
> Provided also that nothing contained in sub- clause (iv) or sub-clause (v) [or sub-clause (vi) or sub-clause (via)] shall apply in relation to any income of the fund or trust or institution, [or any university or other educational institution or any hospital or other medical institution], being profits and gains of business, unless the business is incidental to the attainment of its objectives and separate books of accounts are maintained by it in respect of such business:"

6. Learned counsel for petitioner has argued that once the predominant object of the activity conducted by the petitioner was only educational then merely because while imparting education profit was generated, it would not dilute the object for which the petitioner has been established. In support of his submission, he has relied upon the judgement reported in **Pine Grove International Charitable Trust** vs. **Union of India and others [2010] 327 ITR 73 (P&H), Commissioner of Income Tax** vs. **Godwin Steels P. Ltd. [2013] 353 ITR 353 (Delhi)** and a judgement of this court in **Maa Saraswati Educational Trust** vs. **Union of India and another [2013] 353 ITR 312 (HP).**

7. This submission of the petitioner though appears to be attractive but when tested in the factual background of the case, the same merits rejection. The respondent No.3 while adjudicating upon the claim of the petitioner has recorded more than a dozen reasons for coming to a categorical conclusion that petitioner was not entitled to the aforesaid provision because it had invested unaccounted income of the members or their relatives in creating a profit generating equipment in the form of commercial educational institution and once such institution had been created there was a systematic siphoning out of income by inflating the expenses in the form of construction/ repairs expenses etc.

8. Surprisingly the petitioner has not called in question and challenged even any one of these findings of fact and therefore, in absence of any challenge, this court cannot interfere with these findings of fact in exercise of its power of judicial review under Article 226 of Constitution of India. It is well settled that a party cannot be allowed to prove that what it has not actually pleaded and unlike ordinary suits where the evidence, oral and documentary, is adduced by the parties in support of their respective cases, writ petitions are decided merely and mainly on the basis of evidence which makes it fortiori necessary that pleadings in writ petitions must be far more explicit and exhaustive than they are required to be in ordinary suits.

9. Resultantly, once it is established that the predominant object of the activity conducted by the petitioner was not educational but was generating profit, none of the aforesaid judgments are applicable to the fact situation obtaining in the present case.

10. The petitioner would lastly argue with all vehemence that the impugned order was not sustainable as no reasonable opportunity of being heard had been afforded to the petitioner. This plea is equally merit -less as the impugned order reveals that respondent No. 3 had issued notice to the petitioner and fixed the case for hearing on

21.6.2012 and thereafter again on 26.6.2012 when the Chairman of the society alongwith Inder Ram Chaunaliya, Chartered Accountant had not only attended the proceedings but had filed the reply and other details. In the teeth of such findings, which have gone un-rebutted, it is not lie in the mouth of the petitioner that no reasonable opportunity of being heard had been given to the petitioner.

11. In view of the aforesaid discussion, we find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs.

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

State of H.P. ...Appellant.
Versus
Sita Ram and others. ...Respondents.

Cr.A. No. 166/2006
Reserved on: 3.3.2015
Decided on: 4.3.2015

Indian Penal Code, 1860- Sections 354, 323, 506 and 34- Prosecutrix was alone at home- accused 'S' started uprooting flowers and used filthy language- she went to the Courtyard and confronted him- other accused arrived at the spot – accused 'S' behaved indecently with her- she sustained nail marks on her breast and injury on her body- accused 'S' also threatened to inflict a blow on the prosecutrix with knife- accused 'N' gave beating to the prosecutrix – there were contradictions in the testimonies of the witnesses regarding the presence of the inmates of the house of the prosecutrix- independent witnesses were not produced by prosecution- as per prosecution, PW-3 snatched knife from accused 'S' and received injury on his hand- Medical Officer noticed that injury was simple in nature and could have been caused with blunt weapon- held, that in these circumstances, acquittal of the accused by Trial Court was justified- appeal dismissed. (Para-13 to 16)

For the appellant: Mr. Parmod Thakur, Addl. A.G.
For the Respondents: Mr. Sanjay Dutt Vasudeva, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 27.2.2006 rendered by the Judicial Magistrate, 1st Class, Court No.II, Palampur, whereby the respondents-accused (hereinafter referred to as the "accused" for convenience sake), who were charged with and tried for offences punishable under section 354, 323, 506 and 34 of the Indian Penal Code, have been acquitted.

2. Case of the prosecution, in a nutshell, is that on 9.10.2004, Geeta Devi came to the Police Station, Lambagaon. She stated that at about 8.00 A.M., her husband and sons had gone for fishing and she was alone at home. Accused Sita Ram, who is her brother-in-law, started uprooting flowers and used filthy language. She came in the courtyard and accosted him. Accused Sita Ram, Sakina Devi and their son Niku Ram and Pawna Devi also came on the spot. They started abusing her. They were threatening her.

Sita Ram held her shirt from the breast. He behaved indecently with her. She sustained nail marks on her breast and also sustained injuries on her entire body. Her husband accosted Sita Ram as to why he has uprooted the flowers. Sita Ram responded that the courtyard was given to him by the Patwari and Kanungo. Sita Ram had knife in his hand. He tried to give blow to Geeta Devi. However, her husband prevented him and sustained injuries on his hand. Nikku Ram was holding a stick in his hand and started giving beatings to Geeta Devi and her husband. However, the stick hit Sita Ram on his head. On the basis of her statement, FIR Ex.PW-7/A was lodged. Site plan was prepared. Knife Ex.P-2 was recovered vide memo Ex.PW-3/A. Shirt Ex.P-1 was also seized by the police vide memo Ex.PW-1/C. Medical examination of Sukh Chain and Geeta Devi was sought vide rukka Ex.PW-5/C and MLCs Ex.PW-5/A qua Geeta Devi and Ex.PW-5/B qua Sukh Chain alongwith final opinion Ex.PW-6/A were obtained. Police investigated the case and the challan was put up in the court after completing all the codal formalities.

3. Prosecution examined as many as eight witnesses in all to prove its case against the accused. Statements of accused under Section 313 Cr.P.C. were recorded. They have denied the case of the prosecution in entirety. Learned trial Court acquitted the accused, as noticed hereinabove.

4. Mr. Parmod Thakur, learned Additional Advocate General has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Sanjay Dutt Vasudeva, learned counsel for the accused has supported the judgment passed by the trial Court.

6. I have heard the learned counsel for the parties and have gone through the record meticulously.

7. According to FIR, PW-1 Geeta Devi was all alone when the incident happened on 9.10.2004. According to the contents of the FIR, her husband was not at home and her brother-in-law started plucking flowers and also abused her. Her shirt was torn and accused Sita Ram misbehaved with her. She also sustained injuries on her breast. Sita Ram was carrying knife in his hand. He tried to hit her but her husband intervened and received injuries on his hand. Accused Niku Ram was carrying stick in his hand.

8. Complainant Gita Devi has appeared as PW-1. She has stated that accused Sita Ram plucked flowers. Her husband was not in the house. She was all alone. Sita Ram was accompanied by his son Niku, Pawna and wife Sakina. Sita Ram misbehaved with her. He tore her shirt. Sita Ram tried to hit her with knife but she was saved by her husband and in the process her husband received injuries on his hand. In her cross-examination, she has deposed that the incident was seen by Up-Pradhan Vinod Kumar, Bipan Kumari, Ward Panch and Shambhu Devi.

9. PW-2 Sukh Ram has proved Ext. PW1/C. PW-3 Sukh Chain is the husband of PW-2 Geeta Devi. According to him, he had gone for fishing. His wife and daughter were at home. He came at 8:30 a.m. Accused Sita Ram was fighting with his wife. Accused also tried to inflict injuries on his wife with the help of knife. He prevented him. He received injuries. The shirt of his wife was also torn. Accused Sita Ram was accompanied by his son Niku, Pawna and wife. PW-4 Kumari Babita has also testified that she alongwith her mother Geeta Devi was at home at 8.00 a.m. when accused entered their compound and started uprooting the flowers. The shirt of her mother was torn. Sita Ram attacked her mother with knife. Her father snatched knife from accused Sita Ram.

10. PW-5 Dr. Deepak Sharma has proved MLCs Ext. PW5/A and PW5/C.

11. PW-6 Dr. Sushma Sood issued MLC Ext. PW6/A.

12. PW-7 Jagdish Chand has investigated the matter. He has taken into possession shirt Ext. P1 and knife Ex.P-2 along with MLCs of Gita Devi and Sukh Chain.

13. According to PW-1 Geeta Devi, she was all alone at the time when the alleged incident had taken place. However, according to PW-3 Sukh Chain, his daughters were also at home when the incident had taken place. PW-4 Kumari Babita, as noticed hereinabove, has categorically stated that she was at home with her mother Geeta Devi at the time of incident. In FIR also, PW-1 Gita Devi has stated that she was all alone. There are material contradictions in the statements of PW-1 Geeta Devi, PW-3 Sukh Chain and PW-4 Kumari Babita Devi. It renders the entire case of the prosecution untrustworthy. PW-1 Geeta Devi has also deposed that the incident was witnessed by Up-Pradhan Vinod Kumar, Vipan Kumari Ward Panch and Shambhoo Devi. These were material witnesses, but have not been produced by the prosecution.

14. According to the prosecution case, accused Sita Ram has tried to hit PW-1 Geeta Devi with knife. However, PW-3 Sukh Chain snatched the knife from accused Sita Ram and received injuries on his hand. PW-5 Dr.Deepak Sharma has testified that the injuries received by Sukh Chain were simple in nature and the weapon used was blunt. In case PW-3 Sukh Chain had snatched the knife from the hands of the accused, in that case Doctor would have stated so in his statement. However, as noticed above, as per statement of PW-5 Dr. Deepak Sharma, injuries received by PW-3 Sukh Chain were caused with blunt weapon.

15. The matter is required to be considered from another angle. According to prosecution, PW-3 Sukh Chain came to his house all of a sudden. He instead of inquiring from accused Sita Ram why he has misbehaved with his wife, asked him only about uprooting of flowers. In case the incident had happened, as per the case of the prosecution, he would have taken serious view of the alleged incident of misbehaviour by accused Sita Ram with his wife.

16. Learned trial court has correctly appreciated the evidence while acquitting the accused. This Court need not interfere with the well reasoned judgment rendered by the trial court.

17. Accordingly, in view of analysis and discussion made hereinabove, there is no merit in the present appeal and the same is dismissed.

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

Shakti Chand Thakur ...Petitioner.

Versus

State of H.P. and others ..Respondents.

CWP No. 8435 of 2014
Date of decision: 5.3.2015

Constitution of India, 1950- Article 13- Petitioner filed a Writ Petition against H.P. State Co-operative Bank seeking promotion from the date when his juniors were promoted- held, that Co-operative Bank does not fall within the definition of State under Article 13 of the Constitution of India- even the matter cannot be remitted for decision to the Registrar, Co-

operative Societies as he has no power to adjudicate the dispute regarding the service matter as it does not touch the constitution, management or business of the Society. (Para-2 to 16)

Cases referred:

Sanjeev Kumar and others vs. State of H.P. and others Latest HLJ 2014 (HP) 1061

Morinda Coop. Sugar Mills Ltd. vs. Morinda Coop. Sugar Mills Workers' Union (2006) 6 SCC 80

For the Petitioner : Mr. Sushant Vir Singh Thakur, Advocate.

For the Respondents : Mr. V.K.Verma , Ms. Meenakshi Sharma and Mr. Rupinder Singh, Addl. Advocate Generals, for respondents No.1 & 2.
Mr. Sunil Mohan Goel, Advocate, for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (*Oral*)

The petitioner has invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India and has claimed the following substantive relief:

> *"A) That the writ of certiorari may kindly be issued to quash the impugned order dated 13.01.2014 (Annexure P-1).*
>
> *B) That the writ of mandamus may kindly be issued directing the respondent-Bank to promote the petitioner for the post of Assistant General Manager w.e.f. the juniors are promoted.*

2. Indisputedly, the petitioner is an employee of the H.P.State Co-operative Bank Ltd. (for short 'Bank') and working as Senior Manager at Sarkaghat and the relief claimed herein is directed only against the H.P. State Co-operative Bank. Therefore, the preliminary question which requires consideration is as to whether the writ petition against the bank is maintainable.

3. This question is no longer res-integra in view of the Division Bench Judgment of this Court in **Sanjeev Kumar and others** vs**. State of H.P. and others Latest HLJ 2014 (HP) 1061,** wherein it was held as under:

> "2. The moot question as raised by respondent No. 3 by way of preliminary objection is as to whether the petition is maintainable against the H.P. Cooperative Bank (hereinafter to be referred as Bank) against whom primarily the reliefs have been sought.
>
> 3. Notably the Bank in terms of judgment passed by a learned Division Bench of this Court in **Chandresh Kumar Malhotra** vs. **H.P.State Coop. Bank and others 1993(2) Sim.L.C. 243** has not been held to be a "State" within the meaning of Article 12 of the Constitution and has further not been held to fall within the meaning of other authority for the purpose of Article 226 of the Constitution. The judgement in **Chandresh Kumar Malhotra's** case has since been 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).**
>
> 4. Yet, the learned counsel for the petitioner would insist that the fact situation in this case was absolutely different as he was not challenging the action of the bank but was seeking to challenge the orders passed by the authorities created under the

H.P. Cooperative Societies Act, 1968 (for short, the Act) and H.P. Cooperative Societies Rules, 1971 (for short, Rules).

5. In this background certain essential facts may be noticed. Certain persons filed writ petitions bearing CWP No. 1762 of 2012 and CWP No. 3560 of 2012, which were disposed of by this court directing them to approach the bank. Some of the persons instead of approaching the Bank approached the Registrar, Cooperative Societies by terming the petition to be under section 72 of the Act and the same was disposed of by the Joint Registrar on 18.8.2012. This order was challenged by way of CWP No. 8996 of 2012 and the said petition was disposed of by this court by holding that parties had a statutory remedy under section 94 of the Act by filing a revision petition before the State government. It is thereafter that the State government passed a decision, which has been impugned herein.

6. In order to justify the maintainability of the petition, the following averments have been set out:-

> *"That respondents No. 1 & 2 are State and respondent No. 3 is State being "other authority" as per Article 12 of the Constitution of India. Be it stated here that respondents No. 1 & 2 have got deep and pervasive control upon respondent No.3, which is a society registered under the H.P. Cooperative Societies Act and Rules. Respondent No. 3 is functioning strictly in accordance with Act, Rules and Bye-Laws framed and approved by respondent No.2. It is submitted, subject to correction, that State has got more than 55% share capital in respondent No.3 bank. As per provisions of the Act and Rules, respondent No.3 cannot move an inch for any of its functions without approval of the Registrar Cooperative Societies, respondent No.2. It is submitted that as per section 35-B of the Act, Managing Director of respondent No.3 is always from Himachal Pradesh Administrative Services (HPAS) and as per section 35 of the Act, three nominations to the Board of Directors of respondent No. 3 are made by the Government. As per rule 56(3) of 1971 Rules, no employee or salaried officer or servant can be employed by the society, whose remuneration is exceeding Rs.1,000/- without the previous permission of the Registrar. Registrar Cooperative Societies under section 35-A of the Act has got powers to constitute new Committee. Government has got powers as per section 37 to supersede the Managing Committee and as per section 38, possession of the records can be secured. Society is bound to comply with all directions as may be issued by the State Government. The Board of Directors, which is incharge of general superintendence/ direction and control of the powers of the society and all its income and property, is also largely controlled by the nominees of the State. Thus, the State Government, by reason of the provision of approval stated supra, has got full deep and pervasive control of the working of the society, thus, respondent No. 3 is State within the meaning of Article 12 of the Constitution of India. It is submitted that representations filed by petitioners on the basis of directions issued by this Hon'ble Court now having been decided as per statute by the Joint Registrar Cooperative Societies, H.P., Shimla, vide orders dated 18.8.2012, and the dispute between petitioners and respondent No. 3 having been decided vide statutory orders passed, stated supra, thus now gives jurisdiction to assail the same by invoking powers as vested in this Hon'ble Court under Articles 226 and 227 of the Constitution of India, respondents are amenable to the writ jurisdiction of this Hon'ble Court. Further, as per*

judgement of the Full Bench of this Hon'ble Court, statutory orders of the authorities are being assailed, thus, also this Hon'ble Court has the jurisdiction."

7. It is on the strength of such pleadings that writ jurisdiction of this court has been sought to be invoked.

8. We are afraid that we cannot agree with the submissions of the petitioners because all these contentions have already been dealt with and discussed in detail by the learned Division Bench in **Chandresh Kumar Malhotra's** case (supra) and it is after taking into consideration the entire facts and law that this court held as follows:-

> *"98. Consequently, we have no hesitation in holding that the three Societies, namely, The Himachal Pradesh State Co-operative Bank Ltd; The Kangra Central Co-operative Bank Ltd,, and the Himachal Pradesh State Co operative Marketing and Development Federation Ltd , are not 'other authorities' and, as such, cannot be characterised as 'State' when the meaning of Art. 12 of the Constitution and the same are also not authority within the meaning and for the purpose of Article 226 of the Constitution, Order passed by the Societies under their respective service regulations against its employees, as such, or in connection With employment cannot be corrected by way of writ petitions. The petitions also would not be maintainable in order to challenge the action of the Registrar since the same is not an exercise of statutory power conferred upon him under the provisions of the Act or the Rules but an exercise of powers by him under service regulations framed under Bye-laws having no force of law. The writ petition also will not be maintainable since none of the three Societies are discharging any public functions."*

9. Faced with such situation, the petitioners would then contend that the orders passed by the Registrar and thereafter by the State government were statutory and therefore, a writ against an order passed by the statutory authority was maintainable.

10. There would have been no dispute in case the orders impugned herein could be termed to have been passed by the statutory authority in exercise of powers conferred upon it by the Act and Rules, because in that event undisputedly the writ petition would be maintainable before this court. However, the moot question again herein is as to whether the orders passed by the respondents i.e. Registrar and the State Government can be termed to be statutory orders.

11. Admittedly, the dispute raised by the petitioners pertained to a service matter and therefore, even if this court had relegated the petitioners to the Registrar/ State government, could the orders be termed to be in exercise of the statutory powers? The obvious answer is no, for more than one reasons. Firstly, the dispute of an employee and employer relationship is not a dispute, which touches the constitution, management or business of the cooperative societies and therefore, is not amenable to the jurisdiction of the Registrar under section 72 of the Act [Re: **Morinda Coop. Sugar Mills Ltd.** Vs. **Morinda Coop.Sugar Mills Workers' Union (2006) 6 SCC 80**]. Secondly even if this court had relegated the petitioners before the Registrar/ State government, the orders passed by them would not clothe

the orders so passed with statutory colour, as the same are not in exercise of statutory powers conferred upon them under the provisions of the Act and Rules as held in **Chandresh Kumar Malhotra** (supra).

12. The petitioners would then contend that Cooperative bank is subject to the control of the statutory authorities like the Registrar, Joint Registrar, the government and therefore, amenable to the writ jurisdiction of this court.

13. Even this submission of the petitioners cannot be accepted, firstly because of the decision of this court in **Chandresh Kumar Malhotra's** case (supra), wherein this court had held:-

> *"……The petitions also would not be maintainable in order to challenge the action of the Registrar since the same is not an exercise of statutory power conferred upon him under the provisions of the Act or the Rules but an exercise of powers by him under service regulations framed under Bye-laws having no force of law…"*
>
> And, secondly, on account of all these submissions having already been considered by the Hon'ble Supreme Court in **S.S.Rana** vs. **Registrar, Co-operative Societies and another (2006) 11 SCC 634,** wherein the provisions of H.P. Cooperative Societies Act and Rules have been considered and it has been held that general regulations under an Act like the Companies Act or the Cooperative Societies Act would not render the activities of the Company or Societies as subject to control of the State. It has further been observed that such control was only in terms of the provisions of the Act and was meant to ensure proper functioning of the society and the State or statutory authority would have nothing to do with its day-to-day functions.

14 The petitioners would then urge that this court in **Vikram Chauhan** case (supra) has clearly held that a writ would lie against the cooperative bank if the facts and circumstances so warrant despite it not being a State within the meaning of Article 12 of the Constitution in exercise of the powers under Article 226 of the Constitution and relied upon the following observations:

> "15. For the view taken by us on both facts of the referred questions, we proceed to answer the Reference as under:
>
> (1) …….
>
> (2) …….
>
> (3) …….
>
> (4) As regards the second part of the question as to whether a writ would lie against the stated Cooperative Banks, we hold that it is not appropriate to give a definite answer to this question. For, it would depend on several attending factors. Further, even if the said Banks were held to be not a State within the meaning of Article 12, the High Court in exercise of powers under Article 226 of the Constitution of India, can certainly issue a writ or order in the nature of writ even against any person or Authority, if the fact situation of the case so warrants. In other words, writ can lie even against a

> Corporative Society. Whether the same should be issued by the High Court would depend on the facts of each case."

15. We are afraid that even this submission is without merit. This court in **Chandresh Kumar Malhotra's** case has clearly held the respondent- bank not to be a "State" within the meaning of Article 12 of the Constitution and also not an authority within the meaning and for the purpose of Article 226 of the Constitution. (Referred: para-98, quoted above), which judgement has been affirmed by the Hon'ble Full Bench.

16. Further, it would be seen that the learned Division Bench of this court while hearing CWP No. 3634 of 2012 vide its order dated 20.7.2012 referred the following question for consideration by the Full Bench:-

> *"Whether the Kangra Central Co-operative Bank, the Himachal Pradesh State Co-operative Bank Ltd. And the Jogindra Central Co-operative Bank, are `State' within the meaning of Article 12 of the Constitution of India and whether a writ would lie against them?"*

17. The Hon'ble Full Bench while proceeding to answer the question observed that question as formulated raised two independent issues. Firstly, whether the stated Cooperative Banks are "State" within the meaning of Article 12 of the Constitution and the second which was held to be independent of the first question was whether a writ would lie against those cooperative banks. It is in this background that this court while answering the second question held as follows:-

> "12. That takes us to the second part of the question formulated by the Division Bench, as to whether a writ would lie against the stated Cooperative Banks? This question, essentially, touches upon the scope of power of the High Courts to issue certain writs as predicated in Article 226 of the Constitution of India. This is completely independent issue. In a given case, in spite of the opinion recorded by the Court that the respondent concerned in a writ petition, filed under Article 226 of the Constitution of India, is not a State within the meaning of Article 12 of the Constitution of India. Even then, the High Court can exercise jurisdiction over such respondent in view of the expansive width of Article 226 of the Constitution of India. It is well established position that the power of the High Courts under Article 226 is as wide as the amplitude of the language used therein, which can affect any person – even a private individual – and be available for any other purpose – even one for which another remedy may exist (Rohtas Industries Ltd. and another vs. Rohtas Industries Staff Union and others) (1976) 2 SCC 82. In the case of Engineering Mazdoor Sabha and another vs. Hind Cycles Ltd. AIR 1963 SC 874, the Court opined that even if the Arbitrator appointed under Section 10-A is not a Tribunal for the purpose of Article 136 of the Constitution in a proper case, a writ may lie against his Award under Article 226 of the Constitution. In the case of Praga Tools Corporation vs. C.A. Imanual and others 1969 (1) SCC 585 the Apex Court held that it as not necessary that the person or the Authority on whom the statutory duty is imposed need be a public official or an official body. That a mandamus can be issued even to an official or a Society to compel him to carry out the terms of the statute under or by which the Society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorizing their undertakings. Further, a mandamus would lie

against a Company constituted by a statute for the purposes of fulfilling public responsibilities. In the same decision, the Apex Court examined the amplitude of the term "Authority" used in Article 226 of the Constitution. The Court opined that it must receive liberal meaning unlike the term in Article 12 of the Constitution. It went to observe that the words "any person or authority" used in Article 226 cannot be confined only to statutory authorities and instrumentalities of the State. It may cover any other person or body performing public duty irrespective of the form of the body concerned. It is emphasized that what is relevant for exercising power is the nature of the duty imposed on the body which must be a positive obligation owned by the person or Authority. Depending on that finding, the Court may invoke its authority to issue writ of mandamus. In the case of Life Insurance Corporation of India vs. Escorts Ltd. and others 1986 (1) SCC 264 the Constitution Bench opined that the question must be "decided in each case" with reference to particular action, the activity in which the State or the instrumentality of the State is enacted when performing the action, the public law or private law, character of the Constitution and most of the other relevant circumstances. In a given case, it may be possible to issue writ of mandamus for enforcement of public duty which need not necessarily to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract, as noted by Professor de Smith, which exposition has found favour with the Apex Court.

13. The Apex Court after referring to catena of decisions and authorities in the case of UP State Cooperative Land Development Bank Ltd . Vs. Chandra Bhan Dubey and others (1999) 1 SCC 741 has succinctly delineated the scope of authority under Article 226 of the Constitution. In para 27 of this decision, the Court opined that Article 226 while empowering the High Court for issue of orders or direction to any Authority or person does not make any difference between public functions or private functions, but did not go to elaborate that question in the fact situation of that case. It is unnecessary to multiply the authorities on the point except to observe that a writ would lie against even a Cooperative Society or Company. But that does not mean that the Court is bound to issue such a writ. It is the prerogative of the High Court to issue writ to any person or authority, which is not a State or an instrumentality of the State. The Court would do so with circumspection and keeping in mind the well defined parameters. Whether in the fact situation of a given case, the Court ought to exercise its authority to issue writ or order in the nature of writ under Article 226 of the Constitution, will have to be answered on the basis of the settled principles, on case to case basis. Thus, it will be inapposite to put it in a straight jacket manner that every writ petition filed against the Cooperative Banks must be dismissed as not maintainable or otherwise.

14. Counsel appearing for the parties invited our attention to several other decisions. However, we do not intend to dilate on all those authorities any further, except to mention the same. Counsel appearing for the Kangra Bank had relied on two Judges Bench decision in the case of Zorastrian Cooperative Housing Society Ltd. and another vs. District Registrar, Cooperative Societies (Urban and others) (2005) 5 SCC 632 (para 32), which took the view that a Cooperative Society cannot be treated as State unless it

fulfills the tests spelt out in Ajay Hasia's case by the Constitution Bench of the Apex Court, followed in the case Praga Tools (supra). Reference was also made to the seven Judges Bench of the Apex Court in the case of Pradeep Kumar Biswas vs. Indian Institutes of Chemical Biology and others (2002) 5 SCC 111 (paras 1 to 4 and 40) and another decision in the case of Bhadra Shahakari S.K. Niyamita vs. Chitradurga Mazdoor Sangh and others (2006) 8 SCC 552 (para 3), which deals with the question as to whether the appellant, Cooperative Society can be treated as State within the meaning of Article 12 of the Constitution. The learned Senior counsel for the H.P. Cooperative Society invited our attention to the decision of two Judges Bench of the Apex Court in General Manager, Kishan Sahkari Chini Mills Ltd. Sultanpur, UP vs. Satrughan Nishad and others (2003) 8 SCC 639 (paras 6 to 8), to contend that even if it is a case of nominated Directors of Society that does not presuppose that the State has perennial control over the Society. Reliance is also placed on the another decision of the Apex Court in the case of Shri Anadi Mukta Sadguru S.M.V.S.J.M.S. Trust vs. V.R. Rudani and others AIR 1989 SC 1607 (paras 14 to 16 and 19 to 21) and in case of Zee Telefilms Ltd. and another vs. Union of India and others (2005) 4 SCC 649 (paras 8,9 and 35)."

18. It was on the basis of the aforesaid reasoning that the principle in paragraph-15(4) was laid down by the Hon'ble Full Bench which have been completely read out of context by the petitioners. The fact situation in the present case does not attract the applicability of the principles laid down therein. This is not a case where the respondents have been imposed with the public duty, as already held by this court in **Chandresh Kumar Malhotra's** case (supra). Moreover, it is settled law that it is neither desirable nor permissible to pick out a word or a sentence from the judgment, divorced from the context of the question under consideration and treat it to be the complete `law' declared by the Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Court. A decision of the Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of the Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by the Court, to support their reasoning. (See: **Commissioner of Income Tax** vs. **Sun Engineering Works (P) Ltd. (1992) 4 SCC 363.** Likewise, it is also to be borne in mind that the observations in the judgement cannot be read like a text of a statute or out of context. [See: **Hindustan Steel Works Construction Ltd.** Vs. **Tarapore & Co. and another (1996) 5 SCC 34].**

19. The preliminary objection raised by respondent No. 3 is required to be upheld for yet another reason, which is on account of the recent judgement rendered by the Hon'ble Supreme Court in **Thalappalam Ser. Co-op. Bank Ltd. and others** vs. **State of Kerala and others 2013 AIR SCW 5683.** No doubt, the primary issue in this case pertained to the applicability of the provisions of Right to Information Act to the Cooperative society and also the Registrar. However, one of the issues therein also related to the question as to whether the cooperative society was a "State" within the meaning of Article 12 of the Constitution. The Hon'ble Supreme Court after discussing the entire law on the subject has come to a categorical finding that the cooperative societies which were the subject matter of the lis do not fall within the expression "State" or an "instrumentality of the State" within the meaning

of Article 12 of the Constitution and were therefore, not subject to all constitutional limitations as enshrined in Part-III of the Constitution. The relevant finding of the Hon'ble Supreme Court is as follows:-

> "Co-operative Societies and Article 12 of the Constitution:
>
> 13. We may first examine, whether the Co-operative Societies, with which we are concerned, will fall within the expression "State" within the meaning of Article 12 of the Constitution of India and, hence subject to all constitutional limitations as enshrined in Part III of the Constitution. This Court in U.P. State Co-operative Land Development Bank Limited v. Chandra Bhan Dubey and others (1999) 1 SCC 741, while dealing with the question of the maintainability of the writ petition against the U.P. State Co-operative Development Bank Limited held the same as an instrumentality of the State and an authority mentioned in Article 12 of the Constitution. On facts, the Court noticed that the control of the State Government on the Bank is all pervasive and that the affairs of the Bank are controlled by the State Government though it is functioning as a co-operative society, it is an extended arm of the State and thus an instrumentality of the State or authority as mentioned under Article 12 of the Constitution. In All India Sainik Schools employees' Association v. Defence Minister-cum-Chairman Board of Governors, Sainik Schools Society, New Delhi and others (1989) Supplement 1 SCC 205, this Court held that the Sainik School society is "State" within the meaning of Article 12 of the Constitution after having found that the entire funding is by the State Government and by the Central Government and the overall control vests in the governmental authority and the main object of the society is to run schools and prepare students for the purpose feeding the National Defence Academy.
>
> 14. This Court in Executive Committee of Vaish Degree College, Shamli and Others v. Lakshmi Narain and Others (1976) 2 SCC 58, while dealing with the status of the Executive Committee of a Degree College registered under the Co-operative Societies Act, held as follows:
>
> > '10.....It seems to us that before an institution can be a statutory body it must be created by or under the statute and owe its existence to a statute. This must be the primary thing which has got to be established. Here a distinction must be made between an institution which is not created by or under a statute but is governed by certain statutory provisions for the proper maintenance and administration of the institution. There have been a number of institutions which though not created by or under any statute have adopted certain statutory provisions, but that by itself is not, in our opinion, sufficient to clothe the institution with a statutory character.....
>
> 15. We can, therefore, draw a clear distinction between a body which is created by a Statute and a body which, after having come into existence, is governed in accordance with the provisions of a Statute. Societies, with which we are concerned, fall under the later category that is governed by the Societies Act and are not statutory bodies, but only body corporate within the meaning of Section 9 of the Kerala Co-operative Societies Act having perpetual succession and common seal and hence have the power to hold property, enter into contract, institute and defend suites and other legal

proceedings and to do all things necessary for the purpose, for which it was constituted. Section 27 of the Societies Act categorically states that the final authority of a society vests in the general body of its members and every society is managed by the managing committee constituted in terms of the bye-laws as provided under Section 28 of the Societies Act. Final authority so far as such types of Societies are concerned, as Statute says, is the general body and not the Registrar of Cooperative Societies or State Government.

16. This Court in Federal Bank Ltd. v. Sagar Thomas and Others (2003) 10 SCC 733, held as follows:

> "32. Merely because Reserve Bank of India lays the banking policy in the interest of the banking system or in the interest of monetary stability or sound economic growth having due regard to the interests of the depositors etc. as provided under Section 5(c)(a) of the Banking Regulation Act does not mean that the private companies carrying on the business or commercial activity of banking, discharge any public function or public duty. These are all regulatory measures applicable to those carrying on commercial activity in banking and these companies are to act according to these provisions failing which certain consequences follow as indicated in the Act itself. As to the provision regarding acquisition of a banking company by the Government, it may be pointed out that any private property can be acquired by the Government in public interest. It is now a judicially accepted norm that private interest has to give way to the public interest. If a private property is acquired in public interest it does not mean that the party whose property is acquired is performing or discharging any function or duty of public character though it would be so for the acquiring authority."

17. Societies are, of course, subject to the control of the statutory authorities like Registrar, Joint Registrar, the Government, etc. but cannot be said that the State exercises any direct or indirect control over the affairs of the society which is deep and all pervasive. Supervisory or general regulation under the statute over the co-operative societies, which are body corporate does not render activities of the body so regulated as subject to such control of the State so as to bring it within the meaning of the "State" or instrumentality of the State. Above principle has been approved by this Court in S.S. Rana v. Registrar, Co-operative Societies and another (2006) 11 SCC 634. In that case this Court was dealing with the maintainability of the writ petition against the Kangra Central Co- operative Society Bank Limited, a society registered under the provisions of the Himachal Pradesh Co-operative Societies Act, 1968. After examining various provisions of the H.P. Co-operative Societies Act this Court held as follows Para 9 of AIR SCW):

> "9. It is not in dispute that the Society has not been constituted under an Act. Its functions like any other cooperative society are mainly regulated in terms of the provisions of the Act, except as provided in the bye-laws of the Society. The State has no say in the functions of the Society. Membership, acquisition of shares and all other matters are governed by the bye-laws framed under the Act. The terms and conditions of an officer of the cooperative society, indisputably, are governed by the Rules. Rule 56, to which reference

has been made by Mr. Vijay Kumar, does not contain any provision in terms whereof any legal right as such is conferred upon an officer of the Society.

10. It has not been shown before us that the State exercises any direct or indirect control over the affairs of the Society for deep and pervasive control. The State furthermore is not the majority shareholder. The State has the power only to nominate one Director. It cannot, thus, be said that the State exercises any functional control over the affairs of the Society in the sense that the majority Directors are nominated by the State. For arriving at the conclusion that the State has a deep and pervasive control over the Society, several other relevant questions are required to be considered, namely, (1) How was the Society created? (2) Whether it enjoys any monopoly character? (3) Do the functions of the Society partake to statutory functions or public functions? and (4) Can it be characterised as public authority?

11. Respondent 2, the Society does not answer any of the aforementioned tests. In the case of a non-statutory society, the control thereover would mean that the same satisfies the tests laid down by this Court in Ajay Hasia v. Khalid Mujib Sehravardi. [See Zoroastrian Coop. Housing Society Ltd. v. Distt. Registrar, Coop. Societies (Urban) (2005 AIR SCW 2317)]

12. It is well settled that general regulations under an Act, like the Companies Act or the Cooperative Societies Act, would not render the activities of a company or a society as subject to control of the State. Such control in terms of the provisions of the Act are meant to ensure proper functioning of the society and the State or statutory authorities would have nothing to do with its day-to-day functions."

18. We have, on facts, found that the Co-operative Societies, with which we are concerned in these appeals, will not fall within the expression "State" or "instrumentalities of the State" within the meaning of Article 12 of the Constitution and hence not subject to all constitutional limitations as enshrined in Part III of the Constitution. We may, however, come across situations where a body or organization though not a State or instrumentality of the State, may still satisfy the definition of public authority within the meaning of Section 2(h) of the Act, an aspect which we may discuss in the later part of this Judgment."

20. In view of the aforesaid clear exposition of law not only of this court but also the Hon'ble Supreme Court, we find merit in the preliminary objection raised by respondent No. 3 regarding the maintainability of the petition against the H.P. State Cooperative Bank and uphold the same and accordingly declare this petition to be not maintainable against the H.P. State Cooperative Bank. Since the relief in this petition is primarily claimed against the said bank, therefore, the petition itself is not maintainable and accordingly the same is dismissed leaving the parties to bear their own costs."

4. Confronted with this situation, learned counsel for the petitioner would then contend that the matter may be remitted for decision to the Registrar, Co-operative Societies. Section 72 of the H.P. Co-operative Societies Act, 1968 (for short 'Act') reads thus:

> ***"72. Dispute which may be referred to arbitration*** *:—*
>
> *(1) Notwithstanding anything contained in any law for the time being in force, if any, dispute touching the constitution, management, or the business of a Co-operative society arises—*
>
> *(a) among members, past members, and persons claiming through members, past members, and deceased members ; or*
>
> *(b) between a member, past member or person claiming through a member, past member, or deceased member and the society, its committee or any officer, agent or employee of the society or liquidator, past or present; or*
>
> *(c) between the society, or its committee and any past committee, any officer, agent or employee, or any past officer, past agent or past employee or the nominee, heirs or legal representatives of any deceased officer, deceased agent, or deceased employee of the society;*
>
> *(d) between the society and any other Co-operative society, between a society and liquidator of another society or between the liquidator of one society and the liquidator of another society; or*
>
> *(e) a surety of a member, past member or a deceased member or a person other than a member who has been granted a loan by the society under section 58 whether such surety is or is not a member of the society;*
>
> *such dispute shall be referred to the Registrar for decision and no court shall have jurisdiction to entertain by suit or other proceeding in respect of such dispute.*
>
> *(2) For the purpose of sub-section (1), the following shall be deemed to be disputes touching the constitution, management, or the business of a Co-operative society, namely;—*
>
> *(a) a claim by the society for any debt or demand due to it from a member or any employee, or the nominee, heir or legal representatives of a deceased member or an employee, whether such debt or demand be admitted or not;*
>
> *(b) a claim by a against the principal debtor where the society has recovered from a surety any amount in respect of any debt or demand due to it from the Principal debtor as a result of default of the principal debtor, whether such debt or demand is admitted or not;*
>
> *(c) any dispute arising in connection with the election of any officer of the society.*
>
> *(3) if any question arises whether a dispute referred to the Registrar under this section is or is not a dispute touching the constitution, management or the business of a Co-operative society, decision, thereon, of the Registrar shall be final and shall not be called in question in any court.*
>
> *The section lays down provision regarding settlement of disputes in co-operative societies by reference to arbitration by the Registrar. Settlement of disputes by co-operative societies through arbitration only is essential to save them from prolonged and expensive litigation, in civil Courts. As such, it is*

specifically provided that no court has jurisdiction to entertain any suit or other proceedings in respect of any dispute, touching the constitution, management or the business of the co-operative societies.

The Registrar has been vested with the power to decide whether any dispute is a dispute falling within the purview of this section or not. His ruling is final in such issues."

5. Now, the question would arise as to whether the dispute raised by the petitioner touches the constitution, management or the business of the Co-operative Societies because it is only on satisfaction of any one of the aforesaid conditions that the Registrar will be vested and conferred jurisdiction to adjudicate. This very question fell for consideration before the Hon'ble Supreme Court in ***Morinda Coop. Sugar Mills Ltd. vs. Morinda Coop. Sugar Mills Workers' Union (2006) 6 SCC 80*** and while construing *pari-materia* provision of the Punjab Co-operative Societies Act, it was held as under:

"6. Per contra learned counsel for the respondent submitted that the High Court has analysed the legal position, the objects and has come to the right conclusion by upholding the judgment and decree of the first appellate court.

7.Sections 55 and 79 of the Act read as follows :

"55. Disputes which may be referred to arbitration. - (1) Notwithstanding anything contained in any law for the time being in force, if any dispute touching the constitution, management or the business of a cooperative society arises -

(a) among members, past members and persons claiming through members, past members and deceased members ; or

(b) between a member, past member or person claiming through a member, past member or deceased member and the society, its committee or any officer, agent or employee of the society or liquidator, past or present; or

(c) between the society or its committee and past committee, any officer, agent or employee, or any past officer, agent or past employee or the nominee, heirs or legal representatives of any deceased officer, deceased agent, or deceased employee of the society; or

(d) between the society and any other co- operative society, between a society and liquidator of another society or between the liquidator of one society and the liquidator of another society,

such disputes shall be referred to the Registrar for decision and no Court shall have jurisdiction to entertain any suit or other proceeding in respect of such dispute.

2. For the purposes of sub-section (1), the following be deemed to be disputes touching the constitution, management or the business of co-operative society, namely-

(a) a claim by the society for any debt or demand due to it from a member or the nominee, heirs or legal representatives of a deceased member, whether such debt or demand be admitted or not:

(b) a claim by a society against the principal debtor where the society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the default of the principal debtor, whether such debt or demand is admitted or not:

(c) any dispute arising in connection with the election of any officer of the society.

3. If any question arises whether a dispute referred to the Registrar under this Section is or not a dispute touching the constitution, management or the business of a co-operative society, the decision thereon of the Registrar shall be final and shall not be called in question in any Court.

* * *

79. Notice necessary in suits.- No suit shall be instituted against a co-operative society or any of its officers in respect of any act touching the business of the society until the expiration of three months next after notice in writing has been delivered to the Registrar or left at his office stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint, shall contain a statement that such notice has been so delivered or left."

8. The object of Section 55 of the Act is clear. If any dispute touches the constitution, management or business of any cooperative society arising between specified category of members has to be referred to arbitration. Similarly no cooperative society or its officers should be dragged to litigation before the Civil Court in respect of any act touching the business of such a society unless notice required to be given in writing as has been issued to the Registrar of the society. Bye law No. 5 of the Bye Laws of the Appellant, so far as relevant, reads as follows:

"Objects

The objects of the Mills shall be to promote the economic interest of its members and for this purpose to carry on the manufacture of sugar, sugar products and other ancillary products and to make arrangements for their sale and also to take necessary steps and measure for the development of sugarcane and sugar beet. For the purpose of attaining the aforesaid objects, it shall be competent for the Mills :-

**** **** ****

"(d) To Purchase sugarcane of sugar beet preferably from grower members and others and to sell the finished products so manufactured.

**** **** ****

(j) To install plant and Machinery for utilization of ancillary/bye products and bury raw materials for the same and sell finished products in the course of the utilizing and marketing of the ancillary/bye products.

**** **** ****

(p) To do such other things as are incidental or conductive to the attainment of all or any of the above objects."

The emphasis made by learned counsel for the appellant is that when the object is to promote the economic interest, any thing which has link with the economic interest has to be, per force, taken as touching the business of the society.

9. This Court in O.N. Bhatnagar v. Smt. Rukibai Narsindas and Others (AIR 1982 SC 1097) observed inter alia as follows: (SCC pp. 255-56, para 20)

"20. In the present case the society is a tenant co- partnership type housing society formed with the object of providing residential accommodation to its co-partner tenant members. Now, the nature of business which a society carries on has necessarily to be ascertained from the object for which the society is constituted, and it logically follows that whatever the society does in the normal course of its activities such as by initiating proceedings for removing an act of trespass by a stranger, from a flat allotted to one of its members, cannot but be part of its business. It is as much the concern of the society formed with the object of providing residential accommodation to its members, which normally is its business, to ensure that the flats are in occupation of its members, in accordance with the bye-laws framed by it, rather than of a person in an unauthorized occupation, as it is the concern of the member, who lets it out to another under an agreement of leave and licence and wants to secure possession of the premises for his own use after the termination of the licence. It must, therefore, follow that a claim by the society together with such member for ejectment of a person who was permitted to occupy having become a nominal member thereof, upon revocation of licence, is a dispute falling with the purview of Section 91(1) of the Act."

10. In Deccan Merchants Co-operative Bank Ltd. v. M/s. Dalichand Jugraj Jain (1969 (1) SCR 887) it was held as follows : (SCR p. 896 A-C)

"Five kinds of disputes are mentioned in sub- section (1): first disputes touching the constitution of a society: secondly, disputes touching election of the office bearers of a society: thirdly, disputes touching the conduct of general meeting of a society: fourthly, disputes touching the management of a society: and fifthly disputes touching the business of a society. It is clear that the word "business" in this context does not mean affairs of a society because election of office-bearers, conduct of general meetings and management of a society would be treated as affairs of a society. In this sub-section the word "business" has been used in a narrower sense and it means the actual trading or commercial or other similar business activity of the society which the society is authorized to enter into under the Act and the Rules and its bye-laws."

11. In Co-operative Central Bank Ltd. and others etc. v. Additional Industrial Tribunal, Andhra Pradesh, Hyderabad and others etc. (1969) 2 SCC 43, it was held that alteration of the conditions of the service of the workman would not

be covered by the expression "touching the business of the society". It was held inter alia as follows : (SCC p.51, para 7)

> *"7. Applying these tests, we have no doubt at all that the dispute covered by the first issue referred to the Industrial Tribunal in the present cases could not possibly be referred to decision to the Registrar under Section 61 of the Act. The dispute related to alterations of a number of conditions of service of the workmen which relief could only be granted by an Industrial Tribunal dealing with an industrial dispute. The Registrar, it is clear from the provisions of the Act, could not possibly have granted the reliefs claimed under this issue because of the limitations placed on his powers in the Act itself. It is true that Section 61 by itself does not contain any clear indication that the Registrar cannot entertain a dispute relating to alteration of conditions of service of the employees of a registered society: but the meaning given to the expression "touching the business of the society". In our opinion, makes it very doubtful whether a dispute in respect of alteration of conditions of service can be held to be covered this expression. Since the word "business" is equated with the actual trading or commercial or other similar business activity of the society, and since it has been held that it would be difficult to subscribe to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its objects, such as laying down the conditions of service of its employees, can be sad to be a part of its business, it would appear that a dispute relating to conditions of service of the workmen employed by the society cannot be held to be a dispute touching the business of the society."*

6. In view of the aforesaid discussion, it can safely be concluded that the present petition under Article 226 of the Constitution is not maintainable against the H.P. State Co-operative Bank Ltd. and even the Registrar has no power to adjudicate such kinds of disputes as the same do not touch the constitution, management or business of the Co-operative Societies.

Accordingly, the present petition is dismissed, leaving the petitioner to avail of any other remedy which may be available to him under the law. Costs easy.

****

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

Ravi Kumar .....Appellant.

Versus

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

Cr. Appeal No. 225 of 2009
Reserved on: March 05, 2015.
Decided on: March 09, 2015.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 4 kg of charas – conductor stated that he was busy in issuing tickets and could not see the police officials- there was variance in the testimonies of the prosecution witnesses regarding the occupation

of the seats adjacent to the seat of the accused- Column No. 12 of NCB Form was not filled up- there was no corresponding entry of taking of the case property out of Malkhana and handing it over to the witness for being carried to FSL- there was discrepancy regarding the weight and the scale- held, that in these circumstances, prosecution version was not proved. (Para-16 to 20)

For the appellant: Mr. Ajay Sharma, Advocate.

For the respondent: Mr. M.A.Khan, Addl. AG with Mr. P.M.Negi, Dy. AG, Mr. J.S.Guleria, Asstt. AG and Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 29.11.2008, rendered by the learned Special Judge, Presiding Officer, Fast Track Court, Mandi, Distt. Mandi, in Sessions Trial No. 33 of 2008, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Sections 20, 61 & 85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs. 1,00,000/- and in default of payment of fine, he was further ordered to undergo rigorous imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 15.2.2008 at about 4:35 A.M., HC Krishan Chand alongwith HC Ashok Kumar, Lady Constable Sangita Devi, HHC Padam Singh, HHC Ramesh Kumar and Const. Hitender Kumar proceeded from S.I.U. Mandi to Bindrabani for 'Naka Bandi' and routine traffic checking. At about 7:50 AM, a bus of Punjab Roadways bearing registration No. PB-32F-1303 came from Manali side which was enroute to Jallandhar. The bus was stopped for checking by the police party. Driver Kulwant Singh and Conductor Jaspal Singh were associated in the raiding party. Thereafter, the search of the bus was carried out in their presence. The accused was found sitting on seat No. 20 having polythene packet on his lap. Upon search of the packet, another polythene packet was found in it containing 4 sweet boxes which were wrapped with gift paper. All the four packets were opened and a black material in the shape of sticks and "chapatti" was found. It was found to be charas. It weighed 4 kgs. Out of the recovered charas two samples of 25-25 grams each were separately drawn and packed in two small cloth parcels which were sealed with seal impression 'D' at four places each and the remaining charas was also packed in a main cloth parcel alongwith sweet boxes and polythene packets and sealed with seal impression 'D' at 8 places. The specimen of sample seal 'D' was also drawn separately on a piece of cloth over which accused and witnesses Kulwant Singh and Jaspal have appended their respective signatures. NCB forms in triplicate were filled in. The impression of seal 'D' was affixed over it and the seal was handed over to witness Jaspal Singh after use. On the basis of the rukka, which was carried from the spot by HHC Padam Singh, FIR No. 63 of 2008 was registered. The contraband was re-sealed by SI SHO Dandu Ram with seal impression 'A' at 8 places and the sample parcels were resealed with seal impression 'A' at four places each. He also filled Sr. No. 9 to 11 of NCB forms. Thereafter, SI/SHO Dandu Ram handed over the case property alongwith related documents to Incharge Malkhana HHC Nand Lal. On 15.2.2008, after receiving the case property by HHC Nand Lal entered all the case property in the Malkhana Register at Sr. No. 847. On 19.2.2008 HHC Nand Lal forwarded one of the sample parcel to FSL, Junga through HHC Nika Ram alongwith NCB forms in triplicate, seizure memo, sample seals 'D' and 'A', copy of FIR and other related documents vide RC No.

49/2008. HHC Nand Lal has handed over the receipt of deposit to HHC Nand Lal, PS Sadar, Mandi, H.P. 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 11 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.

4. Mr. Ajay Sharma, Advocate, appearing on behalf of the accused, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. P.M.Negi, Dy. AG, for the State has supported the judgment of the learned trial Court dated 29.11.2008.

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

6. PW-1 Jaspal Singh is the independent witness. He was the Conductor of the Punjab Roadways Bus No. PB-32F-1303. According to him at about 7:50 AM, they reached near Bindraban Forest Barrier Naka. The bus was stopped by the police and the search of the passengers as well as the bus was carried out by the police. The checking of the bus and the passengers was done in his presence. The driver was sitting on his seat. The police was checking every passenger and their belongings individually. When the police reached near Seat No. 20, a person was having two polythene bags in his hands. The polythene bags were having two sweet boxes in each polythene. The sweet boxes were wrapped with gift paper. Upon checking, sweet boxes were opened and black material was found in those boxes. The police arrested the accused vide memo Ext. PW-1/A. The recovered charas was weighed. It was taken into possession vide recovery memo Ext. PW-1/B. He signed the same. Samples of 25-25 gms. each were taken out of the recovered charas. The sample parcels and the residue charas was packed in the same sweet boxes and polythene bags packed in a cloth parcel and all the parcels were sealed with seal 'D'. The sample seal Ext. PW-1/C was separately drawn which bears his signature at Point 'A' and signature of Kulwant Singh at point 'B'. In his cross-examination, he deposed that SHO of police signaled to stop the bus. In police party, there were 6-7 personnel. The bus was 50 seater. It was full of passengers. The bus was having two doors. He was issuing tickets at that time when the bus was stopped. He was standing in the rear portion of the bus. The accused was sitting on the three seater bench which consisted of seats No. 19 to 21. No passenger was sitting on seats No. 19 and 21. The seat Nos. 19 to 21 are situated at the back of the driver seat side. He admitted in his cross-examination that when the police was conducting search of the passengers and their luggage, he was busy in issuing the tickets

from the rear portion of the bus and as such he could not see the police official recovering the polythene bags Ext. P-4 and Ext. P-5. The polythene bags Ext. P-4 and Ext. P-5 were not recovered in his presence from the accused by the police. After preparing document Ext. PW-1/A, the police told him that charas was recovered from one passenger Ravi Kumar. After preparing memo Ext. PW-1/A, the police arranged weight and scale from the PS Sadar Mandi, H.P. The weight and scale were brought from PS within about half an hour after preparation of memo Ext. PW-1/A.

7. Statement of PW-2 Const. Ramesh Chand is formal in nature.

8. PW-3 HHC Padam Singh, is the official witness. He narrated the manner in which the accused was apprehended and the sealing and seizure process was completed on the spot. In his cross-examination, he deposed that the bus was 52 seater. The bus was

full up to capacity and no seat was vacant. The conductor of the bus was issuing the tickets in the bus. He did not remember as to who was sitting on either side of the accused on seat Nos. 19 and 21 but those were occupied by the passengers. According to him, the weights and scale were already with the IO in his kit. He further deposed that he took rukka to the Police Station at 9:45 AM and reached in the Police Station at 10:10 AM. The file was handed over to him at about 10:30 AM and he could not narrate at what time he reached on the spot with the case file. The FIR was written by MHC Prakash Chand. He did not know at what time the police party returned from the spot to the Police Station, Sadar Mandi.

9. PW-4 HC Lachhman Dass is a formal witness.

10. PW-5 HHC Nika Ram, deposed that on 19.2.2008, MHC Nand Lal handed over one sample parcel, NCB forms, sample seal and copy of FIR and seizure memo vide R/C No. 49/2008. He took the same and handed over at FSL, Junga on 20.2.2008.

11. PW-6 HHC Nand Lal deposed that on 15.2.2008 SI/SHO Dandu Ram handed over three parcels one of which sealed with impression 'D' at 8 places and resealed with seal 'A' at 8 places and remaining two parcels were sealed with seal 'D' at four places each and re-sealed with seal'A' at four places each. He entered the case property in the Malkhana Register at Sr. No. 847 in his hand writing vide Ext. PW-6/A. On 19.2.2008, he forwarded one of the sample to FSL Junga through HHC Nika Ram alongwith NCB forms in triplicate, seizure memo, sample seals and copy of FIR vide R/C No. 49/2008. In his cross-examination, he admitted that he has not deleted the items in his register which were forwarded to FSL, Junga through HHC Nika Ram. He received the case property after re-sealing.

12. PW-7 SI Dandu Ram has re-sealed the residue charas with seal impression 'A' at 8 places and sample parcels were re-sealed with seal 'A' at four places. The sample seal Ext. PW-7/A was separately drawn over a piece of cloth. He filled in column No. 9 to 11 of the NCB forms Ext. PW-7/B in his own hand writing and signature. In his cross-examination, he did not know on which date MHC had forwarded the sample parcel to FSL, Junga.

13. Statements of PW-8 to PW-10 are formal in nature.

14. PW-11 HC Krishan Chand also deposed the manner in which the bus was signaled to stop and the bus alongwith the passengers was checked. According to him, on seat No. 20, a person was sitting carrying a polythene packet on his lap. He identified the accused in the Court. Search of the polythene was carried out. It contained four sweet like boxes wrapped with gift paper. On opening, a black material in the shape of sticks and chapatti was found. He prepared memo Ext. PW-1/E in the presence of witnesses Jaswal and Kulwant Singh regarding the identification of the contraband in accordance with law. The charas was recovered vide recovery memo Ext. PW-1/B. Rukka Ext. PW-11/A was written and forwarded to Police Station through HHC Padam Singh on the basis of which FIR was registered. He prepared the spot map. The tickets Ext. P-11 were collected from the accused and taken into possession vide recovery memo Ext. PW-11/D. He handed over the case property for re-sealing and obtaining certificate Ext. PW-11/E. In his cross-examination, he admitted that the bus was 52 seater. It was full to capacity and nobody was standing. He entered the bus from front door and HC Ashok Kumar boarded the bus from the rear door in the bus. He had searched about 14-15 passengers of the bus on that day. The driver and conductor were associated with him and were standing in the gallery of the bus. The bus was having luggage shelf near the roof. The passengers were having their luggage with them and some were having their luggage on the bus shelf. Seat No. 20 was in

the three seater bench. Nobody was sitting on seat Nos. 19 and 21. He has not inquired about the names and addresses of passengers but checked their luggage. He sent rukka at 9:55 AM. He did not know how HHC Padam Singh went from the spot to the Police Station. He remained on the spot up to 2:00 PM.

15. What emerges from the statements of the witnesses is that the bus was stopped at 7:50 AM. The accused was apprehended. The contraband was recovered. The charas weighed 4 kg. According to PW-1 Jaspal Singh, the bus was full of passengers and the accused was sitting on three seater bench consisting of seats No. 19 to 21. No passenger was sitting on seat Nos. 19 and 21. He admitted in his cross-examination categorically that when the police was conducting search of the passengers and their luggage, he was busy in issuing tickets from the rear portion of the bus and as such he could not see the police official recovering the polythene bags Ext. P-4 and Ext. P-5. The polythene bags Ext. P-4 and Ext. P-5 were not recovered in his presence from the accused by the police. According to PW-3 Padam Singh, the accused was sitting on seat No. 20. The bus was 52 seater. The bus was full to capacity and no seat was vacant. He reiterated in his cross-examination that he did not remember who was sitting on either side of seat No. 19 and 21 but those seats were occupied by passengers. According to PW-11 Krishan Chand, nobody was sitting on seat Nos. 19 and 21. There is variance in the statements of PW-1 Jaspal Singh, PW-3 Padam Singh and PW-11 Krishan Chand. According to PW-1 Jaspal Singh, nobody was sitting on seat Nos. 19 and 21, however as per PW-3 Padam Singh, these seats were occupied. PW-11 Krishan Chand has testified that seats No. 19 and 21 were not occupied. PW-11 HC Krishan Chand has stated that he has prepared the rukka Ext. PW-11/A. It was handed over to PW-3 HHC Padam Singh to be carried to the Police Station. PW-3 has carried the rukka to the Police Station at 9:45 AM. He reached the Police Station at 10:10 AM. The file was handed over to him at about 10:30 AM. Surprisingly, he could not tell as to at what time he reached on the spot with the case file.

16. According to PW-6 HHC Nand Lal, he entered the case property in the Malkhana Register at Sr. No. 847 in his hand writing vide Ext. PW-6/A. He further deposed that he handed over one of the sample to FSL Junga through HHC Nika Ram alongwith NCB forms in triplicate, seizure memo, sample seals and copy of FIR vide R/C No. 49/2008 dated 19.2.2008. PW-6 HHC Nand Lal in his cross examination admitted that he has not deleted the items in the register which were forwarded to FSL, Junga through HHC Nika Ram.

17. Mr. P.M.Negi, learned Dy. Advocate General has vehemently argued that infact PW-5 HHC Nika Ram has taken the case property to FSL Junga and it was handed over at FSL Junga. According to PW-11 Krishan Chand he has filled in column Nos. 1 to 8 of NCB forms Ext. PW-7/B. According to PW-7 SI Dandu Ram, he has filled in column Nos. 9 to 11. However, surprisingly, column No. 12 of the NCB forms Ext. PW-7/B has not been filled in. It was required to be filled in by MHC of the Police Station. Now, what emerges is that in Ext. PW-6/A, there is no corresponding entry of the details of the case property taken out of the malkhana and handed over to HHC Nika Ram including NCB forms in triplicate, seizure memo, sample seals "D' and 'A', copy of FIR and other related documents. PW-6 HHC Nand Lal has only given reference to RC in the Malkhana register. The column No. 12 has not been filled in. Thus, it casts doubt that whether the same contraband, which was seized, was sent for chemical examination or not.

18. There is another loophole in the prosecution case. According to PW-1 Jaspal Singh, weights and scale were summoned from the Police Station, Sadar Mandi, which reached the spot within half an hour. However, as per the statement of PW-3 Padam Singh, the weights and scale were already with the I.O. in his kit.

19. The prosecution has failed to prove that the contraband was recovered from the exclusive and conscious possession of the accused. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Sections 20, 61 & 85 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 29.11.2008, rendered by the learned Special Judge, Presiding Officer, Fast Track Court, Mandi, H.P., in Sessions trial No. 33 of 2008, 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 TARLOK SINGH CHAUHAN, J.

Chamaru Ram ..... Petitioner.
Vs.
Pushpa Devi ..... Respondent

Civil Revision No. 171 of 2014.
Reserved on : 5.3.2015
Date of decision: March 9, 2015.

Code of Civil Procedure, 1908- Section 24- Petitioner filed a Civil Suit for declaration that respondent is not his legally wedded wife and the sons of the respondent are not his sons- defendant contested the suit by taking preliminary objections regarding the jurisdiction of the Court at Sarkaghat to try and adjudicate the matter- subsequently, defendant filed an application under Section 24 for seeking transfer of the suit to Mandi Court pleading that she was a poor lady and could not travel to Sarkaghat, which was at a distance of more than 80 k.m from her residence- application was allowed by the Court on the ground that defendant was resident of Mandi and she had filed petition for maintenance in which interim maintenance of Rs. 3,000/- per month was granted to her showing that she had no independent sources of income- held, that defendant is a destitute and is wholly dependent upon the maintenance- financial condition of the parties, travelling facilities and conduct of the petitioner are required to be considered while deciding the case for transfer- application was filed in case of extreme compulsion and was rightly allowed. (Para- 3 to 17)

Case referred:
DAV Boys Senior Secondary School and others vs. DAV College Management Committee (2010) 8 SCC 401

For the petitioner : Mr. Lovneesh Kanwar, Advocate.
For the respondent : Mr. Devender Kumar Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, J.

Challenge in this Revision Petition under Section 115 of the Code of Civil Procedure (for short 'Code') has been laid to the order passed by the learned District Judge, Mandi, H.P. on 14.8.2014 whereby he allowed the application of the respondent for transferring of the case under Section 24 of the Code and transferred the same from the court of learned Civil Judge (Senior Division), Sarkaghat to the Court of learned Civil Judge (Senior Division), Court No.1, Mandi.

2. The key facts may be noticed. The petitioner filed a suit for declaration that the respondent is not his legally wedded wife and the sons of the respondent are not his sons. Further a declaration was sought to the effect that the entries showing the respondent as wife and sons of the petitioner be adjudged wrong and incorrect and lastly relief of permanent prohibitory injunction was claimed.

3. The defendant/respondent contested the suit by raising preliminary objections regarding jurisdiction of the Court at Sarkaghat to try and adjudicate the matter and it was alleged that it is the Court at Mandi, who alone has the jurisdiction to try and decide the present suit. It was also claimed that the defendant had filed an application under the provisions of Protection of Women from Domestic Violence Act against the petitioner which was pending disposal in the Court of learned Judicial Magistrate 1st Class, Court No.II, Mandi and interim maintenance of Rs.3000/- per month had been granted. Therefore, the suit being a malafide one ought to be dismissed. Other objections regarding cause of action, locus standi, valuation and the suit being bad for non-joinder and mis-joinder of necessary parties was also raised.

4. During the pendency of the suit, the respondent preferred an application under Section 24 of the Code as aforesaid. It was claimed that since the suit was governed by the provisions of Section 20 of CPC, therefore, it ought to have been instituted at the place where the defendant resides i.e. Mandi and the Court at Sarkaghat had no jurisdiction. It was further claimed that since the respondent was legally wedded wife of the petitioner and the children had been born out of such wedlock, therefore, entries in the Panchayat records to this effect were legal and correct and the suit had been filed just to harass the respondent. The respondent also sought to take advantage of the orders passed by the learned Judicial Magistrate 1st Class, Court No. 1 Mandi awarding interim maintenance of Rs.3000/- to the respondent under the provisions of Protection of Women from Domestic Violence Act in support of her contention that she was legally wedded wife of the petitioner. Lastly, it was contended that the respondent was a poor lady and could not travel to Sarkaghat which was at a distance of more than 80 KMs from her residence and there was otherwise danger to the life of the applicant at the hands of the respondent as he had continuously been threatening the respondent.

5. In reply filed to this application, the petitioner reiterated that the entries made in the records of the Panchayat were wrong and, therefore, were required to be declared as null and void. Insofar as awarding of maintenance by the learned Judicial Magistrate 1st Class, Mandi is concerned, it was averred that the appeal against the said order was contemplated to be filed by the petitioner. Lastly, it was denied that the respondent was a poor lady and could not afford to contest the litigation at Sarkaghat.

6. The learned District Judge, allowed this application and ordering the transfer of the proceedings as aforesaid.

7. Aggrieved thereby, the petitioner approached this Court by contending that while passing the impugned order, the learned Court below has acted with material irregularity and illegality thereby vitiating the order.

Section 24 of the Code, reads thus :

> *"**24. General power of transfer and withdrawal**: (1) on the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion, without such notice, the High Court or the District Court may, at any stage –*
>
> *(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or*
>
> *(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it; and*
>
> *(i) try or dispose of the same; or*
>
> *(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or*
>
> *(iii) re-transfer the same for trial or disposal to the Court from which it was withdrawn.*
>
> *(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which [is thereafter to try or dispose of such suit or proceeding] may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.*
>
> *(3) For the purposes of this section, -*
>
> *(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;*
>
> *(b) "proceeding" includes a proceeding for the execution of a decree or order.*
>
> *4. The Court trying any suit transferred or withdrawn under this section from a Court of small causes shall, for the purposes of such suit, be deemed to be a Court of small causes.*
>
> *5. A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it".*

8. The cardinal principle for the exercise of power under Section 24 C.P.C. is that ends of justice demand the transfer of the suit, appeal or other proceeding and it does not prescribe any ground for ordering the transfer of the case and the Court acting under Section 24 may or may not in its judicial discretion transfer a particular case. The transfer can be ordered suo motu and it may be done for administrative reasons. But when an application for transfer is made by a party, the Court is required to issue notice to the other side and hear the party before directing transfer. To put it differently, the Court must act judicially in ordering a transfer on the application of a party.

9. Discretionary power should point out to promote justice and prevent miscarriage by enabling the Courts to do justice. In myriad situations all of which cannot be

envisaged. Approach which needs to be adopted in the absence of statutory guidelines should be based on a pragmatic approach keeping in view judicial precedents established over a long period of time.

10. It is true that the plaintiff as '*arbiter litis'* has the right to choose any forum the law allows him and it is a substantive right like a right of appeal. As a general rule Court should not interfere unless expenses and difficulties of trial would be so great as to lead injustice or the suit has been filed in a particular court for purpose of working injustice. What the Court has to consider is whether the party has made out a case to justify it in closing the doors of the Court in which the suit or proceedings is brought by the plaintiff and leaving him to seek his remedy in another jurisdiction.

11. The fact that more than one court has jurisdiction under the Code of Civil Procedure to try the suit, the plaintiff as '*dominus litis'* has a right to choose the Court and the defendant cannot demand that the suit be tried in any particular court convenient to her/him. The mere convenience of the parties or any one of them may not be enough for the exercise of power but it must also be shown that the trial in chosen forum will result in denial of justice. Cases are on the increase where a party seeking justice, chooses a forum most inconvenient to the adversary with a view to depriving that party of fair trial.

12. A perusal of the impugned order would show that the following circumstances weighed with the learned District Judge for transferring the case from Sarkaghat to Mandi :

(i) that the respondent-applicant was inhabitant of Mandi and whereas Sarkaghat was situate at a distance of 60 KM:

(ii) petition for maintenance was already pending adjudication at Mandi wherein interim maintenance of `3000/- per month had already been awarded to the respondent which proved that the respondent had no independent source of income and she was unable to maintain herself. This fact also lent credence to her plea that she could not afford to contest the litigation at Sarkaghat;

(iii) Since the applicant was resident of Mandi, it was easy for her to defend her case at Mandi and it would be difficult for her to contest the proceedings at Sarkaghat where she will have to incur huge expenses including traveling expenses, while no prejudice would be caused to the petitioner as he was already defending the proceedings under the Domestic Violence Act at Mandi.

13. Learned counsel for the petitioner would however, contend that mere convenience of the parties is not enough for transferring the proceedings and it has to be shown that trial in the chosen forum would result in denial of justice. In support of his submission, reliance has been placed upon the judgment of the Hon'ble Supreme Court in ***DAV Boys Senior Secondary School and others vs. DAV College Management Committee (2010) 8 SCC 401***, more particularly observations contained in para 12 thereof which reads as follows:

> *"12. Section 25 of the Code itself makes it clear that if any application is made for transfer, after notice to the parties, if the Court is satisfied that an order of transfer is expedient for the ends of justice necessary direction may be issued for transfer of any suit, appeal or other proceedings from a High Court or other Civil Court in one State to another High Court or other Civil Court in any other*

State. In order to maintain fair trial, this Court can exercise this power and transfer the proceedings to an appropriate Court. The mere convenience of the parties may not be enough for the exercise of power but it must also be shown that trial in the chosen forum will result in denial of justice. Further illustrations are, balance of convenience or inconvenience to the plaintiff or the defendant or witnesses and reasonable apprehension in the mind of the litigant that he might not get justice in the Court in which suit is pending. The above-mentioned instances are only illustrative in nature. In the interest of justice and to adherence of fair trial, this Court exercises its discretion and order transfer in a suit or appeal or other proceedings".

14. There is no quarrel with the aforesaid proposition of law. But here it is not the case of the respondent that she is seeking transfer only on the ground of inconvenience.

15. As already noticed above, the learned District Judge has accorded cogent and well founded reasons for transferring the case. This court cannot be unmindful of the fact that the respondent is a lady whose marital status with the petitioner has been disputed by the petitioner himself and therefore, being a lone lady, she is vulnerable and cannot be compelled to face the litigation at a Court which is at a distance of 60 KM.

16. The fact that the respondent is a destitute and is totally dependent upon the maintenance cannot work to her disadvantage because after all circumstances like the financial conditions of the parties, traveling facilities and the conduct of the plaintiff/petitioner are required to be considered while deciding the case for transfer. The Court may also consider the distance between the places where the proceedings are pending and the places where the proceedings are sought to be transferred.

17. Undoubtedly, the power to transfer under Section 24 is to be exercised with circumspection and should not be exercised as a matter of course and all facts and circumstances of the case, the conduct of the contesting parties and the convenience of the parties have to be objectively assessed. When all these circumstances are objectively assessed in this case one reaches an inescapable conclusion that the application moved by the petitioner is not a mere wanton desire of the respondent to compel the petitioner to attend the proceedings at Mandi, rather it appears to be a case of extreme compulsion necessitating the transfer of the case.

18. It is proved from the record that the respondent is a destitute lady who has none to look after her and would suffer tremendous inconvenience in case she is compelled to attend the proceedings at Sarkaghat. It is but natural for a party in such circumstances to make a plea to the Courts of equity to transfer the proceedings to a place where they would be in a best position to defend the case. In the instant case the wife who has sought the transfer of the proceedings from Sarkaghat where she has no moorings to a place wherein she is leading a life of destitution could be characterized as either perverse, vindictive or based on no evidence. The lengthy arms of justice have to be extended to help the poor, destitute, hapless and the marginalized sections of the society.

19. From the above discussion, it can safely be concluded that the learned Court below has committed no material illegality or irregularity in passing the impugned order calling for no interference by this Court and therefore, there being no merit in this petition, the same is accordingly dismissed, so also the pending application. The parties are left to bear their own costs. Interim order granted on 28.11.2014 is vacated.

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